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-XXI D.L.R., See Pages vii-xvi.

VOL. 21

EDITED BY

W. J. TREMEEAR

C. B. LABATT *and*

EDWIN BELL

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO., LIMITED

84 BAY STREET

1915

CASES REPORTED
IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 21 INCLUSIVE
OF THE DOMINION LAW REPORTS.

INDEX OF SUBJECT MATTER, VOL. XXI., PART 1.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XXI., PART 1.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

ALTA.

S. C.

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

1. ESTOPPEL (§ III A—40)—ESTOPPEL BY CONDUCT—AGENT'S FRAUD OR WRONG—OBTAINING FREIGHT BILLS ON PERSONAL CHEQUE.

Where an oil company's local manager or agent in charge of its branch business gave his unmarked personal cheque to a railway for freight charges payable by his employers and thereupon the railway receipted the freight bills as having been paid by the oil company, but without any intention of looking to the personal credit of the local manager or knowledge that the cheque did not represent funds supplied by the oil company for the purpose of paying the freight, no estoppel arises to prevent the railway suing the oil company for the freight charges on the dishonour of the manager's cheque, although the latter had fraudulently utilized the receipted freight bills as vouchers to obtain money from his employer as upon a reimbursement where no knowledge of the latter purpose could be imputed to the railway.

[*Gentles* v. *C.P.R.*, 14 O.L.R. 286, distinguished; *People's Bank* v. *Estey*, 34 Can. S.C.R. 452, and *Wyatt* v. *Marquis of Hertford*, 3 East 147, referred to.]

Statement

APPEAL from the decision of McCarthy, J., at the trial without a jury.

George Walker, for plaintiff (respondent).

G. H. Ross, K.C., for defendant (appellant).

Harvey, C.J.

HARVEY, C.J.:—The defendant company carried on business in Winnipeg, but had a sales branch at Lethbridge, in charge of one Willison, who is described in their statement of defence as manager, and in their evidence as salesman and collector. They knew that he was not entirely trustworthy, and they consequently allowed him a credit of only $100 for paying small accounts. As to collections made by him they were secured by a bond. As payments of larger amounts than $100 had to be paid to the plaintiffs from time to time, special arrangements were made for these. As to these, the defendant's secretary-treasurer, in his evidence, says:—

> Our arrangement was, with the bills of large amount, that the railway company take the freight bills to the bank and get their money, and the bank in turn should draw on us. Willison would O.K. the bills, get a draft on us, and we would honour the draft, provided the freight bills were receipted and in order.

This arrangement made with Willison and the bank, was not communicated to the plaintiffs and was never put into effect, though the defendants evidently supposed it was. Instead, how-

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

Harvey, C.J.

ever, Willison gave his cheque to the plaintiffs for the freight, and they receipted the bills, which Willison then took to the bank and attached to a draft on the defendant, which the bank cashed and collected from the defendants. This course of business continued for several months, and then Willison asked the defendants to authorize another bank to cash the draft. This the defendants did, simply instructing the bank to cash the draft if accompanied by the receipted freight bills. The freight bill this time was a large one—over $1,400. Willison gave his cheque for it, cashed a draft for it and another bill, but neglected to use the proceeds to meet the cheque, which, on presentation several days later after the draft had been paid, was dishonoured. This action is for the amount of the freight bill, and the defence is one of estoppel.

Mr. Justice McCarthy, by whom the action was tried, gave judgment for the plaintiff. At the close of the argument, I was rather disposed to the view that the principle of estoppel did not apply in the circumstances, and I think I was somewhat affected in favour of the plaintiff by the fact that the defendants suspected their agent's honesty, and did not communicate that fact to the plaintiffs, and that it seemed unfair that the defendants should escape and the plaintiffs suffer. After fuller consideration, I am unable to satisfy myself that there was any obligation on the defendants to communicate to the plaintiffs this fact. They were not putting him forward to the plaintiffs as a person to be trusted. If he had conducted their business as he was instructed, there was no occasion for him to place himself in any relation to the plaintiffs that could cause them any risk of financial loss. It would be a very great hardship to persons who had made a slip if they could only get employment upon condition of their employers telling all they knew about their trustworthiness to everyone with whom the employees should have business relations. The precautions they took to safeguard their own interest were only reasonable and legitimate, having regard to the position in which he was placed, but I am unable to see that there was any failure of duty to the plaintiffs in not communicating what they knew upon this subject.

I also am unable to see that the permission to deal through another bank, which did not have the same instructions as the

first one, had any effect in this case, inasmuch as, notwithstanding the difference in instructions, there was no difference in the procedure in the two banks, since the instructions to the first bank were disregarded. In any event, the instructions were given for the defendants' protection and not for the plaintiffs. It appears to me probable that they were given because the defendants had no idea that the plaintiffs would receipt the bills unless they received the money.

I am of opinion, therefore, that the case must be looked at in exactly the same way as if the defendants had no suspicion of Willison's trustworthiness, and had given him no special instructions, such as were given about payment by the bank to the plaintiffs.

The question then is, does the receipt of the plaintiffs' for the amount of the freight bill amount to such a representation to the defendants that, they having relied on it as being true and having paid to Willison the full amount, the plaintiffs should now be estopped from setting up as against them that the bill is not in fact paid? It seems perfectly clear that the plaintiffs, in giving the receipt, did not know that it would be used in the way in which it was used. It is said in 13 Hals., p. 384, par. 541, that a representation to work an estoppel "must have been acted on in the manner in which it was meant to be acted on or in such manner as a reasonable man would suppose it was meant to be acted on."

In *Peoples Bank of Halifax* v. *Estey* (1904), 34 Can. S.C.R. 429, at 452, Nesbitt, J., quotes Brett, J., as saying, in *Carr* v. *London & North-Eastern R. Co.*, L.R. 10 C.P. 307:—

> And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented.

In Smith's Leading Cases, 11th ed., p. 848, Parke, B., is quoted as saying, in *Freeman* v. *Cooke*, 2 Ex. 654:—

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be precluded from contesting its truth.

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

Harvey, C.J.

In *Gentles* v. *C.P.R. Co.* (1907), 14 O.L.R. 286, the plaintiff, who had a bill against the defendant, gave a receipt for the amount to the defendant's agent, who forwarded it to the defendant as representing a payment made by him, but failed to pay the plaintiff the amount when received. It was held that the plaintiff was estopped from maintaining, as against the defendant, that he was not in fact paid. I was at first disposed to the view that the trial Judge had correctly distinguished that case from the present, on the ground that in that case the plaintiff gave the receipt to the agent, with the knowledge and intention that it would be used in the manner in which it was used. After further consideration, however, I am of opinion that this difference is more apparent than real.

It is true that in the case at bar the plaintiffs did not know or expressly intend that the receipts should be used as they were used, but they did know that Willison was only an agent, and they did know that he gave his personal cheque for the amount of the bill, and it almost necessarily followed that the receipts would not be simply filed away, but that they would be used by him as vouchers in settling his accounts with his principals, and, consequently, if he was not then in funds, that they would probably be used as the basis of advances, as they were in fact used. As a man must be deemed to intend the probable consequences of his act, it appears to me that they must in this case, under the circumstances, be deemed to have intended that the receipts should be so used, and that, therefore, the case is not really distinguishable from the *Gentles* case, and is within the rules above quoted. In the latter case, at p. 294, Meredith, C.J., says:—

> In my opinion, the case falls well within the rule stated by Mr. Bowstead in his work on Agency (2nd ed., p. 297): "Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor to reasonably believe that the agent has paid the debt or discharged the obligation . . . and in consequence of such belief pays, or settles, or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid or the obligation discharged.
>
> *Wyatt* v. *The Marquis of Hertford*, 3 East 147, which is referred to by Mr. Bowstead, supports his statement of the law.

The facts of this last-mentioned case are not very dissimilar to those of the present in essentials. The defendant was in-

debted to the plaintiff, who rendered his account to the defendant's steward, named Hunt, who gave his own draft, in exchange for which a receipt was given. The draft was not paid, and another was given at 21 days. This also was not paid. The defendant knew nothing about the drafts. Lord Ellenborough gave judgment for the defendant, on the ground that the plaintiff had accepted the agent for his debtor in lieu of the defendant. On appeal, this judgment was set aside and a new trial ordered. In giving judgment on appeal, Lord Ellenborough, C.J., said:—

Harvey, C.J.

> From the evidence it did not appear that the defendant was in any way prejudiced by his steward having given his own security to the plaintiff and taken the latter's receipt. That if it had appeared that the defendant had in the interval inspected the steward's accounts and had in any manner dealt differently with him on the supposition that this demand had been satisfied as the receipt imported, no doubt the defendant would have been discharged; for it was clear that Hunt had sufficient money of the defendant's in his hands to answer the demand.

In the present case the agent not merely had sufficient money, but he had the very money that represented the bills as the proceeds of his draft. Although that case was decided more than a century ago, it is cited by Halsbury, as well as the other authorities mentioned, as a correct exposition of the law of to-day, and I cannot see any difference in essence between it and the case at bar.

In my opinion, the appeal should be allowed with costs, and the action dismissed with costs.

Scott, J.

SCOTT, J., concurred with HARVEY, C.J.

Stuart, J.

STUART, J.:—I have hesitated much, and till the last, between the two views of this case as expressed in the judgments of the Chief Justice and Mr. Justice Beck. There seems to me to be almost equal force in the two arguments.

The precedents seem to be against the respondents, particularly the case of *Wyatt* v. *The Marquis of Hertford*, 3 East 147, although it is to be observed that the principle for which this case is quoted as an authority is rather hypothetical. It is, however, recognized as an authority by Halsbury and by Bowstead in his work on Agency, and it is followed by an Ontario Divisional Court, in *Gentles* v. *C.P.R.*, 14 O.L.R. 286. But I have much difficulty in discerning the real justice of such a decision, or, at any rate, of its application to the present case.

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

Stuart, J.

The defendants were carrying on business in Lethbridge and had an agent in charge. The plaintiffs, on the faith of the agent's personal unmarked cheque, gave him a receipt for some freight charges. The agent forthwith used the receipt in reporting to his principals as evidence of his having paid the charge, and secured money from them on the faith of it. His cheque to the plaintiffs he did not protect. I have no doubt that the agent committed a fraud upon the plaintiffs in dealing with the receipt as he did, because he must have known perfectly well that the plaintiffs were trusting in his good faith and his honest intention to see that his own cheque was paid when they let him have the receipt. If he did not conceive the fraud when he got the receipt, he, at any rate, conceived it later, and it was a fraud upon the plaintiffs to deal with it as he subsequently did. But it is said that he also defrauded the defendants. Doubtless he did. It is said that the plaintiffs should reasonably have expected that the receipt would be used in settling accounts. But should they be held, as against Willison's employers, to have been reasonably bound to expect anything more than it would be acted upon honestly? The defendants here are saying to the plaintiffs, "You foolishly trusted our employee. Because you did not refuse to trust him, because you did not take every precaution, you enabled him to deceive us, his employers."

Suppose the case of three partners carrying on business. One of them gives his own cheque for a firm's debt and gets a receipt. He then uses it in settling his co-partners, and the settlement is made before the cheque is dishonoured, so that it is too late, the partner having absconded. According to the defendant's contention here, the partnership would be relieved.

I do not think that business men, dealing with other business men's accredited agents, should be held to be reasonably bound to anticipate and provide against the possibility of the agents proceeding to defraud their principals. It might be different in the case of a man whose business is that of being agent for various people, such as a broker or banker. But Willison here was doing the defendants' whole business at Lethbridge, and apparently doing nothing else, at least as agent. He was, in fact, the Continental Oil Co. at Lethbridge.

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

BECK, J.:—This is an appeal from the decision of McCarthy, J., at the trial without a jury. He gave judgment for the plaintiff for $1,411.92. This was the amount of the account of the railway company, against the oil company, for incoming and outgoing freight charges for the week ending September 21, 1912.

The oil company's head office was in Winnipeg. It had a branch office at Lethbridge. One Willison was in charge of the Lethbridge office. He was the only employee of the oil company connected with that office. He was authorized by the oil company to collect all moneys owing to the company, which it was his duty to deposit to the company's account in the Molsons Bank of Canada at Lethbridge. Because the company did not fully trust him, owing to experience it had had of him at earlier stages of his employment, apparently elsewhere and perhaps in other capacities, the company provided him from time to time with sums limited to $100, with which to pay small accounts against the company.

On October 10, 1911, the local agent of the railway company at Lethbridge wrote to the oil company, addressing the letter to Lethbridge, saying that the railway company granted the oil company a weekly credit account at this station, and that the weeks closed the 7th, 14th, 21st, and last day of each month, and that it was absolutely necessary that payment should be made on these days, otherwise credit would be immediately discontinued. In consequence of this, the oil company made an arrangement with the Molsons Bank. This arrangement, and the arrangement between the oil company and Willison, with respect to the payment of freight generally, is thus stated by the oil company's secretary-treasurer at Winnipeg, as follows:—

Q. And what had he (Willison) to do with freights? A. Why he paid all the small freight bills out of money that we advanced him; that is up to $100; all the petty cash bills.—Q. You advanced him the sum of $100 for petty cash? A. Yes.—Q. And how would you keep that sum up? A. Whenever he paid any bills, miscellaneous bills round town, he would send those receipts and we would forward him the amount back. Q. So that you kept that $100 always standing with him? A. Yes.—Q. Did you ever have freight bills to exceed $100? A. Quite often.—Q. How were those to be treated? A. Our arrangement was with the bills of large amount that the railway company take the freight bills to the bank and get their money and the bank in turn should draw on us. Willison would O.K. the bills, get a draft on us, and we would honour the draft, provided the freight bills were receipted and in order.—Q. You had an arrangement by which

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

Beck, J.

they were to pay the freight and attach a draft? A. Those are our instructions to the Bank; yes.—Q. Did you ever pay any freight bills exceeding $100 that were not, as far as you could tell, treated in that way—first receipted and then forwarded to you. A. No.—Q. How long had this system been going on here? A. I think for—I cannot say positively about the time; possibly a year or more.—Q. Had your company any knowledge that Mr. Willison was paying this freight by private cheque?—A. Well, we know he had to handle it in some way; we did not know whether he used his cheque or whether the bank turned it over to the company; our instructions were to pay to the company.—Q. But you knew nothing up to then of their attaching this cheque of Willison's; you knew nothing of that? A. No.—Q. From anything you were able to tell, your instructions were being followed? A. Yes.—Q. When did you first have knowledge that the C.P.R. had got a cheque that was no good in payment of these bills? A. I think it was early in October, 1912—about that time.

No information was given to the railway company of the oil company's instructions to the bank or to Willison. It is quite clear in the evidence that the oil company had a bank account with the Molsons Bank at Lethbridge at least as early as December, 1911 (see the oil company's letter of December 27, 1911, to the manager of the Molsons Bank).

Now, the arrangement between the oil company and the bank, as stated by the oil company's secretary-treasurer, was, as appears from the extract I have made from his evidence, "that the railway company take the freight bills to the bank and get their money, and the bank, in turn, should draw on the oil company."

The agent of the railway company, who knew nothing of this arrangement, never took the receipted freight bills to the bank. As he says, knowing the oil company to be good for the amount of the bills, he took Willison's individual cheques from time to time for the amounts of the bills, and thereupon receipted them. He never did anything else than this. On several occasions these cheques were dishonoured, but afterwards, presumably within a short interval of time, paid. A natural presumption in the mind of the railway company's agent would be that the oil company had not furnished Willison with funds with sufficient promptitude. There was on the part of the railway company's agent absolutely no intention of electing to give credit to Willison; he looked upon the taking of his cheques merely as a means of payment by the oil company.

The railway company did not conform to the arrangement between the oil company and the bank, because the agent of the railway company had never heard of it. The bank obviously

did not conform to the arrangement. The agent of the railway company never brought the receipted freight bills to the bank.

How the business between Willison and the Bank was actually done is not stated by anyone. If the railway agent had attended at the bank with the receipted freight bills, the course of business, according to the arrangement, would have been this: The railway company would have "got their money," *i.e.*, the bank would have paid the railway agent the amount of the bills, and have charged the amount to the oil company in its current account. At the same time a draft would be drawn on the oil company and credit given for the same amount, either immediately or on report of payment; the proceeds of the draft, which would equal the payment to the railway company. If the instructions were exactly followed, the bank itself would draw the draft; but, if it bethought that the instructions justified the bank putting through a draft of Willison's, the result and method of dealing with the proceeds ought to have been the same. Vouchers for these entries would be passed, which would become the property of the oil company, and which the company would, in the ordinary course, receive from the company, the items, of course, also appearing in their pass book.

As the bank neither conformed to the arrangement nor insisted that Willison should do so, what, may we infer, was the course adopted by the bank and Willison under these circumstances?

Willison was in the habit of taking to the bank the receipted freight bills, which he had obtained by giving his own cheque. This being so and the bank knowing, as it did, that Willison had no authority to draw a cheque against the oil company's account (see letter of December 27, 1911), would not place the proceeds of any draft for the freight to the creidt of the company, but would have either to place it to the credit of Willison, by whom it could be drawn only by his cheque, or instantly pay him the cash proceeds of the draft. The reasonable inference is that they did the former; for, as already appears, he was in the habit of giving cheques to the railway company, which were, till the one in question, always paid. Even in the event of Willison taking the money at once, the bank would require a voucher, which, in all probability, would take the form of a cheque. In

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

Beck, J.

any case, under the circumstances of the bank not following instructions, the money would not go to the credit of the oil company's account, and it follows that, if the oil company was not careless and negligent, it must have learned by an examination of its bank book and vouchers from time to time that neither the bank nor Willison was conforming to the arrangement made—that is, that the bank was disobeying the company's instructions.

There was the greater obligation upon the oil company to inquire and insist that its instructions should be followed, by reason of the fact already noted that it lacked full confidence in Willison.

Notwithstanding this gross negligence on the part of the oil company, it does not appear that anyone suffered until Willison misappropriated the proceeds of a draft on the oil company for the moneys now in question; and it was, in my opinion, by reason of the change of which I am about to speak—one not communicated to the railway company—that Willison was enabled to effect the misappropriation or at least was facilitated in doing so; and thus, I think the oil company was guilty of another instance of gross negligence.

Within a day or two before August 29, 1912, Willison, or the Imperial Bank at Lethbridge, at his request, communicated with the oil company at Winnipeg, in all probability by wire—and on August 31 the bank by letter—a request the substance of which is shewn by the following replies:—

Night Lettergram. Winnipeg, Man., Aug. 29-12.

Imperial Bank, Lethbridge.

We will honour sight draft for receipted railway expense bills voucher by Mr. Willison.

CONTINENTAL OIL CO.

Letter. Continental Oil Company,
Winnipeg, Canada, September 4th, 1912.

Imperial Bank of Canada, Lethbridge, Alta.

Dear Sirs,—We have your favour of the 31st ult., in reference to allowing Mr. Willison to make sight drafts on us, and, in reply, would state that we will be glad to promptly honour any sight drafts made on us by Mr. Willison, when receipted railway expense bills are attached and vouched for by him.

Yours truly,
CONTINENTAL OIL CO., LTD.
By J. S. Wilbert, Sec.-Treas.

I extract some of the evidence of the secretary of the oil company:—

Q. And you now say that you did advise the Imperial Bank that you would accept drafts with receipted freight bills attached? A. Yes.—Q. But at the same time you could not understand why that change was necessary from the Molsons Bank to the Imperial? A. No.—Q. And you write Mr. Willison, "We have recently made arrangements, etc., but we are at a loss to know why this arrangement was not satisfactory." A. Yes.—Q. And you cannot say that your instructions to the Imperial Bank went any further than that you would accept a draft with receipted bills (freight) attached? A. I say not.—Q. While, on the other hand, you swear that your instructions to the Molsons Bank were that they were not to accept merely receipted bills, but get the receipts and pay the railway company before they would put a draft through on you? A. They were to see to it. —Q. And you gave no instructions to the Imperial Bank? A. Not that I remember.—Q. Did it not occur to you that you were enabling this man to commit such a fraud as he did commit? A. Thought the railway company would not be foolish enough.—Q. Did you think anything about it? A. I did not think they would receipt those expense bills unless they got their money.—Q. To your knowledge he had never drawn on you before this particular occasion through any bank but the Molsons Bank. A. Not that I know of.—Q. This was on the first occasion? A. That was in Lethbridge; yes.—Q. How did you suppose the Imperial Bank would know what instructions you had given to the Molsons Bank? A. I don't suppose they did know.

Now, as the transaction in relation to the freight bills for the week ending September 21 was the only transaction put through the Imperial Bank, it must be clear that, although the Imperial Bank had been authorized to accept Willison's drafts by letter of September 4, and that, therefore, Willison might have abandoned dealing with the Molsons Bank in relation perhaps to the freight bills for the week ending September 7, and certainly in relation to those for the week ending September 14, for, I think, we may infer that these accounts for those weeks, he continued to do business with the Molsons Bank, and yet the oil company appeared to have made no effective investigation of the reason for a change which it is thought a strange one.

There was, as I have pointed out, what, in my opinion, was gross negligence on the part of the oil company, the more gross because it related to an employee occupying a responsible position and one which necessitated his being the only representative of the company before the public, and one whom the company itself was not prepared to trust. What was the negligence of the railway company on which it is sought to construct an estoppel? This is what, it seems to me, the evidence establishes: That, knowing the good financial standing of the oil company, knowing that Willison was its only representative in Lethbridge,

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CONTINENTAL OIL CO.

Beck, J.

and that the company's business required it to pay large sums for freight, and having been given no directions whatever by the oil company as to any method of payment, and naturally and properly supposing that by some method the company would place funds to pay the freight bills at Willison's disposal, the railway company accepted the personal cheque of Willison for the freight bills, quite clearly without any intention whatever of looking to his personal credit, but, on the contrary, equally clearly with the fixed idea that the oil company always was and continued to be the creditor until the account was actually paid; that the railway company did this with no idea that the receipts on the face of the freight bills—indicating, as they did, payment by the oil company and not by any individual on its behalf—were intended to be or would be used for any other purpose than that of being filed by the oil company as vouchers for the payment.

The case is perfectly distinct from such cases as *Gentles* v. *C.P.R.*, 14 O.L.R. 286, where receipts were given for the very purpose of being used as shewing a discharge of the debt

One of two innocent parties, the oil company or the railway company, must suffer by the fraud of a third party. That third party was the agent of the oil company; the oil company, by its carelessness, made it easy for him to commit the fraud; the railway company did nothing that was not reasonable in dealing with a reputable company.

In *Davison* v. *Donaldson* (1882), 9 Q.B.D. 623, a case of principal and agent, it is said of an earlier decision:—

> All the Judges agreed in laying down that, where the seller knows that there is a principal behind the person with whom he is dealing, he must be shewn to have himself done something which raises an equity against him, otherwise the principal is not discharged.

As is indicated here, a defence by way of estoppel *in pais* is one founded upon equitable considerations. In each case the particular circumstances must be carefully considered, and placed on the one side or the other and weighed; the conduct of the party against whom the estoppel is set up is not alone to be taken into account; and, in my opinion, carelessness in the conduct of the affairs of the party setting up the estoppel, though ordinarily he owes no duty of carefulness respecting them to anybody, must be taken into account as part of the circum-

stances to be considered when considering whether, on the whole case, it is equitable that the other party should be estopped.

Looking at all the circumstances of this case, in my opinion, the defendant—the oil company—has failed—for the burden is upon it—to establish such a state of circumstances as makes it inequitable that it should pay the railway company the freight charges in question.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

Annotation—Estoppel (§ III A—40)—Estoppel by conduct—Fraud of agent or employee.

The general doctrine of estoppel *in pais* is laid down in *Pickard* v. *Sears*, 6 A. & E. 469, as follows: "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things" (p. 474, *per* Denman, C.J., delivering the judgment of the Court); *Morrison* v. *Universal Marine Insurance Co.*, L.R. 8 Ex. 197; *Aaron's Reefs Ltd.* v. *Twiss*, [1896] A.C. 273, 290, 294; *Civil Service Musical Instrument Association* v. *Whiteman* (1899), 68 L.J. Ch. 484.

To constitute an estoppel *in pais*, there must be a representation made with the intention that it should be acted upon, which representation is acted upon, by the party to whom it is made, in the belief that it is true and by which he is prejudiced: *Giberson* v. *The Toronto Construction Co., Ltd.*, 40 N.B.R. 309.

Where a railway company furnished its customs agent with the necessary documents, including accepted cheques, for the payment of duties necessary to enter goods through the customs house, and the agent, by a system of frauds, was able to pass a large quantity of goods free of duty, receiving back from the customs officers, on the assumption that all imposts had been fully paid, the difference between the face of the cheques and the duty actually paid, which the agent converted to his own use, the company is estopped in an action by the Crown for the duties unpaid on goods so passed and not entered for duty from claiming that in accepting the money returned he was not acting within the scope of his employment: *The King* v. *Canadian Pacific R. Co.*, 11 D.L.R. 681, 14 Can. Ex. 150; *Fry* v. *Smellie*, [1912] 3 K.B. 282; *Whitechurch* v. *Cavanagh*, [1902] A.C. 117-130; *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Lloyd* v. *Grace*, [1912] A.C. 716, specially referred to; *British Mutual Banking Co.* v. *Charnwood Forest R. Co.*, 18 Q.B.D. 714; *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439, distinguished.

By holding out a person as its agent or permitting him to appear as such, a company is estopped from questioning his authority on the ground that his appointment was not under seal; and contracts with persons dealing with him in good faith without notice of any informality in his appointment are binding on the company: *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Re County Life Assce. Co.*, L.R. 5 Ch. 288; and *Muldowan* v.

ALTA.

Annotation

Annotation (*continued*)—Estoppel (III A—40)—Estoppel by conduct—Fraud of agent or employee.

German Canadian Land Co., 19 Man. L.R. 667, specially referred to; *Pulford* v. *Loyal Order of Moose* (No. 2), 14 D.L.R. 577, 23 Man. L.R. 641.

The act of another in placing the name of a person on a note to the knowledge of the person whose name has been placed may be rendered valid by a ratification or acquiescence; and where the note to which the signature was disputed had been used to replace other notes which the party whose name appeared had actually signed and the extent of his liability was not increased, evidence that he and others by way of guaranty had signed a transfer to the bank of another security referring to the endorsement of the disputed note as being the subject of the guarantee is a proof of ratification: *La Banque Nationale* v. *Lemaire*, 15 D.L.R. 152, 44 Que. S.C. 445.

E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co., for $2,000, would fall due at that bank on a date named, and asking them to provide for it. The name of E. & Co. had been forged to said note, which the bank had discounted. Two days after the notice was mailed at Toronto, the proceeds of the note had been drawn out of the bank by the payees. It was held, affirming the judgment of the Court of Appeal, 7 O.L.R. 90, that, on receipt of said notice, E. & Co. were under a legal duty to inform the bank promptly that they had not made the note, and, not doing so, they were afterwards estopped from denying their signature thereto: *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133. Leave to appeal was refused by the Privy Council: *Ewing* v. *Dominion Bank*, [1904] A.C. 806.

Where money had been paid by the defendant on account of the plaintiff on an unauthorized order, the plaintiff was held not to be estopped from denying or repudiating it simply because he had retained the forged order in his possession without prosecuting the wrong-doer, the defendant's position not having been materially altered to its disadvantage by the conduct of the plaintiff in this respect. An act relied on as a waiver should (unless it has altered the position of the other party, thereby giving rise to an estoppel) be of a nature inconsistent with the exercise of the right claimed to have been waived: *Langley* v. *Peel Lumber Co., Limited*, 11 E.L.R. 126.

Where a husband, who had been in the habit of conducting his wife's business, executes an "oil lease" of lands belonging to her, in which lease she does not join, but stands by at the execution thereof, reads the instrument, knows its contents and expresses her approval, and the husband accepts rent under the lease, and later the wife herself actually subscribes her name to the instrument in order to confirm it, she is estopped as against assignees of the lease from claiming that there was no valid execution of the lease (*Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827, referred to): *Maple City Oil and Gas Co.* v. *Charlton*, 7 D.L.R. 345, 3 O.W.N. 1629.

Abell v. *Hornby*, 14 Man. L.R. 450, was an action to recover balance due for a threshing outfit sold and delivered by the plaintiff company to defendants, Charles Hornby and his wife, Ellen Hornby, under a written agreement signed by defendants, which provided that promissory notes were to be given on approved security for the amounts payable at the dates

ALTA.

Annotation

Annotation (*continued*)—Estoppel (III A—40)—Estoppel by conduct—Fraud of agent or employee.

mentioned. When the machinery had been delivered at the defendants' farm, the plaintiffs' agent called there to take settlement for it. Defendants then signed the notes asked for, and the agent demanded a lien on the farm as security for the notes, and, relying on the representations of both defendants then made that the wife owned the land, accepted a lien on the land for the amount, signed by Mrs. Hornby, in the presence of her husband, and did not insist, as he might have done, that the husband should also sign it. It appeared that the title to the land was then actually in the husband, and had remained so ever since. Renewal notes had been given by the defendants and the original periods of credit considerably extended, and during this time the husband wrote several letters, in which the wife was spoken of as the actual owner. The chief contention at the trial was as to whether the plaintiffs were entitled to a lien on the land for the debt as against the defendant Charles Hornby. The Court held (1) There was ample consideration for the giving of the lien, as the plaintiff might have removed the machinery and refused to carry out the transaction if it had been refused; (2) the defendant Charles Hornby was estopped by the representations he had made, and subsequently repeated, from denying that the land in question was his wife's property and from claiming it as his own as against the plaintiffs; (3) defendant Hornby was also thereby estopped from claiming it to be exempt as land occupied by him from proceedings under a registered judgment. Judgment was given declaring that the lien claimed forms a valid charge on the land referred to for the amount of the plaintiff's claim and costs of suit: *Abell Co.* v. *Hornby*, 14 Man. L.R. 450 (Perdue, J.).

The plaintiff alleged and proved fraud and misrepresentation of the defendants, whereby he was induced to enter into an agreement for the purchase of a patent for an invention. The agreement was set aside and damages awarded in respect of the money he had paid and a further sum for loss of time, expense, etc. It was also held that the plaintiff had not by his conduct elected to affirm the contract, although he withheld from the defendants notice of his intention to disaffirm it, and acted for some time as if he did intend to affirm: *Carrique* v. *Catts*, 20 D.L.R. 737, 32 O.L.R. 548.

In general a contract induced by misrepresentation is valid until disaffirmed; whether or not there has been an election in fact depends upon the view taken of the evidence. An estoppel could arise only on proof that the defendants had been prejudicially affected by a belief that the plaintiff was treating the contract as binding. (*Morrison* v. *Universal Marine Insurance Co.* (1872-3), L.R. 8 Ex. 40, 197, followed; *Campbell* v. *Fleming* (1834), 1 A. & E. 40, distinguished): *Carrique* v. *Catts*, 20 D.L.R. 737, 32 O.L.R. 548.

SASK.

S. C.

OCEAN ACCIDENT & GUARANTEE CORPORATION v. CITY OF MOOSE JAW.

Saskatchewan Supreme Court, Lamont, J. February 8, 1915.

1. INSURANCE (§ VIII—436)—EMPLOYER'S LIABILITY INSURANCE—CONTRACTOR'S EMPLOYEES—CITY EMPLOYEES—EXTRA PREMIUMS.

A stipulation in an employers' liability policy issued to a municipality that it shall not cover loss from liability for injuries or death caused to a person unless his compensation is included in the scheduled estimate on which the insurance was based, will exclude liability by the insurance company in respect of employees of the city completing works which had been let to contractors at the time the policy was taken out, but which afterwards were taken over by the city on the contractor's default; consequently no action lies against the city for an excess premium on the basis of the additional wages on such work not contemplated in the insurance contract paid to city workmen completing the contract work as to whom no claim was made nor could be substantiated on the city's behalf.

Statement

ACTION for extra premium on an employers' liability policy.

G. E. Taylor, K.C., for plaintiffs.

W. B. Willoughby, K.C., for defendants.

Lamont, J.

LAMONT, J.:—This is an action for an additional premium under a policy of insurance. By a policy dated December 7, 1911, the plaintiffs agreed to indemnify the defendants against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while the policy was in force by an employee of the assured, while in places described in the schedule thereto, in and during the prosecution of the work described in such schedule. The schedule sets out the kind of work engaged in by the defendants' employees, the place where the work was to be done, the estimated compensation of the employees for the period of the policy, the percentage rate of premium, and the estimated amount of premiums to be paid, the premiums to be paid being determined on a percentage basis for the different kinds of employment according as they were considered to be more or less dangerous. So far as this action is concerned, only one item in the schedule is important, and that is the one relating to water construction, which provides that the policy covers persons on the pay-roll of the defendant city engaged in the business of water construction at Moose Jaw, Caron, and Snowdy Springs; that the compensation which the employees engaged at these three places would receive was estimated at $7,639.67, and that the rate was to be 6 per cent. At the time the policy was taken out, the defendant city

was engaged in establishing a water supply system, which was called the Caron system, because the head works and reservoir were situated a few miles west of the town of Caron. They had another system, independent of this one, known as the Snowdy Springs supply. It was contemplated by the city council that during the year 1912 the city would proceed with the construction of the Caron system, partly by day labour and partly by contract. It was also contemplated that certain water construction at Snowdy Springs and at the head works at Caron could be done by the city itself, and that the laying of the pipe lines would be by contract. The estimated wages to the employees of the city for the water connection were placed in the policy as $7,639.67. Contracts were let for the construction of a pipe line from the head works to Moose Jaw. One of the contractors was unable to perform his contract, and the defendants were obliged to construct the portion of the line unfinished by the contractor. In completing it, they paid out in wages the sum of $26,626.42, and it is for a 6 per cent. premium on this sum that this action is brought.

The plaintiffs claim that this work comes within the designation of "Water construction at Caron" in the schedule. The defendants contend that the employees who were engaged in completing the pipe line for which a contract had been let were not covered by the policy, and, therefore, that no premium is due in respect of their wages. The whole question is, did the policy cover these employees?

I am of opinion that the defendants' contention is right. In issuing their policy, the plaintiffs limited their liability by certain conditions. Condition (B) provides as follows:—

> This policy does not cover loss from liability for injuries or death caused to or by (1) any person unless his compensation is included in the estimate set out in the schedule.

And then (J) provides as follows:—

> The premium is based on the entire compensation, whether for salaries, wages, piecework, overtime, or allowances earned by the employees of the assured during the period of this policy. If such entire compensation exceeds the sum set forth in the schedule, the assured shall immediately pay the corporation the additional premiums earned. If such compensation is less than the sum set forth in the schedule, the corporation will return the unearned premiums when determined.

What do these conditions mean? In my opinion, they mean

SASK.

S. C.

OCEAN ACCIDENT & GUARANTEE CORPORATION v. CITY OF MOOSE JAW.

Lamont, J.

that the plaintiffs stipulate that, as a condition of their liability under the policy, the wages of the employees who are to be insured must be estimated and set out in the schedule. It does not necessitate that the city shall know who the employees shall be, nor the exact amount of the wages they shall earn, but it does contemplate that the work in which the city shall be engaged shall be known, and the wages to be paid for the doing of this work shall be estimated, and that estimate placed in the schedule. The whole contract is based upon the fact that the city have under contemplation the construction of certain works for which they must have a number of employees, whose compensation is included in the estimate set forth in the schedule. It seems to me, therefore, to follow that, if the city engage in works not contemplated at the time the contract is entered into and for which no estimate was made or put in the schedule, the policy, by virtue of the limitation imposed by condition (B), would not cover the employees engaged in such additional work. The wages of the employees engaged to complete the pipe-line on the failure of the contractors was not included in the schedule. It was not in the contemplation of the parties that the contractor would fail to complete his undertaking or that the city would be obliged to complete it. Had an accident happened on this work, I am of opinion that the plaintiffs could properly have said to the defendants, "This was not work contemplated by you in reference to which we contracted to insure your employees. The compensation of employees for this work was never estimated by you, nor was it put in the schedule, and we have limited our liability to the persons whose compensation is included in the estimate set forth in the schedule." To my mind this is the only interpretation that can reasonably be put on condition (B); and if the plaintiffs limit their liability in this way their premiums must be limited in the same manner.

I am, therefore, of opinion that the action must be dismissed with costs.

Action dismissed.

MOLISON v. WOODLANDS.

MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B. February 13, 1915.

1. SCHOOLS (§ IV—72)—SCHOOL DISTRICTS—DEBENTURES—VALIDITY—SEALING.

The effect of sec. 219, sub-sec. (*g*), of the Public School Act, Man., is that no matter what defects or irregularities existed in the formation of a school district, debentures of a consolidated school district signed by the Provincial Secretary and sealed with the seal of the province of Manitoba, such debentures thereafter constitute an indefeasible security in the hands of an innocent purchaser; and after such sale of debentures a ratepayer is too late in bringing action against the new school district and the municipalities concerned for a declaration setting aside the consolidation, even with a reservation safeguarding the validity of the debentures.

Statement

TRIAL of action brought by three ratepayers of the rural municipality of Woodlands, residing within the former school district of Macleod, suing "for themselves and all other ratepayers of the said municipality who may come in and contribute to the expense of this suit" against the municipality of Woodlands, the municipality of Rockwood and the consolidated school district of Brant, No. 1703. The relief asked for was a declaration that an award purporting to be made under sec. 123 of the Public Schools Act reporting in favour of consolidating the three school districts of Macleod, Brant and part of Bruce into one, and the consolidation effected pursuant thereto, are null and void and not binding upon the plaintiffs or other ratepayers of the school district of Macleod, and that the school district of Macleod is still a legally existing school district under the Public Schools Act.

W. H. Trueman and *Ward Hollands*, for the plaintiffs.

W. Boston Towers and *L. P. Roy*, for the municipality of Woodlands.

A. C. Campbell and *A. V. Darrach*, for school district of Brant and municipality of Rockwood.

Mathers, C.J.

MATHERS, C.J.K.B.:—The former school district of Macleod was wholly within the municipality of Woodlands, and the former school districts of Brant and Bruce were wholly within the municipality of Rockwood. The award in question purports to be made by five arbitrators, consisting of his Honour Judge Paterson (chairman), School Inspectors Best and Parker, S. Sims (arbitrator for the municipality of Woodlands) and W. A. Inkster (arbitrator for the municipality of Rockwood).

MAN.

K. B.

MOLISON v. WOODLANDS.

Mathers, C.J.

Each of the municipal arbitrators was appointed by a resolution of the council of his respective municipalities and not by by-law; but in the case of Woodlands the resolution bears the seal of the municipality; in the case of Rockwood the resolution is unsealed. The municipality of Woodlands appointed its arbitrator because of a request from two of the trustees of the school district of Macleod contained in a letter dated August 18, 1913, set out in paragraph 5 of the statement of claim. Before this letter was sent, a meeting of the ratepayers of the Macleod school district had been held to consider the subject of consolidation, and at that meeting a vote was taken, which shewed 12 or 13 votes for and 9 against consolidation. The municipality of Rockwood also appointed its arbitrator, pursuant to a request from the trustees of Brant and Bruce school districts. In neither case was there a petition of six, or any number, of ratepayers, pursuant to sub-sec. (*a*) of sec. 123 of the Public Schools Act.

The award in question was made on November 8, 1913, and is set out in par. 7 of the statement of claim.

On December 11, 1913, the award was approved by the Department of Education by the following resolution:—

> Whereas an award of arbitrators has been published consolidating the school districts of Brant, Macleod and part of Bruce, to be known as the Consolidated School District of Brant, No. 1703,
>
> And whereas it is expedient to assent to such award under sec. 91 (*a*) of the P.S.A.
>
> Therefore the Department of Education doth hereby assent to the said award of arbitrators consolidating the said school district of Brant, Macleod and part of Bruce, and has assigned the number 1703 thereto, the full corporate name of the District being "The Consolidated School District of Brant, No. 1703."
>
> (Sgd.) G. R. COLDWELL,
> Minister of Education.

On November 29, 1913, a meeting of the new consolidated school district was held for the purpose of electing trustees. Two of the plaintiffs, Molison and McKay, attended this meeting, but took no part in it. They say that they went to the meeting believing it to be a meeting for the purpose of considering consolidation, but, when they got there, they discovered that the consolidation was complete, and that the meeting was for the purpose of electing trustees for the new consolidated district.

The first meeting of the new trustees took place on January 7, 1914.

On January 26, 1914, a public meeting of the ratepayers of the new consolidated district was held for the purpose of selecting a site for a new school. At this meeting also the plaintiffs Molison and McKay were present. By resolution a site was adopted at the village of Argyle, in the former school district of Brant. Pursuant to this resolution the trustees purchased the site selected.

On March 17 another public meeting of the ratepayers was held for the purpose of deciding the kind of school that should be erected on the new site. Again the plaintiffs Molison and McKay were present, but took no part in the meeting. The plaintiff Josling was aware that all the meetings referred to were about to be held and of the time and place of holding the same, but did not attend.

On March 17 the trustees of the new school district passed a by-law authorizing the borrowing of $9,000 for the purpose of buying the site and erecting and equipping the new school building and of issuing debentures therefor. This proposed loan was submitted to a vote of the ratepayers comprised in the new school district, pursuant to by-laws to that effect passed by the councils of the municipalities of Woodlands and Rockwood. The vote took place on the 28th of April, and the by-law was carried. Of the ratepayers in the municipality of Rockwood 18 voted for the by-law and 2 against. Of those resident in the municipality of Woodlands, 7 voted for and 16 against. All the plaintiffs voted against the by-law.

On May 8, 1914, the Department of Education assented to this loan in the following resolution:—

Whereas the Consolidated School District of Brant, No. 1703, is desirous of buying a school site, building and equipping a school house for a sum not exceeding $9,000, and for such purpose desires to issue debentures in the said sum of $9000;

And whereas it is expedient to assent to such loan under the provisions of sec. 219 of the Public Schools Act;

Therefore the Department of Education doth hereby assent to a loan to the Consolidated School District of Brant ,No. 1703, by an issue of debentures in the sum of $9,000 for the purposes above set forth.

(Sgd.) G. R. COLDWELL,
Minister of Education.

Debentures were issued by the School Board, under its seal, to the amount of $9,000, and were presented to the Provincial Secretary, who signed the same under the memorandum, "Issued

MAN.

K. B.

MOLISON v. WOODLANDS.

Mathers, C.J.

under the provisions of the Public Schools Act," and affixed thereto the Great Seal of the Province.

On June 20, 1914, the trustees sold the debentures issued for $8,840, and on July 13, 1914, this money was paid over to the defendant school district.

On May 9, 1914, a contract was let for the building of the new school on the site previously selected, the contract price being $7,000. The contractor commenced work at once on the building, and on July 25, the date on which this action was brought, there had been work done and material provided for the erection of the said building to the amount of about $6,000, and $910 of the moneys raised by the sale of debentures had at that time been paid out.

The contract called for the completion of the building on August 15. On October 13, 1914, it was completed, furnished and occupied. The total cost of purchasing the site, building and equipping the school, was as follows:—Site, $435; school building, $7,216; outbuildings, $400; well, $117; fencing, $104; furniture, $405; vans for conveying children to and from school, $900.

The defendants assert that the plaintiffs have no title to bring this action; that the consolidation of the defendant school district was properly brought about, and that it is now a legal and subsisting school corporation, and that, if all the provisions of the Public Schools Act were not complied with in the steps leading up to the consolidation, that the plaintiffs have by their conduct estopped themselves from now complaining.

I am inclined to think that the plaintiffs have no title to sue in the character in which they have sued. The people particularly concerned are the ratepayers of the several school districts, as they were constituted before consolidation. But the plaintiffs purport to sue on behalf of themselves and all other ratepayers of the municipality of Woodlands, who may come in and contribute to the expense of this suit. No ratepayer of Woodlands outside the boundaries of the former school district of Macleod has any interest in this matter. Either all the ratepayers of the former school district of Macleod should be parties to the action, or at least the plaintiffs should have sued not only on behalf of themselves, but of all ratepayers of that district.

No person appears to have been misled by the character in which the plaintiffs have sued, and, as the defect might be cured by amendment, I will pass it over without further comment.

Neither municipality appointed its arbitrator in the manner required by the Public Schools Act. The Act says that an arbitrator may be appointed upon a petition of six ratepayers. A letter from a couple of trustees is not the equivalent of a petition from six ratepayers, and cannot possibly be construed as a compliance with that provision. The award also falls considerably short of being a compliance with sub-sec. (*d*) of sec. 123.

Had the plaintiffs brought their action at any time before the debentures were issued and approved under the provisions of sec. 219, sub-sec. (*g*), of the Act, it is probable that they might have succeeded. That section, however, says that, after a loan has been approved by the Department of Education and the debentures have been signed by the Provincial Secretary and the Great Seal of the Province affixed thereto,

> Such signature and seal shall be conclusive evidence that such corporation has been legally formed and that all the formalities in respect to the said loan and the issue of such debentures have been complied with and of the correctness of the statement or endorsement thereon, and the legality of such debentures shall be thereby conclusively established and its validity shall not be questionable by any Court in this province, but the same shall, to the extent of the revenues of the school district issuing the same, be a good and indefeasible security in the hands of any *bona-fide* holder thereof.

It would be impossible to use more comprehensive language. It was manifestly the intention of the Legislature that, no matter what defects or irregularities existed in the formation of the school district, once a loan was approved by the Department of Education and the debentures were signed by the Provincial Secretary and sealed with the Great Seal of the Province, they would thereafter constitute an indefeasible security in the hands of an innocent purchaser.

The situation here, then, is that debentures to the extent of $9,000 are a charge against this consolidated school district, and the plaintiffs now ask the Court to declare that this school district has no legal existence. From November, 1913, the plaintiffs were aware that the defendant school district and the trustees thereof were proceeding under the belief that their legal constitution was unquestioned. They were aware of the negotiations for the purchase of the school site and of the style of building

MAN.
K. B.
MOLISON
v.
WOODLANDS.
Mathers, C.J.

to be erected upon it. They were aware that a by-law had been carried for the issue of $9,000 debentures. They were aware that a contract had been let for the purpose of erecting a school building upon the site selected, and that that contract was being carried to completion. They must have known that debentures would be issued pursuant to the by-law, which had been sanctioned by the ratepayers on April 28. They must be presumed to have known that, if the proposed loan was approved by the Department of Education and if the debentures issued therefor were signed by the Provincial Secretary and sealed with the Great Seal of the Province, pursuant to sub-sec. (*g*) of sec. 219, such debentures would become an indefeasible security. They must be taken to have been aware that these debentures would be sold and thereby pass into the hands of an innocent holder, and that the proceeds thereof would be paid out to the school contractor.

Knowing all this, the plaintiffs did nothing other than to casually express disapproval, until July 25th when this action was launched. Before that date they gave no intimation to any of the defendants of the objection upon which they now rely, or that they intended to raise any question as to the legality of the proceedings upon which the consolidated district depended for its very existence. It might be argued with a good deal of force that it was the plaintiffs' duty to disclose their objection at an earlier stage, and that their silence under the circumstances was of that misleading character which estops them from now putting it forward. In the view I take of this case, it is not necessary to decide that question.

I prefer to base my judgment upon the effect of sub-sec. (*g*) of sec. 219 of the Public Schools Act.

It is contended that this sub-section at most only operates to cure defects and irregularities in so far as the debentures issued and sold are in the hands of a *bona-fide* holder. The *bona-fides* of the holder of these debentures is not questioned. Even if such a contention be well founded, for the purpose of supporting the debentures at least, the signature of the Provincial Secretary and the imprint of the Great Seal is "conclusive evidence" that the defendant school district "has been legally formed." What the plaintiffs now ask is a declaration that, although the defen-

dant school district is a legally formed corporation for the purpose of sustaining the validity of its debenture issue, and although such debentures have become a charge upon such school district to the extent of its revenues, it has otherwise no legal existence, and that the school districts of which it was formed are still legally subsisting school districts under the School Act.

The result would be that the three old districts would elect trustees and proceed to carry on their schools as formerly. The consolidated district, having no legal existence except for the purpose of paying the debentures, would cease to conduct a school. What would become of the new school building and plant now vested in, what would be declared to be, a non-existent corporation, I am at a loss to say. The ratepayers within the boundaries of what was the consolidated district would be taxed to pay the $9,000 debentures, and would also be taxed for the support and maintenance of their own particular schools.

The chief grievance of the plaintiffs is, I infer, a financial one. Two of them have no school children. As to the third, the new school is located about half a mile farther away than the old school. This disadvantage is more than compensated for by the fact that the new school is much better and more modern in its appointments, but also by the fact that, under the new *regime*, vans are used to convey the children to and from school. I have much doubt whether even the dissentient ratepayers of Macleod would welcome success in this action if they knew that the result would be, not the hoped-for decrease, but an increase of taxation.

Be that as it may, the whole spirit and intention of the Public Schools Act is, in my opinion, opposed to the creation and maintenance of a school district for the purpose of paying debentures only and not for the purpose of discharging its legitimate functions of conducting a public school. When the organization of a school district had reached the stage of issuing debentures pursuant to a by-law sanctioned by the ratepayers, it was manifestly the intention of the Legislature that its legal existence should not thereafter be questioned because of any antecedent informality.

The plaintiffs have stood silently by until circumstances have arisen which make it impossible for the Court to grant the relief asked, even if they would have been entitled to succeed had they brought their action before their right to relief had been taken away by operation of the statute.

MAN.

K. B.

MOLISON v. WOODLANDS

Having arrived at this conclusion, I have not considered the objections raised as to lack of parties.

The plaintiffs' action will be dismissed with costs.

Action dismissed.

ALTA.

S. C.

NAKATA v. DOMINION FIRE INSURANCE CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Simmons, JJ. March 26, 1915.

1. INSURANCE (§ III C—56)—FIRE INSURANCE—CANCELLATION—NOTICE OF—RETURN OF PREMIUM.

In order to validly cancel its policy of fire insurance under statutory condition No. 19, Con. Ord., N.W.T., ch. 113, the insurance company must not only send notice to the assured, but tender him the unearned premium; even if the company's sub-agent had previously been authorized by the assured to hold the money for the purpose of procuring insurance elsewhere in the event of the company cancelling, the company would not be relieved from the necessity of making the tender or at least of causing him to be notified that the portion of the premium to which he was entitled was held at his disposal.

2. INSURANCE (§ VI E—400)—LOSS BY FIRE—BAWDY-HOUSE—RIGHT OF RECOVERY—DEFENCE OF ILLEGALITY.

A fire insurance company cannot set up public morals as a defence to a claim under its policy issued upon premises described therein as a "sporting house" and used as a bawdy-house.

[*Morin* v. *Anglo-Canadian*, 3 A.L.R. 121, applied.]

Statement

APPEAL from the judgment of BECK, J., in favour of the plaintiff for the amount of a policy of insurance.

C. T. Jones, for the plaintiff (respondent).

A. H. Clarke, for defendant company (appellants).

Harvey, C.J.

HARVEY, C.J., agreed with SCOTT, J.

Scott, J.

SCOTT, J.:—The grounds of appeal relied upon by defendant company are: (1) That the premium upon the policy had not been paid by the plaintiff; and (2) that the defendant company had cancelled under the powers contained in it.

On January 30, 1913, plaintiff's husband applied, on her behalf, to one Carr, the agent of another insurance company, for insurance upon the property comprised in the policy in question. Carr informed him that his company would not accept the risk, but he then offered to endeavour to place it with another company, and he was instructed to do so. On the same day he applied to Tavender & Co., the defendant company's general agents at Calgary, who accepted the application, and on that

day issued the policy and delivered it to him. He had received $10 from the plaintiff's husband on account of the premium, and on February 8 the latter paid him $70, being the balance of the premium, and received the policy.

The premium of $80 was not paid by Carr to Tavender & Co. in actual cash, but there appear to have been numerous dealings between them with respect to premiums or on other insurance negotiated by him for defendant company, and there was a running account kept by Tavender & Co. in their ledger, in which he was charged with the premiums and credit given him from time to time for payments made by him on account and for his commissions upon the premiums. In that ledger account he is charged with the amount of plaintiff's premium ($80), and credited with his commission thereon ($12).

Carr may have been the agent of the plaintiff for the purpose of placing the insurance with the defendant company, but, in my view, the evidence clearly establishes that from the time it was placed he was the agent of the latter. He was so styled upon the policy when it was issued. In a letter from Tavender & Co. to defendant company's head office, on February 10, respecting plaintiff's insurance, he is referred to as its sub-agent, and in a letter from Tavender & Co. to him on February 8, which I will refer to later, he is, in effect, instructed to take the necessary steps to cancel plaintiff's policy.

The facts I have stated appear to me to be sufficient to charge the defendant company with receipt of plaintiff's premium. Even if the receipt of it by Carr is not in itself sufficient, the course of dealing between himself and Tavender & Co. was such as to charge the latter with its receipt. One of the conditions of the policy is as follows:—

> 19. The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice, excluding Sunday, shall be given. Notice may be given by any company registered under the provisions of Foreign Companies' Ordinance and having an agency in the Territories, by registered letter addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which application was received, and where such notice is by letter, then ten days from the arrival at any post office in the Territories shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or ten days, as the case may be.

ALTA.

S. C.

NAKATA v. DOMINION FIRE INS. CO.

Scott, J.

(a) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company, or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid.

Upon issuing the policy, Tavender & Co. at once notified the head office of defendant company, and on February 4 the latter wrote them, asking for further information about the risk and suggesting that the policy should be cancelled. On February 8 Tavender & Co. wrote Carr, as follows, respecting it:—

As advised you by telephone to-day, the head office have asked for immediate cancellation of above policy. Kindly arrange to let us have this by return mail and very much oblige.

On February 8 Carr sent the following notice to the plaintiffs at Calgary by registered mail:—

Please take notice that your policy of insurance, No. 13278, of the Dominion Fire Insurance Company, covering for $2,000 on sporting house, is cancelled on the 8th February, and will not be in force after that date. I have to request the return of the above number policy of insurance.

H. CARR, Agent.

On February 10 Carr wrote Tavender & Co. as follows:—

I am in receipt of your favour of the 8th inst. with reference to the cancellation of the above-numbered policy. I have sent a registered letter to the insured cancelling same on February 8th and requesting the return of the policy here for cancellation.

H. CARR, Agent.

No tender was made by either the defendant company or Carr to the plaintiff of the proportion of the premium for the unexpired portion of the term; nor was any offer made to her, either directly or indirectly, to return her any portion of the premium. Carr, however, states that on January 30, after Tavender & Co. had accepted the application, he told plaintiff's husband that the policy might be cancelled, and asked the latter whether, in such case, he (Carr) should return the money or retain it, and place the insurance in some other company, and that the latter told him to place it in another company. The latter denies that anything was said to that effect. Carr also states that he endeavoured to place the insurance elsewhere, but he was unable to procure another company to accept it. The plaintiff did not receive the notice of cancellation nor did she become aware of it until after the fire, which took place on May 22 following.

Although Tavender & Co. received notice from Carr on February 10 that he had cancelled the policy, it was not until March 22, some six weeks afterwards, that they credited his account with the amount of plaintiff's premium and debited him with the amounts of his commission thereon.

It is, in my view, open to serious doubt whether the notice of cancellation given by Carr is one within the conditions referred to. The condition provides that where, as in this case, the notice is sent by registered mail, the policy shall cease at the expiration of ten days from the giving of the notice, whereas the notice given by Carr expressly states that the policy shall not be in force after the date of the notice. It, therefore, plainly discloses the intention to cancel it in a manner not authorized by the condition, and it is, at least, open to question whether the defendant company should be held entitled to rely upon it as a notice of cancellation in the authorized manner.

Even if the notice were held to be sufficient for the purpose, I am of opinion that, by reason of the fact that no tender was made by either defendant company or Carr of the portion of the premium to which plaintiff was entitled or any offer made by either to account to her for same, the insurance was not terminated. Even if Carr's statement to the effect that he was authorized to hold the money for the purpose of procuring insurance in another company is accepted, the defendant company would not thereby be relieved from the necessity of making the tender, or, at least, of causing her to be notified that the portion of the premium to which she was entitled was held at her disposal. The effect of Carr's statement is that he occupied the dual position of defendant company's agent to terminate the insurance and of plaintiff's agent to receive the moneys to which she was entitled. It was, therefore, not only his duty, at least, to notify her that the money was held at her disposal, but it was also the duty of defendant company either to see that she was so notified, or that the money was returned to her. Had she received the notice, there was nothing to lead her to any other conclusion than that defendant company had not only terminated the insurance, but also intended to retain the whole of the premium paid by her.

The appeal should be dismissed with costs.

ALTA.

S. C.

NAKATA v. DOMINION FIRE INS. CO.

Simmons, J.

STUART, J., agreed with SCOTT, J.

SIMMONS, J.:—The plaintiff sued the defendant company for $1,700 on an insurance policy, dated January 31, 1913, insuring the plaintiff's house and contents for $2,000. The plaintiff claims the premises were destroyed by fire on May 22, 1913, while the said policy was in force.

The defendant company sets up as defences:—

(*a*) The policy is void as the premises were described in the policy as "a sporting house," and were used as a bawdy-house. (*b*) The premium had not been paid, and this was a condition precedent to the coming into effect of the policy; and (*c*) the said policy was cancelled by the defendant company prior to May 22, 1913, when the premises were destroyed.

The learned trial Judge found as a fact that the premium had been paid, and that there had not been a cancellation of the policy.

Following *Morin* v. *Anglo-Canadian Fire Ins. Co.*, 3 A.L.R. 121, a decision of the Court of Appeal of this province, the learned trial Judge refused to give effect to the defence that the contract was void on the ground of immorality. From this judgment the defendant appeals. E. F. L. Tavender Co., Ltd., was the agent of the defendant company at Calgary. A. H. Carr was an insurance broker at Calgary, who, at various times in the course of business, sent to Tavender & Co., Ltd., applications for insurance from his clients, when the company or companies represented by Carr could not accept the risks.

The defendant company had a policy of insurance on the property in question in favour of a former owner, and which would expire on February 5, 1913. The defendant's husband brought this policy to Carr, who had the same cancelled, and took an application for the policy in question, and was paid $10 on account of the premium. The property in question was used by the owner as a bawdy house, and was described in the application for insurance and in the policy issued by the defendants as "A Sporting House." On February 8, 1913, the plaintiff's husband paid the said Carr $70, which was the balance due from the plaintiff for the premium, and Carr delivered to him the policy in question. On February 4, 1913, the company, from their head office in Toronto, wrote their agents, Tavender & Co., Ltd., at Calgary, making inquiries about the property insured, and suggesting that, if the property was not "Under absolute police pro-

tection," they would consider the agent was not treating them fairly, if he did not cancel the business at once.

On February 8, subsequent to the payment to Carr of the balance of the premium and delivery of the policy by him to the plaintiff's husband, Tavender & Co., Ltd., telephoned Carr, asking him to cancel the policy and return it to them, and also wrote Carr on the same day confirming the telephone message. Carr thereupon wrote the plaintiff, the same day, advising her that the policy was cancelled on that date, and requested her to return to him the said policy. The letter was registered, but was not delivered to the plaintiff, and was returned through the post office to Carr on March 1, 1913.

Mr. Massie, president of the defendant company, says that Carr never was the agent of the company; and that Tavender & Co., Ltd., had authority to issue policies, but that, in regard to this class of risk, his authority was limited to the extent that the policies "were subject to acceptance or being declined by the head office." Massie says the company had not received the premium, but that the non-payment of premium had nothing to do with cancellation of the risk. Carr says he had for some years a standing account with Tavender & Co., Ltd., for insurance turned in by him as a broker, and the premium in question went through in the ordinary way.

The page of Tavender & Co., Ltd., ledger, ex. "12" is the account from December 2, 1911, until September 1, 1913, and shews a debit to Carr, on February 14, 1913, of $80, and a credit of $12 on account of the policy in question, and on March 27 a credit of $12 and a debit of $80.

On January 31, 1913, the date on which the policy issued, Carr is credited with 94c. and debited with 16c. on account of $1.10 rebate on the insurance policy on the same property, which was cancelled on that date. The defendants wrote Carr instructing him to cancel the policy. These instructions carried with them the burden of performing the necessary things provided by the contract in order to effect cancellation. They had, in the course of business, charged Carr with the premium. They did not put Carr in funds to repay the premium, and they did not indicate to him that they would make a cross entry in their books crediting him back with the premium less the commission, and they made no such cross entry until March 27, 1913.

ALTA.
S. C.
NAKATA
v.
DOMINION
FIRE
INS. CO.
Simmons, J.

Mr. Campbell, then in charge of the office of Tavender & Co., Ltd., says:—"At the time the policies are issued, we make an entry charging the broker with the amount of the premium less the commission." In the result, then, Carr was not even in a position to hold the premium for the plaintiff, pending re-insurance, as the effect of the account, having regard to the course of business between Carr and Tavender & Co., Ltd., was that the same had been paid by Carr to Tavender & Co., Ltd.

Between December, 1911, and September, 1913, payments in cash by Carr on this account occurred three times only—namely, December 12, 1911; March 6, 1912; and May 22, 1913, the last being the only one that squared the account. In view of this account and the evidence of the course of business between Tavender & Co., Ltd., and Carr, the finding of the trial Judge is absolutely correct, as to the payment of the premium to Tavender & Co., Ltd., by Carr: *Bell* v. *Hudson Bay Ins. Co.*, 44 Can. S.C.R. 419.

It was not repaid to Carr—that is, the premium less $12 commission was not credited back to Carr until March 27—and Carr is debited with a balance of $67.06, which was balanced by a cash entry of $67.06 on May 22.

Carr says that, when he took the application, the plaintiff's husband was told that it was subject to cancellation, to retain the premium for the purpose of replacing the policy in another company, and that he failed to get another company to accept it. There is no evidence that he communicated this to Tavender & Co., Ltd., at the time the policy was issued, or up to February 8, when the notice of cancellation was sent. Carr does say that he had conversation with Tavender & Co., Ltd., about the time that the fire took place, in regard to getting the policy back, and that he told Mr. Campbell, a member of the firm of Tavender & Co., Ltd., that the money was in his hands, waiting for the plaintiff to call for it.

The statutory conditions endorsed on the policy are the statutory conditions in force in this province, ch. 113, Con. Ord. N.W.T., and sec. 19 prescribed the method by which a policy may be terminated. A tender of the ratable proportion of the unexpired premium must accompany the notice, which, in the case of a foreign company registered in the province, may be made by registered letter addressed to the assured at his last post office

address, notified to the company, and, in the absence of such, then addressed to the post office of the agency from which the application was received, and which notice shall take effect ten days after arrival at such post office, and the policy shall cease after such tender and notice as aforesaid.

Even if assumed, in favour of the defendant company, that Carr was agent of the assured for the purpose of receiving notice of cancellation, failure to tender to Carr the unearned premium, or to credit him with it at the time, is fatal to their attempted notice through Carr of cancellation.

I do not think there is any valid ground, however, for questioning the finding of the learned trial Judge to the effect that Carr was not the agent of the assured for the purpose of receiving notice and tender pursuant to sec. 19.

An intention on the part of one of the parties not communicated to the other party cannot alter the construction of a contract aside from its effect as to fraud or mistake: *Reliance Marine Ins. Co.* v. *Duder*, [1913] 1 K.B. 265.

What took place between Carr and the husband of the assured in regard to any such arrangement was not communicated (if at all) at least until after February 8, and the defendant cannot rely upon it as affecting the rights of the parties.

The defence that the policy was void on the ground that the contract was an immoral one is governed by *Morin* v. *Anglo-Canadian Fire Ins. Co.*, *supra*, and, therefore, fails. I would dismiss the appeal.

Appeal dismissed.

ROWLAND v. CITY OF EDMONTON.

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

1. DEDICATION (§ I A—3)—MODE AND EFFECT—ANIMUS DEDICANDI—PUBLIC USER—EFFECT.

In order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an *animus dedicandi* of which the use by the public is merely some evidence; public user does not create a presumption of grant or dedication.

[*Mann* v. *Brodie*, 10 A.C. 378, 386, applied; *Rowland* v. *Edmonton*, 20 D.L.R. 36, reversed.]

2. DEDICATION (§ I C—15)—BY MUNICIPALITY—PRESUMPTIONS — BUILDING HIGHWAY.

The spending of a sum of money by the government and the municipality on the plaintiff's land by building a highway wider than the authorized or reserved width and so encroaching on the plaintiff's land does not create a presumption *juris et de jure* in favour of dedication, even if acquiesced in by the owner.

[*Rowland* v. *Edmonton*, 20 D.L.R. 36, reversed.]

CAN.

S. C.

ROWLAND v. CITY OF EDMONTON.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 20 D.L.R. 36, reversing the judgment of Harvey, C.J., at the trial, and dismissing the plaintiff's action with costs.

Ewart, K.C., and *G. B. O'Connor*, for the appellant.

Bown, K.C., and *O. M. Biggar*, K.C., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.—I can find no evidence of dedication by the plaintiff, appellant, and there certainly is no justification for reversing the trial Judge on this finding of fact. . .

As pointed out by Mr. Justice Idington, the requirements of the local statute were not complied with and the mere grant or spending of a sum of money by the Government and the municipality on the plaintiff's land to build a highway does not create a presumption *juris et de jure* in favour of dedication even if acquiesced in by the owner. The mere user by the public does not create a presumption of grant or dedication. In order to constitute a valid dedication to the public of a highway by the owner of the soil it is clearly settled that there must be an intention to dedicate, there must be an *animus dedicandi* of which the user by the public is evidence, and no more. *Mann* v. *Brodie*, 10 App. Cas. 378, at 386. See also *Folkestone Corporation* v. *Brockman*, [1914] A.C. 338.

The appeal should, therefore, be allowed with costs here and in the Courts below and the judgment of the trial Judge restored.

Idington, J.

IDINGTON, J.—The appellant seeks to enjoin respondent from trespassing on certain lands which were granted by the Crown to him in 1887, when part of the North-West Territories, but which are now in Alberta. By virtue thereof he became registered owner on June 15 of said year. Over part of these lands there was a trail known as the "Edmonton and Fort Saskatchewan Trail." Prior to said grant there had been enacted the North-West Territories Act. It had then become ch. 50 of R.S.C., 1886. By sec. 108 thereof the Governor-in-Council, upon notice from the Lieutenant-Governor that it was considered desirable that any particular thoroughfare or public travelled road or trail, in the territories, which existed as such prior to any regular surveys should be continued as such, might direct such to be surveyed by a Dominion land surveyor and thereafter might transfer the control of each thoroughfare, public travelled

road or trail, according to the plan and description thereof, to the Lieutenant-Governor in Council for the public uses of the territories. The grant of said lands to appellant probably was subject to the exercise of said power.

Said sec. 108, however, was repealed by 60 & 61 Vict. ch. 28, sec. 19, which was substituted therefor.

This later enactment was much longer and more specific in regard to what might be done under it, and provided a number of steps to be taken in respect to the results of such a survey before its becoming effective. Amongst other things to be done with the return of such a survey was the filing of it in the land titles office for the district. It seems clear that it was not until that and other things were done that the road or trail so surveyed could be transferred to the Lieutenant-Governor for the use of the territories, and even then it was subject to any right which might have been acquired under letters patent issued previously to such transfer.

Sub-sec. 2, of said sec. 19, is as follows:—

2. The width of such road or trail shall be one chain or sixty-six feet; and in making the survey the surveyor shall make such changes in the location of the road or trail as he finds necessary for improving it, without, however, altering its main direction.

It is exceedingly doubtful in face of the certificate of title, which in absence of the letters patent is our only guide to contents thereof, if there ever could have been a survey made under this section interfering with the apparently absolute grant to the appellant. But it is shewn that in fact a Dominion land surveyor, in 1901, did make a survey of this trail, but how he came to do it or by what authority he presumed to do it is not explained. He was called as a witness and tells, amongst other things, that when done the plan thereof was sent to Regina.

The said sec. 19 required any such return when approved by the Surveyor-General to be filed in the Department of the Interior. Nothing of that kind seems to have been done or attempted. It never was filed in the district registry office and it seems quite clear that it was null as regards any legal effect herein or elsewhere as governing the right of any one.

It is simply because it seems to have been one of the many curious things put forward in answer to appellant's claim herein, as helping to establish an alleged dedication by him or something

CAN.

S. C.

ROWLAND v. CITY OF EDMONTON.

Idington, J.

that might estop him from claiming the part of his land so granted, now in question, that I notice this proceeding alleged to have been taken under said statute.

He sold ten acres of his lands to a Mrs. Sinclair, and in his deed thereof, as appears by the certificate of title to her in 1902, described same as bounded in part by the northern boundary of a surveyed road along the north side of Rat Creek. A plan of this part was drawn by same surveyor and is said to have been annexed to the deed.

It appears that in the plan of survey of the said trail the said surveyor had taken it upon him to make the proposed road allowance nearly two chains wide at this part instead of only one chain as the statute required, and this illegal and improper dealing with another man's property, without calling his attention to it or asking his consent, it is claimed so appears on the plan as to constitute an act of dedication by him.

The deed was sent to him at Battleford, where he lived, for execution and then executed and returned. The marking of road allowance or boulevard thereon can be under such circumstances no evidence of dedication of this part of the land in question or foundation for any estoppel.

Then in 1903 the appellant agreed to sell to McDougall & Secord the remainder of said lands at so much an acre, and, in course of that transaction, came to discover, by reason of the amount of acreage that would have to be paid for by the purchasers, that he was short of the price he expected. That led to correspondence with the Department of the Interior demanding compensation, answered by referring him to provincial authorities, who failed to recognize that way of looking at matters. He was forced, by these circumstances, to conclude his bargain by deducting from the price the acreage cut off by this illegal survey. And in his deed, as I infer from the certificate of title issued to McDougall & Secord, the land sold them was described by describing his original grant of lands and excepting therefrom that ten acres sold to Mrs. Sinclair "and also saving and excepting thereout a surveyed road crossing the said land hereby described."

It is again said this was a dedication. I fail to find anything therein of dedication. Some people might be tempted to call it something else if anything but blundering of some one.

The appellant lived at Battleford still and so executed the deed there, but never abandoned in any way his right to the property. No one acting on behalf of the respondent ever had occasion to consider these deeds or registrations or is able to say he acted upon them, and thus as an estoppel enuring to respondent it is out of the question for it to claim thereby. The legal presumption that every one is supposed to know the law might well, coupled with the fact of a trail having existed there, be supposed to have probably induced appellant to be reconciled to losing sixty-six feet in width for a road such as the statute above quoted seemed to make a possible provision for.

Even if in strict law it could not have been at one time forced from him, there were other considerations such as his sale to these people, needing a road, which may well be looked at as tending to constitute a dedication or laying a foundation for inferring that much.

But beyond that I fail to see how it is possible to find in this appellant's conduct anything which could be fairly construed into an actual dedication by him of anything more than the common width of road allowance so generally and extensively in use in the west.

The defendant's streets did not then extend out there, and no inference can be drawn in law from what has transpired since in way of offer to dedicate or accept such dedication beyond the said sixty-six feet in width. Defendant has since, on the north part of this land, but in no way extending further south from the said northerly limit of the surveyed land than sixty-six feet, expended some money thereon to render it a highway. It has been travelled upon that much but the remainder now claimed herein is a founderous piece of land unfit for use as a road. The expenditure of public money may, under the statute, constitute so much of the land as so improved thereby, a public highway, but not beyond.

The appeal should be allowed with costs here and in the Courts below and the judgment of the learned trial Judge be restored.

DUFF, J.—I concur in the result. Duff, J.

ANGLIN, J., for reasons given in writing, was of opinion that the conclusion reached by the trial Judge was right, and that his judgment should be restored. The plaintiff to have his costs both Anglin, J.

CAN.
S. C.
ROWLAND
v.
CITY OF
EDMONTON.

in this Court and in the Appellate Division of the Supreme Court of Alberta.

BRODEUR, J., also, for reasons given in writing, would allow the appeal.

Appeal allowed with costs.

N. S.
S. C.

DUNHAM v. CAPE BRETON ELECTRIC CO.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell and Drysdale, JJ. January 12, 1915.

1. STREET RAILWAYS (§ III B—25)—OPERATION—DUTY AND CARE—STRUCK BY STEP OF CAR—LIABILITY.

A plaintiff suing a street railway company for being hit by the step of a car while at the side of the track is not entitled to have the question of negligence submitted unless he has established by some reasonable proof want of due care by the company or its servants.

Statement

ACTION by plaintiff, an infant, suing by his next friend, against the defendant company, claiming damages for injuries sustained by reason of the alleged negligent and unskilful operation of a car of the defendant company.

This was a motion on behalf of plaintiff to set aside the verdict for defendant or for a new trial.

T. J. N. Meagher, for appellant.

H. Mellish, K.C., and *H. Ross*, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND C.J.:—The learned trial Judge has not, in my opinion, properly and sufficiently instructed the jury in this case. It was an action for negligence on the part of the defendant company resulting in serious injury to the plaintiff. At the outset, in his charge, the jury were told;

But in regard to the evidence itself I may state to you that I practically see no evidence of negligence in the company whatever. After all, if there is any negligence at all, I don't know what it is, but if there is any negligence at all the defence has rebutted it by the evidence of the boy named Gratto and I shall deal with the circumstances of Gratto's evidence and the evidence against him.

Now, it is submitted that if the learned Judge held the strong opinion so expressed he should have withdrawn the case from the jury and dismissed the action. He does not do so, but comments on the evidence in very emphatic language against the

plaintiff and reiterates his already expressed views as follows:—"I must confess I don't see any negligence whatever." Again, "From my point of view there are no damages—from my point of view, there is no negligence."

Under such directions it is hard to understand that the jury were in a position properly to appreciate the issues they were to decide, for the Judge had told them there was no evidence whatever of negligence which, of course, was the foundation of the case. It is true he does say "but then it is a question for you;" which statement, in view of his previous declaration, and the absence of any instruction as to what amounted to negligence, could not have fairly made the jury understand what they were to try.

Now, with all deference, I think there were issues which should have been submitted to the jury in the usual way in cases of negligence. First, were the company guilty of negligence and in what respect? There was evidence on both sides on this question. The plaintiff produced witnesses who swore that the gong was not sounded at the crossing as the company were obliged by law to do. This was denied by the defendant company's witnesses. Again, the plaintiff swore that he was walking alongside the track and if the motor man had been standing in his place he ought to have seen the plaintiff. Other witnesses for the plaintiff say they saw the boys at the bottom of the street. Agnes Tait says:—

> The children left the sleigh at the crossing and the car was just then coming around the turn and I did not see the children any more until I saw the boy down when he was struck with the car. The boy was just a few yards from the car when I last saw him before he was struck.

The motorman swears that he was standing up and saw no boys on the track or alongside. Now these statements on the part of plaintiff, if believed by the jury, afford evidence of negligence and it was for the jury to decide. The next question which should have been submitted was the matter of contributory negligence. On this question there is most conflicting evidence. If plaintiff and his witnesses are to be believed he was just "crossing the track when the car came and struck me." On the part of the defence the boy who was with him is

N. S.

S. C.

DUNHAM v. CAPE BRETON ELECTRIC CO.

Sir Charles Townshend, C.J.

produced who swears that the plaintiff got on the step of the car to steal a ride and in jumping off after the car started he fell under it and was injured. It was of great importance to have the jury's finding on this point but we are left in doubt as to whether the jury believed there was no negligence on the part of defendant company or that the plaintiff by his own negligent act, brought the injury on himself. Then, there was the third all important inquiry, whether the defendant company could have avoided injuring the plaintiff notwithstanding his contributory act if they believe the defendant company's witness.

It appears to me, taking the instructions as a whole, and in view of these grave omissions the result of the trial is unsatisfactory and that the verdict of the jury should not stand, and that a new trial should be ordered, and this motion should prevail with costs.

Graham, E.J.

GRAHAM, E.J.:—I have come to a different conclusion. I concur in the opinion which will be read by Mr. Justice Drysdale. I wish to add that the accident did not happen at a crossing and there was, therefore, no necessity for ringing the gong.

Russell, J.

RUSSELL, J.:—I think there should be a new trial in this case but I have considerable doubt whether I could agree with the learned Chief Justice as to the grounds on which it should be ordered. I do not think the evidence was fairly stated to the jury. Speaking of the plaintiff, the learned Judge says: "He stated that he did not know anything about it" (the accident) "except that he was struck by the car and lost his recollection." There was nothing in the evidence of the boy to warrant this statement of the learned Judge which does not moreover seem wholly consistent with what he says of him in another part of the charge when arguing against his claim for damages: "He is bright and gives his evidence perfectly well."

In commenting on the evidence of the other boy, I think it would have been fair to call the attention of the jury to his admission in the beginning of his cross-examination that he had on the day before the trial said to the plaintiff that, "He did not see him steal a ride on the car." The gist of the defence was

N. S.

S. C.

DUNHAM v. CAPE BRETON ELECTRIC CO.

Russell, J.

that the plaintiff had been stealing a ride on the car, and was thus himself wholly responsible for the accident.

I cannot think that the evidence was fairly placed before the jury. The verdict may or may not have been correct but when the Judge undertook to present the evidence to the jury I think it was of the utmost importance that he should have presented it fairly.

Drysdale, J.

DRYSDALE, J.:—This is an action charging negligence against defendant company wherein it is charged that such company so negligently managed or ran its tram cars in the town of New Aberdeen as to cause injury to plaintiff.

The jury found for the defendant company on this issue and complaint is made before us of the learned Judge's charge to the jury. Whilst it is true that the charge may fairly be said to be almost if not altogether a directing charge—that is to say, a charge strongly expressive of opinion that in the view of the learned Judge there was no proof of negligence submitted in the case, that caused or contributed to the accident complained of—still such a charge is not objectionable if on the proof there was nothing to be submitted to the jury in support of the action. I have asked over and over again what is relied upon here as want of due care under the circumstances disclosed affecting the company or its servants, and I have been unable to discover what is relied upon other than that the plaintiff boy was in some way hit by the street car. The plaintiff is not entitled to have the question of negligence submitted unless he has established by some reasonable proof want of due care by the company or its servants. This, I venture to think, cannot be found in the case as presented. Since the argument, I have read and re-read the case as printed and I am of opinion that the question raised against the charge cannot avail plaintiff as I think it a case that should have been withdrawn from the jury for want of any *primâ facie* proof of negligence.

It seems clear the boy was struck by the step of the car and that he was picked up on the street side. He says himself he was crossing the track, that the step struck him in the back. How, and why, this happened is not explained. He could not have

N. S.

S. C.

DUNHAM v. CAPE BRETON ELECTRIC CO.

Sir Charles Townshend, C.J.

been in front of the car if the step struck him, and he is picked up on the street side. The car had shortly previous pulled away from a crossing-stop, was on the main road, and was proceeding up hill slowly, and no suggestion is made as to any want of care in the management of the car whilst slowly moving along the main street. Beyond the fact that the boy got in contact with the step of the car there is no suggestion of anything wrong, and certainly no definite allegation against the car or its management or against the men in charge thereof. I would dismiss the appeal.

Appeal dismissed, without costs.

MAN.

C. A.

Re PHILLIPPS & WHITLA.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. January 5, 1915.

1. SOLICITORS (§ II C—31)—COMPENSATION—CONTINGENT FEE.

In the absence of a contract made under the provisions of the Law Society Act, Man., between solicitor and client, there is no authority for fixing the remuneration of a solicitor upon the basis of a commission or percentage of the amount recovered; a solicitor's fee on settlement in a matter where large interests are involved may be taxed by analogy to the usual allowance for counsel fees.

[*Re Phillipps and Whitla*, 12 D.L.R. 106, 23 Man. L.R. 92, referred to.]

2. SOLICITORS (§ II C—30)—COMPENSATION—FEES—TAXATION — APPEAL FROM.

Where an appeal from a taxation between solicitor and client has been taken to the Court of Appeal which Court remits the matter to the taxing officer with directions, the right of appeal still remains from the new certificate or report of the taxing officer following the rehearing of the matter before him.

[*Turnbull* v. *Janson*, 3 C.P.D. 264, referred to.]

3. SOLICITORS (§ II C—30)—COMPENSATION—TAXATION OF COSTS.

In respect of a charge made in a solicitor and client bill for a service which by the tariff of costs is to be fixed in the discretion of the taxing officer, testimony of other solicitors practising in the same locality is not admissible to prove what would be a fair and usual charge for the service in question but the taxing officer is to exercise his own discretion in the matter.

[*Howard* v. *Burrows*, 7 Man. L.R. 181, distinguished.]

Statement

APPEAL from order of Galt, J., 20 D.L.R. 314.

H. F. McWilliams, for the appellants.

A. B. Hudson, for the respondents.

Richards, J.A.

RICHARDS, J.A., concurred with PERDUE, J.A.

PERDUE, J.A.:—This is an appeal from the taxing officer in respect of a matter which has already been considered by this Court. The facts are fully set out in the report of the previous decision of the case and need not be repeated. See *Re Phillipps & Whitla*, 12 D.L.R. 106, 23 Man. L.R. 92. By the order of this Court made on that appeal the matter was referred back to the taxing officer to re-consider the fee of $3,500 which had been allowed by him on the previous taxation as a fee on settlement. In pronouncing this order the majority of the Court, all of whom gave written expressions of their reasons for judgment, intimated that they considered the fee allowed by the taxing officer to be excessive and not fixed in accordance with the principles of the tariff. Pursuant to this order the taxing officer reconsidered the charge in question. He has reported that he has seen no reason to change his mind as to the amount that should be allowed, and he has again allowed the item at $3,500.

In his report the taxing officer refers to R.S.M. 1913, ch. 111, sec. 71, which provides that, "Every barrister shall be entitled to sue for fees due to him." He then goes on to say: "The barristers could have sued for their services and proven their claim. The item before me, although in a solicitor and client bill of costs has been admitted to be, and has been treated as, a counsel fee all through this reference."

When this matter was before this Court on the previous appeal no suggestion was made that it was a counsel fee. In the bill of costs the charge in question, which covers nearly five pages of the Appeal Book, is headed "Negotiations for settlement." It then sets out a series of interviews with the solicitors for the defendants in the suit of *McGibbon* v. *Oldfield*, and enumerates the letters written to the client, the letters received from him and perused and considered, telegrams sent or received and attendances and consultations with different parties. It ends with the words: "Fee on settlement as per negotiations, October 18th to November 24th; $8,480.11." A glance at the various services enumerated under the above heading is sufficient to shew that it covers and is intended to cover solicitor's work only. As Mr. Justice Robson pointed out in this case when he gave the solicitors liberty to deliver an itemized bill, the only

MAN.

C. A.

RE PHILLIPPS & WHITLA.

Perdue, J.A.

authority for allowing a fee on settlement is the memorandum on p. 10 of the tariff which says:—

1. When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, *or compromise actions*, an allowance to be made therefor in the discretion of the taxing officer. See Cameron on Costs, p. 424.

It was under the above authority that the charge was inserted and sought to be taxed. It is sufficient to say that it is not a counsel fee, and that it covers the services of solicitors and not those of counsel. I may add that if the item were regarded as a counsel fee, even a counsel fee, in the absence of an agreement fixing the amount, must be just, proper and reasonable, all the circumstances being taken into account.

The solicitors had recovered from the defendants the sum of $3,875, which they had in their hands. The taxing officer in his report expresses the opinion that the evidence he took shewed that the client expected that this money would be retained by the solicitors on account, and therefore the client must have thought that their bill would exceed that sum. This does not appear to me to have any bearing upon the question. In the absence of a contract under the statute, the client is not bound by any estimate he may have formed as to the amount his solicitors would demand or be entitled to recover.

The taxing officer received the evidence of three members of the profession, of standing and experience as to what would be a reasonable sum to allow for conducting the settlement. If the item in question were one of common occurrence, such as a matter of simple conveyancing, one as to which there was no prescribed tariff, members of the profession might, I think, be asked what was the usual or customary charge made in such a case: *Howard* v. *Burrows*, 7 Man. L.R. 181, 188. But the present charge is made under a provision in the tariff and the taxing officer must exercise his own discretion as to the amount to be allowed. I do not think that evidence of members of the profession was receivable as to how that discretion should be exercised.

The taxing officer has had a very wide experience and his judgment in matters relating to the taxation of costs is entitled

to the highest respect, but I think that in the present case he has overlooked the expressed opinion of this Court that the allowance of $3,500 was excessive, and that it had been referred back to him in order that the sum to be allowed might be reconsidered and fixed in accordance with the principles of the tariff. With great respect, I think he proceeded upon an erroneous principle and did not properly exercise his discretion when fixing the amount to be allowed as "Fee on settlement."

That this is appealable is beyond question: K.B. Act, Rules 679 and 681; *Turnbull* v. *Janson*, 3 C.P.D. 264, 270. It is therefore necessary that this Court should now do what, in our opinion, the taxing officer should have done.

Both in the judgment of Robson, J., and in the judgment of this Court it was shewn that, in the absence of a contract under the provision contained in the Law Society Act, there is no authority for fixing the remuneration of a solicitor upon the basis of a commission or percentage on the amount recovered. The charge made in the bill of costs for effecting the settlement was based on a percentage upon the supposed value of the property. The fee taxed has been fixed, wholly, I think, upon the basis of the value of the property recovered The sum allowed is a little less than two and a quarter per cent. on that value. Making the remuneration proportionate to the results achieved may commend itself in many cases as fair between solicitor and client, but there must be a legal contract to that effect; otherwise, the solicitor is bound by the tariff. At the same time I think it right and proper that the magnitude of the interests involved should be given some consideration in arriving at the quantum of the fees to be allowed.

The bill of costs sets out very fully the work performed in effecting the settlement. The negotiations covered a period of about five weeks, but the actual work could not have occupied more than ten days if it had been carried on continuously and not spread, as, no doubt, was necessary, over the longer period. In the previous judgment of this Court it was intimated that the taxing officer might, in arriving at the amount to be allowed, be guided by the analogy of the usual allowances for counsel fees in cases of importance. Adopting this method and assuming

MAN.
C. A.
RE PHILLIPPS & WHITLA.

that ten days' time was occupied, I would fix the fee at $1,000. The appeal will be allowed, the order of Galt, J., reversed and the item in question allowed at $1,000, instead of $3,500 allowed by the taxing officer. The Court does not, in the circumstances of this case, make any order as to costs.

Cameron, J.A.

CAMERON, J.A.:—I have again read the judgment of Mr. Justice Robson in this case in 1 D.L.R. 291, 22 Man. L.R. 150, and the judgment of the members of this Court as reported in 12 D.L.R. 106, 23 Man. L.R. 92. Pursuant to the last named decision the matter again came before the taxing officer who heard further evidence (which was objected to) and taxed to the solicitors the identical amount which had previously been the main subject of appeal. Without reviewing the expressions of opinion in the various judgments referred to, I am unable to come to the conclusion that the Master has followed them in adhering to the amount formerly fixed by him. The Chief Justice considered it "altogether excessive" and held that the Master "should fix it on the principles of the tariff," taking into consideration the amounts already allowed. I cannot rid my mind of the impression that such an amount is altogether outside of the range prescribed by the tariff. The parties here are relegated to their strict legal rights. McGibbon has done nothing to prevent him from taking that position.

I have read the judgment of Mr. Justice Perdue prepared in this matter, and concur in it. At the same time I am bound to state that my own inclination has been to fix a smaller amount, but I do not feel disposed to carry my inclination so far as to differ from the amount there fixed. It is necessary to put an end, at some time or other, to this protracted dispute and I concur in the sum mentioned in Mr. Justice Perdue's judgment.

Haggart, J.A. (dissenting)

HAGGART, J.A. (dissenting), for reasons given in writing was of opinion that the appeal should be dismissed.

Appeal allowed.

SMITH v. THE MASTER OF TITLES.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. January 9, 1915.

HIGHWAYS (§ I—1)—ESTABLISHMENT—SURVEY — ALTERATION OF STREET LINES.

The special survey which the Attorney-General may direct at the request of a municipal council under the Special Surveys Act, Sask., 3 Geo. V. ch. 24, applies only for the correction of errors; and to justify the acceptance of a new survey altering the street lines it must be shewn that there was an error in those lines and that they did not carry out the intention of the former owner on whose behalf the original survey was made or that the expressed intention leads to an absurdity.

[*Smith* v. *Millions*, 16 A.R. (Ont.) 140, referred to.]

Statement

APPEAL from the Master of Titles.

T. J. Blain and W. A. McIntyre, for appellant.

T. A. Colclough, K.C., for respondent.

H. L. Jordan, K.C., for the city of Saskatoon.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an appeal by Andrew Smith from an order of the Master of Titles made under the provisions of the Special Surveys Act, 3 Geo. V. ch. 24. That Act provides that the Attorney-General may, upon the request of any municipal council, direct a special survey to be made by a Saskatchewan land surveyor of any land in the municipality of such council, "for the purpose of correcting any error or supposed error in respect of any existing survey or plan." It also provides that such survey shall be made under the guidance of, and instructions from the Master of Titles, and the plan of such survey, when made, shall be filed with the Master of Titles for the purpose of being laid before the Lieutenant-Governor in Council for approval. The Master of Titles is empowered to publish a notice of such plan, and the costs thereof, and by whom they shall be paid, and also to hear and determine any complaints that may be made against such survey or plan by any person interested in the property thereby affected. On February 17, 1913, the council of the city of Saskatoon passed a resolution recommending that the Attorney-General be requested to direct a re-survey of blocks 123 and 124, plan Q, Saskatoon, "so that the confusion at present existing can be cleared away." In April the

SASK.

S. C.

SMITH v. THE MASTER OF TITLES.

Lamont, J.

council requested that blocks 122, 125, 126 and 127 be included in the re-survey of plan Q. The Attorney-General authorized a special survey of all these blocks to be made, and the Master of Titles, on June 21, directed E. H. Phillips, a surveyer, to make a survey and plan. In his letter of instructions the Master of Titles said: "I would call your attention to the fact that the re-survey requires to be a re-tracement survey in accordance with the Saskatchewan Surveyors' Act." The land in question lies to the west of Government road and south of the Saskatchewan River, which for a short distance from the north-west corner of said land runs, roughly speaking, N.NE., and then takes a bend and from there runs north-east. The original survey, of which the blocks in question form a part, was made by F. Blake, D.L.S., and plan Q. is dated by him July, 1883, although it was not registered until February 25, 1892. According*to that plan the land was laid out in blocks facing the river, with a street designated Saskatchewan Ave. extending all along the river front; this varied in width from 50 to 100 feet according to the varying indentations of the bank. The first street south of Saskatchewan Avenue is Broadway, which on the plan is shewn to be parallel to Saskatchewan Ave.; the next street is Temperance, which also on the plan is shewn as parallel to Broadway and Saskatchewan Avenues. At the point where the river alters its course from N.NE to NE., Saskatchewan Ave., according to plan Q. changes its direction from N. 26° .30′ east to N. 54° E., and this alteration of direction is followed on Broadway, and it is at the point where this alteration occurs on Broadway that the land is situated which forms the subject-matter of this appeal. The appellant is the owner of lots 5 & 6, block 123. These he purchased according to the registered plan for the purpose, he says, of making a home. The dividing line between these two lots where it meets Broadway is the point where the bend occurs in the street. The street opposite lot 5 runs N. 26° .30′ E., while that opposite lot 7 runs north 54° E., giving what Smith calls a facing in two directions. The city of Saskatoon, thinking some mistake existed in plan Q., applied for a special survey. This survey has been made, and by it and the plan proposed to be filed the south line

of Broadway is moved 25 ft. further south, where the appellant has his lots, and consequently takes that quantity of land off the front of these lots. To this he objects. The Master of Titles approved of the re-survey; and it is from his order so approving and directing its registration that this appeal is now brought.

In order to determine the validity of the special survey, it is necessary to consider the scope of the Act, and whether or not the provisions of the Act have been complied with. The Act allows a survey for the purpose of correcting any errors or supposed errors in respect of any existing survey or plan. It is therefore limited in its application to the correction of errors. The first question then is, Was there any error in the registered plan to correct? Mr. Phillips, who made the special survey, in his report finds a number of errors, of which the following are the most important:

(1) If the registered plan be adhered to, and the figures thereof taken as correct, blocks 126 and 127 will not reach Government road. There is a surplus of land in these blocks. (2) Also the boundaries of block 123 will not meet by some 38 feet. (3) That Temperance St. will not be parallel to Saskatchewan Ave. and Broadway; and (4) That there is a difference in length between the front and rear of some of the lots and blocks.

It is admitted that the registered plan is correct up to 16th street. The land covered by the special survey is bounded by Saskatchewan Ave. running along the river front; Government road, on the east; Temperance St., which according to plan Q. is parallel to Saskatchewan Ave.; and 16th St., which is at right angles to Saskatchewan Ave. In this area no original posts were found, while in all the adjoining areas original posts were discovered. In his report Mr. Phillips suggests as a possible explanation of this that Mr. Blake, in making the original survey was working from 8th St. towards Government road, that he first ran his outlines, and then subdivided the land; this he completed to 16th St., but from there to Government road left the survey incomplete, and that the plan was subsequently drawn without the survey being actually made upon

SASK.

S. C.

SMITH v. THE MASTER OF TITLES.

Lamont, J.

the ground. On 16th St. six original posts were found. Original posts were also found on Government road. One was found at the north-east corner of block 128, which adjoins the road; another at the lane corner of block 127; another at the south-east corner of block 126, which is the intersection of the north side of Broadway and Government road, and one at the north-east corner of said block. These points being established, Mr. Phillips set about making a survey to correct the errors found. In making the survey, he took the south side of Temperance St. as a base, and, with the points established by the original posts on 16th St. and Government road, he plotted out the intervening land, making Broadway and Saskatchewan Ave. run parallel to Temperance St. This survey differs from plan Q. in this: the south side of Saskatchewan Ave. on the registered plan, starting at the original post at the north-east corner of block 119 and 15th St., and allowing 66 feet for the width of the street, runs north 26° 30′ E. for a distance of 261 ft. 9 in., then N. 54° E. to Government road. By the special survey, starting at the same point and allowing the same width for 16th St., the line runs N. 26° E. for a distance of 185 feet, then N. 53° E. to Government road. The distance from the original post to where the line bends to N. 54° E. is shortened by 76 ft. 9 in., and the angle is altered from N. 54° E. to N. 53° E. On the south side of Broadway, by the special survey the distance from the original post on 16th St. to the point where the line bends to N. 54° E. is shorter by 58 ft. than on the original plan, and the direction of the line from there to Government road is altered from N. 54° E. to N. 53° E. The effect of these changes is to place Saskatchewan Ave. and Broadway at the point where, on the original plan, the direction changes to N. 54° E. some 25 ft. further south, with the result that the street line of all the lots on both streets from Government road to within a short distance of 16th St. is altered, and the alignment of the lots in many places changed. To support alterations of such magnitude, there must be very clear evidence that the new survey corrects the errors existing in the registered plan, and carries into effect the intention of the original owner. The new plan was not necessary to absorb the surplus land

found to exist in blocks 126 and 127. That could have been apportioned among the lots of these blocks without altering the directions of the street lines on Saskatchewan Ave. and Broadway. It may not have been necessary to correct the discrepancies in the figures on plan Q. or to correct the error that prevented the boundary lines on block 123 from appearing closed. In order to correct the error in block 123 (for an error undoubtedly exists there) it is necessary to find out where that occurred. Was it in the survey, or was it in the figures put upon the plan? If in these figures, the figures should be altered, and not a new survey laid out. In regard to block 123, Mr. Phillips says he does not know where the error was. No attempt, however, seems to have been made to ascertain if the figures on the plan were incorrect. It was argued before us that if a scale were applied to block 123 it would be found that the figures giving the depth of the lots were far from being correct, and further, that although, from the figures giving the depths of the lots, it would appear that Temperance street was parallel to Broadway, yet it was apparent that a straight line drawn from the south-west corner to the south-east corner of the block could not be parallel to Broadway, as, for a portion of the distance, (shewn as 21 ft. on the new plan) the line should run N. 26° 30′ E., and for the balance N. 54° E.

To justify the acceptance of a new survey altering the street lines, it must be shewn that there was an error in these lines and that they did not carry out the intention of the owner. So far as the evidence before us shews, the original intention may have been to run the street lines exactly where plan P. shews them to be, and the error may have been in the figures from which it is deduced that Temperance St. ran parallel to Broadway. In correcting errors in a plan, no deviation from the plan should be made beyond what is necessary to correct the error, and then only if it is the best mode of correcting it. The re-survey is not shewn to be either the only way, or even the best way, of correcting the errors in plan Q. For this, if for no other reason, the order appealed from cannot be supported. There are, however, other objections equally fatal. In the first place, the re-survey was to be a re-tracement of the old. This

SASK
S. C.
SMITH
v.
THE MASTER OF TITLES.
Lamont, J.

was not done. From the evidence and plans I am satisfied that a surveyor could have started at the original post at the north-east corner of block 119, and run a line from there N. 26° 30′ E. 66 ft., and established the north-west corner of block 124 and continued that line to a distance of 261 ft. 9 in., and from there N. 54° E. to Government road, where it would practically reach an original post. Similar lines could have been run from original posts on each side of Broadway, the distances shewn on the plan to where the direction of the line is altered to run N. 54° E., and these points connected up with Government road. A straight line could have been drawn from the north-west corner of block 123 at 16th St., which street, it is admitted, was established, to a point 176 feet south from the original lane posts on Government road in block 127 as shewn on registered plan. Mr. Phillips' objection to retracing the street lines of the original survey in this manner was that it would leave the lots on the south side of block 123 much deeper than shew on the plans, and that Temperance St. would then not be parallel to Broadway and Saskatchewan Ave. To assume that the original intention was to make Saskatchewan Ave. and Broadway conform to Temperance St. is to assume that the depths of the lots given on the plan are correct, and that therefore the distances given from the original posts on 16th St. to the bend in the lines on Saskatchewan Ave. and Broadway, as well as the direction N. 54° E., are wrong. This is begging the whole question. In *Smith* v. *Millions*, 16 A.R. (Ont.) 140, where it was found that either the angle given on the plan or the figures given for the width of the lot were incorrect, it was held that under the circumstances of that case it was more probable that the angle given was correct and that the width given for the lot was not correct. There is no presumption therefore in favour of the correctness of the depth given for the lots. In the present case I am of opinion that the great preponderance of probability is in favour of the theory that the outlines shewn on the plan are correct and the figures, probably filled in as suggested by Mr. Phillips, are incorrect.

Another objection raised to the retracement of the street lines was that it would leave Saskatchewan Ave. at the point

where the street line bends to N. 54° E. much closer to the river than is shewn on the plan. The plan gives the width of Saskatchewan Ave. at this point at 50 ft. There is not that distance now between the south side of the street and the river bank. This objection seems to me to be completely answered by the explanation that since 1883 the river has been eating into the bank and has washed away a certain portion of it.

The special survey is based upon two assumptions: first, that the south boundary of Temperance St. was established, and second, that the original intention was to make Broadway and Saskatchewan Ave. run parallel thereto. The evidence, in my opinion, does not substantiate the first, and for the reasons I have given, the second seems improbable. The evidence upon which Mr. Phillips established Temperance St. as a basis, as set out in his report, is that he found an original post at the north-east corner of block 128, on Government road. This post is not disputed. Then he says that at the north-west corner of block 128 Mr. Wiggins, who is also a surveyor, in 1910 informed him that he had found an original post at a point now marked by a concrete monument. Mr. Phillips admits that he himself did not investigate at this point. Mr. Wiggins was not called to testify as to his finding an original post there. The only evidence before us of an original post at this point is, therefore, hearsay, and not admissible. Mr. Phillips, however, did find an original post at the north-west corner of block 122. In his special survey he joins this point to the established post on Government road by a straight line. This line, however, he admits, runs 8 ft. 8 in. north of where he found evidence of an original post on the east boundary of block 122. To establish the south boundary of Temperance St. where he has located it, Mr. Phillips must, therefore, disregard the original post found on the east boundary of block 122. A boundary established by disregarding original posts cannot be said to be conclusively established. If the boundary be taken to be a line drawn from the original post on the north-west corner of block 122 to the original post found on the east boundary of block 122, and then joining that to the original post on Government road, such boundary would depart from a straight line by 8 ft. 8 in.

SASK.

S. C.

SMITH v. THE MASTER OF TITLES.

Lamont, J.

I am therefore of opinion that the evidence does not establish either of the assumptions upon which the special survey was based. The registered plan must be taken as the expressed intention of the owner, and it must be interpreted as a correct expression of his intention until the contrary is proved or unless such expressed intention leads to an absurdity. If the plan shews, as in block 123, that some mistake has been made, the error must be discovered and should be corrected, but no departure from the expressed intention beyond that which is necessary to correct the error should be made.

In my opinion it was never contemplated by the legislature that under the Special Surveys Act a special survey could be made which, under the guise of correcting an error in an existing plan, would practically amount to a re-subdivision of the property, not as intended by the owner when he had the original survey made, but as the municipal council now think it should be.

The appeal will therefore be allowed, and the order appealed from set aside, with costs to be paid by the city of Saskatoon.

Appeal allowed.

ALTA.

S. C.

MAYHEW v. SCOTT FRUIT CO.

Alberta Supreme Court, Scott, Stuart and Beck, JJ. January 26, 1915.

1. SALE OF GOODS (§ I B—12)—PASSING OF TITLE — SALE F.O.B. — GOODS DAMAGED BY FROST—LIABILITY.

A frost severe enough to damage potatoes in transit by rail is to be treated as something out of the ordinary course, the risk of which must rest upon the buyer under a contract of sale f.o.b. at point of shipment, unless there is an indication of a contrary intention in the contract.

[*Beer* v. *Walker*, 46 L.J.C.P. 677, considered.]

Statement

APPEAL by the defendants from a judgment of His Honour Judge Lees in an action tried at Red Deer whereby he directed judgment for the plaintiff for $237 and interest and costs.

A. Macleod Sinclair, for defendants, appellants.

W. E. Payne, for plaintiff, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The defendants carried on business at Edmonton where they had taken over by some means not clearly shewn

the business of a company called the Macpherson Fruit Co. Ltd. The plaintiff was a farmer residing in Grand Forks, B.C. He was in Edmonton in March, 1913, and there personally obtained an order from the defendants in the following words:—

Edmonton, Alta., Mar. 1, 1913.

We agree to take one car of potatoes from E. Mayhew at the price of $9 per ton sacked f.o.b. Grand Forks, B.C., it being understood these take a rate of 42 cents per cwt. to Edmonton.

The Scott Fruit Co. Ltd., MacKelvie.

This order was written on a sheet of paper which had a printed heading shewing that it had originally been one of the letter heads of the Macpherson Fruit Co. Ltd.; but above the latter words had been stamped with a rubber stamp in red ink and in fairly large letters the words: "The Scott Fruit Co. Limited, Successors to."

The plaintiff returned to Grank Forks, B.C., and there on March 12, 1913, loaded a car of potatoes, and having done so went to the railway agent to secure a bill of lading. Instead of drawing it up himself he asked the agent to do so and in order to give the agent the necessary information he passed in to him through the wicket the order of March 1 above set forth. The agent overlooked the words stamped at the top of the order and made the bill of lading out to the Macpherson Fruit Co., Edmonton. He handed this bill of lading to the plaintiff, who does not seem to have noticed the error. The plaintiff then made out his account against the Scott Fruit Co. for the sum of $236.70. On both the bill of lading and on the account the number of the car in which the potatoes had been placed was stated. The plaintiff mailed both the bill of lading and the account at once to the defendants at Edmonton, but did not write any letter accompanying them.

The car arrived at the switch or siding in front of the defendants' warehouse on March 22. The defendants examined the potatoes and they were found to be badly frozen. They refused to accept them. They sent at once the following telegram to the plaintiff:—

Your car No. 184504 only arrived to-day and is badly frozen we have refused same as we will not look to railroad company for a claim. We have too many claims in now we can't get paid.

They also wrote a letter the same day, to the same effect prac-

ALTA.
S.C.
MAYHEW
v.
SCOTT
FRUIT CO.
Stuart, J.

tically, in which they made no mention of a wrong address. To the telegram the plaintiff replied denying responsibility and asserting that the question was entirely one between the railway company and the defendants. On March 28 the defendants wrote the plaintiff and then first pointed out the fact of a mistake having been made by the plaintiff in the address, adding "if the truth be known we think you can blame that circumstance for the freezing of the potatoes." They then went on to discuss the question of making a claim against the railway company and conclude their letter by the following sentences:—

There is absolutely no question about the damage having been inflicted and there is plainly some negligence on the part of the railway company. If we were you we would not make any mention to the railway company at your point of your error in billing this car because they may take notice of that and base an objection to the claim on it.

On April 28 the plaintiff wrote from Red Deer threatening suit, and on April 29 the defendants replied urging that a claim be made against the railway company. The plaintiff began his action in December, 1913.

The learned trial Judge in giving judgment for the plaintiff went upon the ground that the defendants had by the use of the old letter head of the Macpherson Fruit Co. when giving their order contributed to the mistake made at Grank Forks, the point of shipment, that when the plaintiff delivered the potatoes at Grand Forks to the carrier and handed them the order for the purpose of making out the bill of lading, he had performed his whole duty to the defendants and that after the delivery of the potatoes to the carrier the latter became the agent of the defendants and any mistake on the part of the carrier was the mistake of the defendants' own agent.

With much respect I think the learned Judge, while right in the conclusion he arrived at, did not put the matter exactly upon the right ground in giving his judgment, which was an oral one.

I do not think the defendants were to blame at all in respect to the mistake made at Grand Forks. The plaintiff personally took the order from the defendants at Edmonton. He knew perfectly well that he was dealing with the Scott Fruit Co. and not with the Macpherson Fruit Co. The order he took was signed

by the former company. He was their agent to make a contract with the carrier and he was bound to make a proper contract. He could not relieve himself of that duty by letting the carrier make the contract on both sides. The carrier was not the agent of the defendants in the matter of the making of the contract of carriage. It was only after the contract had been made and the goods received under it that the carrier became the agent of the buyer and the agency was then one for the carriage of the goods, not for the making of the contract of carriage. For this latter purpose the plaintiff alone was the defendants' agent. He omitted to make a proper contract on the defendants' behalf and could not excuse himself by saying that he left it all to the other party to the contract to draw up the contract.

But notwithstanding this it is obvious that the defendants were ultimately at fault. It is true the plaintiff made a mistake. But he at once sent the bill of lading, in which the mistake had been made, to the defendants, who were his principals in regard to the question of the making of the contract. The bill of lading we must assume, in the absence of any evidence to the contrary, arrived in due course of mail. What evidence there is tends to shew that it did so arrive. The position then is that the defendants were at once informed that a car of potatoes with a certain number had been shipped to Edmonton intended for them, but shipped in the name of the Macpherson Fruit Co. They were then aware of the mistake of their agent, the plaintiff. They had ample time to correct the mistake by communication with the carriers. They could at once have informed the carriers that car number so and so shipped to the Macpherson Fruit Co. was intended for them. But there is no evidence that they did so. The evidence shews, indeed, that they probably assumed that the carriers would know that the goods were intended for them because one of their witnesses admitted that they had previously received a number of cars billed to the Macpherson Fruit Co. and that the carriers had asked them, the defendants, if they would take delivery of them. It was, therefore, quite plainly possible for the defendants to correct the mistake in ample time to prevent any delay arising on account of it. It is noteworthy that they did not in their first communication complain of any mistake and, on the whole, it appears to have been largely an

ALTA.

S. C.

MAYHEW v. SCOTT FRUIT CO.

Stuart, J.

afterthought on their part. Their real desire, as the correspondence shews, was to avoid the necessity for putting in a claim against the carriers.

There were two other contentions advanced in support of the appeal. One contention rested upon the terms of sec. 31, sub-sec. 2, of the Sale of Goods Ordinance (ch. 39), which provides that

> unless otherwise authorized by the buyer the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case.

The difficulty in the way of the appellant on this point is that he did not allege in his statement of defence that a proper contract had not been made. I am putting aside now, of course, as already disposed of, the mistake in the address. What is suggested is that there should have been a special bargain made with the carrier as to the care of the potatoes in transit by means of a properly heated car or something of that kind. But not only is this matter not raised by the defence—and in my opinion it ought to have been raised by the pleadings if it was intended to be relied upon—but there is nothing in the evidence to shew that there was not in fact a proper contract made. The bill of lading was put in at the trial, but it is not extended in the appeal book. No evidence was directed to the point at the trial in order to shew what a proper contract in such a case would be. Even if we had the full terms of the bill of lading before us it would not be for the Court to say what constituted a proper contract. That should have been shewn by the evidence of witnesses and there was no evidence upon the point at all. This contention, therefore, cannot be sustained.

The remaining contention was that the goods were at the seller's risk. It was admitted that in the case of ordinary goods this would not be the case, unless there was evidence of a contrary agreement. See sec. 22 and sec. 20, rule V. of the Sales of Goods Ordinance and also Benjamin on Sales, 5th ed., p. 411. But it was argued that the goods in question were perishable goods and reliance was placed upon the rule laid down in Hals., vol. 25, sec. 386, which says:—

> Notwithstanding that the seller may have agreed merely to dispatch the goods to the buyer by delivering them to a carrier or other agent for transmission on behalf of the buyer, nevertheless where the goods are perishable, the seller is deemed to take the risk of the goods not arriving in the ordinary

circumstances of transit and of their not remaining for a reasonable time after arrival in a merchantable condition.

From an examination of the case I doubt if much reliance was placed upon this point in the Court below. I doubt also whether it was ever open to the defendants upon the pleadings. There was no reference in the original defence to a rejection of the goods on account of their condition on arrival while the amendment obtained at the opening of the trial referred to damage caused by the delay arising from the mistake in the address; which is another point entirely. The argument as to the mistake in the address rested entirely on the theory that the freezing took place during the last two days of delay at Strathcona; and, if that theory be correct, although there is really no evidence to shew when the freezing occurred, then, for the reasons I have given, I think the defendants were themselves to blame for it.

But aside from that matter and assuming that upon the pleadings the point is open to the defendants I am of opinion that the authorities cited in support of the passage above quoted from Halsbury are distinguishable. There is really only one case, *Beer* v. *Walker*, 46 L.J.C.P. 677, which supports the proposition laid down and that case was one in regard to dead rabbit meat. As is well known, such a commodity from its very nature deteriorates rapidly. Such is not the case with potatoes. These, in the ordinary course, continue in good condition for a long while. Even the rule laid down in *Beer* v. *Walker* is subject to the condition "if nothing out of the ordinary course happened." In my opinion a frost severe enough to damage potatoes must be treated as something out of the ordinary course, the risk of which must rest upon the buyer in the absence of any indication of a contrary intention.

The likelihood of such a thing happening must have been as much present to the minds of the defendants as to that of the plaintiff, and I think their only course was to have instructed the plaintiff to make a special contract on their behalf which apparently they did not do.

The rule cited from Halsbury is not found in the codified law, the Sales of Goods Ordinance, and I can see no reason for departing in this case from the ordinary rule contained in sec. 22. The appeal should be dismissed with costs.

Appeal dismissed.

SASK.

S. C.

REX v. SCHILLING.

Saskatchewan Supreme Court, Haultain, C.J. January 11, 1915.

1. DENTISTS (§ I—6)—PRACTISING WITHOUT LICENSE.

That an unqualified person is doing dental practice and is seemingly in full charge of the business carried on under the name of another person resident in a distant city for his own benefit may constitute a *primâ facie* case of practising in contravention of the Dental Profession Act, R.S.S. ch. 108.

2. SUMMARY CONVICTIONS (§ V—50)—IMPRISONMENT IN DEFAULT OF PAYING FINE—SPECIAL ACT.

The magistrate making a summary conviction for an infraction of the Dental Profession Act, R.S.S. ch. 108, has power to order imprisonment forthwith in default of payment of the fine and costs, although sec. 51 of that Act provides a special mode of levying a fine by distress.

[Cr. Code sec. 739; R.S.S. ch. 1, sec. 52; R.S.S. ch. 62, sec. 8; R.S.S. ch. 108, sec. 51, considered; *R.* v. *Cantillon*, 19 O.R. 197, and *R.* v. *Skinner*, 9 Can. Cr. Cas. 558, distinguished.]

3. SUMMARY CONVICTIONS (§ VI—60)—SPECIAL ACT MAKING FINE PAYABLE TO MAGISTRATE—FORMAL CONVICTION.

Where the statute under which the summary conviction is made directs that the fine shall be payable to the convicting magistrate, there is no necessity for a direction in the formal conviction that the fine should be paid to him.

4. CERTIORARI (§ II—28)—DIRECTING AMENDMENT OF SUMMARY CONVICTION —STATING THE OFFENCE—PRACTISING DENTISTRY.

An objection that a conviction for unlawfully practising dentistry in contravention of the Dental Profession Act, R.S.S. ch. 108, does not specify the particular acts which constituted the alleged practising, may be remedied on *certiorari* by the Court directing an amendment of the conviction so as to insert a statement of the several acts shewn in the evidence to have been committed by the defendant, if the Court finds that the magistrate had jurisdiction and that an offence was committed of the nature specified in the conviction.

[Cr. Code sec. 1124; *R.* v. *Coulson*, 1 Can. Cr. Cas. 114, applied; *R.* v. *Harris*, 13 Can. Cr. Cas. 393, referred to.]

Statement

MOTION to quash a certain conviction made against C. S. Schilling (applicant herein), who was defendant in a prosecution at the instance of one William D. Cowan (informant), before William Trant, Esquire, one of his Majesty's justices of the peace, in and for the province of Saskatchewan.

P. M. Anderson, for applicant.
H. F. Thomson, for the informant.
C. M. Johnston, for the magistrate.

Haultain, C.J.

HAULTAIN, C.J.:—The most important objection to this conviction is that the evidence does not disclose an offence under the Dental Profession Act (ch. 108, R.S.S.), inasmuch as there is no evidence of practising for hire, gain, or hope of reward. In my opinion there is a *primâ facie* case. The evidence shews

SASK.

S. C.

REX v. SCHILLING.

Haultain, C.J.

that the defendant practised dentistry and dental surgery and charged fees for his services. There is some evidence that a Dr. Robinson, of Winnipeg, had some connection with the business, but what that connection is does not appear. The defendant did the work, fixed the fee, and, so far as the evidence goes, controlled and disbursed the moneys received by him for his services. There is some suggestion in the evidence that Dr. Robinson had something to do with the business, but what his interest is does not appear. Miss Partridge, the office clerk, seems to have had some instructions from Dr. Robinson, but she was under the control of the defendant, took her instructions and received her pay from him. The fact that the account was kept in Robinson's name does not, in my opinion, make any difference, as the defendant, according to the evidence, kept the account at the bank and drew cheques on it. The whole affair, to my mind, is an attempt on the part of Robinson to reap a little benefit by allowing an unqualified man to evade the law under cover of his name. In any event there is no evidence that Robinson is licensed to practise in Saskatchewan, and the onus was on the defendant to establish that. (See sec. 54, Dental Profession Act).

I am, therefore, satisfied that an offence of the nature described in the conviction has been committed. I am also satisfied that the punishment imposed is not in excess of that which might have been lawfully imposed for the offence in question.

Objection has been taken that there is no provision for distress in default of payment of the penalty and costs, as provided by sec. 51 of the Dental Profession Act. Reading sec. 52 of the Interpretation Act (ch. 1, R.S.S.), and sec. 8 of the Magistrates' Act (ch. 62. R.S.S.), in conjunction with sec. 739 of the Criminal Code, I am of opinion that the magistrate had power to order imprisonment forthwith in default of payment of the penalty and costs, notwithstanding the fact that sec. 51 provides a special mode of levying the same by distress.

The case of *Reg.* v. *Cantillon*, 19 O.R. 197, was cited in support of the objection, but that case was decided before sec. 739 (*b*) of the Criminal Code was enacted. *Rex* v. *Skinner*, 9 Can. Cr. Cas. 558, and a number of cases cited therein, were all decided under sec. 744 of the Criminal Code, and do not apply to a conviction made under sec. 739 (*b*). The amended conviction pro-

SASK.

S. C.

REX v. SCHILLING.

Haultain, C.J.

vides for the costs and charges of commitment and of conveying to gaol. By the Dental Profession Act, ch. 108, sec. 52, the fine is clearly payable to the convicting magistrate, so that there is no necessity for a direction in the conviction as to whom the fine should be paid.

The only other objection which it is necessary for me to consider is the objection that the conviction does not specify the particular act or acts which constituted the alleged practising of dentistry. On this point the cases of *Reg.* v. *Coulson* (1893), 1 Can. Cr. Cas. 114; *Smith* v. *Moody*, [1903] 1 K.B. 56, 20 Cox C.C. 369; *R.* v. *Harris* (1908), 13 Can. Cr. Cas. 393, were cited, among others.

I am inclined to think that the conviction is bad on the ground stated, but, as I find that the magistrate had jurisdiction, and that an offence was committed of the nature specified in the conviction, this defect can be remedied by amendment. (*Per* Armour, C.J., in *Reg.* v. *Coulson*, *supra*, at p. 117.) I will accordingly amend the conviction by inserting in the appropriate place a statement of the several acts shewn to have been committed by the defendant in the evidence.

For the foregoing reasons this application must be refused, but without costs.

Conviction amended.

B. C.

C. A.

UNION ASSURANCE CO. v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. February 26, 1915.

1. LIMITATIONS OF ACTIONS (§ I D—26)—AGAINST WHOM AVAILABLE—CORPORATIONS—ELECTRIC COMPANY.

The statutory obligation of an electric railway company to supply lighting to customers within a certain distance of the company's lines makes its negligence in allowing a dangerous current to set fire to the customer's premises one in relation to the works or operations of the defendant, and the customer's action therefor must be brought within the period of limitation which is provided for that class of action by its special Act (Consolidated Railway Companies Act, 1896, B.C., ch. 55, sec. 44).

[*B.C. Electric* v. *Crompton*, 43 Can. S.C.R. 1, referred to; *Lyles* v. *Southend*, [1905] 2 K.B. 1, applied.]

2. INSURANCE (§ VI H—425)—LOSS BY FIRE—CLAIMS—LIMITATION OF TIME.

Where a fire insurance company, on paying the loss of the assured alleged to have been caused by the neglect of an electric company, does not bring its action against the latter in the name of the assured, under the subrogation clause of its policy, but instead sues in its own name after taking a written assignment from the assured of his rights

against the electric company, it can maintain the action only if it has given the latter notice in writing of the assignment under the Laws Declaratory Act, R.S.B.C., ch. 133; and the defect is not cured by an order adding the assured as a co-plaintiff made without prejudice to defendants' rights after the period of limitation had expired within which the added party would have had to sue.

[*B.C. Electric* v. *Crompton*, 43 Can. S.C.R. 1; *Simpson* v. *Thompson*, 3 A.C. 279, referred to.]

3. ASSIGNMENT (§ I—2)—WHAT ASSIGNABLE—INSURANCE CLAIM—VALIDITY.

The claim of the person whose premises are damaged by fire against another for negligence in causing the fire is assignable to a fire insurance company which, in consequence, is called upon to pay a loss under its policy to the owner of the premises.

[*King* v. *Victoria Insurance Co.*, [1896] A.C. 250, followed; *Dell* v. *Saunders*, 17 D.L.R. 279, 19 B.C.R. 500, referred to.]

B. C.
C. A.
UNION ASSURANCE CO. v. B.C. ELECTRIC R. CO.

APPEAL by defendants from judgment of Gregory, J.

Statement.

H. B. Robertson, for appellants (defendants).

Crease, K.C., for respondents (plaintiffs).

MACDONALD, C.J.A.:—The plaintiff company insured the Sisters of St. Ann against loss by fire. The defendant was at and prior to the time of the fire in the Sisters' convent, out of which the plaintiffs' claim arises, supplying electric current to light the convent. The plaintiff company made good to the Sisters the damage, and obtained from them, in writing, an assignment of their rights against the defendant, and thereupon this action was commenced, in the plaintiff company's own name, within six months from the date of the fire. Subsequently, but more than six months after the date of the fire, the Sisters of St. Ann were added as co-plaintiffs, but without prejudice to the defendants' right to take advantage of the limitation clause in its special Act. The learned Judge who tried the action gave judgment in favour of the plaintiff company, and directed a reference to ascertain the damages, and dismissed the action so far as the Sisters of St. Ann were concerned with costs.

Macdonald, C.J.A.

The defendant appealed, and the Sisters of St. Ann cross-appealed. Defendants' grounds of appeal may be shortly stated as follows:—That (1) the claim of the Sisters was not assignable; that (2) the plaintiff company had no right of action in its own name; that (3) the action in the Sisters' name was barred by sec. 60 of the Consolidated Railway Company's Act, 1896, being ch. 55, B.C. statutes of that year; that (4) the plaintiff company's claim was also barred; and that (5) there was no legal evidence of negligence on defendants' part.

B. C.

C. A.

UNION ASSURANCE CO. v. B.C. ELECTRIC R. CO.

Macdonald, C.J.A.

By their cross-appeal the Sisters claim to be reinstated and to have judgment in their favour if it should be held that their co-plaintiff could not sustain the judgment.

King v. *Victoria Ins. Co.*, [1896] A.C. 250, disposes of the first ground in favour of the plaintiffs. That case also bears on the second ground of appeal. It was held, under a contract of assignment or subrogation not distinguishable in its bearing on the point at issue from the one here, that the insurance company could recover from the tort feasor; in that case notice in writing of the assignment was given to the defendant, bringing it within the operation of a statute identical with sub-sec. 25 of sec. 2 of the Laws Declaratory Act, ch. 133, R.S.B.C., which enables an assignee who has brought himself within that statute to sue in his own name. In the case at bar, while the assignment was in writing,no notice in writing to the defendant was proved, and, therefore, the plaintiff company is not entitled to the benefit of the statute.

But there was an equitable assignment, and the failure to give notice merely affected the manner of recovery. Instead of suing in its own name, the plaintiff company must sue in the name of the assignors: *Dell* v. *Saunders* (1914), 17 D.L.R. 279, 19 B.C.R. 500.

The learned Judge appears to have been under the erroneous impression that a legal assignment in pursuance of the Act had been shewn in this case. This may account for his having dismissed the Sisters and retained the plaintiff company. But, apart from the assignment, upon payment of the loss the plaintiff company was in law subrogated to the rights of the Sisters and entitled to bring this action in their (the Sisters') name: *Simpson* v. *Thompson* (1877), 3 App. Cas. 279.

The facts of the case at bar, with one exception, are identical with the facts in *B.C. Electric R. Co.* v. *Crompton* (1910), 43 Can. S.C.R. 1. The defendants are the same; the legislation affecting the case is the same; each in its facts falls within sec. 44 of the said Consolidated Railway Act, which, after providing that it shall be lawful for the company to contract for the supply of electricity to consumers for lighting purposes, declares that:

> the company shall from time to time supply electricity to any premises lying within 50 yards of any main supply wire or cable suitable for that purpose on being required by the owner or occupier of such premises.

The section then proceeds to further provide that the company, before complying with the request, may require security for the costs of making the connection, for the payment of rates, and for rent of instruments.

In this case the contract (if any) for the supply of electric current is an implied one, arising wholly from a request for the service and compliance therewith by the defendant, and payment of the rates from time to time by the Sisters in the ordinary course of business. In *Crompton's* case, and herein lies the distinction, it was the mother of the plaintiff who applied for and was given the service; not the plaintiff himself, who was an infant living with his mother. In each case the injury was the result of the defendant's negligence, assuming for the moment that they were negligent in this case, in permitting a wire charged with a high voltage to come in contact with a low voltage service wire leading into the premises of the customer. The units of voltage in these respective wires were not proved, but the wires were spoken of throughout the evidence as the high voltage wire and the low voltage wire, or in terms of similar significance. The fact that there was no real dispute about the voltage in each perhaps accounts for the want of more definite evidence upon the point.

The circumstances, therefore, in these two cases are distinguishable only in this, that in *Crompton's* case the plaintiff was as the majority of the Court held, not the customer, and that, therefore, no contractual relationship existed between him and the defendants, whereas in this case the Sisters of St. Ann were the customers, and, if no contractual relationship existed between them and the defendants, it is because of the effect of sec. 44.

The defendants are not by law obliged to carry passengers. If they contract to carry a passenger, they are subject to the common law obligations imposed upon carriers of passengers. To such a case sec. 60 has been held to be inapplicable: *Sayers* v. *B.C. Electric R. Co.* (1906), 12 B.C.R. 102. Where there is no contractual relationship between the plaintiff and these defendants, and the injury is the result of defendants' breach of duty towards the plaintiff in operating its works, whether the tramway or the electrical supply branch thereof, the section is applicable: *B.C. Electric Ry.* v. *Crompton*, *supra*.

B. C.

C. A.

UNION ASSURANCE CO. v. B.C. ELECTRIC R. CO.

Macdonald, C.J.A.

These authorities narrow the case down to the inquiry as to the effect of sec. 44 on the legal relationship of the parties. Apart from the section, on the facts of this case a contract, I think, would clearly be implied. The defendants' contention, for which they claim the authority of *Lyles* v. *Southend-on-Sea*, [1905] 2 K.B. 1, is that, as the statute required them to supply the service to an applicant whose premises are within fifty yards of their main supply wire, their compliance with the request of the Sisters of St. Ann did not constitute a contract, and that this action is, therefore, one for "indemnity for damage or injury sustained . . . by reason of the works or operations of the company," to quote from sec. 60, and expressly within its protection. The Court of Appeal distinguished *Palmer* v. *Grand Junction R. Co.* (1839), 4 M. & W. 749; and *Carpue* v. *London & Brighton R. Co.* (1844), 5 Q.B. 747, on the ground that the Acts of incorporation of the defendants in those cases did not require the companies, but merely enabled them, to become carriers if and when they elected to do so, and that, hence, the actions were for failure in their duties as carriers under contract, express or implied, and were not for "any act done in pursuance or execution or intended execution of any Act of Parliament" (their special Acts) so as to entitle them to the protection of the Public Authorities Protection Act, 1893, from which I have just quoted, whereas, in the case before them, they thought that, because the defendants' Light Railways Order, which had the force of a statute, requested them to provide a public passenger service on their tramways under penalty for default therein, the action was one arising out of an act done in pursuance of their said Light Railways Order, and must be commenced within the time limited by the Public Authorities Protection Act, 1893. In other words, that an obligation was imposed beyond that which at common law attaches to carriers of passengers, viz., the obligation to carry passengers, whether they wished to or not, and that, hence, the relationship between the carrier and the passenger was not merely contractual in its inception.

I think the doctrine of *Lyles* v. *Southend-on-Sea*, *supra*, must be applied to this case. I can see no essential difference in principle between the two. There the defendants were under a statutory duty to accept Lyles as a passenger. Here the de-

fendants were under a like duty to supply the Sisters of St. Ann with electricity. In each case the obligation to perform the duty without negligence is an obligation imposed by the common law. If, therefore, the action in *Lyle's* case was one commenced against the defendants for negligence in connection with an act done in obedience to the statutory mandate to carry the passenger, I cannot see any escape from the conclusion that this action was commenced for damages sustained by defendant's negligence in relation to the works or operations of the defendant. There appears to me to be no more nor less of the element of contract in the one than in the other, and, what is perhaps of more importance, there is in the one just as clearly as in the other the initial statutory obligation.

As the plaintiff company cannot support this action in its own name, and as the Sisters of St. Ann are, in my view of the section, barred, it follows that the appeal should be allowed and the cross-appeal dismissed.

It has thus become unnecessary to consider the fourth and fifth grounds of appeal.

IRVING, J.A.:—I concur in the opinion of the Chief Justice. Irving, J.A.

MARTIN, J.A.:—I agree with the judgment of the Chief Justice allowing the appeal for the reasons stated, only adding, by way of precaution, in case the matter should go higher, that I do not wish it to be understood that there is not much also to be said in favour of another ground of appeal, viz., that no negligence has, in any event, been established, the evidence, *e.g.*, as to the current, which was given in *Crompton* v. *B.C. Electric R. Co.* (1910), 43 Can. S.C.R. 115, having been omitted in this case. Martin, J.A.

GALLIHER, J.A.:—I think this is an action arising out of tort, and, as the plaintiff failed to comply with the provisions of subsec. 25 of sec. 2, Laws Declaratory Act, being ch. 133, R.S.B.C., 1911, no notice in writing having been given of the assignment, the plaintiffs cannot maintain the action in their own name. When the Sisters of St. Ann were added as a party, it was too late, as the action was then barred by sec. 60, ch. 55, B.C. Can. Statutes, 1896; *Crompton* v. *B.C. Electric R. Co.* (1910), 43 Can. S.C.R. 1. Galliher, J.A.

The appeal should be allowed.

Appeal allowed.

SASK.

S.C.

HEINRICHS v. WIENS.

Saskatchewan Supreme Court, Brown, J. January 30, 1915.

1. LIBEL AND SLANDER (§ II C—37)—CHURCH MATTERS—ECCLESIASTICAL CENSURE.

An action does not lie against a church bishop merely because of his ecclesiastical direction to his congregation not to deal with a certain excommunicated member of the church where the statement is not defamatory.

[*Allen* v. *Flood*, 67 L.J.Q.B. 119; *Quinn* v. *Leathem*, [1901] A.C. 495, 507; *Giblan* v. *National*, 72 L.J.K.B. 907, 912, referred to.]

Statement

THE plaintiff is a retail dealer and at one time a member of the Neuanlage Mennonite church, but was excommunicated by the defendant and subsequent to being excommunicated the defendant issued a decree among his congregation forbidding any of his congregation to deal with the plaintiff. The result was that the plaintiff suffered a considerable loss in his business and brought action against the defendant for damages.

B. H. Squires, for the plaintiff.

McCraney, MacKenzie & Co., for the defendant.

Brown, J.

BROWN, J.:—I have reached the conclusion in this case that the statement of claim does not disclose any cause of action.

I might say that I would like to have gone into the authorities at greater length than I have been able to do, but it is important in this case that I should give judgment before I leave to-day, not only because I will not be returning next week, but in order that counsel who have expressed an intention of appealing in any event should have an opportunity of bringing the case before the next sittings of the Court *en banc* to be held in the month of February. There will be no difficulty in having the case brought before that Court, because there is no evidence to be extended, and I may say here that there will be no necessity of having the appeal book printed, as I give the parties the right to use a typewritten appeal book. I have looked carefully into the leading cases which were cited to me in the argument, and it seems to me that the effect of those decisions is, put in a brief form, that the defendant in order to be made liable in an action of this kind must himself have committed some legally wrongful act, or have been the cause of someone else committing a

legally wrongful act. If by virtue of defendant's teachings or his influence he had caused parties to break a contract with the plaintiff then it seems to me under the authorities he would have been liable for damages, or if his actions had amounted to a trespass as against the plaintiff he would have been liable in damages; if the language he used with reference to the plaintiff could be considered as libelous or slanderous as to the plaintiff's business, then he would, it seems to me, clearly have been liable. Again if there had been a conspiracy on the part of the defendant and others to do the plaintiff a wrong, and they had in the carrying out of this conspiracy actually done him damage, then under the authorities he would have been liable. I might read some short portions of the leading authorities which have been cited. In the first place taking up the case of *Allen* v. *Flood*, 67 L.J.Q.B. 119, which is cited in 67 Law Journal, Q.B.D. at p. 175, Lord Watson is reported as saying and I may say that Lord Watson's judgment seems to be considered in subsequent decisions as the main judgment in that case:—

> He who wilfully induces another to do an unlawful act, which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured.

Then at p. 181, Lord Herchell says:—

> It is to be observed in the first place, that the company, in declining to employ the plaintiffs, were violating no contract; they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self-interest; they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on behalf of the iron-workers. It was not contended at the Bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously.

This case held that the mere fact that they acted "maliciously" was not a factor at all in the case.

Then in the case of *Quinn* v. *Leathem*, [1901] A.C. 495, which is cited in [1901] A.C. at p. 507, the Lord Chancellor, the Earl of Halsbury, referring to the case of *Allen* v. *Flood*, *supra*, says:—

> It was further an element in the decision—that is in the case of *Allen* v. *Flood*—that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the

SASK.

S. C.

HEINRICHS v. WIENS.

Brown, J.

defendant, actuated in what he did by the desire to express his own views in favour of his fellow members.

Indicating very clearly that there will be no liability where the defendant was not in conspiracy with others to do a wrong. Then further in that case at p. 510, Lord Macnaghten, going into the matter very fully says:—

> Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong. Precisely the same questions arise in this case as arose in *Temperton* v. *Russell*. The answers, I think, must depend on precisely the same considerations. Was *Lumley* v. *Gye* rightly decided? I think it was. *Lumley* v. *Gye*, was much considered in *Allen* v. *Flood*. But as it was not directly in question, some of your Lordships thought it beter to suspend their judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no such sufficient justification for the interference.

In the case of *Giblan* v. *National*, 72 L.J.K.B. 907 at 912, Vaughan Williams, L.J., is reported as saying:—

> There remains the question of the liability of the Union and Toomey. I think they are both liable. The Union, Williams, and Toomey were all parties to acts constituting an actionable wrong—namely interference with Giblan in the exercise of his undoubted common law right to dispose of his labour according to his will.

In that case there was an act of interference with the plaintiff in obtaining employment; in entering into contracts with employers and that was held to be an actionable wrong. There is an American decision in the Supreme Court of the United States which was referred to by counsel, and which apparently has not yet been officially reported. That is the case of *D. E. Loewe & Co.* v. *United Hatters of North America*, really against two hundred members of the United Hatters of North America and the American Federation of Labour, but that case is evidently from the newspaper report which has been handed to me, decided and based on the Sherman anti-trust law. The whole

decision according to this report seems to be founded on that statute and so has no application to the case at bar.

It seems to me that this case is very much similar to a case of an employer who may offer advice or suggestions to his servants or employees. Surely he would not be considered as doing a legal wrong if an employer advised his servants or employees to patronize a certain store, and not to patronize another store. This case seems to be very similar. A school teacher might advise his pupils to get their school supplies from a certain store, and not to get them from another store, and in doing that, unquestionably by virtue of his position would influence his students to patronize the one store and to as it were boycott the other store, but that would not be an actionable wrong.

I find no authority, and no authority has been cited where the facts are similar to the case at bar, and where the defendant has been held liable. So therefore I reach the conclusion as I have already stated that there is no right of action under this claim; and there will be judgment for the defendant with costs.

As this judgment, however, is going to appeal, the trial of the action should be postponed until the next sittings of the Court, and then the same can be further dealt with in the light of the judgment of the Court *en banc*.*

Judgment for defendant.

[*Appealed to the Supreme Court of Saskatchewan *en banc*. Appeal dismissed, March 20, 1915.]

Annotation—Libel and slander (§ II C—37)—Church matters.

Annotation

Libel and slander.

Inasmuch as the rule of law is that the motive or intention of the writer is immaterial to the right of action, the fact that the writer wrote as a Roman Catholic addressing himself to Roman Catholic readers is not a ground of justification for the publication of an absolute statement that the two persons were not legally married when the fact was merely that their marriage was not recognized as valid by the Roman Catholic Church. *Chiniquy* v. *Bégin*, 7 D.L.R. 65, 42 Que. S.C. 261. The latter decision is somewhat qualified in effect by the reversal of the judgment in which it was given though upon an entirely different ground. *Chiniquy* v. *Bégin*, 20 D.L.R. 347.

A bishop's charge to his clergy is *primâ facie* privileged, although it contain defamatory mater. *Loughton* v. *Bishop of Sodor and Man*, L.R. 4 P.C. 495, 42 L.J.P.C. 11, 21 W.R. 204, 28 L.T. 377, 9 Moore P.C.N.S. 318.

SASK.

Annotation

Libel and slander.

Annotation (*continued*)—**Libel and slander** (§ II C—37)—**Church matters.**

Plaintiff was the collector of pew rents in St. Paul's Church, and it was his duty as such to hand them over to the defendant, who was the senior warden. The church had been broken open, and the moneys and money boxes, with certain books of no use to any one but the plaintiff and the church, taken away. The defendant, in presence of the plaintiff's surety (a vestryman), two other vestrymen, and the rector of the church, charged plaintiff with the crime, adding that he had not handed over the money collected, and had destroyed the books to cover the deficiency. The jury in answer to a question, said that they could not decide whether the defendant had malice or not when the words were spoken, but that they considered he had no right to use them, and they found for the plaintiff. It was held that the communication was privileged, and that as the jury had not found express malice the verdict must fall. *Shepherd* v. *White*, 2 R. & C. 31.

Where the plaintiff was a member of a provincial assembly of congregational ministers, a resolution proposed at a meeting of that assembly, severely censuring the plaintiff, and all speeches made thereon, are privileged; so is the publication of the resolution in the denominational papers. But a letter written to the assembly by a person not a member of it is not privileged. *Shurtleff* v. *Stevens*, 51 Vermont 501, 31 Amer. R. 698; *Shurtleff* v. *Parker*, 130 Mass. 203, 39 Amer. R. 45b; and see *Oliver* v. *Bentinck*, 3 Taunt. 456.

Words spoken at a church meeting in the regular course of church discipline, when the question before the meeting is whether the plaintiff member is or is not fit to be a member of the church, are held privileged: *Jarvis* v. *Hatheway*, 3 Johns. (N.Y. Sup. Court) 178; *Remington* v. *Congdon and Others*, 2 Pick. (19 Mass.) 310, *York* v. *Pease*, 2 Gray (68 Mass.) 282.

But if such words are also defamatory of some third person who is not a member of the church, such outsider may sue. *Coombs* v. *Rose*, 8 Blackford (Indiana), 155; *R.* v. *Hart*, 1 Wm. Bl. 386.

A confidential consultation between a vicar and his curate as to the course which the vicar ought to adopt in an ecclesiastical matter was held privileged in *Clark* v. *Molyneux*, 3 Q.B.D. 237, 47 L.J.Q.B. 230, 26 W.R. 104, 36 L.T. 466; 37 L.T. 694, 14 Cox C.C. 10, and see *Bell* v. *Parke*, 10 Ir. C.L.R. 279.

But where a rector sent to his parishioners a circular letter warning them not to send their children to a school which plaintiff had opened in the parish against the rector's wishes, and in opposition to the rector's parish school, it was held that no privilege attached. *Gilpin* v. *Fowler*, 9 Exch. 615, 23 L.J.Ex. 152, 18 Jur. 293.

If a clergyman or parish priest, in the course of a sermon, "make an example" of a member of his flock, by commenting on his misconduct, and either naming him or alluding to him in unmistakable terms, his words will not be privileged, although they were uttered *bonâ fide* in the honest desire to reform the culprit, and to warn the rest of his hearers, and although the congregation would probably be more interested in this

Annotation (continued)—Libel and slander (§ II C—37)—Church matters. SASK.

Annotation

Libel and slander.

part of the discourse than in any other. If the words be actionable, the clergyman must justify. *Magrath* v. *Finn*, Ir. R. 11 C.L. 152; *Kinnahan* v. *McCullagh*, *ib.* 1; *R.* v. *Knight* (1736), Bacon's Abr. A. 2 (Libel). And see *Greenwood* v. *Prick*, cited in Cro. Jac. 91, as overruled by Lord Denman, 12 A. & E. 726.

A prominent member of the church of St. Barnabas, Pimileo, went to stay in the vacation at Stockcross, in Berkshire, and so conducted himself there as to gravely offend the parishioners. Letters passing between the curate of St. Barnabas and the incumbent of Stockcross relative to the charges of misconduct brought against the plaintiff were held privileged, as both were interested in getting at the truth of the matter. *Whitelcy* v. *Adams*, 15 C.B.N.S. 392, 33 L.J.C.P. 89, 10 Jur. N.S. 470, 12 W.R. 153, 9 L.T. 483.

CITY OF NEW WESTMINSTER v. THE "MAAGEN."

CAN.

Ex. C.

Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. March 5, 1915.

1. ADMIRALTY (§ I—4b)—JURISDICTION—EXCHEQUER COURT—CONDEMNATION OF SHIPS—INJURY TO BRIDGE.

A ship may be sued and condemned in damages in the Exchequer Court in favour of a municipality whose bridge over a river has been injured by the ship running into it through bad navigation amounting to negligence.

[*Jones* v. *C.P.R.*, 13 D.L.R. 900, 906, 83 L.J.P.C. 13, referred to.]

Statement

TRIAL of an action by the city of New Westminster against the steam tug "Maagen" for damages caused by the collision of that ship with the plaintiff's bridge at Lulu Island on June 26 and 29, 1913.

McQuarrie & Cassady, for plaintiff.

C. M. Woodworth, for defendant.

Martin, L.J.A.

MARTIN, L.J. ADM.:—Though the damages claimed are small in amount yet in principle they are of considerable importance as they raise the question of the obstruction of the navigation of the North Arm of the Fraser River by the said bridge, which river is a tidal and navigable one at that point, and for a consideration of the general public rights therein reference may be made to the cases in this Court of *Kennedy* v. *The "Surrey"* (1905), 10 Can. Ex. 29, 11 B.C.R. 499; *New Westminster* v. *The "Maagen"* (1912), 14 Ex. 323, 18 B.C.R. 441; and *Graham* v. *The "E. Mayfield"* (1913), 14 D.L.R. 505, 14 Can. Ex. 330. It

CAN.

EX. C.

CITY OF NEW WESTMINSTER v. THE "MAAGEN."

Martin, L.J.A.

is first alleged that said bridge is not properly constructed, it being said to be set at such a wrong angle to the current of the river that it tends to cause ships to strike against it. With respect to this defence it is sufficient to say that the evidence to the contrary was so weighty that it was in effect abandoned, and I only notice it to record the fact that this is the second time such an allegation has been made with the like results—see the prior decision of this Court between the same parties on November 30, 1912, already cited.

Then it is further alleged that at the time of the first collision, on June 26, the ship was not to blame because the master was confused in his bearings and temporarily blinded at the critical moment by a jet of water which was discharged upon him by a pipe from the floor of the bridge while he was passing through its channel on the northerly, or city, side going down stream, and in so doing trying to keep as close as possible to his starboard side to allow for the set of the current, there being lashed to his port bow a scow 84 x 32.6 feet, laden with about 250-300 tons of gravel. A good deal of evidence was given on this point and to elucidate it I took a view of the bridge and saw it in operation and the water being discharged through the six inch "blow off" pipe from the main level of the bridge, which throws a strong stream of water upstream for a distance of about 80 ft. into the river below and at right angles to the bridge.

This pipe is not in ordinary use, only being used in connection with the emergency 8 inch pipe on the bridge, but at the time in question it was in use, having been laid in November, 1912, and used till 1913. The mouth of it is about 20 ft. above ordinary high tide and the stream of water in gradually falling that distance "feathers" a good deal. I have reached the conclusion that if a fairly strong wind were blowing from any one of several points of the compass the result might well be that the feathering of the water and its tendency to obscure the bearings of the bridge would confuse an ordinarily prudent and careful navigator, though usually it would not have that effect. In the present case, without going into unnecessary details, I am of the opinion that the evidence of the master of the tug as to the force and direction of the wind and water on that day should be credited to the extent at least of raising such a doubt in my

mind that I would not be justified in finding him guilty of negligence for any damage caused by the first collision.

But that does not relieve him from the consequences of the second collision three days later, because it is not alleged that the wind increased or deflected the spray on that occasion, and no other valid excuse for the collision has been set up, and I have no doubt it was caused by bad navigation. The position taken for the defence is that the scow simply scraped along the draw protection pier and did no damage, but I am unable to take that view of the matter in the face of the evidence of two witnesses to the contrary, and I have come to the conclusion that the second collision materially added to the damage already done at the same spot. It is difficult in the circumstances to say how much this amounted to, the whole damage being only $182.90. I feel great reluctance in adding to the cost of this litigation by directing a reference to ascertain such additional damage, the cost of which would be out of all proportion to the small amount to be ascertained, and from the nature of the case it would be very unlikely that any more evidence would be forthcoming to assist the registrar in arriving at a conclusion than is now before me. The matter is one of those which frequently arise wherein it is impossible to assess damages with exactitude (*cf. Jones* v. *C.P.R.* (1913), 83 L.J.P.C. 13, 13 D.L.R. 900), but nevertheless the same attempt must be made as a jury would, make, and I, therefore, feel disposed to direct that the damages should be assessed at one-third of the whole amount, which, I think, will meet the justice of the case, and for which amount judgment will be entered for the plaintiff with costs.

Judgment for plaintiff.

SLOBODIAN v. HARRIS.

Manitoba King's Bench, Galt, J. January 2, 1915.

1. MORATORIUM (§ I—1)—JUDGMENT—SUSPENSION OF.

A registered judgment is an instrument charging land within the meaning of the Moratorium Act, 1914, Man., but where registered after July 31, 1914, it is a "contract" within the exception of sec. 6, and by virtue of the County Courts Act, so that the restrictions of the Moratorium Act do not apply to prevent an order for sale being made thereunder within the six months' period.

MAN.

K. B.

SLOBODIAN v. HARRIS

Galt, J.

MOTION for sale of lands.

R. H. Boulton, for plaintiff.

No one for defendants.

GALT, J.:—This is an application by the plaintiff for liberty to sell certain lands, or a competent part thereof to realize the amount payable under a judgment recovered on June 24, 1914, against the defendants Mike Harris and Mike Makoski in an action in the County Court.

The affidavit in support of the motion is made by a student in the office of the plaintiff's solicitor and shews that judgment was entered in the County Court by the plaintiff on the above date for $233.45, and neither the said sum nor any part thereof has been paid; that on November 17, 1914, execution was issued out of the County Court which has been returned *nulla bona;* and that on November 17, 1914, a certificate of the said judgment was registered in the land titles Office at the city of Winnipeg against the lands of the defendant Mike Makoski. The deponent further says that said Mike Makoski is the registered owner in fee simple of certain lands in the Winnipeg land titles office, describing the same. No one appeared for the defendants.

Under the provisions of the County Courts Act, secs. 215 and 216, and the King's Bench Act, rules 741 and 742, the plaintiff is entitled to the relief which he seeks, unless the Moratorium Act prevents it.

In the case of *Ledoux v. Cameron*, 25 Man. L.R. 71, recently before me on appeal, the Master had refused to settle a certain advertisement for sale under a County Court judgment registered in the land titles office shortly before the Moratorium Act was passed, by reason of sec. 2 of the Act. In that case I held, affirming the Master's decision, that a registered judgment was an instrument charging land with the payment of money within the meaning of sec. 2 of the said Act, and no proceedings for sale could be taken until after the lapse of 6 months from August 1, 1914. In the present case the certificate of judgment was not registered until November 17, 1914.

Under sec. 6 of the Moratorium Act:—

Nothing in this Act shall apply to proceedings or the rights of the parties under any mortgage, agreement of sale, or other contract made or entered into after the thirty-first day of July, 1914.

Can it be said that a registered judgment is a "contract?" Under secs. 215 and 216 of the County Courts Act a registered judgment binds and forms a lien and charge on all the lands of the judgment debtor the same as though charged in writing by the judgment debtor under his hand and seal, with the amount of the judgment. In my opinion a registered judgment, under the provisions just mentioned, becomes a contract, and the case thus falls within the exception provided for in sec. 6 of the Moratorium Act. The plaintiff, therefore, is entitled to the relief he claims, together with the costs of this motion.

Motion granted.

KAULBACH v. BEGIN.

Nova Scotia Supreme Court, Russell, Longley, Drysdale and Ritchie, JJ. April 5, 1915.

1. BILLS AND NOTES (§ VI C—167)—PROMISSORY NOTE—EXECUTORY AGREEMENT—TRANSFER OF SHARES—AGREEMENT TREATED AS NON-EXISTENT—FAILURE OF CONSIDERATION.

An executor suing upon promissory notes given by the defendant to the testator under the latter's executory agreement for the transfer to the maker of the note of certain shares in a vessel so soon as the note should be paid, cannot recover on the note if the testator had treated the agreement as non-existent, made no tender or offer of the shares, made no demand under the notes and had treated the defendant as having no interest in the vessel by selling the shares in question without referring to the defendant.

Statement

ACTION by plaintiffs as executors of the estate of C. Edwin Kaulbach, deceased, to recover the amount of two promissory notes with interest given by defendant in connection with a proposed purchase of shares in a fishing vessel which the deceased with others was building at the time.

The cause was tried before Graham, E.J., who gave judgment in defendant's favour on the ground that no interest in the vessel ever passed to defendant, the shares having been taken over by and registered in the name of deceased and having been subsequently sold by him without any reference to defendant.

V. J. Paton, K.C., and *R. C. S. Kaulbach*, for appellants.

J. A. McLean, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The defendant is sued on two promissory notes given to the late C. Edwin Kaulbach either under an executory agreement by the latter to transfer to him four shares in a

N. S.

S. C.

KAULBACH v. BEGIN.

Russell, J.

schooner then building or for money advanced by way of loan to the defendant to purchase and pay for the shares which were taken in the name of Mr. Kaulbach and held as security for the loan. The learned trial Judge has found that the notes were given on the consideration first mentioned and has negatived the theory of a loan. There are circumstances in the case that would lend colour to the theory of a loan. One of these is the memorandum on the stub of the cheque signed with the initials C.E.K., which is to this effect:—

Am't advanced for John Begin. Geo. Begin's new schooner, $125.

This was proved to have been made in the handwriting of Mr. Young, now deceased, who was in his lifetime a clerk of the late C. Edwin Kaulbach. It is contended that this evidence was inadmissible as it was also contended that the memorandum on the cheque for $125, "John Begin, new schooner," was inadmissible. I think that both entries were admissible as having been made by the deceased clerk in the ordinary course of his duties. But the learned Judge has treated these memoranda as merely earmarking the transaction, and not as proof that the cheques were drawn as advances to the defendant to enable him to buy the shares in the vessel.

Another circumstance tending to support the theory of a loan to the defendant is his statement in the course of his cross-examination that McLean, one of the firm of builders of the vessel, asked him to take a share and he replied that he had no money, whereupon McLean said, "we will go to Mr. Kaulbach and borrow the money." But the witness had already said in his direct examination, as to this same interview, "we went to him and he was supposed to have twelve shares, or he was taking twelve shares. He says you don't want any money; give me notes and I will give you four shares."

And in answer to the question of the learned Judge, "You knew unless you paid you were not to get a share?" defendant replied, "that is what I was under the impression."

The following questions and answers also occur in the cross-examination:—

Q. Was it arranged Mr. Kaulbach was to keep your shares until you paid for them? A. That is what I understood. Q. He was to have your shares as security until you paid the notes? A. Not as security; I was

to get four shares from him and he was to hold it over until I paid for them.

Both the defendant and McLean confess that their recollection of the interview is too indistinct to enable them to report it with anything like accuracy. There is no writing produced, although one was drafted by Mr. Kaulbach's clerk, the purport of which seems to have been that defendant was to get the shares when the notes were paid. The defendant was never treated by Mr. Kaulbach as the owner of the shares, and when the vessel was sold he was not consulted in any way with reference to the transaction, as I think he would have been if he had been considered by Mr. Kaulbach as the owner of the shares which were in that view held by Mr. Kaulbach as security for the advance. If the learned Judge had found this to be the effect of the transaction I doubt if I should have felt free to find otherwise. As he has found it to be an executory agreement I do not think there is evidence on which we should reverse his finding, especially in view of the fact that Mr. Kaulbach registered all the shares in his own name, and in order to do so had to make a declaration of ownership, a circumstance to which importance was attached in the case of *Woods* v. *Russell*, 5 B. & Ald. 942. I agree with the learned Judge that the circumstance of the shares being referred to as Begin's shares, or the cheque having been described as an amount advanced to John Begin is wholly inconclusive. If Mr. Kaulbach were paying for the shares with the intention and under an agreement to transfer them to the defendant on payment of the notes, he would be just as likely to earmark the stub or have it earmarked as an advance for John Begin as if the agreement had been clear and distinct for a loan.

If the case is that of an executory agreement for the transfer of the shares I do not see how the notes can be collected when the payee has by the sale disabled himself from transferring the shares. The learned trial Judge has treated the case as a rescission of the agreement and the circumstances seem to point to that inference.

The defendant, at the trial, said in answer to a question from the Judge:—

All I remember him (Kaulbach) saying, "as soon as you pay for the shares I will transfer them over"; but I never could pay for them; I never

N. S.

S. C.

KAULBACH v. BEGIN.

Russell, J.

paid a cent on it; so it looked as if I didn't have a share because I signed no papers of any kind to become a shareholder.

It seems, therefore, that both parties to the agreement have treated it as having been rescinded and the learned trial Judge has found as a fact that it was so treated by the plaintiff's testator. I think that finding is supported by the evidence, and that being so I do not feel bound to enter upon the thorny and difficult questions arising out of a re-sale *in invitum*.

The argument of the case did not afford any very clear light as to whether the analogy of a sale of land by a mortgagee or of a re-sale of chattels by an unpaid vendor was most nearly applicable to the case. There would be difficulties in working out either analogy. But I think the essential question at issue here can be answered by saying that the plaintiff cannot recover on the notes given in this case after the testator had treated the agreement as non-existent, made no tender or offer of the shares, made no demand of the notes, treated the defendant as having no interest whatever in the vessel and sold the shares intended for him under the agreement without notice to him or consultation with him.

Whether the case be treated as that of a total failure of consideration or a rescission of the contract by a tacit though real agreement which should result in a discharge of the notes is not very material. Perhaps in the last analysis these are in reality one and the same proposition. In any case I think the appeal must be dismissed.

Longley, J.
Drysdale, J.

LONGLEY and DRYSDALE, JJ., concurred.

Ritchie, J.

RITCHIE, J.:—In my opinion the appeal should be dismissed with costs for the reasons stated in the judgment appealed from. I adopt it as my judgment on appeal.

Appeal dismissed with costs.

JOURNAL PRINTING CO. v. McVEITY.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. February 18, 1915.

1. INJUNCTION (§ I—10)—NEWSPAPER REPORTER—EXCLUSION FROM CITY HALL—ORDER OF MAYOR—INJUNCTION RESTRAINING.

A newspaper reporter has a right of entry into the city hall of the city in which the newspaper is carried on, both as a representative of the publishers and as a resident of the city and the enforcement of an order given by the mayor of the city to the city hall officials excluding newspaper reporters from the city hall will be restrained by injunction.

2. MUNICIPAL CORPORATIONS (§ II—I—280)—MUNICIPALITY—RATEPAYER—RESIDENT—RIGHT TO INSPECT RECORDS—STATUTORY.

A ratepayer or resident of a municipality has in Ontario no common law right to inspect the record of the municipal corporation; all rights of examination or inquiry by a ratepayer into municipal affairs are limited to those given by statute.

[*Tenby* v. *Mason*, [1908] 1 Ch. 457, followed; *Williams* v. *Manchester*, 13 Times L.R. 299, distinguished.]

Statement

APPEAL from the judgment of Middleton, J.

G. F. Henderson, K.C., and *H. F. Parkinson*, for the appellant company.

A. J. Russell Snow, K.C., for the defendant.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B. (giving the judgment of the Court):—Bearing in mind that this appeal is taken from the formal judgment, and not from the reasons therefor, there is no necessity, we are all agreed, for reserving judgment.

The only point, we consider, is the right of an "inhabitant" or "person" to examine into the affairs of the city. We are of opinion that no rights exist except such as are expressly or by implication given by the statute. Our municipalities are in no way an evolution from the common law municipal corporations, but are the product of statutory enactments, and in this respect differ from them. Some account of this origin may be seen in Biggar's Municipal Manual, McEvoy's The Ontario Township, and a series of articles on Early Legislation and Legislators in Upper Canada in 33 C.L.T. All reasoning, therefore, based upon the common law rights of the parties falls to the ground.

In the case of *Tenby Corporation* v. *Mason*, [1908] 1 Ch. 457, at p. 462, Mr. Justice Kekewich says "Thirdly, the defendant claims to be entitled to attend the meetings of the council as one of the public, that is, he alleges that they are necessarily public meetings. I pass over without further notice the evidence that

ONT.

S. C.

JOURNAL PRINTING CO. v. MCVEITY.

Falconbridge, C.J.K.B.

the door leading to the council room has remained open during the time of meeting, and there has been no doorkeeper to challenge the entrance of any one not coming in an official character, as also the evidence, which is by no means strong, that occasionally some such persons may have entered and attended the meetings. The only arguable ground of this claim is that they are public meetings. The first observation on this is that we are dealing with the creature of statute, and that there is no room for the application of the common law on which one would fall back if dealing with, for instance, vestries: see Steer's Parish Law, 5th ed., p. 195. The borough council is constituted under the Municipal Corporations Act, 1882, and if the defendant's claim is well founded there must be expressed in, or reasonably inferred from, that Act a right on his part as one of the public to attend the meetings. Admittedly there is no expression of any such right. Can it be reasonably inferred? The defendant endeavours to answer this affirmatively. Of those provisions of the statute, including the rules set out in the Second Schedule, which ensure some publicity of the proceedings of the council, none of them really affects the public except the 5th rule, which provides for notice of the time and place of intended meetings being fixed on the town hall, and if the meeting is called by members of the council the notice must also state the business proposed to be transacted. Giving the utmost possible weight to these provisions, I cannot deduce therefrom any intention on the part of the Legislature that the public shall have a right to be admitted to the meetings; and indeed I should infer that this is the limit of publicity which it was thought desirable to ensure, and that no more was contemplated."

This judgment is affirmed by the Court of Appeal, Buckley, L.J., saying, at p. 469: "But all this must be controlled no doubt by anything which is found in the statute which governs the corporation. If there is anything in the statute, that must prevail. The Master of the Rolls has dealt with the provisions of this statute and of the Local Government Act of 1894, to which reference may be made as to other like authorities. I fail to find in the Act which creates this corporation anything which says that a burgess is entitled to access to the meetings of the deliberative body. In sec. 233 I do find that he is entitled to copies of

the minutes of the proceedings of the council. He is entitled to know what they have done. But the Act contains no provisions as to his being entitled to be present at the proceedings themselves."

Then, the other case that has been much laboured this morning, *Williams* v. *Mayor, etc., of Manchester*, 13 Times L.R. 299, is a mere interpretation of sec. 233 of the Municipal Corporations Act of 1882, as to the extent of the right given by that section to a burgess to inspect the minutes of council and its committees, as indeed, the report starts out by saying, and it does not support the proposition that the public have rights in the premises not given by the statute. This was practically a consent judgment case. Epitomes only of the minutes of committees were prepared for the council, but not incorporated in the minutes of council. Mr. Asquith, for the corporation, said: "Perhaps if the epitomes were treated as minutes of the council that would satisfy both parties." Judgment is given as follows: "The Court then granted a declaration that the burgesses were entitled to inspect in future all acts of committees submitted to the council for approval and either approved or not." Therefore that case does not support the proposition that the public have rights not given by the statute.

Therefore, both on principle and authority, we think the appeal should be dismissed with costs.

Appeal dismissed.

O'TOOLE v. BRANDRAM-HENDERSON.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley, and Drysdale, JJ. January 12, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY TO TEAMSTER—IN OR ABOUT PLANT.

Compensation may be allowed under the Workmen's Compensation Act, N.S. in respect of injury to a teamster while driving a truck and team of horses in the delivery of the output of the factory although at some distance therefrom, the horses and truck being a part of the factory "plant" under the extended meaning given by sub-sec. 2 of sec. 2 to the word "factory," so that an injury "on, in or about" any part of the plant is within the statute.

[*Yarmouth* v. *France*, 19 Q.B.D. 647, and *Carter* v. *Clarke*, 14 Times L.R. 172, applied.]

Statement

APPEAL from the judgment of Wallace C.C.J., in favour of plaintiff on a case stated from an arbitration under the Workmen's Compensation Act.

N.S.

S. C.

O'TOOLE v. BRANDRAM-HENDERSON.

Russell, J.

H. Mellish, K.C., in support of appeal.

S. Jenks, K.C., and *R. H. Murray, contra.*

The judgment of the Court was delivered by

RUSSELL, J.:—The English Workmen's Compensation Act 1897, applies only to employment on, in, or about a railway, factory, etc., and it has been held that a person who was injured at a distance from the factory was not killed on, in or about the factory, because the accident happened whilst loading his cart one and a half miles from the factory at which he was employed. *Lowth* v. *Ibbotson*, [1899] 1 Q.B. 1003. On the other hand in *Powell* v. *Brown*, [1899] 1 Q.B. 157, it was held that compensation could be claimed in respect of a man who was killed by falling from a cart which he was loading at the time. The cart was standing in the public street but backed up against the curb of the pavement on the other side of which was the wall of the respondent's factory. In this case the employment was held to be about the factory.

The N.S. Workmen's Compensation Act has not followed the English Act under which these decisions were made. It has introduced words which it is contended change the meaning of the Act. It is as follows:—

> This Act shall apply only to employment by the undertakers as hereinafter defined where not less than ten workmen are employed on, in or about a railway, factory, etc., etc.

The contention is that the restriction "on, in or about" applies not to the nature of the employment in which the injury has happened but only to the nature of the employment of the ten persons whose employment on, in or about the factory, etc., is made a condition of the application of the Act. But this manner of construing the Act leads to the result that there may be persons employed by the undertaker who would be entitled to compensation but the fact of his employment would not count in determining to what classes of factory, etc., the statute is applicable. I cannot think that it was ever intended by the insertion of the words not found in the English Act to make two different kinds of employment, one of which would be considered in determining whether the Act applied while the other would not be considered in determining that question but would never-

theless be such as to furnish grounds for compensation. The Act can be read without any transposition of its phrases so as to bear the same construction as the English Act, and I think that was the intention of the legislature.

The deceased teamster in the present case was killed, not "on, in or about" the respondent's manufactory but a considerable distance therefrom, and compensation cannot be recovered in respect of the accident unless by virtue of the contention next to be considered.

It is said that the team from which he was thrown was part of the plant of the factory under the definition, and therefore that his employment was on, in or about the "factory" as defined in sec. 2, sub-sec. 2, as follows:—

"'Factory' has the same meaning as in the N.S. Factories Act and also includes any dock, wharf, quay and buildings thereon, machinery or plant, and every laundry worked by steam, water or mechanical power."

In *Yarmouth* v. *France*, 19 Q.B.D. 647, a horse was held to be part of the plant of a wharfinger whose business *inter alia* was that of conveying goods from the wharf to the houses or shops of the consignees. Although the same learned Judge in another case held that cab horses could not be held to be included in the term "plant" under the Bills of Sales Acts because of special considerations arising under the construction of the terms used in those Acts. *London and Eastern Counties, etc.* v. *Creasy*, [1897] 1 Q.B. 768.

I agree with the learned Judge of the County Court that the term plant may well include in the present case the teams which were used for the delivery of the output of the manufactory.

In *Carter* v. *Clarke*, 14 T.L.R. 172, an action was brought against Stephenson, Clarke and Co., who were under contract to supply coals to a railway company. They shipped the coal in vessels belonging to another company which was afterwards joined in the action. The action was dismissed as against the shipping company but it was held that the ship in which the claimant was injured was part of the plant of the defendants.

N. S.

S. C.

O'TOOLE v. BRANDRAM-HENDERSON.

If the ship in which the coal was carried was part of the defendants' plant I see no reason why the team in this case would not be a part of the respondents' plant. For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs.

B. C.

C. A.

RITCHIE CONTRACTING CO. v. BROWN.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and McPhillips, JJ.A. February 26, 1915.

1. APPEAL (§ I A—1)—RIGHT OF APPEAL—INTERPLEADER ISSUE.

An appeal lies without leave from a County Court judgment in an interpleader issue where the value of the property involved is over $100, under Order 13, rule 7, of the B.C. County Court Rules, 1912.

[*Re Tarn*, [1893] 2 Ch. 280, applied.]

2. CHATTEL MORTGAGE (§ IV B—45)—DEFECTIVE AFFIDAVIT—EXECUTION CREDITORS—PRIORITIES.

A chattel mortgagee whose mortgage is not effectively registered because of a defective affidavit will not be protected as against execution creditors of the mortgagor by the fact that he took and held actual possession against the mortgagor for a short time after the execution of the mortgage, if he afterwards voluntarily parted with possession to the mortgagor so that the latter appeared thereafter to be the ostensible owner of the mortgaged goods.

[*Ex parte Jay*, L.R. 9 Ch. 697, and *Re Wood*, 40 L.T. 104, referred to.]

Statement

APPEAL by defendant from judgment of Grant, County Judge.

Charles Macdonald, for appellant, defendant.

Ladner, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—A preliminary objection was taken at the hearing of this appeal that as the interpleader action had been tried by the learned Judge and disposed of on the merits pursuant to power given in that behalf by O. 13, r. 7, of the County Court Rules, 1912, and as no leave to appeal was given by the learned Judge, the appeal should be quashed. The respondents rely on r. 10 of said O. 13 in support of this contention.

The English Common Law Procedure Act, 1860, secs. 14 and 15, like our County Court Rules 7 and 8, O. 13, enabled a Judge to dispose summarily of claims in interpleader matters, and sec. 17 of the same Act provided that:—

The judgment in any such action or issue as may be directed by the Court or a Judge in any interpleader proceedings and the decision of the Court or Judge in a summary manner shall be final and conclusive against the parties and all persons claiming by, from or under them.

Although all the other provisions of the Common Law Procedure Act, including said secs. 14 and 15, were repealed, sec. 17 above quoted was allowed to remain in force. Sec. 14 and 15 now appear in the form of Rules of the Supreme Court, O. 57, rr. 8 and 9, and correspond to said County Court Rules 7 and 8. But while said sec. 17 remained unrepealed, it was with certain changes incorporated in the Rules of Court, where it appears as r. 11, O. 57, in the same words as our County Court Rule 10, O. 13.

The effect of these rules and statutes on the right of appeal has been considered in a number of cases, including *Waterhouse* v. *Gilbert* (1885), 15 Q.B.D. 569; *Re Tarn*, [1893] 2 Ch. 280; *Lyon* v. *Morris* (1887), 19 Q.B.D. 139; *Bryant* v. *Reading* (1886), 17 Q.B.D. 128; *Van Laun* v. *Baring*, [1903] 2 K.B. 277; *Cox* v. *Bowen*, [1911] 2 K.B. 611; *Mason* v. *Boltons Ltd.*, [1913] 1 K.B. 83.

Lindley, L.J., in *Re Tarn*, *supra*, speaks of r. 11, at p. 284, as follows:—

Rule 11 is difficult to work out in practice, but the introductory words make the rule not applicable where it would be inconsistent with any statutory provisions as to the finality of the order. We have then to look out of the rules into the statutes and when we look at the statutes we find that an order made summarily by a Judge in interpleader proceedings is not appealable.

In this province the statute law applicable to a case like this is materially different from that of England. We have no statutory provision such as sec. 17 of the Common Law Procedure Act, which takes away the right of appeal, but on the contrary we have sec. 116 of the County Courts Act which gives a right of appeal from all judgments or orders whether final or interlocutory in interpleader proceedings where the amount involved is $100 or upwards. As to such judgments or orders it is "otherwise provided by statute" that they shall not be final, but may be appealed without leave. It would, therefore, follow that leave need be obtained only where the amount involved is less than $100. The value of the property involved in this appeal

B. C.
C. A.
RITCHIE CONTRACTING CO. v. BROWN.
Irving, J.A.

is above that sum, and hence the preliminary objection must be disallowed with costs. On the merits I concur in the conclusion and reason therefor of my brother Irving.

IRVING, J.A.:—I agree with the opinion just read that the motion to quash should be dismissed.

The plaintiff company having recovered judgment against Pratt, the claimant, and caused a motor car to be seized under the warrant of execution, Charles Brown put in a claim to the car under a chattel mortgage, and in the alternative upon having taken actual possession of the car.

The sheriff obtained an interpleader order and the learned County Court Judge held the chattel mortgage was bad because of a defective affidavit, and he found that whatever possession the claimant might have had for a short time after the execution of the chattel mortgage of November 4, he had parted with voluntarily, on or about December 25, and allowed the debtor to hold himself out from December 25 till March 27 as the ostensible owner of the car.

Brown now appeals on the ground that the possession taken cures the defects in the chattel mortgage. His contention is that the car was not in possession or apparent possession of Pratt.

When the mortgage was given the car was kept in the Tudhope Garage on Granville Street. After the mortgage was given it was put into the claimant's garage on 14th Avenue. Just before Christmas, about December 22, Pratt obtained permission to use the car, as he had some friends who were coming over for Christmas. He took it away and the inference I draw is that he kept it and used it for some time. Pratt promised to return it to the claimant, but no time for its return was specified. It does not appear that it was ever returned to the claimant's garage. The claimant says he knew nothing about the car till some time in January when he learned it was in a public garage on 13th Avenue, where it had been placed for repairs, having, I infer, been injured while in Pratt's possession. At any rate the claimant was no party to the ordering of the repairs, nor to the placing the car in the 13th Avenue garage. It stayed there until the seizure, the claimant taking the position it was the duty of the man who damaged the car to put it in good condi-

B. C.

C. A.

RITCHIE CONTRACTING CO. v. BROWN.

Irving, J.A.

tion, and "*put it back again*," that is, into his garage on 14th Avenue.

Our section defining apparent possession is taken from the English Bills of Sale Acts, 1854 and 1878 (41 & 42 Vict. ch. 31, sec. 4), which were intended to prevent false credit being given to people allowed to remain in possession of goods which apparently are theirs, the ownership in which they have parted with. That, I think, was what was done in this case. Pratt was permitted by the claimant to use and enjoy the car, apparently as owner, from December 22 certainly until the time of the discovery of the car in the 14th Avenue garage. As to the possession of the car after the interview the claimant and the proprietors the case raises a nicer question. Here we have third persons in possession—who had received it from Pratt; but these third persons, though indifferent to the ownership of the car, never attorned, or agreed to hold the car as agent for the claimant. There could not be concurrent possession of the car so I think the third parties must be regarded as the holders for the person who left the car with them.

According to the general rule that one who has recovered property from another as his bailee, or agent, or servant must restore or account for that property to him from whom he received it. The *obiter dicta* in reference to the meaning of the word possession under the Bills of Sale Act reported in *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, at pp. 292 and 293, are against the claimant: and see *Re Wood* (1879), 40 L.T. 204.

The leading case on apparent possession is *Ex parte Jay* (1874), L.R. 9 Ch. 697. It is there laid down that if the mortgagee does not actually get possession diligence in attempting to get it will not help him. Pratt having undoubted possession I think it must be incumbent on the claimants to regain possession —to do something more than merely discuss with the third party the terms on which he might remove the car.

I would dismiss the appeal.

McPhillips, J.A.

McPHILLIPS, J.A.:—This is an appeal from the County Court of Vancouver, being a judgment pronounced by His Honour Judge Grant upon the hearing of an interpleader matter ordered by consent to be tried summarily—under O. 26, r. 7.

B. C.

C. A.

RITCHIE CONTRACTING CO. v. BROWN.

M. Phillips, J.A.

In the argument reference was made to the County Court Rules, 1905, O. 26, rr. 7 and 10—the County Courts Act (ch. 53, R.S.B.C., 1911), sec. 116(*d*), sec. 119, and sec. 165—and the Court of Appeal Act (ch. 51, R.S.B.C., 1911), sec. 6(3), (4), and it was urged that there was the right of appeal notwithstanding that it was admitted that no special leave to appeal had been obtained.

In my opinion the County Court Rules—marginal No. 461 (O. 26, r. 10), which has the force of statute law—*vide* secs. 162 and 165 of the County Courts Act—is conclusive and no right of appeal can be claimed in the present case unless leave be first had and obtained.

It would seem to me that there was in the present case a decision of the Judge in a summary way—although it is true an order was made directing the summary hearing—a quite unnecessary order—but not to my mind of such potency as to change the character of the hearing—and that which is appealed from is the summary disposition of the whole matter—which in my opinion is only appealable with leave—*Van Laun* v. *Baring*, [1903] 2 K.B. 277, 72 L.J.K.B. (C.A.) 756.

The case which is absolutely in point—and it determines the further point that even with leave there is no appeal in England—by reason of sec. 17 of the Common Law Procedure Act, 1860 (Imperial)—is *Harbottle* v. *Roberts*, [1905] 1 K.B. 572, 74 L.J. K.B. (C.A.) 310—it was in the case pointed out by counsel for the claimant, who took the preliminary objection that no appeal lay—that "the order of Bray, J., did not actually decide the claim summarily, but directed it should be so decided"—in the present case the order of April 20, 1914, made by the learned Judge—recites that it is an order *by consent* and that the question as to whether at the time of the seizure—the goods were the property of the claimant as against the execution creditor should be tried summarily—on April 23, 1914—and was so disposed of on that date—Collins, M.R., in giving judgment in *Harbottle* v. *Roberts*, *supra*, at p. 311, said.

[The learned Judge here gave the quotation at length.]

It is true the Common Law Procedure Act (Imperial), 1860, sec. 17, cannot be said to be the law with us—but the statute law

was equally effective as to the point under consideration on November 19, 1858—the English Law Act (ch. 75, R.S.B.C., 1911), as at that time the Interpleader Act (Imperial), 1 & 2 Wm. IV., ch. 58, was in force in England—and where there was consent as in the present case and the matter being disposed of summarily there can be no appeal: *Curlewis* v. *Pocock*, 5 D.P.C. 381; *Harrison* v. *Wright*, 13 M. & W. 816; and *Shortridge* v. *Young*, 12 M. & W. 5.

Quite apart from the Interpleader Act (Imperial), 1 & 2 Wm. IV., ch. 58—and to the perhaps somewhat reasonable contention that it is now inapplicable—in my opinion the statute law as we have it and the rules which have the force of statute law preclude an appeal in the present case.

I admit that the question is indeed one of complexity and the decisions which have been given from time to time have given rise to understandable variance of opinion—however, upon the facts of the present case—the consent itself to a summary disposition of the matter is conclusive—and in my opinion there is no appeal.

Appeal dismissed.

COLUMBIA BITULITHIC CO. v. VANCOUVER LUMBER CO.

British Columbia Court of Appeal. Irving, Martin, Gallihcr and McPhillips, JJ.A. February 26, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D—77*a*)—POWER TO CONTRACT—CHATTEL MORTGAGE—VALIDITY—ULTRA VIRES.

A chattel mortgage for money lent must be held invalid where the company in whose favour it was given had no power to lend money under its memorandum of association and where the lending could not be classed as an incidental power to the specific objects of the company's incorporation; the company may nevertheless have power to sue for the return of the money.

[*Ashbury Carriage Co.* v. *Richie*, L.R. 7 H.L. 653, 44 L.J. Ex. 185; *A.-G.* v. *Great Eastern*, 5 A.C. 473; *Osborne Case*, 79 L.J. Ch. 93, [1910] A.C. 87, 79 L.J. Ch. 93; *A.-G.* v. *Mersey*, [1907] A.C. 415; *Re Bagley* (1911), 80 L.J.K.B. 168; and *Carter* v. *Columbia* (1914), 18 D.L.R. 520, referred to.]

Statement

APPEAL from the judgment of MURPHY, J., *Columbia Bitulithic* v. *Vancouver Lumber Co.*, 20 D.L.R. 954.

Bodwell, K.C., for appellant, plaintiff.

Davis, K.C., for respondent, defendant.

B. C.
C. A.
COLUMBIA BITULITHIC CO. v. VANCOUVER LUMBER CO.
Irving, J.A.

IRVING, J.A.:—In *Carter* v. *Columbia Bitulithic Co.* this Court held a guarantee given by the Columbia Bitulithic Co. for the convenience of the Scott Goldie Co. was *ultra vires*.

The defendants in this action having recovered a judgment against the Scott Goldie Quarry Ltd., the grantors of a chattel mortgage dated August 16, 1913, seized the goods and chattels mentioned in the mortgage; the plaintiffs thereupon claimed the goods as theirs under the said mortgage, and an issue, which came on to be heard before Mr. Justice Murphy, was directed.

That learned Judge, who felt that he was bound by our decision in *Carter* v. *Bitulithic*, 18 D.L.R. 520, was of the opinion that the transaction of loan was *ultra vires* of the company, and that as it was a proceeding which neither the directors nor the company had authority to make the issue must be decided in defendant's favour.

Mr. Bodwell draws a distinction between a lending on the security of a mortgage (that is this case) and the giving of a guarantee (as in the *Carter Case*) and contends that what was done in this case was "incidental" to the powers of the company: *Ashbury Carriage Co.* v. *Riche* (1875), L.R. 7 H.L. 653, 44 L.J. Ex. 185, construing incidental as "reasonably" incidental in accordance with the opinion of Selwyn, L.C., in *A.-G.* v. *Great Eastern* (1880), 5 App. Cas. 473, the word "incidental" was discussed in the *Osborne Case*, [1910] A.C. 87, 79 L.J. Ch. 87, 93, and means nothing more than "by fair implication."

In *Union Bank* v. *McKillop* (1913), 16 D.L.R. 701, 30 O.L.R. 87, a number of cases relating to guarantees by a trading company are collected. It is not necessary that further reference should be made to them. In my opinion the lending of money and undertaking to make future advances on mortgage is not incidental to any of the purposes mentioned in the plaintiff's memorandum. The power to loan is quite a common power to insert and its omission from the memorandum is of the utmost significance in the case of a trading company.

There seems to be no golden rule by which you can determine all cases as to what is incidental except this—Is what has been done and is now objected to, reasonably incidental to the business authorized by the memorandum? This rule—almost no rule it is

so simple—is perfectly plain, the difficulty lies in its application. We are warned not to give way to the argument that because what had been done assists or would be convenient to the company—see *A.-G.* v. *Mersey*, [1907] A.C. 415. I do not think anybody reading the memorandum would say that lending the money of the company was incidental to any of the matters mentioned in the memorandum of the company. Since that pungent judgment was delivered the words "incidental powers" or whatever equivalent language is used must be read strictly—see *A.-G.* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338, at 343.

Mr. Bodwell, on the assumption that his first point is bad, then argued that the chattel mortgage given to secure the loan was not necessarily bad—and that it would support the plaintiff's claim against the seizure. His main authority was *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, 51 L.J. Ch. 3. That was a case on a promissory note given to the trustees of a friendly society to secure £300. The defendant's contention was that as the trustees were not authorized to make a loan to anybody other than a member of the society, the loan was an illegal act and therefore the society could not recover.

The Court of Appeal, however, thought that although the trustees had no authority to make the loan, the majority of the members could have done so, and, therefore, the loan was not illegal, and the plaintiffs could recover. So far as I can find that case has not been overruled. The right of the lender to recover notwithstanding that there has been a breach of trust on his part seems well established—*cf.* the case of *Ernest* v. *Croysdill* (1869), 29 L.J. Ch. 580.

In the present case the plaintiff company may have the right to recover their own money from the Scott Goldie Co. by a tracing order or a decree for rescission or both, but that is quite a different thing to being able to hold as their own property something which was mortgaged to them when they parted with their money. That something could only become theirs by virtue of a contract and it is that particular contract that they were not authorized to enter into. The consideration for it was wanting and, therefore, I reach the conclusion that the security is void. I would dismiss the appeal.

B. C.

C. A.

COLUMBIA BITULITHIC CO. v. VANCOUVER LUMBER CO.

Martin, J.A.

MARTIN, J.A.:—Apart from other questions, an objection is raised to the validity of the chattel mortgage on which the plaintiff relies, and it should, I think, be determined at the outset because if the objection is sustained that is an end of the matter.

Sec. 8 of the Bills of Sale Act provides that the bill of sale "be registered by the filing of such bill of sale or copy thereof, as the case may be, together with such affidavits as are herein required, in the County Court registry of such county or place (as specified) . . . in the office of the registrar of the County Court at Victoria," or as the case may be. And the following proviso is at the end of the section:—

Provided, however, that the Lieutenant-Governor in Council may from time to time subdivide or alter the said districts, and provide for the registration of bills of sale in the office of any registrar of a County Court for a district or at a place different from those above mentioned.

Rule 309 of the County Court Rules (1905) is as follows:—

An affidavit shall not be filed or used which has been sworn before any person who was at the time of the swearing of the same the solicitor acting for the party on whose behalf such affidavit is to be used, or the agent, partner or clerk of such solicitor, or who is the party himself.

Rule 536 (Order 38, r. 16) of the English Supreme Court Rules is the same as our Supreme Court Rule 536, and is this:—

No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself.

Upon that rule and the English Bills of Sale Act, 1878, it was decided by Wright, J., in *Baker* v. *Ambrose*, [1896] 2 Q.B. 372, that "I must hold that the rules of the Supreme Court generally apply to bills of sale," and therefore a bill of sale was void because the affidavit of due execution was sworn before the solicitor for the defendant in that action, who was the grantee under the bill of sale, as the plaintiff company is in this action. That decision has been affirmed by the unanimous decision of the Court of Appeal in *Re Bagley*, [1911] 1 K.B. 317, 80 L.J. K.B. 168, quite apart from the proviso in the English Commissioners for Oaths Act, 1889, ch. 10, sec. 1 (which is not to be found in our Evidence Act, ch. 78, wherein the powers of commissioners for taking affidavits are dealt with by secs. 61 *et seq.*) the Master of the Rolls saying, p. 171:—

I feel no doubt that under rule 16 of Order 38 the same objection applies as under the general language of the Act to this so-called affidavit.

that it was sworn before a person who had no authority—that in fact it was a proceeding *corem non judice*.

The prohibition in our County Court rule is stronger than in the English Rule as it says that the affidavit shall not even "be filed" if sworn contrary to it, so to escape from these decisions it was argued that the affidavit was not filed or used in the Court at all in the true sense, and a distinction in principle is sought to be drawn between the masters of the Supreme Court of Judicature, who under section 13 of the English Act, are the appointed officers with whom bills of sale are to be filed, and the registrars of the various County Courts who are the appointed officers for that purpose under sec. 8 of our Act. The affidavit in England may be sworn before a master or commissioner only (sec. 17); here before a registrar, or commissioner, and several other persons: sec. 24. After a careful perusal of both Acts and the cases decided thereon I am unable to perceive any such distinction, and it is clear to me that the governing factor in the decisions is that once the document is filed in a Court then the rules of that Court apply to it, and nothing turns on the particular officer who is required to perform the duties in connection with the registration. In each case there is a registrar who is required to keep a principal book called a register (and an index book) giving the information of a similar character as set out in sec. 13 and schedule B. in the English Act and secs. 21 and 25 and schedule C. in our Act, the only difference being that our register gives further information in two respects. Power is given to a Judge of the Supreme Court in each case to rectify the register (*cf.* Eng. sec. 14 and our sec. 21), but our section also provides that in addition to the rectification of the register itself an office copy of the order "shall be annexed to the bill of sale or any copy thereof, as the case may be and registered therewith." Furthermore, by sec. 12 of our Act either a Judge of the Supreme or County Court may make an order permitting the filing of the bill of sale in the case of the attesting witness dying or leaving the province, etc., and a copy of this order must also be annexed and filed. There is no section in the English Act which corresponds to this one giving the Judges of both Supreme and County Courts jurisdiction; sec. 21 gives jurisdiction to the former Judges only. So here we have proceedings authorized by

B. C.

C. A.

COLUMBIA BITULITHIC CO. v. VANCOUVER LUMBER CO.

Martin, J.A.

this Act to be taken in both Courts and, therefore, it might be plausibly contended that the rules of both should apply, according to the decisions, and this case may not depend upon the rules of the County Court alone as was assumed at the argument. But it is sufficient in this case to hold that the rules of the Court which is the depository of the instrument should at least apply.

Then a further distinction was suggested that in England the Judges have power to make rules of Court, whereas in this province they are made by the Lieutenant-Governor in Council both in the Supreme and County Courts and under this Bills of Sale Act, sec. 25, and it was suggested that this shewed an intention to regard the English Bills of Sale proceedings as being more under the control of the Court than ours. But that suggestion is not sound because the English Act, sec. 21, provides that rules for the purposes of that Act "may be made and altered by the like persons and in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 and 1875." Now in both those Acts power was given to Her Majesty to make rules by Order-in-council during the times and for the purposes therein specified: *cf.* secs. 68-9 of 873 and sec. 17 of 1875. But more than that, the Rules of Court under the latter Act were made by Parliament itself by sec. 16 and set out in the first schedule thereto and declared to "come into operation at the commencement of this Act." So there is no magic in the fact that the Judges had authority given them to "alter and annul" those rules which were enacted and promulgated by Parliament and Order-in-council, which were to and did remain in force till altered by the Judges; *cf.* secs. 16 and 17 of 1875 and Wilson's Judicature Act (7th ed., 1888), pp. 75, 128, 795. Therefore, the analogy between the two enactments is complete in all respects and I can discover no real ground for distinguishing the authorities.

Some importance was sought to be attached to the fact that it appears to be the practice in England to head the affidavit "In the King's Bench Division," which was said in *Bagley's Case*, 80 L.J.K.B. 168, 171, to be "proper" to do, because the office of registrar is performed "by the Master attached to the King's Bench Division," and I have no doubt that it would also be

B. C.

C. A.

COLUMBIA BITULITHIC CO. v. VANCOUVER LUMBER CO.

"proper" to follow that practice here as the registrar is "attached to the" County Court, though it has not been done so far and is not necessary. But no doubt proceedings under secs. 12 and 21 would be properly, and should be headed in the name of the Court, Supreme or County, which is resorted to for an order, as the case may be.

It only remains to notice the contention of the appellant that as the solicitor here acted for both grantor and grantee the rule does not apply as both interests are safeguarded. I note that the converse of that was argued for the appellant in *Baker* v. *Ambrose*, [1896] 2 Q.B. 372, (where *Vernon* v. *Cooke* (1880), 49 L.J.Q.B. 767, now relied upon was distinguished), and I think rightly so, because if the affidavit were taken by a person who was prohibited from taking it because he was acting for one party he cannot avoid that prohibition by acting for that party plus another. The prohibition in the rule is absolute and expresses this policy unmistakeably—such an "affidavit shall not be filed or used . . ." It follows that the appeal should be dismissed.

Martin, J.A.

GALLIHER, J.A.:—I agree in the reasons for judgment of my brother Irving.

Galliher, J.A.

MCPHILLIPS, J.A., dissented.

McPhillips, J.A. (dissenting)

Appeal dismissed.

YOUNG v. SMITH.

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, Beck and Walsh, JJ. February 19, 1915.

1. CORPORATIONS AND COMPANIES (§ V F 3—262)—SHARE SUBSCRIPTION OBTAINED BY FRAUD OR MISREPRESENTATION.

A representation by the seller of company shares that other shareholders had paid cash for their shares is a material representation.

2. CONTRACTS (§ V C—390)—RESCISSION—MISREPRESENTATION — MATERIALITY.

The test of a material inducement on a claim to rescind a contract for misrepresentation is not whether the buyer would have acted differently if the misrepresentation had not been made, but whether he might have done so; it is sufficient to prove that in the ordinary course of events the natural and probable effect of the misrepresentation was to influence the mind of a normal representee in the manner alleged.

3. CONTRACTS (§ V C 3—402)—RESCISSION—MISREPRESENTATION—MATERIALITY—INDUCEMENT.

Both materiality and inducement are questions of fact on a claim to rescind a contract for misrepresentation.

[*Young* v. *McMillan*, 40 N.S.R. 52, considered.]

ALTA.

S. C.

YOUNG v. SMITH.

Stuart, J.

APPEAL from dismissal of action.

G. F. Auxier, for plaintiff, appellant.

A. H. Clarke, K.C., for defendant, respondent.

The judgment of the Court was delivered by

STUART, J.:—This is an appeal by the plaintiff from a judgment of the Chief Justice delivered at the close of the trial whereby he dismissed the plaintiff's claim against the defendant as maker of two promissory notes of $1,000 each upon which $400 had been paid and gave the defendant judgment for a return of the amount paid. The notes had been given in payment of the purchase price of 20 shares of the par value of $100 each in the capital stock of The Kootenay River Land Co. Ltd.

The defendant's defence consisted of a number of alleged misrepresentations as to the nature of the assets of the company which consisted in an interest under an agreement of purchase from one Birtch in certain lands in British Columbia and also a misrepresentation to the effect "that the plaintiff was selling the said stock to the defendant at the actual cost of the same to him without profit to the plaintiff or expense added." The defendant also counterclaimed for a delivery up of the notes and a return of the money paid thereon.

At the trial practically, and upon the appeal finally, the defendant abandoned his defence resting upon the allegations in regard to the company and the land owned by it and rested his case solely upon the misrepresentation above set forth. It did not become necessary for the trial Judge to deal with the former misrepresentations because it clearly appeared and was indeed admitted by the defendant that he had made payments on the notes after having learned the real facts in regard to the nature of the land and the position of the company. It was found by the trial Judge, however, that his knowledge as to the real facts with regard to what the shares had cost the plaintiff was not acquired until shortly before the action was begun and that he had then and before action at once refused to pay and had repudiated the transaction. The learned Chief Justice found that a misrepresentation had been made and that it had been made falsely and fraudulently. It does not appear in his oral judg-

ALTA.
S. C.
YOUNG v. SMITH.
Stuart, J.

ment that he expressly found the misrepresentation to have been material but the proper inference is, of course, that he considered it to be so.

The general facts were that the plaintiff together with two other men named Currie and Shields had entered into a scheme for the purchase of the land in British Columbia. A company was eventually incorporated and the owner, one Birtch, on November 2, 1912, agreed to sell the land to the company for $32,940 upon certain terms, one of which was that $2,500 was paid in cash. The three promoters each advanced one-third of this sum, the plaintiff paying $834. On September 28, 1912, the plaintiff Young had signed a sort of unilateral agreement not stated to be with anyone in the following form:—

I, John Oliver Young, of Castor, for and in consideration of eight shares of one hundred dollars each ($100) fully paid-up and non-assessable of the capital stock of the Kootenay River Land Co., Ltd., *when incorporated*, to be allotted at the first general shareholders' meeting and in addition to twelve shares for which I am to pay in cash or its equivalent, twelve hundred dollars ($1,200), agree to give such of my time and services as shall be necessary in furthering the promotion of said company.

This document was filed with the Registrar of Joint Stock Companies on March 14th, 1913, but the plaintiff had, on 5th February, 1913, received his share certificate. On February 26th, the transaction in question took place. The defendant gave the two notes for $100 each at five and eleven months respectively, and the plaintiff assigned his shares, a new certificate being issued to Smith. Smith thereupon became a director of the company in place of Young. Smith admitted in his evidence that he knew how much was being paid to Birtch for the land, how much had been paid to Birtch and that this interest in the Birtch land was all the assets the company had. His chief complaint was that Young had told him that the three of them, Young, Shields and Currie, had each paid $2,000 in actual cash into the company and had got each $2,000 of stock in return.

A second instalment of $2,000 fell due to Birtch on May 1, 1913. This was not paid although the company had resold some portions of the property to other parties. It was recognized, however, in June that the company could not carry out its

ALTA.
S. C.
YOUNG
v.
SMITH.
Stuart, J.

obligations to Birtch and was really bankrupt. Its head office was in Medicine Hat and in June all the books were sent to Smith at Calgary who deposited them in a cellar because as he said there was not room enough for them in his office. He had made two trips to see the land, one in March and the other about the first of June. On this latter trip he found that the land was not as Young had represented it, but he made no repudiation of his bargain. On August 27, Birtch served a notice of cancellation of the agreement for default which was to take effect on November 30. On October 3, a meeting of the company was held in Calgary at which Shields and Smith were present and at which a resolution was passed authorizing a quit claim deed to be signed releasing the land to Birtch on condition that Birtch should protect the company with regard to sub-purchasers. On October 5, Birtch agreed to this and the company surrendered its interest, forfeiting the money already paid.

On July 21, Smith wrote from Vancouver to Young asking for an extension for 60 days on the first note, saying that he was going to lose "like a good sport."

On October 15, 1913, Smith paid $250 on account and on December 4, 1913, he paid $150 more. It was on account of the making of these payments that it was plainly impossible for the defendant to repudiate liability because of the alleged misrepresentations as to the character and condition of the land.

Then about January, 1914, the plaintiff began to press the defendant for more payments on the notes, the last one having now fallen due. Letters were written to the defendant at Vancouver threatening suit. On February 3, 1914, the defendant wrote from Vancouver, saying:—

> I know you have been looking for a cheque from me but I have just been put to it so hard I can not get it. Am rustling night and day here now trying to make a turn. Will write you when I get back to Calgary. Am sorry, but I can not for a few days. Your old friend, Hugh.

The defendant said that on his way back to Calgary owing to a remark some one made to him on the train, he became suspicious about the truth of what Young had told him in regard to the shares when the notes were given, that on returning he looked up the books of the company, of which he had been a

director all the time and then discovered that Young had not sold the shares to him for what they had cost him in cash, in other words that Young had not put $2,000 in cash into the company.

It seems to me to be impossible to reverse the finding of the learned Chief Justice upon the question of fact as to what was said by Young to Smith at the time of the sale. I am bound to say that a reading of the defendant's evidence has created a suspicion in my mind that the distinction between the payment for the shares in full in actual cash and the general cost of the shares to Young in cash and in time and labour was really suggested to Smith by the questions addressed to him and that if he had been merely asked to state the words used by Young he would never have had used the expressions "real money" and "actual cash" at all. But be that as it may, there was clearly evidence to justify the trial Judge's finding and he expressly says that he believed Smith and disbelieved Young. In these circumstances his finding must stand.

The point of real difficulty in the case is the question of the materiality of the misrepresentation. At first blush it seems a little difficult to perceive how the misrepresentation could have been material in the mind of Smith. He knew the price being paid for the land which the company had been formed to exploit, he knew the amount already paid and that the land was all the assets the company had. If it be said that he may have assumed that the extra $3,500 had been spent in improvements on the land, then, in that view the representation assumes the character of a representation as to the condition of the land. This condition, however, he soon discovered. He soon became aware that no such sum had been expended and yet he affirmed the contract by payment on the notes. One of the original misrepresentations he complained of was that there was one-half of the necessary fluming on the land to be used for irrigation purposes and that this was in good condition. When he went over in June he found there was "just the same as no flume at all; it had been built there two, three or four years and left there." From this it is evident that he then learned that no money had been spent on the land by the company at all. And it is really

ALTA.
S. C.
YOUNG
v.
SMITH.
Stuart, J.

exceedingly difficult to conceive how Smith who became a director at once upon the purchase of his shares, who got possession of the books in June, who knew there was no money in the treasury, and none spent on the land could have failed to experience some curiosity as to what had become of the $3,500 in cash which he said he was told had gone into the company over and above the amount paid on the land to the vendor. That sum would have more than paid the second instalment due to Birtch. It is also rather strange that Smith never knew of the registration of the agreement referred to with the Registrar on March 14th, 1913, when he was a director and owned the shares referred to in it and when Young had ceased to have any interest in them. Yet, the trial Judge did believe him when he said that he *found out* in February, 1914, which must be taken to imply "for the first time," that the actual cash had not been paid in. Whatever suspicions one may entertain about it, I think that finding must be accepted.

Upon the point of materiality and inducement, I think it is quite easy to understand how the statement that Young had paid in cash in full for the shares and was just selling them to Smith at the same price making no profit may have had a considerable influence in inducing Smith to make the purchase. In Hals., vol. 20, p. 699, it is said that

> it is sufficient to prove that in the ordinary course of events the natural and probable effect of the representation was to influence the mind of a normal representee in the manner alleged.

In Kerr on Fraud and Mistake, 4th ed., p. 44, it is said:—

> The test therefore of a material inducement is not whether the plaintiff's action would, but whether it might have been different if the misrepresentation had not been made.

In Amer. and Eng. Encyc. of Law, 2nd ed., p. 51, there is a note of a decision in Maine, that representations by the seller of stock in a corporation that all the stockholders had paid for their shares at par was a material representation.

It must further be remembered that both materiality and inducement are questions of fact. Hals., vol. 20, p. 701. In the present case the trial Judge sitting as a jury evidently considered these facts proven. And upon the evidence I am unable

ALTA.
S. C.
YOUNG v. SMITH.
Stuart, J.

to conclude that he was wrong. With regard to the views expressed by Meagher, J., in *Young* v. *McMillan*, 40 N.S.R. 52, to the effect that a statement by the seller as to the price he had paid for goods is not material, I think it need only to be said that materiality being a question of fact the result must depend upon the special circumstances of each individual case. I do not think it can be laid down as a general rule that such a statement can never be material.

In the present case it seems to me quite possible and indeed even probable if Young had stated to Smith that he had only paid $834 in cash directly and *about* $365 for expenses and that he had been allowed another $800 for his time and services that Smith would not have agreed to pay him $2,000 for his shares. That, I think, is as far as we need go in considering the question of materiality.

The only remaining question that need be referred to is the possibility of restitution. The company is, for all that appears still in existence, the share certificate is in Court and can be retransferred. I do not see that the forfeiture of the agreement with Birtch can make any difference. The business of the company took its normal course. What happened would, no doubt, have happened if Young had retained his shares. And in any case the representation was found to have been fraudulent and an amendment was allowed permitting the defendant to claim damages for deceit. As the learned trial Judge remarked, there can be no difference in the result. The result is, the appeal must be dismissed with costs.

Appeal dismissed.

Annotation

Subscription by misrepresentation

Annotation—Corporations and Companies (§ V F 3—262)—Share subscription obtained by fraud or misrepresentation.

A contract to buy shares induced by misrepresentation may be rescinded at the option of the deceived party. If the purchase money has been paid to the company he may bring an action of rescission. *Re London & Staffordshire Co.*, 24 Ch.D. 149.

He must, however, act promptly upon the discovery of the misrepresentation and a short delay has been held to be sufficient to deprive him of the right to rescind. *Petrie* v. *Guelph Lumber Co.*, 11 Can. S.C.R. 450; *Re Scottish Petroleum Co.*, 23 Ch.D. 413; *Beatty* v. *Nealon*, 12 A.R. 50. And means of knowledge as distinguished from actual knowledge, may be sufficient to

ALTA.

Annotation

Subscription by misrepresentation

Annotation (*continued*)—**Corporations and Companies** (§ V F 3—262)—**Share subscription obtained by fraud or misrepresentation.**

debar him. *Ashley's Case*, 9 Eq. 263. He may also lose his right of rescission by conduct such as attending or voting at a meeting of the shareholders. *Sharpeley* v. *Louth*, 2 Ch.D. 664, or by attempting to dispose of his shares or executing a transfer of same. *Crawley's Case*, 4 Ch. 322, or by making a payment on account of the stock. *Shearman's Case*, 66 L.J. Ch. 25. See also *Nelles* v. *Ontario Investment Association*, 17 Ont. R. 129; Parker & Clark on Company Law, 73.

The payment of money on account of shares, the act of participating in the affairs of the company, the knowingly allowing the name to appear as a shareholder or director and the like have always been considered as important, but not conclusive evidence. Each case must depend upon and be governed by its own circumstances. *Bank of Hamilton* v. *Johnston*, 7 O.W.R. 111, and *McCallum* v. *Sun Savings Loan Co.*, 1 O.W.R. 226.

Where a shareholder in an action for calls has put in a counterclaim for rescission, he is entitled to raise all the defences in the winding up that he could have raised in such action. *Re Pakenham*, 6 O.L.R. 582.

A mis-statement of the names of the directors has been held to be a material mis-statement. *Re Scottish Petroleum Co.*, 23 Ch.D. 413. So also a statement that stock has been subscribed when in reality it has been or is to be allowed in paid-up shares to a promoter or vendor. *Arnison* v. *Smith*, 41 Ch.D. 348.

A statement of intention or words to the effect that something will be done, is not regarded as a statement of fact. *Edgington* v. *Fitzmaurice*, 29 Ch.D. 459.

Where the statement is ambiguous the applicant is entitled to put any reasonable construction on it, and the company will be bound by such construction. *Arkwright* v. *Newbold*, 17 Ch.D. 301. A statement that the company's process is a commercial success is regarded as a statement of fact and not an expression of opinion. *Stirling* v. *Passbury Grains*, 8 T.L.R. 71; *Greenwood* v. *Leather Shod Wheel Co.* (1900), 1 Ch. 421. For further cases illustrating the principles see *London and Staffordshire Ins. Co.*, 24 Ch.D. 149; *Ross* v. *Estates Investment Society*, 3 Ch. 682; *Alderson* v. *Smith*, 41 Ch.D. 348.

If the effect of a document is stated and it is also stated that it may be inspected at a certain place the subscriber is entitled to accept the statement as to the effect of the document. He is not bound to go and examine the documents for himself. *Redgrave* v. *Hurd*, 20 Ch.D. 1; *Smith* v. *Chadwick*, 9 A.C. 187.

An unfounded statement recklessly made by the company's agent in order to obtain a subscription for company shares, without any reasonable basis for his opinion, that the company would earn 30 per cent. dividends on its shares, may be relied on as a misrepresentation avoiding the subscription. *Pioneer Tractor Co. Ltd.* v. *Peebles*, 15 D.L.R. 275.

A subscriber for shares is not precluded from questioning the truth of statements contained in a company prospectus by an admission made by him before subscribing for his shares, to the effect that he was not in-

ALTA.

Annotation

Subscription by misrepresentation

Annotation *(continued)*—**Corporations and Companies** (§ V F 3—262)—**Share subscription obtained by fraud or misrepresentation.**

fluenced by anything contained in the prospectus, where he afterwards gave his subscription in reliance on false statements in the prospectus and oral misrepresentations by an agent of the company. *Pioneer Tractor Co. Ltd.* v. *Peebles*, 15 D.L.R. 275; *Aaron Reefs* v. *Twiss*, [1896] A.C. 273, 280; *Edgington* v. *Fitzmaurice*, 55 L.J. Ch. 650, 653; and *Peek* v. *Derry* (1880), 37 Ch.D. 541, 584, specially referred to.

A statement in a prospectus that thousands were interested in a company, which guaranteed its financial success, when, as a fact, there were not over one hundred and twenty-five shareholders, is a false representation sufficient to invalidate a subscription for shares made in reliance thereon. *Pioneer Tractor Co. Ltd.* v. *Peebles*, 15 D.L.R. 275.

A plaintiff suing the company for rescission had learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16 and on March 8, 1904, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13 the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following. It was held that the suit was barred by delay, and that directors who adopted a resolution to sell shares of the company and to employ a broker for the purpose were not responsible in damages for misrepresentations in a prospectus issued by the broker, to a holder of shares who had purchased relying upon the prospectus, it having been issued by the broker as the agent of the company without their authority. *Farrell* v. *Portland Rolling Mills Co.*, 38 N.B.R. 364.

In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiff's agent that two other named persons had each subscribed $10,000 of shares upon the condition that subscriptions for $50,000 were obtained by a certain date; that the defendant's subscription was required to make up the $50,000; and that his subscription would not be binding unless the $50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that $50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiff's agent having died some years before the commencement of the action; and the trial Judge credited the testimony. The Court held the evidence sufficient without direct corroboration, and that in the absence of facts or circumstances of countervailing weight, should be accepted. It was also held that the plaintiff corporation was bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not. *Ontario Ladies College* v. *Kendry*, 10 O.L.R. 324 (C.A.).

N.B.

S.C.

ORCHARD v. DYKEMAN.

New Brunswick Supreme Court, McLeod, C.J. January 7, 1915.

1. PARTNERSHIP (§ I—3)—NATURE — CREATION — WHAT CONSTITUTES—SHARING PROFITS.

A contract whereby one person is to manage the store of another for a fixed amount weekly plus a quarter share of the net profits and the circumstance that the names of both were joined as a firm name in operating the store business, disclose a partnership.

[*Walker* v. *Hirsch*, 27 Ch. D. 460, referred to.]

Statement

ACTION for an account.

J. H. F. Teed, for the plaintiff.

J. B. M. Baxter, K.C., for the defendant.

McLeod, C.J.

MCLEOD, C.J.:—The plaintiff in this case asks that an account be taken of the business that he alleges was formerly carried on by himself and the defendant under the name and style of Dykeman & Orchard, and that the defendant be ordered to pay him one quarter of the net profits of the said business as found on the taking of the accounts. The time the plaintiff alleges they carried on the business was from the first of February, 1913 to April 11, 1914. The defendant in 1912 was, and for some time previously had been carrying on a wholesale grocery business on Simmonds St. in the city of Saint John under his own name. He also sold goods from the same store by retail. The plaintiff was in the year 1912, and for some time previously thereto had been in the employ of the Singer Sewing Machine Co., receiving a salary of $15 a week, and also a commission on his sales which he claims made his whole salary about $20 a week. The plaintiff and the defendant are brothers-in-law, and the plaintiff claims that the defendant in the fall of 1912 told him that he was desirous of opening a retail store, and he asked the plaintiff if he would take charge of it and manage it. After several conversations the plaintiff says it was agreed between them that he was to take charge of and manage the retail store, and was to receive $12 a week and one-quarter of the net profits, to be paid at the end of the year, 1913. The store was opened for business about February 1, 1913, on Simmonds St. on the opposite side of the street from where the defendants wholesale store was, and the plaintiff took charge of it and man-

aged it, and continued in charge until April 11, 1914. The business during the time the plaintiff was in charge and managed it was carried on under the name of Dykeman & Orchard; the bank account was kept in the name of Dykeman & Orchard; the cheques were signed Dykeman & Orchard, and were nearly all signed by the plaintiff. Nearly all the stock was supplied by the defendant from his wholesale store and every week he rendered the account to Dykeman & Orchard, and the plaintiff always paid the account by cheque signed Dykeman & Orchard and if there was any money left he paid it on account of the stock that was first supplied to the firm by the defendant. Some time in February or March the plaintiff notified the defendant that he intended to withdraw from the business about the 20th of April, and he did leave on April 11. A day or two after leaving he called on the defendant and asked for an account of the profits, when the defendant denied that he was entitled to any share in them.

The defendant on his part claims that the agreement with the plaintiff was that he was to receive $12 a week, and he said that he told him he would sell him a quarter share interest in the business in a year's time, but that he denies that he was to have a quarter interest in the net profits of the business. With reference to the name of Dykeman & Orchard being used his explanation is as follows:—"We talked about opening the business and I thought perhaps I would put it in Dykeman & Company, and then I expected he would buy an interest in the business in a year's time, and we would open it under the name of Dykeman & Orchard. There would be no need to make a further change when the year was up."

The first question to be considered is a question of fact, and that is, what was the real contract between the parties. From the way the business was carried on there is no doubt that so far as the third parties are concerned the plaintiff and the defendant could be held liable as partners because they held themselves out as partners. The plaintiff allowed his name to be used in the business, and all the business done with the third parties was done by them as partners. The question, however, is what are the rights of the parties as between themselves, that is,

N. B.
S. C.
ORCHARD v. DYKEMAN.
McLeod, C.J.

what right under the contract between them has one against the other. It is quite conceivable that they might so carry on their business as to be held by third parties to be partners, and yet not to be partners as between themselves. See *Smith* v. *Watson* (1824), 2 B. & C. 40. In *Walker* v. *Hirsch* (1884), 27 Ch.D. 460, at 468, Cotton, L.J., discussing the question whether the plaintiff and defendant were partners between themselves says:—

> Very different questions arise when we come to the question which exists here, whether the parties are between themselves partners. I have used the word "partners," but really what we have to consider when we are considering questions as between the parties themselves and not as between strangers and one of the parties or all of them, is really this: What rights had the contract entered into in fact given one of the parties against the other? And that is the whole question when the matter arises as between those who are alleged to be—I will use now the ambiguous term—'partners.' Therefore what we really have to consider is this, what on the contract between the parties are the rights which that contract has *inter se* given to one as against the other."

And the Court there held that under the contract between the parties they were not as between themselves partners, and the plaintiff was not entitled to an accounting.

The real question I think I have to determine here is whether as between the plaintiff and the defendant the contract was one that gave the plaintiff a right to an account of the net profits of the firm from February 1, 1913 to the eleventh of April, 1914, and that of course must depend on the contract itself. It was an oral contract, and was admittedly fully carried out by the plaintiff on his side. There is a distinct difference between the plaintiff and the defendant as to what that contract was. I do not think that I am much helped in determining what it was by the evidence given by the witnesses outside of the plaintiff and the defendant. Where there is such a difference it is best to look at all the outside circumstances, and see how the parties themselves acted with reference to the contract before any dispute arose. The plaintiff, as I have said, undoubtedly rendered himself liable for the debts incurred in the retail business. They carried on the business under the name of Dykeman & Orchard. The defendant sold goods to the retail store, rendering the bills to Dykeman & Orchard every Saturday night, and was paid for

the goods so sold. He continued rendering bills every week until after the plaintiff gave notice that he intended to withdraw from the firm, and then he ceased.

The book-keeper explains, or attempts to explain this by saying that she was busy and did not have time to render the bills. I do not think the explanation is a good one. If the business was separate from the business carried on by the defendant himself, and the plaintiff was interested in it I could very well see a good reason, indeed it would be necessary for the defendant to render the bills, and he would have to be paid for his goods. If he owned both stores, and the plaintiff had no interest in the retail business then it was not of so much importance. The way the parties managed and carried on the business from the time the contract was entered into and the retail store opened was consistent entirely with the plaintiff's statement of what the contract was. It is absolutely and entirely inconsistent with what the defendant's statement of the contract was. His explanation of the reason for using the name of Dykeman & Orchard is not a good one. If Orchard had no interest in the business it was unreasonable to make him liable as a partner simply for the reason that the defendant thought at the end of the year he might purchase a quarter interest in it.

On the consideration of the whole facts I have come to the conclusion that the contract made is as stated by the plaintiff.

Then the next question is, does that in fact make them partners between themselves, or was it simply a contract of hire, that is that the plaintiff was to receive $12 a week wages and one-quarter of the net profits of the business. I incline to the view that they were partners, but in any event the contract is such as to entitle the plaintiff to an account of the business carried on between the parties from February 1, 1913 to April 11, 1914. It was urged on behalf of the defendant that by the pleadings a partnership was alleged, and that if there was no partnership and it was simply a contract of hire then the contract being one not to be formed within a year would be barred by the Statute of Frauds. I do not think so. Dealing with it simply on the basis that it was a contract of hire. What

N. B.

S. C.

ORCHARD v. DYKEMAN.

McLeod, C.J.

was the contract? The contract was that for twelve dollars a week, and a quarter of the net profits the plaintiff would manage this store. He did manage it from February 1, 1913, to the eleventh of April, 1914. That was his part of the contract which he performed. The defendant's part of the contract was that the plaintiff was to receive $12 a week, and a quarter of the net profits of the business. The plaintiff having performed his part of the contract, the defendant would be obliged to perform his part of it. As I have said, in my opinion the contract as stated by the plaintiff was that there was a partnership between them, but in any event if it did not constitute a partnership it was such a contract as entitled him to this account. If it is necessary to amend the pleadings leave will be given for that purpose.

The order will be that the plaintiff is entitled to an account of the net earnings of the business carried on under the name of Dykeman & Orchard, from February 1, 1913, to April 11, 1914; the salary of $12 a week being first charged against the whole business, and one quarter of the net earnings so found will be paid to the plaintiff. There will be the usual reference to the Master to take the account. The defendant must pay the costs of this suit.

Judgment accordingly.

ONT.

S. C.

GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.

Ontario Supreme Court (Appellate Division), Falconbridge, C.J.K.B., Hodgins, J.A., Latchford and Kelly, JJ. January 14, 1915.

1. BENEVOLENT SOCIETIES (§ III—10)—ENDOWMENT INSURANCE—ACCRUED DUE—NEW CONDITIONS IMPOSED—POWER UNDER CONSTITUTION—VALIDITY.

A benevolent society has not right after a benefit in nature of an endowment insurance is accrued due to its member so that he became a creditor of the society for the amount thereof, to forfeit or impair such creditor's rights to his debt, or to postpone his payment, or to make its payment conditional upon the member paying further assessments, although the society had power under its constitution to alter its constitution and by-laws, other than the fundamental declaration under which it was incorporated, which included as one of the objects of the society the payment of endowment at the age in question.

[*Grainger v. Order of Canadian Home Circles*, 31 O.L.R. 461, affirmed; *In re Ontario Insurance Act and Supreme Legion Select Knights*, 31 Ont. R. 154, distinguished.]

2. BENEVOLENT SOCIETIES (§ III—10)—ONTARIO INSURANCE ACT—CONSTITUTION—AMENDMENT OF—PAYMENT OF ENDOWMENT POLICY.

The amendment to the Ontario Insurance Act, made by 3 Edw. VII. (Ont.), ch. 15, sec. 8 [R.S.O. 1914, ch. 183, sec. 185], enabled a benevolent society subject to the provisions of the Ontario Insurance Act to so amend its constitution as to make the one-half of the benefit which was originally payable in a lump sum to the member on his attaining the endowment age, so that the same would thereafter be payable in fixed yearly instalments commencing at the endowment age; but the statute does not enable the society in the absence of any reservation to that effect in its constitution to postpone or change the endowment age already fixed.

ONT.

S. C.

GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.

APPEAL by the defendants from the judgment of Meredith, C.J.C.P., 31 O.L.R. 461. Statement

J. E. Jones and *N. Sommerville*, for the appellants.

I. F. Hellmuth, K.C., for the plaintiff, the respondent.

January 14. The judgment of the Court was delivered by HODGINS, J.A.:—The amendments of 1914 have provided no age at which the yearly payments are to commence, so far as the respondent is concerned. If, therefore, he elects to accept option B., he gets nothing; while, under clause 4 of the amendment, if he rejects the option, he is shut out from all benefits. This amounts to confiscation of his rights, which the respondent claims had accrued to him when he became 70. No doubt, this was not the intention, but the Court has to deal with his rights as affected by the clause as enacted. That being so, the appellants must shew that their powers of amendment are extensive enough to warrant what they have done. Hodgins, J.A.

The powers relied on are three: first, the Act respecting Benevolent, Provident, and other Societies, R.S.O. 1877, ch. 167, sec. 4; secondly, the powers mentioned in article XIV. of the constitution; and, thirdly, those in the Act of 1903, 3 Edw. VII. ch. 15, sec. 8, now found in the Insurance Act, R.S.O. 1914, ch. 183, sec. 185.

Those given by the Act respecting Benevolent, Provident, and other Societies, under which this organisation was incorporated, are limited to what is necessary for the government and control of the affairs of the society, and do not permit an alteration of the fundamental declaration; this appears from *Bartram* v. *Supreme Council of The Royal Arcanum*, 6 O.W.R. 404.

The powers given by the constitution in article XIV. are limited to the alteration of the constitution and laws, which begin

ONT.
S. C.
GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.
Hodgins, J.A.

at p. 11 of exhibit 3, and do not include authority to alter the original incorporation declaration by which (p. 5, clause 5) members are entitled to half of the amount of their beneficiary certificate on attaining the expectancy age. This age having been reached, and the respondent having complied with all the lawful requirements of the Order, he became entitled to one-half of the amount of the beneficiary certificate, subject to the change sanctioned by the Act of 1903.

Then, looking at the powers under that Act, it would appear that the change which had been made in 1897 became thereby valid, the payment of $100 being made payable yearly, instead of, as originally provided, in a lump sum at the expectancy age. There is no power under that Act to postpone or change the expectancy age already fixed, as the amendment of 1914 purported to do.

Mr. Sommerville relied upon a number of cases, both English and Canadian, as indicating that a member was bound by any change in the laws and regulations which might take place after he became a member, although they affected materially the rights which he had acquired. All these cases depend, in the end, upon the consent of the member, arising from his express or implied agreement to be bound by any changes in the laws, rules, or regulations.

In the case of *In re Ontario Insurance Act and Supreme Legion Select Knights of Canada*, 31 O.R. 154, chiefly relied upon, the constitution and laws were made part of the original declaration; therefore, the powers of amendment were held to apply to that original declaration. That is not the case here, where there is no such consent. In the respondent's application he agreed to abide by the constitution, laws, rules, and regulations then in force, or which might thereafter be enacted. A reference to the book, exhibit 3, shews that the original declaration is not included within the scope of that agreement. He did not agree to a change in the fundamental declaration which in fact remains in force, save as altered under the authority of the statute of 1903.

In the beneficiary certificate the only reference is to the laws, rules, and regulations—the same wording as in the application,

except that the certificate leaves out the word "constitution." In the certificate there is no agreement as to changes and no reference to the fundamental declaration.

None of the cases cited seem to affect the right of a member after, having complied with the regulations, he has become a creditor, and become entitled thereby to a certain sum of money, his right to which arises independently of his remaining a member of the Order; and we think that a right had accrued to the respondent which made him a creditor, and therefore entitled to enforce his rights by action, before the amendment of 1914 was made.

No case has been cited enabling a society, when it has become a debtor, to forfeit or impair its creditor's rights to his debt, or to postpone its payment, or to make that payment conditional upon further payments by the creditor.

Mr. Jones argued that, at all events, the judgment should be varied by providing that payment to the respondent should be made out of a fund called the "Life Expectancy Fund." In view of the amendment of 1897, which made the "Beneficiary Fund" the fund out of which life expectancy benefits were to be paid, it is impossible now to cut down the respondent's rights by declaring that they are limited to payment out of a part of that fund, or out of a fund which exists apart from it. He is entitled to be paid the amount as declared by the judgment, without discrimination as to its source.

For these reasons, we think the appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.

Hodgins, J.A.

TILL v. TOWN OF OAKVILLE.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, and Magee, JJ.A. January 18, 1915.

1. EVIDENCE (§ XII D—943)—ELECTRICITY — PERSONAL INJURIES—NEGLIGENCE—SPECIFIC ACT—EVIDENCE OF.

It is not enough for the plaintiff suing in tort for personal injuries alleged to be due to negligence to shew that he has sustained an injury under circumstances which may lead to a suspicion or even a fair inference that there may have been negligence on the part of the defendant; he is bound to give evidence of some specific act of negligence on the part of the defendant whom he seeks to make liable.

[*Lovegrove* v. *London Brighton and S.C. R. Co.*, 16 C.B.N.S. 669, applied; *Till* v. *Town of Oakville*, 20 D.L.R. 635, 405, 31 O.L.R. 405, varied.]

ONT.
S. C.
TELL
v.
TOWN OF OAKVILLE.

2. CONTRIBUTION (§ I—3)—JOINT DEFENDANTS—REASONABLENESS OF JOINING—LIABILITY ESTABLISHED AGAINST ONE—COSTS—LIABILITY FOR.

Where circumstances in a negligence action brought against two defendants are such that upon the face of the transaction or occurrence it was reasonable to join both and to seek to make each of them liable and the plaintiff could not know which one was at fault and, in the event, liability is established only against the one who had contended that the other was solely liable, the Court may include in its judgment against the one so found to be liable the plaintiff's costs incurred against the co-defendant and also the costs which the plaintiff is ordered to pay to the successful defendant.

[*Besterman* v. *British Motor Co.*, [1914] 3 K.B. 181, followed.]

Statement

APPEAL by the defendant the Bell Telephone Company of Canada from the judgment of Middleton, J., 20 D.L.R. 635, varied.

D. L. McCarthy, K.C., and *F. M. Burbidge*, for the appellant company.

R. McKay, K.C., for the defendant the Corporation of the Town of Oakville, respondent.

M. H. Ludwig, K.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

Meredith, C.J.O. MEREDITH, C.J.O.:—This is an appeal by the defendant the Bell Telephone Company from the judgment, dated the 27th May, 1914, and the 24th June, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him, sitting without a jury at Toronto on the 14th and 15th days of May, 1914, in so far as the appellant is affected by the judgment.

By the judgment it is ordered and adjudged: (1) that the respondent plaintiff shall recover against the appellant and the respondent corporation $6,000; and (2) that the appellant and the respondent corporation shall pay to the respondent plaintiffs the costs of the action, and that they shall be liable as between themselves for these costs in equal shares.

The reasons for judgment of the learned Judge are reported in 20 D.L.R. 635, and the material facts are there stated.

As I understand the reasons for judgment, the learned trial Judge based his conclusion, that the appellant was liable, upon his finding that the risers on the town's electric light pole were

brought into contact while Whitney, the employee of the appellant who placed the rings on the messenger wire, was engaged in that work. He acquitted Whitney of any intentional displacement of the risers, but was not satisfied that he may not have brought them into contact accidentally. Everything he said was consistent with the displacing of the risers while the rings were being placed on the messenger wire, and all other possible causes of the displacement had, he thought, been investigated without result.

I am, with great respect, of opinion that the finding of the learned Judge is not warranted by the evidence. Whitney, who was called as a witness by the respondent plaintiffs, testified that the displacement of the risers was not caused by him; that he noticed the condition of the risers, and realised that he could not come into contact with them without endangering his life, and that he carefully avoided doing so. There is no doubt upon the evidence that it was difficult—perhaps very difficult—to do the work in which Whitney was engaged—doing it in the way he said he did it—without his having come into contact with the risers; but it is not shewn that it was impossible.

It was suggested, in the course of the examination of some of the witnesses, that, owing to the swaying of the messenger wire to which Whitney was suspended, or to muscular contraction, his legs, or one of them, may have displaced the risers without his being aware of what had happened. I do not know whether that was the view of my learned brother, but, if it was, I cannot agree with it. The evidence of the expert witnesses—I refer particularly to the testimony of Mudge, p. 375—is, that it would require considerable physical force to have caused such a displacement of the risers as existed on the day the deceased was killed; and it was improbable, I think, that the movement of Whitney's legs in the way suggested would have brought sufficient force to bear on the risers to have caused that displacement. Any other act of Whitney's which could have caused the displacement must have been a conscious act, and of such an act Whitney is acquitted by the learned Judge.

I am unable to discover any finding, at all events a finding in terms, that the act which the learned Judge thought caused

ONT.
S.C
TILL
v.
TOWN OF OAKVILLE.
Meredith, C.J.O.

the displacement of the risers was a negligent act, though no doubt the learned Judge, when dealing with the legal aspect of the case, speaks of the deceased's death as having been the result of two independent acts of negligence on the part of the respective defendants, and I do not find anything in the evidence that, assuming the finding that the displacement was unconsciously caused by Whitney, warrants a finding that his act was a negligent act; indeed, the finding that it was an unconscious act rather implies that it was not.

Then, too, the work that Whitney was doing was performed between the 15th and the 27th March, probably midway between these dates, and the accident did not occur until the 13th April following; and, granting that the displacement of the risers must have been caused by human agency, the possibility that it was not the result of some act other than that of Whitney was not eliminated. It was not beyond the range of probability, certainly not beyond the range of possibility, that it was caused by the act of a mischievous boy or the wilful act of some evil-disposed person.

Counsel for the respondent corporation was evidently impressed with the difficulty of connecting Whitney's supposed act with the displacement of the risers, for an effort, which failed, was made to shew that the electric light pole bore the marks of spurs, recently made, and to connect these with something done by an employee of the appellant named Stewart on the day before that on which the accident happened.

It appears to me also that it is unlikely that, if the displacement had been caused by Whitney, the condition of the risers would not have been noticed by those who had the superintendence of the town's electric light system, and the interval of time that elapsed between Whitney's supposed act and the happening of the accident is a circumstance—though no doubt not a conclusive one—tending to negative the theory which was put forward at the trial and adopted by the learned Judge.

The observations of Willes, J., in *Lovegrove* v. *London Brighton and South Coast R.W. Co.*(1864), 16 C.B.N.S. 669, 692, are apposite, I think, to this case. He here says: "It is not enough for the plaintiff to shew that he has sustained an injury

under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."

Upon the whole, I am of opinion that the respondent plaintiffs' case against the appellant failed, and that the appeal should be allowed and judgment entered dismissing the action as against the appellant with costs.

It was contended by counsel for the respondent plaintiffs that, if we should come to that conclusion, the costs to be received by them from the respondent corporation should include all costs incurred against the appellant by reason of there being two defendants, and also the costs which they would have to pay to the appellant, and counsel cites in support of his contention *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181, in which such an order as to costs was made.

I am of opinion that a similar order should be made in this case. The test to be applied in determining whether such an order should be made is, "Was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrongdoer to join the other defendant in order that the matter might be thoroughly threshed out?" And Vaughan Williams, L.J., said (p. 187): "Of course, the fact that there were two people who upon the face of the transaction might, either of them, have been guilty is what made it reasonable in the plaintiff, when he brought this action, to join both of these defendants."

In the case at bar, the respondent corporation, in its statement of defence set up, and throughout the trial contended, that the act of the appellant was the *causa causans* of the death of the deceased, and that the appellant and not the corporation was liable to the respondent plaintiffs; and, in my opinion, it was reasonable for the respondent plaintiffs to join the appellant as a defendant.

Appeal allowed.

B.C.

S.C.

RYDSTROM v. KROM.

British Columbia Supreme Court, Macdonald, J. February 17, 1915.

1. ALIENS (§ III—19)—ALIEN ENEMY — DISABILITIES AND CAPACITIES — SUITS BY OR AGAINST.

An alien enemy may be sued although under a disability to sue during a state of war, and if the action against him is dismissed as unfounded, the court may award him costs.

Statement

TRIAL of an action and right of alien enemy to costs.

F. R. McDougal, for plaintiff.

H. S. Wood, for defendant.

Macdonald, J.

MACDONALD, J.:—This action was dismissed at the trial but, at the request of the plaintiff's counsel, the question of costs was reserved. He contended that the defendants were both Hungarians and not entitled to costs against the plaintiff. The evidence as to the nationality of these defendants is meagre, but, assuming that they are both Hungarians, I see no reason on that account to change the opinion I expressed at the trial—that they should not be deprived of costs. They were required to defend an action brought in this Province and it would be an act of injustice were they compelled to pay their own costs in connection with their defence. Counsel for the defendants has presented a complete and carefully prepared argument in support of his contention that his clients are entitled to their costs.

The rights of alien enemies in British Courts has been recently dealt with by the Court of Appeal in England. I quote from the *Times* Weekly Edition of January 22, 1915, at p. 83, as follows:—

> There is no valid reason why, owing to his hostile character, he (an alien enemy) should be relieved from liability to pay his British creditors. Accordingly, the Court decided he may be sued, and, if he is exposed to an action, it follows that he may appear and defend proceedings taken against him. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

These defendants had a perfect right to defend themselves in this action and, in my opinion, are entitled to their costs. There will be judgment accordingly.

Judgment accordingly.

OVERSEERS OF THE POOR v. KENNEDY.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, E.J., and Russell, Longley and Drysdale, JJ. January 12, 1915.

1. BASTARDY (§ I—1)—TRIAL DE NOVO—AMOUNT OF AWARD—CONSIDERATION BY JURY.

Where the defendant in bastardy proceedings obtains a trial *de novo* on an appeal from a magistrate to the County Court sitting with a jury, and without objection allows the case to go to the jury solely upon the question of paternity, he cannot afterwards object that the question of the amount to be awarded should also have been left to the jury and not fixed as it was by the Judge in affirmance of the magistrate's order, on the jury finding against the defendant on the question of paternity.

Statement

APPEAL from judgment of Wallace, Co. C.J., and motion for a new trial or that judgment be entered for defendant in an action brought by the Overseers of the Poor, for the support of a bastard child of which defendant was alleged to be the father.

W. J. O'Hearn, K.C., for appellant.

A. Clancy, K.C., for respondents.

Graham, E.J.

GRAHAM, E.J.:—This is a complaint under the Bastardy Act tried in the usual way before a magistrate. Then there is an appeal later to the County Court by the putative father. In that Court the putative father gave notice for a jury and the appeal was tried by the learned Judge with a jury. Appeals are tried *de novo*. Of course the issue was as to the paternity of the child and that was submitted to the jury who found against him. Now, the point is raised that the amount to be paid by a putative father on a conviction is a question of fact and should have also been submitted to the jury. But the defendant should have asked the Judge at the trial to submit to the jury the question of the amount to be paid if he wished to question the amount awarded below. He raises such a point now. Mere non-direction is a matter that should be raised then and there. I forbear to cite the usual authority on that point.

The appeal to this Court should be dismissed and with costs.

Russell, J.

RUSSELL, J., concurred.

Longley, J.

LONGLEY, J.:—There had been an order taken out against the defendant Kennedy under the Act in relation to bastard

N. S.
S. C.
OVERSEERS OF THE POOR v. KENNEDY
Longley, J.

children and in the magistrate's Court after all the parties had been heard the defendant was convicted. An order was made for him to pay $1 per week for 115 weeks making it $115. The order making it $115 is within the jurisdiction of the Court and has to be determined by the magistrate from his own knowledge of the facts.

The appeal was taken to the County Court and it was entered for trial. In the County Court no person raised any question in regard to the amount of the order. The only question submitted to the jury was whether the defendant was guilty or not of the charge. The defendant's solicitor stated distinctly that he had never mentioned the question of damages and in his address to the jury had submitted the question of whether or not the evidence was sufficient to convict the defendant, and after hearing the case so presented to them the jury found for the plaintiff. It is objected that they ought to have found also in regard to damages. Of this I think there is grave reason to doubt. The justices below are required to make up the amount after they have convicted the defendant and in section 75 subsection 2, it is arranged that "every County Court shall have all the power, authority and jurisdiction by the statute vested in the Court appealed from." Therefore, the Judge of the County Court might have applied the rule which prevails in regard to the magistrate and when the defendant was convicted of the offence, made the order according to his will. He made it in the present instance in accordance with the judgment below, namely $115. While not undertaking to lay down the law in this regard I would nevertheless hold it as perfectly sound and proper that when a defendant had appealed and gone to the jury solely on the question of his guilt or not and the question had been discussed upon that point alone I hold that the Judge in the County Court would be bound to make the order and was at liberty to make the order the same as the justice. I think also that it is contrary to the decisions of our Court and contrary to all principles of right and justice that the defendant should take any other course. Since he went to the jury on the question of defendant's guilt and declined the question of the amount it would seem that he placed the matter of guilt as the one matter on which he was appealing.

The judgment should be confirming the order of the County Court.

DRYSDALE, J.:—An order of affiliation was made against the defendant herein by the Stipendiary Magistrate for Halifax County in November, 1913. The magistrate by said order adjudged the defendant to be the putative father of a bastard child born of Kate Perry and ordered defendant to pay plaintiff's the sum of $1 weekly for 115 weeks or in lieu of said amounts the lump sum of $115.

From such decision and order the defendant appealed to the County Court for district No. 1 and a jury was demanded and had and on the trial in the County Court it is admitted that no question was raised in connection with the amount so ordered to be paid by the magistrate, the jury's finding being taken on the only question raised in the County Court, namely, on the question whether or not defendant was the father of the child. It seems that the finding was taken in the form of an open verdict for plaintiff. After a hearing on the only question raised subsequent to this verdict and after the learned County Court Judge had affirmed the magistrate's order, namely, on February 12, 1914, the defendant by his counsel applied to the Judge of that Court for a new trial on the ground chiefly that the question as to amount ordered by the magistrate was never put before the jury and was not passed upon by them. It is admitted that on the appeal to the County Court and on the trial there had, no question was raised as to the amount by either party and that no direction was given to the jury on the question of amount. It would seem from the record that the appellant raised one question only in the County Court and that there the matter was tried out as if the only matter in controversy were the question of paternity. The evidence given before the jury was altogether on this point and the appellant now seeks to get the benefit of non-direction on a point that it is very obvious he abstained from raising. I think it is too late now to talk of non-direction. Had the appellant desired to raise any question as to the amount awarded by the magistrate and to have the jury pass upon it I think it was incumbent upon him to

N. S.

S. C.

OVERSEERS OF THE POOR v. KENNEDY.

Drysdale, J.

raise the question when the case was being given to the jury. I am aware the appellant had a right to a jury, that it was demanded and that he was entitled to a trial *de novo*. That if in the course of that trial he openly took the position that he desired to try out one question only namely, whether appellant was or was not the father, the objection as to non-direction as to other questions of fact involved in the order affirmed I think comes too late. The complaint as now presented is at most one of non-direction and I regard the authorities as clear that counsel cannot sit quietly by at a trial and afterwards complain of mere matters of non-direction. I think there is such a thing as estoppel by conduct and that it is particularly applicable to the defendant here. The course pursued by the appellant at the County Court trial in reducing the contest before the jury to the one real controversy that was then considered as between the parties could not have been more effective had appellant's counsel risen in his place when the trial was on before the jury and openly stated that he desired one question and one only to be submitted to the jury. Had he done this it would be idle to afterwards complain of facts not submitted and I think the course pursued below was quite as effective in working this result as any open statement that could have been made. In support of the views expressed I cite only the statement of Lord Halsbury whilst Lord Chancellor in *Neville* v. *Fine Arts Co.*, [1897] A.C. 76 to the following effect:—

> Where you are complaining of non-direction of the Judge or that he did not leave a question to the jury if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

THE BONANZA CREEK GOLD MINING CO. v. THE KING.

CAN.
S.C.

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

1. CORPORATIONS AND COMPANIES (§ I E—192)—COMPANY UNDER ONTARIO COMPANIES ACT — NO EXPRESS LIMITATION AS TO TERRITORY — CARRYING ON BUSINESS IN YUKON TERRITORY—ILLEGALITY OF— BRITISH NORTH AMERICA ACT, 1867.

A company incorporated by charter under the Ontario Companies Act to carry on the business of mining does not, although the charter contains no express limitation as to the territory in which the company's operations may be carried on, acquire under such charter the capacity or power to carry on a mining business in the Yukon Territory or to receive any licenses or certificates from the executive officers of the Yukon Territory purporting to confer such right upon a provincial corporation incorporated by the province under its restricted powers of incorporation "with provincial objects" under sec. 92 of the British North America Act, 1867.

[*Companies Reference*, 48 Can. S.C.R. 331, 15 D.L.R. 332; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330; *C.P.R.* v. *Ottawa Fire Insurance Co.*, 39 Can. S.C.R. 405, referred to.]

Statement

APPEAL from the judgment of the Exchequer Court of Canada dismissing the appellants' petition of right.

Hellmuth, K.C., and *Moss*, K.C., for the appellants.

Shepley, K.C., and *Newcombe*, K.C., (*Mason* with them), for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from a judgment of the Exchequer Court on a petition of right launched to recover damages in respect of breaches of agreements and leases alleged to have been vested in the appellant by assignments in the circumstances set forth in great detail in the petition.

The claim was disposed of in the Court below on the short ground that the appellant was without capacity to accept the assignments of the leases and collateral agreements or to carry on mining operations in the Yukon Territory or to recover damages for the breach of the said agreements.

The appellant is a joint stock company incorporated by the Province of Ontario under the provincial Companies Act. The charter professes to authorize it to carry on the business of mining.

Being so incorporated it purported to obtain transfers of two certain hydraulic locations in the Yukon Territory, theretofore issued by the Dominion Government to one Doyle and one

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Sir Charles Fitzpatrick, C.J.

Matson, and to enter into certain agreements in respect thereof with the Dominion Government, and to obtain certain certificates which are referred to in the documents introduced and the admissions made with a view to the final determination of the questions which arise upon the two grounds of defence hereinafter referred to.

The petition of right was granted to settle certain disputes which arose between the appellant and the Government in respect of these leases and agreements. In answer to the petition two grounds of defence were raised which I think are fairly set out in the respondent's factum as follows:—

(*a*) Want of corporate capacity on the part of the suppliant company to carry on its business in the Yukon Territory, and, in consequence thereof, incapacity to acquire the hydraulic leases already referred to, or any rights thereunder, or to enter into the agreements with the government in respect thereof also already referred to, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the suppliant to carry on its business of mining in the Yukon Territory, or to acquire any rights under such certificates or licenses;

(*b*) Want of authority on the part of either the Yukon or the Dominion executive to issue any such certificates or licenses to the petitioner, or to confer any such rights upon the petitioner, as the petition of right claims.

This defence raises squarely in the first paragraph the important question, so frequently considered here and, in my opinion, now finally disposed of by the Judicial Committee, of the power or capacity of a company incorporated by a local legislature to carry on its operations in a territorial area over which the incorporating legislature has no jurisdiction. I adhere to what was said by me on this point in *The Companies Reference*, 15 D.L.R. 332, 48 Can. S.C.R. 331, at p. 339:—

> The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province. Companies incorporated by local legislatures are limited in their operations of the territorial area over which the incorporating legislature has jurisdiction. Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in inter-

national relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Dominion and the provinces under the British North America Act.

This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside the province in matters which are ancillary to the exercise of its substantive powers. I use the terms "substantive" and "ancillary" as descriptive of the two classes of powers inherent in the company, as these are used in the judgment of the Judicial Committee in *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A.C. 54.

It is not, of course, suggested that a provincial legislature may not incorporate a company for one of the objects enumerated in sec. 92 of the B.N.A. Act, which upon its incorporation enters into existence as an entity clothed with corporate powers; but the question raised and which must be decided in this appeal is: Can such a company exercise its functions or pursue the activities of its particular organization beyond the jurisdictional limits of the constituting power? In other words, can a properly constituted provincial company exercise its powers (purposes or objects) locally outside of the province of incorporation. It may be that a provincial company can with the consent of another province exercise its civil capacities within the area of that province, but I am still of opinion that a provincial company cannot either with or without that consent fulfil the purpose for which it was organized, that is, discharge what may be described as its functional capacities, in this case mine for gold, outside the limits of the constituting province. To admit juristic persons to the enjoyment of civil rights is not the same thing as to admit them to exercise their functions or to pursue the activities of their particular organization or in other words to transplant their institution to a foreign jurisdiction (Lainé, des Personnes Morales en Droit International Privé, 282).

The Ontario Joint Stock Companies Act under which the petitioner obtained its charter, enables a provincial charter to be granted "for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends." The legislative authority of Ontario has never been deemed to extend to mining upon lands geographically or jurisdictionally situated beyond the province, and a provincial charter, issued to a company for the purpose of mining, must find "the object or

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Sir Charles Fitzpatrick, C.J.

purpose" for which it was created within and only within the field to which the legislature itself has deemed its authority to extend. There is not, it is quite true, a geographical limitation in the appellant's charter as to the territory in which it may carry on its operations, but the limitations of the constituting power must be read into the charter which must be construed as if it read: "the subscribers to the memorandum of agreement are created a corporation for the purposes and objects described in the letters patent in so far as these purposes and objects are geographically and jurisdictionally situate within the province."

As the Lord Chancellor said in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, at p. 339, "the incorporation of companies with provincial objects cannot extend to a company the objects of which are not provincial." The business of mining in the Yukon Territory is not a provincial object with respect to Ontario. The Yukon Territory is not a province and is exclusively with respect to its public lands under legislative jurisdiction of the Dominion.

If this limitation is inherent in its constitution how could the appellant company acquire by transfer or otherwise hydraulic mining locations in the Yukon Territory or enter into agreements for the purpose of operating those mines with the Dominion Government. I agree with counsel for the Crown on the second branch of his defence for the reasons given in his factum.

Assuming that the company had the power to engage in mining operations in the Yukon Territory it did not comply with the statutory conditions subject to which it was entitled to carry on its operations. No joint stock company is recognized under the statute and regulations as having any right or interest in any placer claim, mining lease or minerals in any ground comprised therein unless it has a free miner's certificate unexpired. No joint stock company can obtain a free miner's certificate unless it is incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada, and I interpret the statute 61 Viet. ch. 49, sec. 1, to mean that a British company and a foreign company are the only sort of joint stock companies that could be licensed there.

The same argument applies to the license given by the Deputy Minister of the Interior. He was without authority to grant any such license. To be effective such a license could only be issued by the Government through the Secretary of State and it is admitted that no such license was ever taken.

In effect I hold that the company was not competent to take the assignment from Matson and Doyle upon which it bases its claim, or enter into the alleged agreement with the Dominion Government with respect thereto, and also that the company could acquire no right or interest in or to a mining claim in the Yukon because it was excluded by the statute from obtaining a free miner's certificate.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—This action raises in a concrete form one of the questions referred to this Court by His Royal Highness the Governor-General in Council as to the limitations, if any, which the B.N.A. Act imposes upon the legislatures of the provinces in giving them exclusive power to legislate in sec. 92, sub-sec. 11, respecting "the incorporation of companies with provincial objects."

In answering the questions submitted to us on that reference I gave at length my reasons for holding that the power conferred was a limited one and that its limitation was territorial.

I have seen no reason to change the opinions I there expressed. The company appellant in this case was incorporated in the Province of Ontario as a mining company. In my opinion it has neither the power nor the capacity to carry on mining operations in the Yukon Territory or district, that being a part of Canada thousands of miles distant from Ontario. It would seem quite unnecessary for me to repeat the reasons given by me in the reference above referred to.

I would, therefore, dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—The questions raised herein relate to the limits of the capacity of a company incorporated by provincial authority acting within the powers conferred in sec. 92, sub-sec. 11, of the B.N.A. Act, to acquire property outside the province, or to contract for anything to be done for its benefit or omitted

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington, J.

by it or any one else to be done for its use or benefit outside the province.

It has been heretofore usually assumed that men incorporated for any object might in their corporate capacity, acting within the scope of such object, do anything relative thereto for the purpose of serving such object, wherever the law of the country where done did not prohibit the doing thereof. This has been recently denied so far as provincial corporate creations are concerned. That denial is founded upon the discovery (long hidden from the ken of man) of manifold possible limitations inherent in said sub-section. It has assumed many shapes.

That involved in the absolute denial of capacity for either contracting beyond, or contracting for anything to be done or to be got beyond the territorial limits, is easily understood whatever may be thought of its legal validity.

But this denial of ordinary capacity which has assumed such various and varying shades of meaning that it is impossible to accurately define any line by which to bound the permitted operations of a limited sort beyond the territorial limits, is not quite so comprehensible.

The facts involved herein are so complicated that they may give rise to the application of any one of these propositions comprehended in such denial of capacity, or specific shade thereof, that I think better they should be set out with some detail.

The appellant was incorporated in 1904 by letters patent issued under and by virtue of the Ontario Companies Act (*a*) to carry on as principal, agent, contractor, trustee, etc., etc., the business of mining and exploration in all their branches, and (*b*) to apply for, purchase, lease, or otherwise acquire, patents, patent rights, trade marks, improvements, inventions and processes, etc.; and apparently incidental to these main purposes, by the means specified in ten succeeding clauses to do a great many things needless to state in detail here.

All we are concerned with is that what was specified either in said clauses (*a*) and (*b*) or in the other subsidiary clauses, or both combined, contemplated the exercise, without saying where, of contracting powers and the acquisition of such kind of rights

and properties as involved in the issues raised herein. The place where operations of any kind were to be carried on is not stated further than that the head office of the company is to be at the city of Toronto. That must, therefore, be taken as the home wherein it carried on its business.

From the pleadings and the contracts, licenses, and correspondence, made part of the case, we find the following facts or what have to be assumed such as to be dealt with herein.

The suppliant, now appellant, sets forth in its petition that one Doyle and his associates, and one Matson and his associates, each set respectively had, in 1899 and 1900, applied to the Department of the Interior for Canada, each for a separate hydraulic mining location, and each became entitled thereto, and got leases from Her late Majesty therefor; and thereupon looking to the further and better development of these properties, collateral agreements were entered into between Her late Majesty, represented by the Minister of the Interior for Canada, and each of said set of parties respectively, in January, 1900, whereby the Minister was to observe that certain other properties should, in certain contingencies which took place, be granted by way of lease to these parties respectively. These leases and agreements entitled each of said set of parties with whom they were made to valuable privileges. It is to be assumed for the present that they were valid and that there were moneys paid to the Crown thereunder and that, for or by reason of any breach of the obligations incurred on the part of the Crown, said parties or their assignee would thereby be entitled to claim heavy damages for losses so caused.

The appellant acquired these leases and agreements by assignment thereof, presumably in Ontario. I presume it thereby became entitled to such indemnification as the original holders respectively might have had at the time against the Crown, besides acquiring the right thereafter to realize the hopes and expectations of said parties and of the appellant thereunder. The appellant on December 24, 1904, the day after its incorporation, got a free miner's certificate, under the regulations then in force, for which it paid the respondent a fee of $100 and kept it renewed, paying for such renewals, it is alleged,

CAN.
S. C.
BONANZA CREEK GOLD MINING CO. v. THE KING.
Idington, J.

so long as the regulations governing mining in the Yukon required the owners of a hydraulic concession to hold a free miner's certificate. It is by no means clear that the possession of such a certificate was necessary to enable it or any one else to make such acquisitions, though probably needed before actively engaging in operating a mine.

The appellant upon acquiring said leases and agreements found the obligations of the Crown thereunder had not been lived up to and that land which fell within the scope and under the operation thereof, instead of being leased to appellant or its predecessor, had been relocated or let to other parties to the detriment of appellant either through its said predecessor in title or directly. Against such omissions, for a time, the appellant made fruitless protests.

On March 16, 1907, however, the Crown represented by the Minister of the Interior, entered into an agreement with appellant—after reciting said leases, and that they had, and all the interests therein and thereunder of said lessee Doyle and others, and Matson and others, had become vested in the appellant and otherwise as appears therein—whereby the respondent leased to said appellant the lands in said mining claims enumerated in the schedule thereto, together with the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other process, of royal or precious metals, etc., for the remainder of said terms of years, respectively, for which the said leases ran for the hydraulic mining locations within which the said claims were situate.

And there are assurances given therein that the Crown will in certain contingencies grant appellant a lease of other locations as and when reverting to the Crown. This agreement and lease from respondent was executed at Ottawa.

Founded upon those things of which the foregoing is a brief outline, the appellant alleges it became and was entitled to certain services of water and water-rights and other privileges, all of which are to be presumed to be admitted; and the loss of large sums of money expended by relying upon each and all of said agreements being observed and of profits which might have been got, I presume is also admitted for the present.

On September 7, 1905, the appellant got a license in pursuance of ch. 59 of the Consol. Ord. of the Yukon Territory, authorizing it to use, exercise and enjoy within the Yukon Territory, the powers and privileges and rights set out in the appellant's memorandum of association; for which it paid a fee of $500.

The authority of this is sec. 2 of said ordinance and is thus expressed: "Any company, institution or corporation incorporated otherwise than by or under the authority of an Ordinance of the Territory or an Act of the Parliament of Canada desiring to carry on any of its business within the territory may petition therefor, etc., and the Commissioner may thereupon authorize such company, etc., etc."

Again by the issue of the free miner's certificate, already referred to, appellant seems to have been recognized pursuant to an Order-in-Council bound up with a Dominion statute for 1898, on p. 39 of which the interpretation clause gives the following: "'Free miner' shall mean a male or female over the age of eighteen but not under that age, or joint stock company, named in, and lawfully possessed of, a valid existing free miner's certificate, and no other." . . .

"'Joint stock company' shall mean any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada." The law of England relating to civil and criminal matters as it existed on July 15, 1870, was brought into force in the North-West Territories subject to certain exceptions, and the law in said territories continued in the Yukon by the statute 61 Viet. ch. 6, setting it apart saving also some exceptions.

Hence the English rule of law by which foreign corporations are by the comity of nations recognized, I presume must prevail, until the contrary is shewn.

No Dominion Act is shewn prohibitive of any provincial incorporation doing business in the Yukon. If such a purpose ever existed it was quite competent for the Dominion to have so enacted inasmuch as the Yukon is within its legislative jurisdiction. As there are many mining companies operating elsewhere than in the Yukon and by virtue of provincial legislation, I imagine the possibility of such being tempted to help develop the Yukon

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING

Idington, J.

would forbid such an imprudent policy as forbidding them. Yet we are asked to imply such from the omission in the Dominion Companies Act to provide specifically for their being licensed by the Dominion. The fact that the Y on Ordinance as already pointed out did provide for such licenses and no objection made thereto, indicates the policy of Parliament as to the Yukon as does also the above Order-in-Council.

All the foregoing claims, and possibilities thereof, are held by the Exchequer Court to have been answered by the legal effect of the following two paragraphs of the defence: "1. The respondent denies that the suppliant has now or ever has had the power either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the District of the Yukon, or to acquire any mines, mining claims or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations.

"2. Should a free miner's certificate have been issued to the suppliant the respondent claims that the same is and always has been invalid and of no force or effect—that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate." And the said petition has been dismissed.

The learned trial Judge assigns as reason for said dismissal, the answers given by the majority of this Court in the *Companies Case*, 48 Can. S.C.R. 331, 15 D.L.R. 332.

With great respect I do not think that position is tenable unless by first forming an opinion which the learned trial Judge disclaims. If a person approaches the problem of ascertaining what the said Judges meant with the preconceived opinion that a limitation is necessarily implied in appellant's charter, or in any other provincial charter, then his conception of what the majority had agreed in is possibly warranted, but not otherwise. However, as expressed by the Court above, these opinions bind no one. And unless approached in the way I suggest there is not a majority maintaining the view the learned Judge acts upon.

On the other hand this Court had decided in the concrete case of the *C.P.R. Co.* v. *Ottawa Fire Ins. Co.*, 39 Can. S.C.R. 405,

against the view which the learned trial Judge adopts as that of this Court. True in that case, if the refusal of the late Mr. Justice Girouard to express an opinion is counted as against what seems to have been the opinion of three members of the Court, it would then be an equally divided Court and the appeal resting upon the like contention set up herein failed. In such a case in appeal the negative thereby established the rule of law binding it for the future, for whatever it may be worth.

It is not for the mere triviality of the marshalling, so to speak, of judicial opinion in this Court with which I am concerned. It is the fact that the seat of the Dominion Government is in Ontario, the home of appellant and that the transactions in question herein took place with that government there and by virtue thereof, and that the appellant paid moneys to respondent which at all events it is entitled to recover back on the principle this Court almost unanimously followed in the said case. More than that, the same principles as supported by a majority of this Court in that case would, I submit, entitle appellant to take an assignment of a lease and of a claim such as those parties had under whom appellant claims. How far the facts would have carried the matter and entitled the appellant to relief I cannot say.

It is to be observed further that the matter of a contract being *ultra vires* and hence unenforceable is not the same as one to be held void by reason of what may more accurately be described as illegal. From the latter nothing can spring entitling a plaintiff to recovery. There may arise herein such rights as to be cognizable by the Court in order that justice may be done. Indeed, in the said case of the *C.P.R. Co.* v. *Ottawa Fire Ins. Co.*, 39 Can. S.C.R. 405, the right was asserted alternatively by the plaintiff to a recovery of the premiums paid, and that right was maintained by the opinion of the judgments of the Chief Justice of this Court and Mr. Justice Davies, though holding the contract in question *ultra vires* of the defendant company. In this case the recovery sought was not limited thereto, but I apprehend the greater might well have been held to include the less if that was all the suppliant had been found entitled to.

It hardly seems right (or indeed consistent with what one should expect to find following that decision) that the Crown

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING

Idington, J.

having recognized the standing of the appellant and taken its money when denying appellant's capacity to pay, should yet refrain from at least tendering so much amends. Moreover, the opinion of Mr. Justice Davies, concurred in by the Chief Justice, recognized the possibility of a provincial incorporation being entitled, in the way of that which might be found ancillary to its business, of going beyond the boundaries of the incorporating province and thereby acquiring rights of property and rights of action arising out of such contracts as it may thus have engaged in. (See p. 431 of the report of that case.)

What the range of possibilities may be of putting into operation such a view, I do not intend to attempt to define. Certainly the acquisition by assignment of the leases and agreements to the company do not seem necessarily excluded therefrom. Exploration was one of the objects written in this charter and as incidental thereto there are specified many things it is permitted to do in the way of acquisition. The ultimate aim of such exploration and that incidental thereto doubtless was gain.

Proceeding upon any and all of the foregoing grounds and having regard to these results of a concrete case in this Court, I most respectfully submit that the petition should not have been dismissed.

Passing these considerations let us come to the broader issue presented by the denial of the inherent capacity of any provincial corporate company going beyond the territorial limits of its parent province, either to contract there, or acquire there, property or rights of any kind, serving its uses in pursuit of its objects. Such companies are incorporated by virtue of the power in sub-sec. 11 of sec. 92 of the B.N.A. Act, expressed as follows: "The incorporation of companies with provincial objects."

Such a view as involved in that denial I rather think was never presented in any Court in Canada till the *C.P.R. Co.* v. *Ottawa Fire Ins. Co.*, 39 Can. S.C.R. 405, case, already referred to. Assuredly the contrary view was acted upon for forty years, to such an extent as to involve in the aggregate enormous sums of money in the way of contracts, by and with companies, which must be held *ultra vires* and void, if the contention set up should prevail.

A microscopical examination of the phrase "provincial objects" cannot help much.

It is to be observed, however, that the word "objects" had been used prior to said Act, both in the English Joint Stock Companies Act of 1862 and the Canadian Act, in ch. 65, sec. 1, of the Consol. Statutes of Canada, as an apt description of what by the articles of association must form the basis of incorporation in either case respectively falling thereunder. And the word "provincial" can be given full force and effect, in the way I am about to submit, without further qualifying or restricting the well known use of the word "objects" in relation to companies so as to produce something as curious as contended for.

No one pretends the whole item No. 11 can apply to anything relative to the purposes, aims or affairs of the government or its direction of the public institutions of the province, which are *primâ facie* the only "provincial objects" as such. Counsel for the Dominion in the *Companies Case*, 48 Can. S.C.R. 331, 15 D.L.R. 332, by introducing history, let us see how the unhappy phrase was begotten. If permissible to refer thereto, I have recorded it in pages 362 and 363 of 48 Can. S.C.R., containing the report of that case.

Is there another possible meaning of the phrase "provincial objects"? Seeing it is an incorporation of companies that is designated it can surely mean nothing else than a provision for the incorporation of persons likely to develop the business activities of any kind seeking such development in any province. Does that necessarily imply that the business in any such case seeking development is to be confined in all or any of its operations within the territorial limits of the incorporating province? Surely such a limitation is and always has been since before the B.N.A. Act, something quite inconsistent with the requirements and expectations of business men looking to commercial success.

But why should we suppose it was by the word "provincial" intended to engraft upon each provincial incorporation of a company the limitation that it could not transact any business beyond the limits of the incorporating province? Those provinces which negotiated and arranged for this creation of a

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington, J.

federal system and thereby determined what as result thereof should appear in the Act, had each up to its enactment coming into force, absolute power over the subject of the creation of incorporate companies. It is somewhat difficult to understand why they should be supposed to have intended to surrender that power essential to their local prosperity save in so far as necessary to facilitate the furtherance of the purpose had in view. Can it fairly be said that such extreme limitations and restrictions as argued for herein were so necessary? Was there not something else to be guarded against?

In assigning the control of property and civil rights in the provinces to the exclusive jurisdiction of provincial legislatures which would impliedly carry with it the right of incorporation, it may have been thought that the power of incorporation relative to the subject matters assigned to the Dominion might be impaired, or indeed render it necessary for its Parliament to look to the province possessed of such far-reaching powers, relative to property and civil rights, to aid it in that regard. To have thus by any possibility impliedly rendered Parliament sub-servient to the will of any legislature, would have been embarrassing.

Again, it may have been conceived undesirable that there should be the possibility of any conflict between the provinces by reason of one asserting as of right the power over or against another to invade its territory against its will, by any such legislation relative to companies. That view was upheld later by Ministers of Justice for the Dominion, as will presently appear.

By framing the enactment as it is, these, and possibly other contingencies, were averted and the general rule of private international law (which I submit was well known) relative to the recognition of corporations abroad by virtue of what has been called the comity of nations, was left to work out the solution of the question; as it has been in each individual case for nearly half a century with great benefit to all and detriment to none.

Some such reasons, as well as the desirability of marking the contradistinction between the provincial corporations, which ought not to have for their objects any of the subject matters

assigned to the Dominion, and Dominion corporations, or such of them as relate to any of the subject matters assigned to the exclusive legislative jurisdiction of the Dominion, one can understand as having been deemed, if not necessary yet desirable, to facilitate the working out smoothly of the scheme as a whole. But why should that necessity have reached to the wholly unnecessary exclusion of trading either with the mother country or its other colonies or the United States or any other foreign country, as has been done for many years by provincial companies.

In short, why should it be supposed to have been intended to render trading by provincial companies impossible?

The scheme of the Act was primarily to arrange for the federal union of four or five provinces until then having very large powers of self-government. The framers thereof followed the example of the United States constitution and its method of assigning very large powers of legislative or administrative control to the governments to be created, by merely specifying the subject matter over which such powers were to be exercised, without elaboration of how; and in like manner prohibiting in terse terms the exercise of power over other subject matters.

They departed, as experience had then dictated in a marked degree, from the substance of the model. All I here desire to press is for a realization of the fact that they made the best use they could, under the circumstances, of such a model, endeavouring to avoid rocks ahead, while trying to cure the ills the provinces laboured under.

Incidentally thereto it is not conceivable that they shut their eyes either to the commercial necessities, to which I have already adverted, or to the history of the development of the recognition of corporate capacity both in the United States and elsewhere, when transacting business beyond the limits of the corporate-creating state. That question had theretofore, both in England and Canada, as well as in the United States, received much consideration. In the United States the question had also been considered with relation to the constitutional limitations of the incorporating state as it is now presented relative to the powers of the provinces.

The discussion it gave rise to in the United States was long and keen. It culminated there in the decision of the case of

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington, J.

Bank of Augusta v. *Earle*, 13 Peters 519, decided in the United States Supreme Court in 1839, which stands good law to-day.

The argument there as here was that the company should not go beyond its home state to do business, and the limitations of state powers were also relied upon. That eminent and able Court held it could go wherever the comity of state or nations might permit.

The very different question, of a foreign company, by its constitution inherently incapable of going abroad, had been presented to our old Upper Canadian Court of Queen's Bench in the case of the *Genesee Mutual Ins. Co.* v. *Westman*, 8 U.C.Q.B. 487. Indeed, some *obiter dicta* therein would go further, but the day was young then. Shortly after Confederation there arose in same Court, the case of *Howe Machine Co.* v. *Walker*, 35 U.C.Q.B. 37, where the issue of the right of a foreign corporate company to do business in Canada was likewise presented and the right maintained with the proper distinction made between that and the *Genesee Case*, 8 U.C.Q.B. 487. This was in 1873.

The decision is only of significance here as indicative of the view then taken and thus likely to have been held six years earlier by those framing the clause now in question. The English view is presented by the authorities collected in Westlake, at sec. 305 of his work on Private International Law.

Is it conceivable that men, presumably holding the views of English law as thus expressed by either Canadian or English authorities, and knowing how that had been applied and worked out at that time under a federal system, deliberately designed the creation of something new and wonderful to be operated with under the Canadian federal system? I cannot assent to such a proposition. Those men had sense, and some of them, wide experience and great grasp of public affairs. To say that they had not in view the daily experience of Canadian trade and industries before their eyes and the futility of providing therefor by a new kind of corporate creature which it would take forty years to discover, is paying them a compliment which, I submit, is undeserved.

The relevancy of all this is that the instrument under consideration is not an ordinary contract or Act of Parliament, but

one which if we would rightly understand it must be read with the eye of the statesman measuring the future range of its effective yet harmonious operation in all its parts so as to make each and all productive of the best results when put in actual practice.

Then there is another practical aspect to be considered along with and consistent with that general survey of the question from a legal or constitutional point of view. It is this: In each of the provinces there are industries peculiar to its people. The adaptation of legislative contrivances needed to aid such people in promoting the development of its resources, whether of an agricultural, mining, fishing, lumbering, mercantile or mere financial (not banking) character, may have to be suited thereto and to the peculiar character or habits of life, of the people of the province. That which would meet the wants of Nova Scotia might be quite unsuited to the requirements of Ontario or that suited to either fall short of promoting the welfare of the farmer on the western plains.

The promotion of any scheme needing legislation for its assistance, is most likely to bear speedy results when an appeal is made to those most directly interested. The vast extent of Canada and diversity of its natural resources, render in many cases the promotion at Ottawa of legislation only subservient to local needs, almost an impossibility, and even where not impossible, very likely to lead to something less efficacious than what might be obtainable if a local legislature were appealed to.

Such considerations or something like thereunto, no doubt were present to the minds of the framers of the Act and of this provision. And it was to give ample scope to the legislative activities of each province in relation to these provincial objects that it was designed.

Having regard to the situation of the then Canadian provinces, and what was then present to the minds of those acting, can anything more absurd be conceived, than to suppose that those men realizing such a situation and looking to the future, deliberately planned that the incorporating power to be given the legislatures of the provinces for such objects as I have outlined, should be hampered by such limitations as are contended for herein, and never had existed elsewhere in the constitution

CAN.
S. C.
BONANZA CREEK GOLD MINING CO. v. THE KING.
Idington, J.

of any legislature to which the like subject matters had been intrusted?

A company incorporated with the objects of exploring as indicated in appellant's charter might seek something in the United States or Mexico, for example. That is conceivable as a business enterprise. Why should its promoters in Halifax, Toronto or Victoria have to go to Ottawa at a loss of time and money for such authorization as needed to obtain that common every-day business convenience and contrivance used by business men?

What difference can it make whether incorporated at Toronto with a home there, or at Ottawa with a home there? Neither province nor Dominion can give it any right or power to go into those countries. All either can do is to give it a form or fashion by creating the legal entity by means of which men may co-operate for that object had in view. Beyond that in a foreign state it must depend entirely upon the comity of the nation concerned whether or not it can do anything.

The Ontario Legislature has always, I think, abstained from ostensibly proposing such ventures abroad. Its companies have been incorporated for a specific object or objects relative to some specified sort or kind of business and within that object in going abroad they have depended for effective recognition entirely upon comity.

In this case the appellant was recognized not only directly by the respondent by virtue of the transactions entered into between them, but also by the local executive of the Yukon.

It is said, however, that the words "provincial" so plainly indicates that it was designed that such corporations should not carry on business beyond the province that there is an implied limitation in the capacity of each precluding it from availing itself of the advantages of recognition by virtue of the doctrine of comity. It is hard to get two to agree exactly in what that proposition does mean. If it ever had been conceived, as once suggested in argument, but which no one has been bold enough judicially to affirm, that nothing could be done or be contracted for being done outside the territorial limits of the province, the situation of each province and the commercial relations of

its people with those of the other provinces and of countries beyond the Dominion, were and remain such as to forbid a moment's serious consideration for such a curious proposition. Besides, such a simple conception if ever entertained could have been concisely stated.

I, therefore, discard once and for all this very improbable conception of territorial limitations as ever having been intended to rest in the language used.

Let us then proceed to consider the theory of the implied limitations restricting business within lines including only that which may be ancillary to the main object and be an "incidental necessity" thereof as, for example, the buying abroad of raw material, etc., and possibly the marketing of a company's goods, without regarding other refinements which might be suggested, and see how it will stand the practical test.

If we apply our common knowledge of the actual facts in an attempt to realize what such corporate activity means, we may find how impossible it would be to make the theory a workable success.

The actual operations of these industrial concerns, of provincial origin, daily furnish us with illustrations.

Of the vast and ever-increasing volume of business done by them with people in other provinces or abroad, more than one-half of what it represents is an actual carrying on, by the agents of such companies, of business outside the province. The production of the article is but a part of the business operation in order to reap the gain for which the corporation was created.

If, as has been suggested, the company has the right, of necessity, to go abroad for supplies, then the division of the carrying on of the business, within and without the province, is such that the part done outside the province greatly preponderates over that done within.

In such cases the company has to acquire abroad its raw material, arrange there for its importation, and then when manufactured, has often, of the like necessity, to send it again abroad to be marketed. Where, in such case, if not as I suggest, is the major part of the business operation carried on? And where has the money been got to carry it on, and how? Has the

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington, J.

business man as he ventures on each step of this process to stop and ask himself if he is within the incidental necessities of his corporate business? Has his foreign customer also to say "stop and shew me, not how to answer the easy old formula of whether the transaction is within the scope of the objects of your company; but how to solve the queer puzzling riddle of what some lawyers in your country of curiosities may say about the actual 'incidental necessities'" of the company in relation to the proposed transaction. And he might, if a foreigner of deep thought, ask what "necessities" can mean anyway. Perhaps he might wisely conclude the transaction proposed was not a necessity for him.

Then the poor obfuscated, beaten Canadian travelling homewards might well ask himself why any one ever conceived he was such a fool as to try to do something that was not necessary for his business.

Again, the mining and lumbering industries of some provinces and the development thereof are parts of the development of the natural resources therein and of the local Crown domain. These having thus peculiarly close relations with the local governments, who better fitted than these powers to determine how the corporations engaged therein are to be created and controlled?

We also know from common knowledge that the miner has often to send his raw product abroad to be treated and then marketed, and in such cases bargains have necessarily to be made abroad involving a great deal more expense and variety of business transactions than the mere expense of digging it out of the earth. In the same way the incorporated lumberman may, indeed often does, find his timber in one province and his mill in another and his market in a third province, or abroad, and occasionally he has to be an importer from abroad of his raw material.

The Courts in which a corporation has appeared as suitor or defendant always had, if its status was in question, to determine whether or not the business involved was of the kind which it was incorporated to transact. This new view of "incidental necessities" in substitution of primary objects as the measure of

capacities, presents new puzzling possibilities hitherto unimagined.

What a fine field for the ingenious mind to roam over and dream in! True, all these difficulties may be averted by practically blotting out the item No. 11 of the section in question and resorting entirely to the Dominion powers. But again, was that the meaning and purpose of the item?

Take another mode of testing this alleged limitation. The province is given by item No. 10 the exclusive power of legislation relative to local works and undertakings except those of an interprovincial character as specified. Railways and other works have been constructed by companies which had to rest, I submit, on no other authority than this item No. 11. It is all comprehensive or nothing. It will not do to say the grant of power to incorporate might be implied in No. 10 itself, without resorting to No. 11. I admit the province as such could undertake such works.

I am referring to the numerous cases of railroads and other works constructed by companies empowered by a legislature to do so and incorporated by it for that purpose. I submit such companies rest upon this very item No. 11 or nothing. For if implications relative to "companies" are to be permitted in item No. 10 then likewise does No. 13, "property and civil rights" carry in such case the like implication and so would end all this contention. It seems generally conceded that this specific enactment excludes such implications so far as "companies" are concerned under provincial legislation and if so I do not see how they can exist relative to No. 10 any more than independently under No. 13.

Now these companies, beyond question, have gone abroad for almost everything, including the money got from stock-holders and bond-holders as well as rails and all else. Who ever thought they were acting *ultra vires?* Are their contracts void?

And indeed no companies can be incorporated to execute such local works or undertakings save by local legislatures unless of the kind declared by virtue of sub-sec. (*c*) of sec. 10, to be for the general advantage of Canada or of two or more provinces.

The enactment in item No. 11, by its terms does not express

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington, J.

any such thing as urged; then why, with such obvious consequences of so reading it as abound on every hand, adopt that instead of the way it has been read so long?

With the limitations sought to be implied in such charters they may mislead and must be of little use. Not only that, but they must obviously conflict with the true working out of sec. 121 of the Act, in its true spirit so far as the incorporated producer is concerned.

Moreover, what must never be lost sight of, there is the fact, that the interpretation which I submit should prevail, has in actual practice been so long observed and acted upon and so much depends thereon that even if otherwise doubtful it should be upheld.

The products of our industrial activities of every kind have been and still are handled by provincially incorporated companies and sold abroad and commercial exchanges effected. Are these transactions all *ultra vires* and these companies engaged in doing so liable to be met by the foreign dealer with a plea such as respondent sets up herein? These companies have often exchanged such products abroad for other goods, or bought goods abroad with the money so got. Are they in any or all of these transactions liable to be met by such a plea?

And perhaps quite as frequently they have been, by the credit thus acquired, enabled to buy goods on credit; and are they in such cases entitled to say they were not liable as they were acting *ultra vires* in thus abusing their credit?

They have borrowed money abroad by virtue of direct contracts or manifold indirect transactions entered into in London or elsewhere. Are they to be permitted to answer the claims of such creditors by a plea of the kind we are asked herein to give effect to? And what of the shareholders who have put their money into such concerns as like as possible in principle to the venture herein involved?

Then the authority of Ministers of Justice insisting upon the exercise of the veto power is relied upon. Supposing each and every one of these reports of such Ministers had stated that the Act must be so interpreted as counsel for the Crown desires, are we to abandon our functions?

These Ministers, however, never ventured to enforce their opinions, if to be read in the way counsel suggests they do read, else we should have had the matter tested long ago in ways open to them. But the reports do not so far as I have seen bear that construction he puts upon them. Time and again legislatures have apparently been alleged to have exceeded their authority by passing bills which expressly provided for the company thereby chartered acting abroad or in other provinces than its own. The Lieutenant-Governor in each of many such cases was told the bill would be vetoed unless withdrawn, and I presume each of these requests was duly complied with. It is not necessary here to express any opinion whether or not that cautious view was right or wrong.

That attitude towards such legislation is a long way from maintaining what is contended for herein. I respectfully submit that it is only by a confusion of thought that what the Ministers in question then forbade must necessarily prohibit those incorporated companies with specified objects, suitable to the commercial needs of those in one of the provinces, from entering into contracts outside the province for the due execution of the purpose for which they were created.

For example, there is nothing inconsistent in the late Sir Oliver Mowat as Attorney-General or Premier of Ontario, permitting scores of Ontario companies when so created to grow and flourish by reason of their foreign connections and trade, and his insisting later as Minister of Justice at Ottawa, that if a provincial legislature should expressly enact that a company was entitled to carry on business in another country or province, it was acting improperly and possibly *ultra vires*.

This appellant is only a small concern following, no doubt that practice which grew up under the eye of that able man who so long and so successfully managed provincial affairs in and for Ontario. And he is now curiously quoted in argument as if, when acting as Minister of Justice, condemning it.

Counsel for respondent addressed to us an argument of some length based upon the recent decision of the Judicial Committee of the Privy Council in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, from British Columbia.

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Idington, J.

I am unable to understand the exact relation supposed thereby to exist between that long sought for but belated recognition of the power resting in item No. 2 of sec. 91 of the B.N.A. Act assigning the regulation of trade and commerce to the Dominion, and the question of the quality of the capacity inherent in a provincial corporation to receive recognition outside the creating province. In an appeal to Parliament, to exercise its power over the subject so assigned to it, and to enact legislation which would curb the aspirations of the provinces and their creatures, that decision might be used to justify such legislation. It strikes me the argument is submitted to the wrong Court. Meantime until Parliament has legislated in that direction if it ever does, we must continue to keep within our judicial functions. The practically minded might say that decision renders needless any disturbance of the long recognized capacity of provincially incorporated companies either herein or otherwise.

Indeed, counsel presented, briefly but stoutly, mining as a trade and hence within the sphere of the operative effect of that decision. I hardly think such a view is necessarily to be attributed to their Lordships whatever may grow hereafter out of the said decision in the way of centralizing our Government.

Nothing remains eternally stationary. Let us be patient and wait upon the evolutionary process which may spare us the probably painful consequences of rashly accepting counsel's theory of trade and commerce.

I must adhere to the view I have always taken, and maintained in the cases above cited, of our constitution as set out in the Act; that its aim and that of the framers thereof was to eliminate friction as much as possible and yet give freedom a chance; and trust to the results of experience to be gotten thereby. It was a distinct recognition of how utterly astray domineering minds may be inherently prone to treat the rest of mankind as children when resorting to needlessly repressive measures. In that converse spirit of freedom every case presenting problems, arising under said Act, for judicial solution should be weighed and the Act worked out accordingly in harmony with the ideals of those who framed it.

I do not see how the recognition of provincial company cor-

porations as possessing the usual qualities of and capacities of other business corporations can fail to subserve what the Act so read was intended to subserve, but I do see how any of the other interpretations contended for will materially tend to defeat such aims, intentions and purposes.

That view which I maintain, in no way extends to an interference with the very wide field of possible corporate activity, which may fall within the range of any of the subject-matters assigned to the exclusive jurisdiction of the Dominion, and needing the exercise of corporate power to give efficacy to the enjoyment thereof.

It is not germane to the issues raised herein to enter upon a discussion of the limits of the Dominion's incorporating power, further than to point out and illustrate how, relative to the said issues, there is no conflict between that and the exercise of the ordinary corporate capacity by the provincial companies.

And as to the rights of other provinces, they may be quite within their rights in refusing recognition if the incorporating province attempted what it should not. Even if they should stupidly seek to curb or curtail the commercial activity and enterprise of a neighbour (unless so far as in conflict with section 121 to which I have referred) experience, and the power of public opinion thus engendered, will rectify such mistakes, if any. With every desire to condense, so far as consistent with perspicuity, I find this opinion already too long drawn out. Yet the neat point involved herein is within a very narrow compass. I have attempted by manifold illustrations to exemplify how unworkable the contentions set up might, if successful, prove and how little in harmony they are with the probable conceptions of the framers of the Act. The extreme importance of what may be involved in the ultimate decision and the desire to make that clear and meet the varying shades of opinions put forward, can alone justify such length.

Whether such companies may in transactions involving the sanction of the shareholders or board of directors got beyond the confines of the province be held, as according to some American decisions in like cases, inherently incapable of deal-

CAN.
S. C.
BONANZA CREEK GOLD MINING CO. v. THE KING.
Idington, J.

ing with such transactions outside the province is entirely another question than here involved. In the alternative view as bearing upon the present case I may make an observation or two.

The case of *Comanche County* v. *Lewis*, 133 U.S.R. 198, at 202, cited to us by appellant's counsel, was decided by an eminent Judge holding that the mere recognition by the legislature of an alleged corporation which might not otherwise have been held validly constituted, entitled that doubtful creation to recognition by the Courts and, therefore, liable to be sued and judicially dealt with.

That decision typical of what in many other cases has been treated as recognition of *de facto* corporations, suggests a good many curious questions more or less bearing upon one aspect of what we have in hand.

Is the power of incorporation so existent in the Crown in right of the Dominion as to enable it to incorporate without direct legislative authority relative thereto? If so what is the effect of the recognition by the Crown of the appellant in these transactions now in question? Re-incorporation can exist, indeed, has more than once been legislatively effected. Can that be effected by the Crown? What more is necessary therefor than recognition? I express no opinion, and, indeed, have none in relation thereto, or to the point made in the pleading of recognition and otherwise in argument, but not based on the suggestion I make. It may be that want of assent to re-incorporation is complete answer to such suggestions.

That branch of the case was not thoroughly argued and, therefore, I have formed no opinion upon it. The point is not to be disposed of by the common-place that the Crown is not bound by any estoppel.

The honour and dignity of the Crown are, I respectfully submit, deeply concerned; and the principles just now adverted to, or the range of the Exchequer Court jurisdiction which remains an unexplored field so far as argument in this case is concerned, ought to be fully considered if my view of appellant's rights are non-maintainable, in order that justice may be done.

In the manifold ways I have pointed out there has been that recognition of the appellant which entitles it, if possessed of the inherent capacity which I hold it has, to succeed without resorting to these considerations.

The appeal should be allowed with costs and that part of the proceedings below, involved in this disposal of the first two paragraphs of defence, and the case be remitted to the Exchequer Court for further trial and disposal of remainder of the case.

DUFF, J.:—Two minor points were taken by Mr. Newcombe which I shall dispose of first. "The regulations touching the disposal of mining locations to be worked by hydraulic process" approved 3rd December, 1898, which admittedly govern the appellants in respect of the rights in question in this action provide, by paragraph 4, that one of the conditions of the right to acquire any such location is the obtaining of a free miner's certificate under the "regulations governing placer mining." Paragraph 1 of the regulations governing placer mining then in force authorizes the issue of free miner's certificates to persons over 18 years of age and to joint stock companies, and "joint stock company" is defined in the interpretation clause as meaning "any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada." Mr. Newcombe's contention is that "Canadian" here means "Dominion" and "Canadian charter" means an Act of the Parliament of Canada or an instrument emanating from the Government of the Dominion or deriving its validity from a statute of the Dominion Parliament. I think this contention is not well founded. It is no doubt proper to read the adjective "Canadian" as describing the kind of charters intended to be included by reference to the authority from which they emanate; and "Canadian" in this connection may doubtless be read in two different ways. It may be treated as indicating the relation of the authority to Canada—as an entity—to the Dominion of Canada. On the other hand it is quite capable of being read as embracing every lawful authority in that behalf exercised within the territorial limits of Canada. Reading "Canadian" in this latter sense "Canadian charter" would mean a "char-

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Duff, J.

ter'' emanating from any lawful authority in Canada—capacity to acquire the right to pursue the business of mining in the Yukon being, of course, assumed. I think this is the meaning that ought to be attributed to it. The proposed construction would exclude not only companies incorporated under provincial authority, but a company incorporated by Yukon authority or by the North-West Territories Council before the erection of the Yukon into a separate territory. It would likewise disqualify companies incorporated by the provinces of Canada before Confederation, by British Columbia, for example, before 1871. These consequences appear to me to afford a sufficient reason for rejecting the proposed construction.

The other contention is that by force of 61 Viet. ch. 49, an Act of the Parliament of Canada, the carrying on of mining operations in the Yukon by any joint stock company or corporation excepting companies or corporations owing their existence to some Act of the Parliament of Canada or licensed under the statute is prohibited. The statute is permissive only. It does not contain a single word expressing prohibition. Nor can I find a single word in it which seems to imply a prohibition such as that contended for. If, indeed, there were any implied prohibition it is difficult to understand upon what ground the implication could be limited in the way suggested. If this statute is to be read as *conditionally prohibiting* the carrying on of mining operations, as it most certainly does under the construction proposed, by a company incorporated by the old Province of Canada, or by the Province of British Columbia before Confederation, or by a ''chartered company'' in the strict sense, such, for example, as the Hudson's Bay Co., it is difficult to imagine what principle can justify such a construction which would not equally involve a like prohibition as against companies existing at the time the Act was passed and owing their existence to some Dominion statute. Any distinction between the two classes of cases could rest upon nothing in the statute itself, but must be founded upon mere speculation as to the policy of it. As to the point of substance.

The specific authority conferred by sec. 92 (11) (the incorporation of companies with provincial objects) in relation to the

subject there dealt with cannot be enlarged by reference to the more general terms of sec. 92, items 15 and 16, "property and civil rights within the province" and "matters merely local and private within the province." (*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330; *C.P.R.* v. *Ottawa Fire Ins. Co.*, 39 Can. S.C.R. 405, at pp. 461 and 462.) This appeal turns upon the answer to the question: What is the effect of the qualification "with provincial objects" as regards the capacity of the appellant company to enter into the contracts which the appellant company's suit is brought to enforce and upon the validity of those contracts? The word "company" obviously does not embrace every kind of corporation. (See items 7 and 8 of sec. 92 and sec. 93.) But the appellant company is indisputably a "company" within the meaning of the clause. "Provincial" means, I think, provincial as to the incorporating province; and although it is perhaps conceivable that as regards companies formed for some communal or governmental purpose, the word "provincial" might be read as having reference to the province as a political entity, I think that as regards companies formed for the purpose of carrying on some business for private gain it must be read as having reference to the province as a geographical area.

It results, I think, from a series of dicta (which, if they have not the force of decisions, are still of such weight that it is my duty to follow them) that the undertaking or business of such a company and the powers and capacities conferred upon the company must when considered as an entirety be so limited that the "objects" of the company fall within the description "provincial" in the sense mentioned. See *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, at pp. 117, 118; *Colonial Building and Investment Association* v. *A.-G. of Quebec*, 9 App. Cas. 157, at 165 and 166; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330. I think that whether the "objects" of a company under a given constitution or charter are "provincial" in this sense (or whether the possession of capacity to enter into a given transaction is compatible with the condition that the *company's "objects" shall be "provincial"*) is a question to be determined upon the circumstances of each case as it arises; and

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING

Duff, J.

I doubt whether upon this point any more specific test than that supplied by the language of sec. 92 (11) itself can usefully be formulated now.

The appellant company's title to relief rests upon the proposition that the letters patent (by which it is incorporated) granted under the authority of the Ontario Companies Act authorizing it to acquire mines and to carry on the business of mining generally without restriction as to locality do confer upon it capacity to acquire the right to carry on the business of mining in the Yukon Territory or elsewhere under the territorial law as established by competent authority or that such capacity has been derived from some other source. I think the possession of such capacity does not flow from the letters patent on the ground that the business of mining (*i.e.*, working mines) generally without restriction as to locality is not a business that is "provincial" as to the Province of Ontario, and that a company having as one of its objects the carrying on of such business would not be a company "with provincial objects" within the meaning of sec. 92 (11); and that consequently letters patent professing to create a company to carry on such business could not be validly granted under the Ontario Companies Act. I do not think it follows as a consequence that the letters patent of the appellant company are void, but only that the description of the objects of the company in the letters patent should be read as subject to the restriction necessarily imported by the reason of the overriding enactment in sec. 92 (11). It follows that the appellant company, a company incorporated pursuant to the provisions of the Ontario Companies Act to carry on the business of mining, must be deemed to be a company created with the object of carrying on that business only as a "provincial" (*i.e.*, Ontario) business in the sense mentioned.

What then is the effect of this restriction as regards the validity of the contractual engagements entered into between the appellant company and the Crown upon which the appellant company's suit is based? It has never been doubted in this country that the doctrine of *ultra vires* applies to companies incorporated under the Ontario Companies Act and that it does so apply was not disputed by the appellant's counsel and indeed

it is not arguable that the reasoning of Lord Cairns in *Ashbury Railway Carriage Co.* v. *Riche*, L.R. 7 H.L. 653, by which His Lordship reached the conclusion that the doctrine governs companies formed under the Companies Act, 1862, does not apply to the provisions of the Ontario Companies Act. It results inevitably that the company had no capacity to enter into the contracts upon which the action is brought unless some additional capacity over and above that imparted to the company by the Ontario Companies Act has been acquired by it from some other source.

It does not appear to me to be necessary to consider for the purposes of this case whether the Yukon Council or the Dominion Parliament from which the Yukon Council derives its legislative capacity has the power constitutionally to legislate with regard to a company "incorporated" by a province "with provincial objects" in such a way as to change fundamentally its corporate nature and capacities. Our attention has not been called to anything in the Yukon law which, properly construed can, in my opinion, be held to profess to authorize extra-territorial companies to carry on within the territory any business which such company would otherwise be disabled from carrying on by reason of restrictions upon its capacity laid down in its original constitution. The ordinance relating to the registration of extra-territorial companies, cannot, I think, be held to contemplate any such enlargement of the corporate powers of companies taking advantage of its provisions.

This appears to be sufficient to dispose of the appeal. But an observation or two may be proper upon the contentions advanced on behalf of the appellant company.

First, it is argued that, assuming it would be incompetent to a province exercising the powers conferred by sec. 92 (11) to incorporate a company for objects other than "provincial objects" in the sense above mentioned still that clause does not necessarily subject companies effectively incorporated for "provincial objects" to the principle of *ultra vires* in such a way as to incapacitate such a company from entering into valid transactions having no relation to such "provincial objects."

The doctrine of *ultra vires* reposes upon statute (Lord Cairns

CAN.
S. C.
BONANZA CREEK GOLD MINING CO. v. THE KING.
Duff. J.

in *Ashbury Railway Carriage* v. *Riche*, L.R. 7 H.L. 653, at 658; Lord Haldane in *Sinclair* v. *Brougham*, [1914] A.C. 398, at pp. 414 and 417. See also an article by Sir Frederick Pollock, 27 Law Quarterly Review at p. 223); and not upon any theory as to the inherent nature of corporations. It is very doubtful if it applies to corporations created by letters patent in exercise of the prerogative (*Sutton's Hospital Case*, 10 Rep. 30*b*; *British South Africa Co.* v. *De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Riche* v. *Ashbury Railway*, L.R. 9 Ex. 224, at 263; *A.-G.* v. *Manchester Corporation*, [1906] 1 Ch. 643, at 651; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch.D. 674 at 685; *Bateman* v. *Borough of Ashton under Lyne*, 27 L.J. Ex. 458), and there can be no doubt that as regards companies created under sec. 92 (11) a province can limit the operation of the doctrine provided that it does not legislate inconsistently with the limitations upon its authority imported by the terms of that clause.

I find, however, two (to me) insuperable objections to this contention as applied to the present controversy: (*a*) A company having capacity to enter into valid transactions having no relation to any "object" which can be described as "provincial" does not appear to me on the assumption above stated to be a "company with provincial objects" within the meaning of sec. 92 (11), and (*b*) assuming a province to be competent to limit the application of the doctrine of *ultra vires* in the way supposed, still there remains the difficulty that if the "objects" of the appellant company as stated in the letters patent are read as the carrying on of the business of mining as an *Ontario business* and not without restriction as to locality (as they must be read to bring the "objects" under the category "provincial") then since it is not disputed that the doctrine of *ultra vires* applies to companies incorporated under the Ontario Companies Act (and it is self-evident as I have said that Lord Cairns' reasoning in *Riche* v. *Ashbury Railway Carriage*, L.R. 9 Ex. 224, applies to that Act) the appellant company must be held to possess only such powers and capacities as have relation to the "objects" so construed.

2nd. It is argued that "with provincial objects" does not define the class of companies in respect of which the legislative

powers conferred upon the provinces by sec. 92 (11) are exercisable. The construction put upon sec. 92 (11) according to this contention is this: The clause is read as dealing with two subjects (*a*) the incorporation of companies, (*b*) the "rights" as distinguished from the corporate capacities with which the incorporating province may endow the company when incorporated. Such "rights" it is said, must fall within the designation "provincial objects," but that restriction has nothing whatever to do with corporate capacities which may include every capacity (excepting capacities that by section 91 (enumerated heads) can only be conferred by the Dominion) with which an incorporeal subject of rights and duties can be endowed. Any "object" according to this interpretation is "provincial" which can be carried out within the limits of the province provided at all events that it is not one committed by the B.N.A. Act to the exclusive control of the Parliament of Canada. While in this view the province cannot invest the company with the right to carry out "objects" which are not "provincial" it can nevertheless endow the company with capacity to acquire rights and powers having no relation to such "objects" from any other competent legislative authority.

I have already indicated certain passages in the judgments of the Privy Council which appear to me to be incompatible with this construction and to which I think effect ought to be given in this Court whether they strictly possess or do not possess the authority of decisions.

As may have been collected from what I have written above I think that, fairly read, the observations referred to mean, that the limitation expressed by "with provincial objects" has reference to the business or undertaking the company is capable under its constitution of carrying on, and the powers and capacities with which the company is for that purpose endowed, looked at as a whole; in other words, that by force of the phrase "with provincial objects" such a company is affected by a "constitutional limitation" which makes it incapable of pursuing "objects" not "provincial."

ANGLIN, J.:—Two questions are presented in this case: (*a*) Whether the appellant company, incorporated by the Province

Anglin, J.

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING.

Anglin, J.

of Ontario to carry on mining operations without territorial limitation, has capacity to avail itself of the sanction of any competent authority outside Ontario to operate within its jurisdiction.

(*b*) Whether the appellant company was duly sanctioned to acquire and operate mining properties in the Yukon Territory by authority competent to confer those rights.

On the first question, but for a misconception by the learned Judge of the Exchequer Court of what I there stated—as inexplicable to me as it is unfortunate—I should merely refer to my views expressed in the *Companies' Case*, 15 D.L.R. 332, 48 Can. S.C.R. 331, p. 452 *et seq.*, as a sufficient presentation of my reasons for an affirmative answer. But, if what I said in that case is so ambiguous that it is open to the interpretation put upon it by Mr. Justice Cassels, it would seem advisable that I should endeavour to re-state my opinion in unmistakable terms. The learned Judge says: "As I read the judgment of Mr. Justice Anglin, I would infer from it that his view would also be that a company incorporated by a province for the purpose of mining would be confined in the exercise of its main functions to the province incorporating it. He does state that he finds 'nothing in the language of clause 11 of sec. 92 of the B.N.A. Act, which compels us to hold that the ordinary mercantile, trading or manufacturing company, incorporated by a province to do business without territorial limitation is precluded from availing itself of the so-called comity of a foreign state, or of a province, which recognizes the existence of foreign corporations and permits their operations in its territory."

"From this is would appear that the learned Judge is dealing with the case of ordinary mercantile trading and manufacturing companies. I would not infer from his reasons that his view would be that where the business of the company is that of a mining company, such a company would have the capacity to carry on its mining business, namely, that of mining in a foreign country." "The ordinary mercantile, trading or manufacturing company" was referred to in the passage quoted from my opinion in contrast to bodies incorporated "for the establishment and maintenance of a hospital or the building of a

railway," mentioned in the sentence immediately preceding as examples of corporations the nature of whose objects implies territorial limitation, and because in the second part of the question then under consideration a company incorporated "for the purpose of buying and selling or grinding grain" was preferred as an example. The inference that a mining company was intended to be excluded from the class of provincial corporations entitled to avail themselves of international comity by the reference to an "ordinary mercantile, trading or manufacturing company" and to be placed rather within the class of which the hospital corporation and the railway company were given as examples, seems to me, with respect, to be scarcely warranted. But, without discussing further the question whether a mining company falls within the category covered by the description, a "mercantile, trading or manufacturing company," in order to remove any possibility of future misapprehension, I shall state explicitly that the nature of the objects of a mining company incorporated by a province does not, in my opinion, involve an implication that its operations are to be confined within the limits of the province, and that, if its letters patent, or incorporating statute impose no territorial limitation, it may avail itself of the comity of another state or province.

Mr. Justice Cassels, however, proceeds to deal further with my opinion in the *Companies' Case*, 15 D.L.R. 332, 48 Can. S.C.R. 331. He says: "The second question submitted for the opinions of the Court is as follows:—

"Has a company incorporated by a provincial legislature under the powers conferred in that behalf by sec. 92, article 11, of the B.N.A. Act, 1867, power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purposes?" The answer of Mr. Justice Anglin is as follows: "Yes—subject to the general law of the state or province in which it seeks to operate and to the limitations imposed by its own constitution—but not 'by virtue of (the powers conferred by its) provincial incorporation.'" If this answer is taken by itself, I infer from it that the learned Judge was of opinion that the capacity of the corporation was limited to the province in which the business was being carried on, as he

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING

Anglin, J.

limits his answer by the words 'but not by virtue of (the powers conferred by its) provincial incorporation.' ''

Why the learned Judge should have taken this answer by itself and without reference to the reasons on which it was based can only be surmised. In the answer ''taken by itself'' I have sought in vain for anything which warrants reading the categorical answer, ''Yes,'' as ''No.'' The quoted words, ''but not 'by virtue of (the powers conferred by its) provincial incorporation','' were taken from the second part of the question being answered. The allusion—sufficiently obvious, I thought—was to the passages in my opinion where I had discussed this question and stated the grounds on which I based my affirmative answer. For instance: ''If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred on it by the law of the incorporating state, it would in my opinion be difficult to sustain them, inasmuch as 'the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed.' But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin, but upon the express or tacit sanction of the state or province in which such powers are exercised and the absence of any prohibition on the part of the legislature which created it against its taking advantage of international comity. All that a company incorporated without territorial restriction upon the exercise of its powers carries abroad is its entity or corporate existence in the state of its origin coupled with a quasi negative or passive capacity to accept the authorization of foreign states to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign state only by virtue of the recognition of it by that state. It has no right whatever in a foreign state except such as that state confers. . . .

''The provincial company is a domestic company and exercises its powers as of right only within the territory of the province which creates it. Elsewhere in Canada, as abroad, it is a foreign company and it depends for the exercise of its charter

powers upon the sanction accorded by the comity of the province in which it seeks to operate, which, although perhaps not the same thing as international comity, is closely akin to it. . . .

"When the B.N.A. Act was passed the doctrine of comity in regard to foreign corporations was well established as a rule of international law universally accepted. It had been long acted upon in English Courts and had received Parliamentary recognition. Modern law acknowledges this capacity of every corporation, not expressly or impliedly forbidden by its state of origin to avail itself of privileges accorded by international comity, as something so inherent in the very idea of incorporation that we would not, in my opinion, be justified, merely by reason of the presence in the clause of expressing the provincial power of incorporation in such uncertain words as 'with provincial objects,' in ascribing to the Imperial Parliament the intention in passing the B.N.A. Act of denying to provincial legislatures, otherwise clothed with such ample Sovereign powers, the right to endow their corporate creatures with it. *Bateman* v. *Service*, 6 App. Cas. 386, at 391. The impotency which such a construction of the statute would, in many instances, entail upon provincial companies affords a strong argument against adopting it. Had Parliament intended in the case of the provincial power of incorporation to depart from the ordinary rule by confining the activities of every provincial corporation within the territorial limits of the province creating it, it seems to me highly improbable that the words 'with provincial objects' would have been employed to effect that purpose. Some such words as 'with power to operate only in the province' would have expressed the idea much more clearly and unmistakably. Inapt to impose territorial restriction the words 'with provincial objects' may be given an effect, which seems more likely to have been intended and which satisfies them, by excluding from the provincial power of incorporation such companies as have objects distinctly Dominion in character either because they fall under some one of the heads of legislative jurisdiction enumerated in sec. 91, or because, they 'are unquestionably of Canadian interest and importance.'" How the learned Judge of the Exchequer Court, with these passages before him, reached the conclusion that the

CAN.

S. C.

BONANZA CREEK GOLD MINING CO. v. THE KING

Anglin, J.

answer given by me to the second question propounded in the *Companies' Case*, 15 D.L.R. 332, 48 Can. S.C.R. 331, meant that in my opinion the capacity of a provincial corporation, without territorial limitation expressed in its charter or implied in the nature of its objects, "is limited to the province in which the business was being carried on" (*sic*) assuming that he meant "limited to the province which granted the incorporation," I am at a loss to understand. But to remove the possibility of further misunderstanding I shall again state explicitly that a provincial corporation, not territorially limited by its letters patent or Act of incorporation, or by the nature of its objects, in my opinion has capacity, within the limitation of its constating instrument as to the character and extent of its undertaking, to avail itself of the comity of a foreign state or of another province.

The recent decision of the Judicial Committee in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, was pressed upon us by counsel for the respondent. After a careful study of the judgment in that case I fail to find in it anything which conflicts with the views above expressed. All that was there decided is that a "province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation."

Certain provisions of the British Columbia Companies Act requiring the appellant, a Dominion company "to be registered in the province as a condition of exercising its powers or of suing in the Court," were held to be "inoperative for these purposes."

"The question," says the Lord Chancellor, "is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred

INDEX OF SUBJECT MATTER, VOL. XXI., PART 2.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XXI., PART 2.

by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative."

I may, perhaps, be pardoned if I quote from my opinion in the *Companies' Case*, 15 D.L.R. 332, 48 Can. S.C.R. 331, the short passage dealing with this point (pp. 455-6): "The Dominion company, on the other hand, is a domestic company in all parts of Canada. It exercises its powers as of right in every province of the Dominion. While a Dominion company is, generally speaking, subject to the ordinary law of the province, such as the law of mortmain (*Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, at 117)—while it may be taxed by the province for purposes of provincial revenue (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 575), while it may be required to conform to reasonable provisions in regard to registration and licensing (*The Brewers' Case*, [1897] A.C. 231), a provincial legislature may not exclude it, or directly or indirectly prevent it from enjoying its corporate rights and exercising its powers within the province (*City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52; *Compagnie Hydraulique de St. François* v. *Continental Heat*, [1909] A.C. 194), as (subject perhaps in the case of alien corporations to the provisions of any general Dominion legislation dealing with them under clause 25 of section 91) it may do in the case of other corporations not its own creatures." I am, for these reasons, of the opinion that question (*a*) should be answered in the affirmative.

This case affords a striking illustration of the undesirability of having the Judges of this Court express opinions upon abstract questions. Although it has been authoritatively stated time and again, and most emphatically in the *Companies' Case*, 3 D.L.R. 509, [1912] A.C. 571, itself, at p. 589; *In re References*, 43 Can. S.C.R. 536, at pp. 561, 588 and 592; (see also *In re Criminal Code*, 43 Can. S.C.R. 434), that the opinions expressed in answer to such questions "are only advisory and will have no more effect than the opinions of the law officers," and that they "do not affect the rights of the parties or the provincial decisions," and are "not binding upon us," "or upon any of the Judges of the provincial Courts," the learned Judge of the

CAN.
S. C.
BONANZA CREEK GOLD MINING CO. v. THE KING.
Anglin, J.

Exchequer Court has deemed it "the proper course for (him) to pursue to give effect to the opinion of the learned Judges in the Supreme Court. . . . I am not sure (he says) that technically I am bound by these reasons, but I have too much respect for the opinions of the Appellate Court not to follow their views no matter what my own opinion might be on the question," and he carefully abstains from expressing any opinion of his own, determining the case, as he apparently thought (though erroneously), in conformity with the views expressed by a majority of the Judges of the Court in the *Companies Case*, 48 Can. S.C.R. 331, 15 D.L.R. 332. While wishing to refrain from an animadverting on the course adopted by the learned Judge, I may perhaps venture the observation that if a Superior Court Judge of his experience finds advisory opinions given by the Judges of this Court so embarrassing that, although "not sure that technically (he is) bound" by them he deems it his duty to follow them regardless of his own views, they are likely to prove even more embarrassing and productive of trouble and uncertainty in Courts of inferior jurisdiction.

I would answer question (*b*) in the affirmative for the reasons given by Mr. Justice Duff.

Appeal dismissed.

CAN.
S. C.

REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL.

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

1. SCHOOLS (§ IV—74)—SCHOOL DISTRICTS—TAXATION—COMPANY TAX—APPORTIONMENT—SEPARATE SCHOOLS.

A separate school board cannot obtain a share of the school taxes of a company by notice under sec. 93*a* of the School Assessment Act, Sask., as amended 1912-13 Sask. ch. 36, sec. 3, requiring the company to apportion school taxes between public and separate schools according to the religious belief of the shareholders and the failure of the company to make any apportionment, if the company is not shewn to have any shareholders of the religious belief to which the separate school pertains, for (*per* Davies and Duff, JJ.), sec. 93*a*, if constitutional, applies only to companies who could apportion under sec. 93, and (*per* Idington, J., concurring in the result), sec. 93*a* is unconstitutional and *ultra vires* of the Saskatchewan legislature.

[*Regina Public School* v. *Gratton Separate School*, 18 D.L.R. 571, reversed.]

Statement.

APPEAL from the judgment of the Supreme Court of Saskatchewan, *Regina Public School* v. *Gratton Separate School*, 18 D.L.R. 571.

Wallace Nesbitt, K.C., and *Christopher C. Robinson*, for the appellant.

H. Y. MacDonald, K.C., for the respondent.

FITZPATRICK, C.J. (dissenting), for reasons given in writing, was of opinion that the appeal should be dismissed.

DAVIES, J.:—This was a special case agreed to by the parties to the action for the purpose of determining the respective rights of the public schools and separate schools to certain school taxes collected from companies by the city of Regina in the Province of Saskatchewan.

The questions submitted were whether the Saskatchewan Legislature had power to enact section 93*a* of the School Assessment Act, and if so whether the Gratton Separate School Trustees had the right they claimed to a portion of the school taxes in dispute.

The provincial Courts answered the questions in the affirmative, Newlands, J., dissenting, from the answer affirming the Separate School Trustees' right to claim a portion of the taxes.

With respect to the constitutional question as to the jurisdiction of the Legislature of the province to enact the section in question, 93*a*, the conclusion I have reached upon its proper construction relieves me from discussing or answering the question of the legislature's jurisdiction.

That conclusion is in accordance with that stated in his dissenting opinion by Mr. Justice Newlands of the Supreme Court of Saskatchewan, sitting *en banc*, to the effect that the sec. 93*a* does not give the Board of trustees of Gratton Separate School District, the defendant respondent in this appeal, the right they claim to a portion of the taxes payable by the companies mentioned in schedule "A" attached to the special case.

[The learned Judge here quoted the words of the Lord Chancellor in the *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353 at 358.]

This extract is, of course, applicable to the Saskatchewan Constitutional Act, the provisions of which we are asked to construe by the special case.

CAN

S. C.

REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL.

Davies, J.

Turning then to the amending sec. 93*a* under review, I agree with the construction Mr. Justice Newlands places upon it. We must bear in mind that under the law as it stood when first passed in the North-West Territories ordinances, and as enacted and continued by the Saskatchewan Legislature up to the passing of the amendment 93*a* in 1913, a company which had no shareholders of the religious faith of the separate school was neither required to give nor could give the notice specified in section 93.

Sec. 93 of the School Assessment Act, and sec. 93*a*, which was passed either in amendment or by way of supplement to sec 93, must be read and construed together.

Sec. 93 is a *permissive* section merely authorizing a company by notice in that behalf to require certain specially designated parts of its property to be "assessed for the purposes of the separate school and not for public school purposes" with the proviso that the share to be assessed for separate school purposes should bear the same proportion to the whole property of the company assessable within the school district as the proportion of the shares of the company held by Protestants or Roman Catholics respectively bore to the whole amount of the shares of the company.

Sec. 93*a* may have been drafted with the intention in the draftsman's mind of compelling all companies to give such notice. It provided that in the event of any company failing to do so an arbitrary division should be made of assessable school taxes payable by the company between the separate and the public schools, which division did not have any reference to the proportion of shares held in the company by Protestants or Roman Catholics.

Now, it is manifest that a company desirous of exercising the permission given by section 93 must, before exercising it have ascertained with certainty the religious persuasions or beliefs or connections of its various shareholders. In no other way could the statutory division the company was authorized to require of its assessable taxes be made and the grossest injustice might be done to one or other of the respective schools.

public or separate, if in the absence of such knowledge any company should attempt to exercise its privilege.

And so after sec. 93*a* was passed, its language, "any company failing to give a notice as provided in sec. 93," must have reference to such companies only as possessed the knowledge necessary to enable them to give the notice requiring the proportional division of their taxes and yet failed to give it. It could not have reference to companies in which none of the shareholders were of the "same religious faith" as that of the separate school seeking the division of the taxes. In the case before us we have no evidence whatever of the religious faith or religious connections of any of the shareholders of the different companies mentioned in schedule "A" of the case.

Mr. MacDonald, who argued the case of the defendant separate school so ably, submitted that such knowledge was not necessary, because the sec. 93*a* applied to all companies that had not given the notice the section provided for quite irrespective of their power to give the notice from want of knowledge of the religious faith or connections of its shareholders.

As already pointed out by me I cannot accept such a construction, the effect of which would undoubtedly be to defeat the manifest purpose and object of sec. 93, and probably in many cases create gross injustice.

It never was nor could have been intended that companies not coming within sec. 93 at all and not having the knowledge requisite to give the notice should have their taxes diverted from the public school to the separate school as a penalty for not giving a notice they could not legally give. The amending sec. 93*a* is somewhat crudely drawn, but I do not entertain any doubt of its real meaning and intent.

In my judgment, therefore, the amendment does not apply to companies in which there are no shareholders of the religious faith of the separate school seeking a share of the taxes collected, and I would answer the questions by saying that, apart altogether from the legislature's jurisdiction to enact section 93*a*, upon which I express no opinion, that section does not give

CAN.
S. C.
REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL.
Idington, J.

the defendant the right it claims to a portion of the school taxes in dispute.

The appeal should be allowed with costs.

IDINGTON, J.:—The question raised by this appeal is whether or not sec. 17 of the Saskatchewan Act fixed the boundaries of the rights of separate schools in relation to taxes which such corporations as respondent may claim. The question has arisen between appellant and respondent representing the respective interests of public school and separate school supporters in that regard.

Said sec. 17, no doubt, was designed to render impossible such inequitable legislation by the legislature of the new province as would enable one religious body or set of religious bodies to make, as it were, reprisals from each other. If the judgments in the Courts below are right then the attempt has been an absolute failure, for it is frankly admitted by the learned trial Judge, and indeed can hardly be seriously denied, that the operation of sec. 93*a* now in question will prejudicially affect every public school district and every public school supporter where a separate school district exists. I may add thereto that just to the extent the public school supporter is prejudicially affected, the separate school supporter will be beneficially affected.

In creating the Province of Saskatchewan, and giving it the power enjoyed by other provinces, under sec. 93 of the B.N.A. Act, paragraph (1) of said section was substituted by the following:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act under the terms of chapters 29 and 30 of the ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

(2) In the appropriation by the legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the

said chapters 29 and 30; and where the expression "at the Union" is employed in the said paragraph (3) it shall be held to mean the date at which this Act comes into force.

It is important to observe that by its very terms this substitution gives rise to a number of considerations different from those which were touched upon in a number of cases which depended upon the Manitoba Act. That Act simply adopted the very language of sec. 93 of the B.N.A. Act, so far as the same could be applicable to a single province. This substitution introduces, in its every part, something which easily differentiates not only each such part, but the group of three parts as a whole from not only the Manitoba Act, but also from the prototype of both.

True, the language of the first two lines is identical with the original, and that has been construed as governing the whole. Why was any more added if that sufficed? Why adopt a change if these lines embodied all that was desired and expressed all hoped to be affected thereby? What purpose were the significant words, "or with respect to religious instructions in any public or separate school as provided for in said ordinances," intended to subserve? Is it not clear that there was something for which the section was intended to operate relatively to public schools as well as separate schools? Why blend the two subject-matters in one sub-section if the first half of a short sentence was to be treated as confined to one subject, one point of view relative thereto, and the phrase, "any class of persons" which is wide enough to cover any class outside or inside those of the class supporting a separate school, be restricted in its meaning so as to cover only the latter in the first part, but both in the latter part?

The trouble is that these lines forming only the first part of a sentence and section in the Act to be construed herein constituted nearly the whole of a section in the Manitoba Act which gave rise to much litigation and strife which has left a mark on men's minds and that operates now as if the two sections were identical.

If that part of this sub-section had been presented in its present setting for the first time and due consideration given

CAN.
S. C.
REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL.
Idington, J.

that which is demanded by what follows and is implied in chapters 29 and 30 of the ordinances of the North-West Territories passed in the year 1901, I venture to think no one would have thought of making anything but the said ordinances the key-note or dominating factor in the interpretation of the whole section. Such, I submit, they clearly were intended by their incorporation therewith to become. So read and interpreted thus these two lines thereof can and will be given another meaning than the narrow one which has been suggested.

I, therefore, turn to said ordinances to see how the terms of them delimit or bound the rights of the warring factions. For the taxing purposes involved in this case, which is all that can concern us, let us look to the terms of said chapter 29, sec. 45 thereof, which first provides for the rights and liabilities of separate school districts and then provides by sub-sec. 2 thereof, as follows:—

(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein.

Yet this which is thus expressly forbidden to be done is what sec. 93*a* specifically enacts shall be done; in an indirect manner it is true but none the less effectually done.

Then we have provision made by sub-sec. 2 above quoted, which specifically forbids, in the distribution of legislative grants, discrimination against schools of any class described by ch. 29, thereby shewing the intention of the legislature in dealing with the subject.

Again, in sub-sec. 3 above quoted we have the words "by-law" in sub-sec. 3 of the B.N.A. Act declared to mean the law as set out in said chapters 29 and 30. Can there be a doubt, when we have regard to all these provisions and the considerations suggested thereby, that said chapters 29 and 30 were designed within said sec. 17 to permanently fix the boundaries of the rights of the separate schools and their supporters and the relations between them and the public schools and their supporters?

If so then let us again read the lines

nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have,

upon which stress is laid, and see if the phrases "with respect to" and "any class of persons" must necessarily mean, and have relation to only those who are separate school supporters.

I submit the literal meaning of the words used does not imperatively require such interpretation and may, taken in connection with the rest of the sub-section and the section as a whole be read as appellant suggests. That protects both classes and insures them and each of them against an invasion of that which was guaranteed by chapters 29 and 30, which was the final result of nearly thirty years of experience and development in relation to a difficult problem.

Moreover, we have in said ch. 30, secs. 9 and 93, which expressly deal with the problem of corporate companies (the former in relation to such in rural districts and the latter in villages and town districts) and enable any such company in a separate school district to give notice of its desire to have the whole or part of its property assessed for separate school purposes and not for public school purposes, but in each case:—

> Provided always that the share or portion of the property of any company entered, rated or assessed in any municipality or in any school district for separate school purposes under the provisions of this section shall bear the same ratio and proportion to the whole property of the company assessable within the municipality or school district as the amount or proportion of the shares or stock of the company so far as the same are paid or partly paid up, held and possessed by persons who are Protestants or Roman Catholics as the case may be bears to the whole amount of such paid or partly paid-up shares or stock of the company.

What does this mean if not an express prohibition against any greater part thereof than indicated being made applicable to separate school support?

Such was the state of the law when the province was created and such limitation of the proportionate share of any corporate company's taxes, however reached, it was evidently designed to perpetuate. It seems companies did not respond to the invitation to allot a proportion of their assessments to separate school support and hence the enactment of 93*a* now in question.

I can, in light of said sec. 93, conceive of legislation being asked for, as against local shareholders in such companies to make those who might be presumed to be supporters of separate

CAN.

S. C.

REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL.

Idington, J.

schools assessable therefore, in respect of their shares, in ways I need not enter upon, and the company being given credit for that in its public school rating.

Without passing any opinion on that and only by way of illustration as something possibly arguable within the purposes of the chapters 29 and 30 incorporated into the Saskatchewan Act, I submit that in said sec. 93 thereof there may be found a field within which the legislature might properly operate. Indeed, I assume it was something of that kind that the legislature had in view.

But I cannot see how an adhesion to the lines laid down in said ordinances can permit of such drastic legislation as that contained in section 93*a*.

I think it *ultra vires* the legislature and that the appeal should be allowed. I see no half-way house such as question (*b*) seems to suggest may exist within said secs. 93 and 93*a* so far as parts of the assessments are concerned. The first two questions should be answered in the negative and doing so renders it unnecessary to answer the third.

The appeal should be allowed with costs throughout.

Duff, J.

DUFF, J.:—I agree with Mr. Justice Davies. For the reason given by him I confine myself to passing upon the point raised by question (*c*) as to the construction of the statute.

The sections to be construed (secs. 93 & 93*a*, as the Act now stands), are as follows:—

[The learned Judge here cited the sections referred to at length.]

The notice authorized by 93*a* is to be given only in the event of "any company failing to give a notice as provided by sec. 93." And the consequences provided for by 93*a* (2) arise only in the absence of "a notice as provided in sec. 93." I think the notice "provided in sec. 93" or "provided by sec. 93" means a notice of the character contemplated by sec. 93 before the passing of the amendment of 1912-13, now sec. 93*a*. It seems plain that sec. 93 only contemplated the giving of notice where some part of the real property of the company within the separate school district would properly be "entered, rated and

assessed'' for the purposes of the separate school in accordance with the rule laid down in the proviso to that section. I think that follows from the language in which that section is expressed.

There is, it appears to me, little or no weight in the suggestion that in this view no provision is made for the case in which all the shareholders should be separate school supporters. The answer seems to be that ''any part'' as used here extends to every part. It is a very different thing to read ''any part'' in this context as meaning none.

Question (*c*) should be answered in the negative.

Since writing my judgment as above, which was filed 2nd February, my attention has been directed to the second and third paragraphs of the judgment of the Chief Justice filed some weeks later and published in the *Western Weekly Reports* of March 26th. The effect of those paragraphs is that all the members of the Court taking part in the hearing of the appeal except Mr. Justice Idington concur in the answer given by the Court below in the affirmative to the first question, that is to say, that the Legislature of Saskatchewan had jurisdiction to enact sec. 93*a*.

In view of this statement I think it necessary to re-state in explicit terms what is stated by reference to the judgment of Mr. Justice Davies in the first paragraph of this judgment.

Having reached a clear opinion that on the proper construction of sec. 93*a* the respondents must fail, I consider it undesirable to express any opinion on the first question—the question relating to the jurisdiction of the legislature to enact that section; or upon any of the thorny questions as to the meaning of sec. 17 of the Saskatchewan Act which may in a proper case require decision. This course is incumbent upon me, as explained by Mr. Justice Davies, by reason of a sound and settled rule that questions as to the limits of legislative powers should not be passed upon when the decision of the cause does not require it—a rule whose observance is especially important in cases such as this.

This is all put very plainly in the judgment of Mr. Justice Davies in which, as stated in the first paragraph hereof, I concur. In the circumstances, however, some expansion of that para-

CAN.
S. C.
REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL.

graph seemed desirable to prevent misapprehension; and I should perhaps add that not only have I expressed no opinion upon the first question—I have formed none.

ANGLIN, J., dissented.

Appeal allowed with costs.

CAN.
S. C.

SASK. LAND & HOMESTEAD CO. v. CALGARY & EDMONTON R. CO.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 2, 1915.

1. EMINENT DOMAIN (§ III C—140)—EXPROPRIATION BY RAILWAY COMPANY—COMPENSATION—TAKING GRAVEL LAND.

Compensation for a gravel pit and the right of way thereto taken by a railway company under sec. 180 of the Railway Act, R.S.C. 1906, ch. 37, to obtain a supply of material for construction purposes is to be made as of the time when the company took possession of the land under judge's order or as of the service of the notice to treat and not on the basis of values some years later when the arbitration took place.

[*Sask. Land & Homestead Co.* v. *Calgary & Edmonton R. Co.*, 14 D.L.R. 193, 6 A.L.R. 471, affirmed.]

2. EMINENT DOMAIN (§ I C—15)—EXPROPRIATION BY RAILWAY COMPANY—GRAVEL LANDS—RIGHT TO TAKE—NEED OF SURVEYS.

Gravel land which is required by a railway company for obtaining construction material and the right of way for a spur line to take it out may be expropriated under sec. 180 of the Railway Act, without any plans being submitted to the Railway Commission; no deposit of plans is required as would be necessary were the land required for a right of way for its line, but a certified copy of the surveyor's plan is to be served upon the property owner as well as the notice to treat.

[*Sask. Land & Homestead Co.* v. *Calgary & Edmonton R. Co.*, 14 D.L.R. 193, 6 A.L.R. 471, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Alberta, 14 D.L.R. 193, 6 A.L.R. 471, dismissing an appeal from an award of arbitrators appointed under the Railway Act, R.S.C. 1906, ch. 37, to ascertain the amount of the compensation payable by the railway company upon the expropriation of lands for railway purposes.

Whiting, K.C., and *A. B. Cunningham*, for the appellants.

O. M. Biggar, K.C., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK:—With some hesitation I agree that this appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The respondent acting under sec. 180 of the Railway Act, sought to expropriate a piece of gravel-bearing

land which belonged to the appellants and, accordingly, by notice of June 30, 1908, served pursuant to said section on appellant and others concerned therein informed them of such intention and tendered the sum of $733.05 as compensation for said land and for any damages to be suffered by the exercise of the powers conferred by said section and notified them that if the said offer was not accepted within ten days after service of said notice the appellant would apply to a Judge for the appointment of an arbitrator or arbitrators as provided by sec. 196 of the said Act. Attached to said notice was a plan and certificate of a Dominion land surveyor such as required in such cases by sec. 194 of said Act. The then Chief Justice of Alberta on July 24, 1908, made, under sec. 217, an order upon consent of all parties interested that upon payment into Court of $1,150 the respondent might enter into immediate possession of said lands. The respondents, accordingly, shortly thereafter entered into possession and from time to time removed a very large quantity of gravel. No steps towards arbitration seem to have been taken until the year 1911, when a board of arbitrators was named, but for some reason failed to act and a new one was constituted in the year 1912, which proceeded with the reference and heard a great deal of evidence directed by both sides almost entirely to the then marketable value of the gravel according to the quality thereof about which there was much conflict of opinion. The majority of the arbitrators held that the value of the property expropriated must be taken to be that which it was worth in 1908, when possession was taken, and awarded the amount tendered then. One of the arbitrators dissented from this view, holding that by sec. 192, as amended in 1909, its value at the time of the hearing was what ought to govern. The appellant asked the Court of Appeal to set the award aside, but that Court dismissed that appeal and hence this appeal. The first and chief question thus raised is whether or not the said sec. 192, as so amended, is applicable. [Secs. 191 and 192, cited.]

It is to be observed in the first place that the deposit of plans in the registry office is constituted by this section notice to all concerned and that service thereof on those concerned is

CAN.

S. C.

SASK. LAND & HOMESTEAD CO. v. CALGARY & EDMONTON R. CO.

Idington, J.

not required until proceedings taken for arbitration. In the next place it may be observed that, for what is done under and by virtue of sec. 180, no plans are required to be deposited or approved of as are other plans by some appointed authority before deposit. Now let us turn to sec. 180 and see what it provides:—

(*a*) Whenever any stone etc., or other material is required, etc.; or (*b*) (as therein appears); and (*c*) (as therein appears) . . . the company may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed to act in the province, or an engineer, to make a plan and description of the property or right-of-way, and shall serve upon each of the owners or occupiers of the lands affected a copy of such plan and description, or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer.

Contrast this with the mode of service by deposit in the registry office and we see at a glance how radically different the two modes of procedure are as framed by this sec. 180 and the sec. 192. I, with respect, submit the latter is dragged in needlessly to aid sec. 180, which, in that which sec. 192 has regard to, needs no aid, but is a self-contained section and power in that regard. True, sub-sec. 2 of sec. 180 provides as follows:—

All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the materials or water so required, or the right-of-way to the same, irrespective of the distance thereof: Provided that the company shall not be required to submit any such plan for the sanction of the Board.

And it is urged that it expressly relates to such powers being exercised to obtain material and it is pointed out that sec. 191 in express terms refers to lands which may be taken, "or which may suffer damage from the taking of materials."

Surely there are conceivable manifold possibilities of situations or conditions being opened up or created by or for the planning of a railway, and its construction, whereon this taking of materials might operate without going outside the obvious purposes of this all comprehensive section relative thereto. Even if it could not be made operative as clearly as it can be shewn, in every word thereof, by a little effort of the imagination, applied to railway building, without making it apply to sec. 180, which even in its express language it does not fit, that would not render it necessary to pervert the obvious mean-

ing of sec. 180. In short, what was to be done under sec. 180 never required the deposit of a plan or profile in the registry office or elsewhere, but substituted therefor, and the publication thereof in a newspaper as required by sec. 191, service on those concerned, and to avoid any misapprehension as to the sanction of the board being required that was expressly dispensed with. Sec. 192 seems, therefore, as it originally stood, entirely inapplicable to what was to be done by virtue of sec. 180 providing a very common-place power such as municipalities have to enable them to execute or repair works they possess. Such being my conclusion I need not follow up the amendment of 1909 and its possible effect; yet I may be permitted to point out that it was no doubt enacted to put an end to the serious wrong done by railway companies filing plans in the registry office and keeping them there for an unreasonable length of time, to the detriment of the proprietors of lands affected thereby, without taking any steps to expropriate any part of such lands or indeed, as has been known, never proceeding with the construction of the railway.

Such proprietors of land had no remedy unless by making an application to the Railway Board. They had no powers of initiative to force an arbitration unless and until something more was done. The company alone was given the right to serve a notice to treat and often left that off till executing the work. And reading the amendment it seems to me that the language hardly fits a case such as this in the way appellant suggests. On the other hand it does suggest, that it might well be argued, that it could not apply where the work was done and presumably an agreement had been reached or arbitration had taken place within a more reasonable time than, as in this case, three years before the amendment. To give effect to the contention would be in this case to make the amendment retrospective over a period of three years. I need not come to any opinion on this phase of the case and express none beyond this that it is one of the curious phases of a rather peculiar case.

Passing all that and agreeing in the contention acted upon by the arbitrators, must we set aside the award simply because there was no evidence presented by the appellant applicable to its

CAN.

S.C.

SASK. LAND & HOMESTEAD CO. v. CALGARY & EDMONTON R. CO.

Idington, J.

claim? It is rather a novel situation that is thus presented and, so far as I can find, barren of express authority to guide us. The parties proceeded, by the respondents presenting to the arbitrators the notice required by sec. 193 of the Railway Act, accompanied by the certificate of a sworn surveyor, required by the 194th section thereof, stating as therein required his opinion that the sum offered is a fair compensation for the land and damages thereto; the appellant tendering a mass of evidence which shewed how much, at the time of the hearing, gravel existed on the premises in question, and how much had been taken, and its value for a variety of purposes at that time; without directly giving evidence of the market value of the land at any time, and by the respondents meeting that case by similar evidence. Hardly any of this, it is admitted, touched in truth the correct issue. It is, therefore, claimed by appellant that there was no evidence upon which the arbitrators could act and that, hence, the award ought to be set aside. On principle it does not seem to me to lie in the mouth of appellant to set up such a contention. The only semblance of authority I can find is such cases as *Craven* v. *Craven*, 7 Taunt. 644, and *Grazebrook* v. *Davis*, 5 B. & C. 535. The former was a motion to set aside an award for the reason that the arbitrator had refused to hear evidence. But it was shewn that none was in fact tendered: after hearing the arbitrator had expressed an adverse opinion as to the possibility of its being applicable. The latter was an action on a bond of submission where on demurrer it was held a plea which failed to allege the tender of evidence could not be maintained.

These cases seem to proceed upon the theory that it was the duty of the party complaining of the award to have expressly tendered evidence that would be relevant.

In this case in hand we must, I think, look at the nature and scope of the reference which seems by the Act to be designed to try the issue of whether or not the offer made is fair, and to lay the foundation for such a trial by requiring the tender of such a specific sum and *primâ facie* proof, in the shape of a surveyor's certificate, that it is so. That presents an issue upon which the burden of proof to displace the certificate rests upon

the party who claims a greater sum. In this case the appellant failed to do so by tendering what, on the view I hold of the Act, was admittedly entirely irrelevant evidence. This mode of presenting the issue is in marked contrast with the proceedings under the Lands Clauses Consolidation Act of 1845, under which the offer cannot be brought before the Court trying the question of compensation. I, therefore, think the award made was justifiable and must be upheld. The appeal should be dismissed with costs. It certainly is to be regretted that so much expense was incurred for so little. Let us hope when dismissing this appeal with costs, that in taxing costs of the reference, if attempted, justice may be so far done that respondents reap nothing from the useless expenditure of putting forward irrelevant evidence.

Duff, J.

DUFF, J.:—I concur in the conclusion at which the appellate Court of Alberta has arrived. Sec. 180 of the Railway Act, under which the proceedings were taken, is in the following terms: [Sec. 180 quoted.]

This section obviously provides for two distinct cases: First, the case in which the company desires to take land adjoining the railway containing the material required and no necessity exists for constructing a spur or branch line through any property except that owned by the company and that intended to be taken; Secondly, the case in which the plan of the railway company involves the construction of a spur or branch line through lands intervening between the railway and that where the material is situated. The effect of sub-sec. 2, in my opinion, is that in the first case the provisions of the Act are to be followed in so far only as they are appropriate to the taking of and compensation for land not required in the construction or working of the railway itself; and in my judgment sec. 192 has no application in such a case.

It is not necessary to determine for the purposes of this case the exact stage of the proceedings with reference to which the amount of compensation or damages payable by the railway company is to be determined. On June 30, 1908, notices were served on the persons interested in the land in question together with a plan and description of the properties in com-

CAN.
S. C.
SASK. LAND & HOMESTEAD CO. v. CALGARY & EDMONTON R. CO.
Duff, J.

pliance with sec. 180 and containing the description and declaration mentioned in sec. 193, together with a notice of an application for possession to be made under sec. 196 in the event of the railway company's offer not being accepted. On July 24, 1908, an order was made by the Chief Justice of Alberta giving the railway company leave to enter into possession of the lands and this order appears to have been acted upon without delay. Whether, therefore, the amount of compensation and damages falls to be determined under the statute, first, by reference to the date when the plan and description under sec. 180 was served upon the owners, or, secondly, when notice to treat was given under sec. 193, or, thirdly, when the right to take possession became consummated by the order referred to it appears to be unnecessary to decide. It is not suggested that any change took place in the relevant circumstances between June 30, 1908, when the notices were served and July 24, 1908, when the order for possession was obtained. The company at that date came, in my opinion, under an enforceable obligation to take the property and to proceed with the ascertainment of the amount of compensation. It seems reasonable, therefore, as it is strictly in accordance with legal analogy to hold that the company's title once consummated relates back at least to this date; and the appellant cannot complain of having the compensation ascertained with reference to it. The relation of vendor and purchaser was, I think, constituted completely when the right of possession was obtained. Only the ascertainment of the price remained.

Anglin, J.

ANGLIN, J.:—Not, I confess, without some lingering misgivings I have reached the conclusion that this appeal should be dismissed. The mention in sec. 191 of the Railway Act of lands "which suffer damage from the taking of materials" no doubt affords some ground for the appellants' contention that the group of sections in which sec. 191 is found, dealing with the preparation, filing with the Board, approval and deposit for registration of plan, profile and book of reference, applies to expropriations under sec. 180—the only section of the Act which deals with the acquisition of lands required for the purpose of taking materials from them. But I am, nevertheless, of

the opinion that the group of sections to which I have referred does not apply to cases under sec. 180. That section itself provides for the making of a plan and description by a surveyor, and requires the company to serve a copy thereof on the owners whose lands are to be taken. Submission of this plan to the Board of Railway Commissioners is expressly dispensed with. Registration of it is not provided for. Having regard to these special provisions and to the nature of the subject-matter, I am satisfied that the application of the sections dealing with the plan, profile and book of reference to expropriations under sec. 180 is inferentially excluded by sub-sec. 2 of that section, which declares that "all the provisions of this Act shall, so far as applicable, apply." If the statute required that a plan, profile and book of reference should be prepared, etc., in cases under sec. 180, as in the case of lands to be acquired for the ordinary right-of-way, there would be no reason for the requirement of a special plan and description or for the service of copies of them on the owners to be affected, as sec. 180 prescribes.

It follows that the provisions of sec. 192 and the amendment thereto of 1909 (8 & 9 Edw. VII. ch. 37, sec. 3), relied upon by the appellants, do not govern this case, no provision being made for the deposit in the registry offices of copies of the plan and description prescribed by sec. 180, similar to that made for the deposit of copies of the plan, profile and book of reference in the case of lands taken for the ordinary right-of-way. In the absence of any provision in the statute fixing a different date, I agree that the valuation of land taken under sec. 180 must be made either as of the date when the copy of the plan, profile and book of reference served upon the owner (treating that as the equivalent of service of notice to treat under the English statute) or as of the date when actual possession is taken, whether by consent or under the authority of a warrant or order of the Court. In the present case possession by consent having closely followed upon the service of the copy of the plan and description, it is immaterial which date is taken. Unless some explicit statutory provision should render such a course inevitable, it would seem to be unreasonable to require a railway company to pay, for land which had been taken possession

CAN.
S. C.
SASK. LAND & HOMESTEAD CO. v. CALGARY & EDMONTON R. CO.
Anglin, J.

of by consent and materials of which a considerable part had been used four years before, their value at the date of the arbitration hearing, which had been then greatly enhanced by adventitious circumstances. The fact that, since the amendment of section 196 of the Railway Act in 1907 (6 & 7 Edw. VII ch. 37), owners have the same opportunity as the company to apply for the appointment of arbitrators, removes any hardship to which the former state of the law may have subjected them.

I agree with Harvey, C.J., that there was some evidence before the arbitrators which entitled them to fix the value of the land taken in 1908 at the figure which they have allowed, although it would have been much more satisfactory, to me at all events, had the attention of all parties been more clearly directed during the proceedings before the arbitrators, to the fact that the value was to be fixed as of that date.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—The gravel land that a railway company desires to expropriate may be taken without any plans being submitted to the Board of Railway Commissioners. The procedure is different in the other cases of expropriation. The railway company is then bound by the law to have its plans approved by the Board. In the former case the company proceeds under sec. 180 of the Railway Act, that says:—[Sec. 180 quoted.]

In the present case a certified copy of a plan of the lands required was served with the notice to treat and, later on, the railway company was, with the consent of the owners, put in possession (sec. 218) under a warrant given by a Judge. The appellants contend that the expropriation of a gravel pit would require virtually the same procedure as regards the location of the line and the proceedings in expropriation, that sec. 192 should govern in this case and that the date with reference to which compensation is to be ascertained should be the time at which the hearing of the witnesses should take place. I cannot concur in such a view. It seems to me reasonable that the damages or compensation should be determined according to the value that the land taken had when the company took possession of it. In the ordinary cases of expropriation the Railway

Act states (sec. 215) that the value shall be ascertained as of the date of the deposit of the plan. Now, with regard to gravel pits, no such deposit is provided for. But the plan duly certified by a surveyor will be served upon the owner. Then the value could be ascertained from the date on which such a notice would be given, or it could be ascertained from the date at which the expropriated party has given consent for possession. There is no difference as to the value of the gravel pit at those two dates. But it would be certainly unfair and illegal to have this value determined by the date at which the case was heard a long time after. For those reasons the judgment of the Supreme Court *en banc*, confirming the award of the majority of the arbitrators, should be confirmed with costs.

Appeal dismissed with costs.

KILDONAN INVESTMENT v. THOMPSON.

Manitoba King's Bench, Mathers, C.J. February 13, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND — RESCISSION — FRAUD OF SUB-AGENT.

The fraud of a sub-agent may be ground for rescission of a contract for sale of the lands of the ultimate principal if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should or might appoint a substitute for the purpose of discharging, in his stead and on behalf of the ultimate principal, duties including or involving the making of representations of the character of that sued upon though no authority had been given to make any false representation.

[*De Bussche* v. *Alt*, 8 Ch.D. 310; *Powell* v. *Evan Jones*, [1905] 1 K.B. 11, applied.]

2. VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND — RESCISSION — FRAUD OF AGENT—AGENT BECOMING PURCHASER.

Where the vendor's agent for sale of the property himself becomes the purchaser, with the assent of his principal, of an undivided share in the property on a joint purchase thereof and makes material misrepresentations in respect to the property to the other purchasers of shares therein which induced them to buy, rescission may be granted on the application of all the other purchasers in an action in which the vendor and his agent are parties although the agent does not concur so far as his share is concerned; the Court has under such circumstances jurisdiction to restore the *status quo ante fraudem*.

[*Braun* v. *Hughes*, 3 Man. L.R. 177, and *Morrison* v. *Earls*, 5 Ont. R. 434, distinguished.]

Statement

TRIAL of action brought by the Kildonan Investment Co. against ten defendants for $837 interest due under an agreement to purchase by the defendants from the plaintiffs 74 lots

MAN.

K. B.

KILDONAN INVESTMENT v. THOMPSON.

Statement

in a subdivision of parish lots 63 and 64 of the parish of Kildonan for the sum of $18,600, of which $4,650 has been paid.

The defendants, other than the defendant W. J. Batters, alleged that they were induced to enter into the said agreement by the fraud of the said Batters and one Baldwin, therein acting as the agents of the plaintiff, and they counterclaim against the plaintiffs and the defendant Batters for rescission of the agreement and for the repayment to them of the sum of $4,650 paid upon it.

R. B. Graham, for the plaintiffs.

C. P. Fullerton, K.C., and *J. P. Foley*, K.C., for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—The fraud alleged is that it was represented to said defendants by Batters and Baldwin that the land they were asked to purchase was situated close to the River road on which the street car line is situate; that a $4,000 house was being erected across the street from it; that the owner was in financial difficulties and forced to sell at a price considerably below its value, and that it could be purchased at such price only for a period of ten days. The facts, as I find them, are as follows: The plaintiff company was the owner, subject to a certain mortgage, of that portion of parish lots 63 and 64 Kildonan, extending from the River road to the Canadian Pacific Railway tracks, a distance, roughly speaking, of a mile and an eighth. The land described in the agreement of sale consists of all block 6, and 28 lots of block 9, the latter block lying immediately to the eastward of block 6. The most westerly end of block 6 is upwards of 2,700 feet, or something more than half a mile, from the River road, and the eastern end of the property described in the agreement is upwards of 4,600 feet from the said River road.

The selling agents appointed by the plaintiffs to dispose of the lots in this subdivision were Messrs. Skuli Hansson & Co., estate agents in this city, and Mr. Hansson, the principal member of this firm, was the secretary-treasurer of the plaintiff company. Hansson & Co. employed one Baldwin to dispose of blocks 6 and 9. Baldwin had acted as selling agent for Hansson & Co. for some time and had desk room in Hansson's office. He

knew that there were a number of well-to-do farmers in the Holland district, and he selected that village as a likely point at which to form a syndicate of farmers for the purpose of purchasing these two blocks. At this time the defendant Batters was carrying on business in the village of Holland as an implement agent and as a purchaser of farm stock. He had resided and carried on business there for upwards of fifteen years and was well and favourably known to the other defendants, all of whom are farmers residing in the Holland district, and with all of whom he had had large business transactions. Baldwin entered into an arrangement with Batters to assist him in forming the proposed syndicate for half the commission to be thereby earned, being actuated, no doubt, by the fact that Batters was well and favourably known to the farmers of the district, and was a man in whose integrity and judgment they had a high degree of confidence. This was in or about the month of August or September, 1913.

Batters at once commenced negotiations with the other defendants individually. The scheme as arranged by himself and Baldwin was, that the whole of blocks 6 and 9 should be sold at a price of $23,000; that the purchase price should be divided into ten equal portions, and that ten men should be procured to form the proposed syndicate, each taking one share. The ten men were procured, but Batters and three others only agreed to take a half share each. The price was thereupon fixed at $18,600 for the whole of block 6 and 28 lots out of block 9. The defendants were interviewed separately, sometimes by Batters alone and sometimes when accompanied by Baldwin. It was represented to them that the land was close to the Kildonan road on which the street car line ran—not that it adjoined the road, but that it commenced at a point, at the farthest, not more than 465 feet from the road: (Batters admits that he told one defendant the distance was not greater than that between his office and the elevator, admitted to be about 465 feet); that a $4,000 dwelling-house was about to be erected across the street from the property and that the selling price was $10 per foot; that the land was well worth $15 per foot, and that lands much farther out were selling at that price; that the owner was

MAN.

K. B.

KILDONAN INVESTMENT v. THOMPSON.

Mathers, C.J.

in financial difficulties, and therefore was willing to accept $10 per foot, which was much below its actual value. Batters also represented to each of the defendants individually that he was going to take two shares himself and that the land was such an excellent bargain that he would take it all himself if he were able to finance it. He also represented to each of the defendants individually that he had selected him because of their past business relations and that this being a particularly good thing, he wanted to confer a favour by letting the defendant take a share. Some of the defendants were shewn by Baldwin and Batters what purported to be the property; but in no case were they shewn its true location. The defendants did not come together to conclude the agreement, but each signed it as it was presented to him for that purpose by Batters, and at the same time his share of the first instalment of purchase money was paid. Some of the cheques given in payment were made payable to Baldwin, but in the majority of cases they were delivered to Batters but were made payable to Hansson & Co. Each of the counterclaiming defendants paid his allotted share of the first instalment in full. Batters, on the other hand, paid no money for the half share allotted to him. His proportion of the first payment was charged by the vendors against the commission he had earned in bringing about the sale. Whether or not he is liable for any of the subsequent instalments does not appear. It is quite clear, however, that up to the present time he has only invested his services in procuring the agreement to be signed by his co-defendants.

I find that Batters did not know on the ground exactly where the property was; but that he represented that it was close to the River road, and at the very most not more than 465 feet distant therefrom, without believing that statement to be true and reckless whether it was true or false. I find that such representation was untrue and that the nearest point to the River road was 2,700 feet. I find that the statement that a $4,000 house was being erected across the road was entirely untrue. I find that there was no truth in the statement that the owner of the land was in financial difficulties and was for that reason forced to sell. I find that Batters concealed from

the other defendants the fact that he was acting for the vendors for a commission and that he did so intending to deceive them into the belief that he was in all respects in the same situation as each of the defendants was. I find that the other defendants would not have entered into the agreement at all had they known the position which Batters occupied. The fact that Batters was acting for the vendors for the purpose of earning a commission upon the sale of the property was not pleaded, but an application was made to add this to the defence and counterclaim at the trial. I reserved judgment on the application and permitted the evidence to be given, and I now permit the amendment to be made. I find that the defendants other than Batters were induced by the above-mentioned representations to enter into the contract sued upon, and that they did so without knowledge that the representations were untrue.

It is first objected that Batters was the agent of Baldwin and was not the agent of the plaintiffs, and, therefore, that the plaintiffs are not responsible for any representations that he might make. I infer that it was intended and agreed by the plaintiffs that Hansson & Co. should appoint sub-agents or substitutes for the purpose of disposing of this land on behalf of the plaintiffs. Hansson & Co. employed Baldwin, and I infer that it was contemplated by them that Baldwin should employ assistants. That Batters was endeavouring to sell the property in question to his co-defendants was well known to Hansson and the latter recognized Batters as his agent for that purpose. When the agreement was signed Batters was not required by the plaintiffs to pay any part of the cash payment, but was given credit thereon for his share of the commission allowed upon the sale. A privity was thus established between the company and Batters.

The rule of law applicable is thus laid down in 20 Hals. at 710:—

> A sub-agent may render the ultimate principal liable if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should, or might, appoint a substitute for the purpose of discharging in his stead and on behalf of the former, duties including or involving the making of representations of the character of that sued upon.

MAN.

K. B.

KILDONAN INVESTMENT v. THOMPSON.

Mathers, C.J.

That statement is fully borne out by the language of the Court of Appeal in *DeBussche* v. *Alt*, 8 Ch.D. 286, at 310, and in *Powell* v. *Evan Jones*, [1905] 1 K.B. at 11.

In my opinion, therefore, the facts in this case establish a privity between the plaintiff and Batters and render them responsible for whatever fraud or misrepresentations Batters committed in carrying out the business of the plaintiffs. Indeed, the case does not need to rest on implied agency alone. There is evidence which would justify a finding that Batters' appointment as agent was expressly recognized by Hansson & Co. and the plaintiffs. It is not necessary to find that the plaintiffs authorized Batters to make the false representations which he did make. Employers do not as a rule authorize their agents or servants to commit frauds, but, having entrusted the agent with the conduct of the business, the employer is responsible for whatever wrong his agent commits in the course of the employment: *Barwick* v. *Eng. Joint Stock Co.*, L.R. 2 Ex. 289; *Lloyd* v. *Grace*, [1912] A.C. 716. It is next objected that Batters is a co-purchaser with the other defendants and that he is not asking for rescission and the rule is invoked that where a contract induced by fraud cannot be rescinded *in toto* it cannot be rescinded at all. The general rule on that subject is well known. It is that a contract which is not severable must be rescinded *in toto* or not at all. In this case the negotiations were conducted with each of the purchasers individually and there was nothing in the negotiations up to the time the agreement was signed to indicate that they were not purchasing each an individual share or interest. If it had been carried out as a several purchase by each of the defendants of a specified interest the case would present no difficulty because then each defendant could return what he had bought without the concurrence of his co-purchasers. The agreement, however, is a joint agreement for a purchase by all the defendants without anything to indicate what share or interest each defendant takes. That being the case I must hold, I think, that the purchase in this case is a joint purchase by all the defendants. Then is there anything in the facts of this case to take it out of the general rule that where several have been induced by fraud to become

joint purchasers rescission cannot be decreed unless all assent to put an end to it? The situation here is that the nine counterclaiming defendants were induced by the misrepresentations of their co-purchaser Batters, therein acting on behalf of the plaintiffs to join in the agreement. Batters alone refuses to acquiesce in rescission, and the plaintiffs contend that because of his refusal the Court is powerless to relieve from liability upon the contract those defendants who were duped by him into signing it. In other words, the plaintiffs say that having procured the signature of the counterclaiming defendants to the agreement by the fraud and misrepresentation of their agent Batters, they are entitled to hold them to it because Batters, who also signed the agreement as a joint purchaser, now refuses to ask for its rescission, and that the defrauded parties must rely upon their claim for damages for the deceit practised upon them. The only case in point to which I have been referred, or which I have been able to find is an unreported decision of Mr. Justice Macdonald rendered in May, 1914, in *Emerson* v. *Quinn*, (18 D.L.R. 241). In that case two defendants were sued for an instalment of purchase money under a joint agreement to purchase. The defendant Quinn allowed judgment to go by default, but his co-purchaser Gallagher defended upon the ground that it was falsely represented to him by Quinn that they were buying on equal terms, whereas, unknown to him, Quinn was the agent of the vendor and in receipt of a secret commission upon the sale, and that in this way Quinn's share of the purchase money was paid. The learned Judge found the facts as alleged by Gallagher and rescinded the agreement and ordered repayment by the plaintiff of the moneys paid by Gallagher thereunder. The power of the Court to grant relief by rescission under the circumstances appears to have been taken for granted. The case of *Morrison* v. *Earle*, 5 O.R. 434 (1884), relied upon by the plaintiffs is quite distinguishable. It is true language is made use of in that case which might be construed as meaning that in no case can there be rescission unless all concerned assent to that course being pursued. The language used must be interpreted in the light of the facts, which were these. The plaintiff sued upon a promissory note given by the defendant for his

MAN.

K. B.

KILDONAN INVESTMENT v. THOMPSON.

Mathers, C.J.

share of the purchase by a syndicate of twenty persons of a parcel of land from the plaintiff. The defendant had been induced by the fraud of the plaintiff to join the syndicate and to give the note sued upon. The other members of the syndicate were not parties to the action and were not asking for rescission. The decision was that as the defendant could not restore to the plaintiff the land purchased, his only remedy was damages for deceit: *Braun* v. *Hughes*, 3 Man. L.R. 177 (1885), was a similar case. The plaintiff sued to recover from the defendant the money which he, as one of a syndicate of five, had paid to the defendant upon the syndicate agreement to purchase. It was found as a fact that the plaintiff had been induced to become a party to the syndicate and to pay the money, repayment of which was claimed by the fraud of the defendant's agent. The other members of the syndicate were not parties to the action, and it was held that, without their concurrence, rescission could not be decreed.

In the present case all the parties concerned are before the Court, a fact which sufficiently distinguishes it from both *Morrison* v. *Earls* and *Braun* v. *Hughes*. The only obstacle in the way of giving the counterclaiming defendants the relief claimed is the refusal of the plaintiffs' agent by whom the fraud was perpetrated to assent to that course being pursued. He is, however, before the Court, and as against him rescission may be decreed and the *status quo ante fraudem* restored, the plaintiffs and Batters being left to work out their respective rights as between themselves as they see fit.

There will be judgment dismissing the plaintiffs' action as against all the defendants except the defendant Batters with costs. There will be judgment for the same defendants upon the counterclaim: (1) declaring that they were induced to enter into the agreement sued upon by the fraud and misrepresentations of the defendant Batters, acting therein as the agent of the plaintiffs; (2) That the said agreement be and is hereby rescinded; (3) That the same defendants do recover against the plaintiffs the sum of $4,650 with interest thereon at 5 per cent. from the date on which the last of such money was paid,

and costs of counterclaim against both the plaintiffs and Batters without regard to the statutory bar or limitation. There will be a fiat for costs of examination for discovery.

Judgment for defendants.

SCHRADER v. MANVILLE.

Saskatchewan Supreme Court, Lamont, J. February 28, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND — FRAUDULENT OPTION.

Owners who had given an option for sale of their land at a certain price are guilty of fraud where they had replaced the option with another at a higher price for the same period of time at the optionee's request for the latter's use in obtaining others to join him in taking up the option but with a secret agreement to give the original optionee the benefit of the difference.

[*Hitchcock* v. *Sykes*, 13 D.L.R. 548; *Hitchcock v. Sykes*, 49 Can. S.C.R. 407, referred to.]

2. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—FRAUD —WAIVER OF.

The making of payments on a purchase agreement after notice of a fraud which might be set up as a ground for repudiation is evidence of an election to affirm.

[*Laurence's Case*, L.R. 2 Ch. App. 421, applied.]

3. VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND—FRAUD—RESCISSION OF CONTRACT—WAIVER.

If after discovery of the whole of the material facts giving him the right to avoid the contract, the representee has by word or act definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission.

4. VENDOR AND PURCHASER (§ I C—10)—SALE OF LAND—DEFECTIVE TITLE —ACCEPTANCE AND APPROVAL.

In an action by vendor on a contract for sale of lands it is only where the purchaser has accepted the title or in his contract has expressly agreed to pay irrespective of the plaintiff having title, that the Court will decree payment without the plaintiff having first shewn a good title and thus satisfied the Court that he is able to deliver the property if the defendant pays the purchase money; but the vendor is entitled to a decree fixing a time within which defendant must pay under a penalty of his rights under the contract being foreclosed and judicially declared to have ceased.

[*Hicks* v. *Laidlaw*, 2 D.L.R. 460, 22 Man. L.R. 96, applied.]

Statement

ACTION for balance due under an agreement for sale.

G. H. Yule, for the plaintiffs.

C. E. Gregory, K.C., for the defendants, Manville, Jack, and Moorhouse.

Lamont, J.

LAMONT, J.:—By an agreement in writing dated March 1, 1912, the defendants agreed to purchase from the plaintiffs the south-west quarter of section three, township forty-eight, range

SASK.

S. C.

SCHRADER v. MANVILLE.

Lamont, J.

twenty-six, west of the third meridian, for $32,000, payable $8,000 cash, and $8,000 on December 15, in the years 1912, 1913, and 1914. The defendants paid the first two payments and a portion of the payment falling due in December, 1913, but failed to pay the balance of that instalment. This action is brought for that balance. To the action the defendants Woods and Stockton have entered no defence. The defence of the other defendants is that they were induced to enter into the contract by false and fraudulent misrepresentations made to them by the defendants Woods and Stockton, who were the plaintiffs' agents to bring about a sale. The facts as disclosed by the evidence are as follows:—

On March 1, 1912, the defendant Stockton obtained from the plaintiffs an option on the above described land at $28,000 which was good until April 1. Near the end of March the defendant Woods went to the office of the defendant Moorhouse, who was a real estate agent in Prince Albert, and listed the land with his clerk in the absence of Moorhouse at $250 per acre. When Moorhouse returned Woods saw him and told him they had an option on it at $32,000 and had a one-eighth interest not then taken up. He said the option expired on the following Monday, and asked Moorhouse to come in as purchaser and take the one-eighth interest. Moorhouse agreed. Later Woods came back and said that his friends in Saskatoon who were to take a one-half interest had fallen down on the deal, and they would have to place that one-half interest elsewhere. Moorhouse said he would see some of his friends in Prince Albert, which he did, with the result that the other defendants agreed to go into the deal and become purchasers along with Woods, Stockton and Moorhouse. Woods having arranged a sale to the defendants, Stockton went back to the plaintiffs, who live in Saskatoon, and said he could not take up the option at $28,000 but if the plaintiffs would give him an option at $32,000 he could effect a sale, but it would be on the understanding that the plaintiffs still took $28,000 for the property and that they would pay over to himself and Woods the extra $4,000 by which the option was being increased. The plaintiffs

agreed to this, and gave Stockton a new option at $32,000 dated back to March 1. On April 1, Moorhouse, acting for himself and his friends, went to Saskatoon to close the deal. Stockton shewed him the option at $32,000. The agreement now sued on was then drawn up by one of the plaintiffs and executed, and Moorhouse paid over the amount of purchase money due from the defendants except that from Stockton and Woods. On the following day the plaintiffs executed an agreement in writing by which the plaintiffs agreed to pay Stockton and Woods the sum of $1,333.33 out of each instalment of $8,000 payable by the defendants on December 15, in each of the years 1912, 1913 and 1914. The plaintiffs admit that when they gave the option at $32,000 they knew that it was to be used to effect a sale at that price, and that they were to hold themselves out to the purchasers as selling for that sum. The defendants paid the cash payment and the payment due in December, 1912. By the time the next payment had fallen due, in December, 1913, the defendants had heard rumours of the increase of the price to them by $4,000. On December 23, 1913, the plaintiff Schrader wrote to the defendant Moorhouse informing him of the two options. That letter contains the following statement: "In regard to the options, I beg to say that the original option to purchase was made between myself, Messrs. Sparling and Davis and F. H. Stockton for $28,000. Later another option was made for $32,000 and Woods and Stockton have a commission agreement for $4,000." On receiving this information, the defendants consulted their counsel in reference thereto, but were advised that, without more evidence, they could not successfully resist payment of the balance of the purchase money. On January 14, 1914, Moorhouse received from Schrader the original option at $28,000. For some reason he seems to have taken no action in reference to it. On March 16, Moorhouse wrote to Lock, the plaintiffs' solicitor, who had demanded payment of the instalment then due, that Mr. and Mrs. Manville and P. R. Jack had promised payment on the following Saturday, and that he would forward Lock a substantial cheque by the end of the week. On March the 18th, he wrote again explaining the delay in forwarding the money and promising to write again the

SASK.

S. C.

SCHRADER v. MANVILLE.

Lamont, J.

following Monday. This letter contains the following paragraph:—

As you are aware, there are a number of assignments of the money due, and at the present time I do not know where we stand. R. W. Davis assigned his interest to the Mutual Securities Co., Ltd., on the 21st January, 1914, which notice was received by me on the 21st January, 1914. You have assigned to the Northern Crown Bank, A. F. Simpson and the Stover estate, and there is an agreement between the bunch of you and Stockton and Woods *which we are recognizing*.

On March 21, he wrote again to Lock saying that all he had been able to collect was $4,700, and he enclosed cheques for that amount. On April 29, this action was commenced. On May 12, the defendants again consulted their counsel, and shewed him the option for $28,000, and instructed him to defend the action on the ground of fraud. On these facts the defendants say the plaintiffs were guilty of fraudulent conduct in colluding with Stockton and Woods to raise the price of the land on the other purchasers. On the other hand, the plaintiffs contend that even if it be held that their conduct was fraudulent, the defendants, after having full knowledge of the fraud, elected to affirm and carry out the contract.

That the plaintiffs, in arranging with Stockton and Woods to represent to the other purchasers that the price of the land was $32,000, when, as a fact it was only $28,000, and in agreeing to pay over the additional $4,000, were guilty of fraud, is beyond question.

The case of *Hitchcock* v. *Sykes*, 13 D.L.R. 548, very closely resembles the present case. In that case two propositions were laid down by the Ontario Court of Appeal. These, as set out in the head note (13 D.L.R. 548), are:—

Where an agent employed to sell property on commission himself joins with a third person in purchasing it at a price which is larger by the amount of the commission than that at which he could himself have bought the property, it is the duty of the vendor, when aware of the relation between the broker and the third person, to inform the latter of the existence of the agency and of the arrangement to pay a secret commission to one of the purchasers.

Where one member of a partnership formed expressly to purchase certain property, for which his associates furnished the money, received a secret profit from the seller, who knew of the existence of the partnership, the defrauded partners may, on discovering the fraud, rescind the contract of sale and recover from the vendor all payments made to him.

The judgment in this case was affirmed by the Supreme Court of Canada, 49 Can. S.C.R. 407, and leave to appeal to the Privy Council was refused. The plaintiffs, in the case at bar, knew before the agreement was executed that Stockton and Woods had joined the other defendants in purchasing the property in question, and they did not disclose to the other purchasers the fact that they were paying a secret commission of $4,000 to these two men. The plaintiffs were therefore guilty of fraudulent conduct, which entitled the defendants, upon discovery of the fraud, to elect whether they would affirm the contract or whether they would rescind it. If they elected to rescind, they would be entitled to a return of the moneys they had paid: 20 Hals. 737. Did the defendants repudiate or affirm the contract after knowledge of the fraud?

They admit that they did not repudiate it before action was brought, and that the first intimation they made of repudiation was contained in their statement of defence. It is also admitted that Moorhouse, who was acting for the defendants except Stockton and Woods, wrote the letters above referred to, and that the defendants made a payment on account after they had not only all the information contained in Schrader's letter of December 23, but also after they had possession of both options. The making of payments after notice of the fraud is evidence of an election to affirm: *Lawrence's Case*, 2 Ch. App. 421. In addition there is Moorhouse's letter to Schrader of March 18, which contains the significant phrase, "and then there is the agreement between the bunch of you and Stockton and Woods, which we are recognizing." No explanation was given of this sentence, and I can only take it to refer to the agreement between the plaintiff and Woods and Stockton by which the plaintiffs were to pay them $4,000, which, Moorhouse says, "we are recognizing." I can place no other interpretation upon these words, coupled with the defendants' payment of $4,000, than that the defendants, being aware of both options and of the agreement to pay Stockton and Woods the sum of $4,000, decided to affirm the contract and pay the purchase-price. In 20 Hals. 748, the law is laid down as follows:—

SASK

S. C.

SCHRADER v. MANVILLE.

Lamont, J.

A fourth defence is that the representee has elected to affirm the contract. It follows from what has already been shewn that if, after discovery of the whole of the material facts giving him the right to avoid the contract, the representee has, by word or act, definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission. The acts and conduct relied on as evincing the representee's affirmance must be such as are more consistent, on a reasonable view of them, with that than with any other theory.

Under the facts of this case as disclosed by the evidence, I am forced to the conclusion that the defendants, after being aware of the facts constituting the fraud, elected to affirm the contract. The defendants' claim for rescission, therefore, fails.

In their statement of claim the plaintiffs ask for payment of the balance of the instalment and in default thereof a sale of the land. In the alternative they ask that in default of payment the interests of the defendants in the land be foreclosed and possession delivered to the plaintiffs. I am of opinion that the plaintiffs are not entitled to personal judgment against the defendants on which execution could be issued. It is only where a defendant has accepted the title of the plaintiff, or in his contract has expressly agreed to pay irrespective of the plaintiff having title, that the Court will decree payment without the plaintiff having first shewn a good title and thus satisfied the Court that he is able to deliver the property if the defendant pays the purchase-money. The plaintiffs here have neither alleged in their pleadings nor proven at the trial that they have any title whatever to the land, neither are they entitled, in my opinion, to an order for sale. Had they claimed in their pleading that they were entitled to a vendor's lien, and asked for a declaration to that effect, they might have been entitled, upon the defendants not paying the amount due within the time fixed by the Court, to an order for the sale of the land to satisfy their vendor's lien. No such claim, however, is made. The plaintiffs are entitled, however, to relief asked for in their alternative claim, that is that a time be fixed within which the defendants must pay, and upon default the interest of the defendants in the land be foreclosed. While this relief is asked for as foreclosure, it is in reality asking for a cancellation of the contract in so far as the defendants' interest in the land is con-

SASK.

S. C.

SCHRADER v. MANVILLE.

Lamont, J.

cerned: *Lysaght* v. *Edwards*, 2 Ch.D. 499, at 506. The time to be allowed must in each case depend upon the circumstances of that particular case. In the present case, considering that over $21,000 has been paid, and the state of the money market, I will give the defendants until July 1 next, to pay. In default of payment on or before that day the plaintiffs will be entitled to an order declaring that the defendants' rights under the contract in so far as the land is concerned have ceased and are at an end: *Hicks* v. *Laidlaw*, 2 D.L.R. 460, 22 Man. L.R. 96.

Judgment accordingly.

THE KING v. ROMANO.

QUE.

K. B.

Quebec King's Bench (Appeal Side), Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. January 21, 1915.

1. TRIAL (§ III D—228)—CRIMINAL CASE—COMMENT ON FAILURE OF PRISONER'S WIFE TO TESTIFY FOR DEFENCE—CANADA EVIDENCE ACT, 1906, SEC. 4.

It is a ground for granting a new trial on a conviction for murder that the trial Judge commented on the failure of the prisoner's wife to testify for the defence although the Judge before verdict withdrew the comment.

[*R.* v. *Corby*, 1 Can. Cr. Cas. 457, *R.* v. *Coleman*, 2 Can. Cr. Cas. 523, *R.* v. *Hill*, 7 Can. Cr. Cas. 38, 33 N.S.R. 253, followed.]

2. APPEAL (§ VII M 1—520)—WHAT ERROR WARRANTS REVERSAL—CRIMINAL APPEALS—SUBSTANTIAL WRONG—CR. CODE, SEC. 1019.

It is for the appellant under sec. 1019 of the Cr. Code to establish that there has been a substantial wrong or miscarriage so as to entitle him to relief because of something done at the trial which was not in strict accordance with the law.

[*Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, referred to; Criminal Appeal Act (Imp.), 1898 distinguished.]

CROWN case reserved. Statement

The opinion of the majority of the Court was delivered by

CROSS, J.:—The accused, Romano, has been found guilty upon an indictment for murder. Two questions have been directed to be reserved for the opinion of this Court and the learned Judge who tried the accused has stated a case for our opinion. Cross, J.

The questions turn upon the summing up of the case to the jury.

It appears that the learned Judge inadvertently commented to the jury upon the failure of the wife of the prisoner to

QUE.
K. B.
THE KING
v.
ROMANO.
Cross, J.

testify, but afterwards, and before verdict, recalled the jury and carefully withdrew the comment.

The questions reserved are the following:—

1. Was there error or misdirection at the trial, such as occasioned substantial wrong or miscarriage to or in respect of the said Luigi Romano, in consequence of the presiding Judge having made the failure of the wife of the said Romano to have given her testimony at the trial the subject comment to the jury charged with the trial of the said Romano, notwithstanding the withdrawal of such comment made by the presiding Judge before verdict?

2. Having regard to the answer to be given to the foregoing question, ought the verdict and conviction to be set aside?

Counsel for the prisoner argues in substance that what had been said could not be unsaid.

Counsel for the prosecutor answers, in substance, that mistakes must be susceptible of correction, that the jury were bound to take directions in law from the Judge and must be taken to have acted upon the direction to disregard the comment, and that there has been no substantial wrong or miscarriage of justice.

In a matter of this kind, it is much more the practice, at least in this province, to follow precedents than in non-criminal matters. It is to be observed at the outset that the forbidding of comment upon the failure to testify was made part of the same enactment by which the disability of an accused person to testify was removed. Had such a safe-guard or qualification not been provided, any one could foresee that prosecuting counsel would incline to support weak cases by indulging the propensity to say to juries: "Here is the prisoner who knows what he has done or has not done: Why does he not give his testimony?" or "Why does his wife not give her testimony?"

Parliament has made the safeguard, then, not from consideration for the guilty, but because, without it, there would be danger to the innocent. There is a kind of forensic talent or genius by the exercise of which cross-examining counsel can sometimes succeed in making a witness—and not necessarily a

weak-minded witness—say things the opposite of what the witness means to say. A prisoner giving testimony from the witness box on the one hand, and cross-examining counsel on the other hand, are in a contest but not on equal terms.

In relation to the Imperial Act of 1898 which does not forbid comment by the Judge, it is aptly said in Best on Evidence, 11th ed., p. 607: "Looking to the risk of a comment from the Judge, and looking also to the probability (increasing as time goes on) that the jury (or some one of them) will be well acquainted with the prisoner's ability in law to testify and will draw unfavourable inferences from his unwillingness to do so, a prisoner's advisers are put in a position, the difficulty of which can hardly be overstated."

Further, and yet also as a preliminary observation, it may be recalled that formerly the erroneous admission or rejection of evidence or misdirection was considered to be a substantial wrong and that that view has been departed from only to the extent declared in Code art. 1019, namely, that a conviction is not to be set aside "although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

We are, therefore, to take the law to be that if there has been something not according to law in the trial, the Court is to form an opinion whether or not some substantial wrong or miscarriage was thereby occasioned on the trial.

It would appear from the reliance placed upon *Makin* v *Atty.-Gen. for New South Wales*, [1894] A.C. 57; in *Allen* v *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, to have been regarded as important that, in forming this "opinion" the Court of Appeal should not take up the task of weighing evidence which it is the appropriate function of a jury to weigh and decide upon.

A reference may now be made to the decided cases which bear upon the question whether or not the effect of a comment of the kind in question can, in the opinion of the Court of Appeal, be considered to have been destroyed or swept away by with-

QUE.
K. B.
THE KING
v.
ROMANO.
Cross, J.

drawal, with the result that, though something not according to law has been done, there has been no substantial wrong or miscarriage. Decisions given in Canada may first be referred to.

In *The Queen* v. *Corby* (1898), 1 Can. Cr. Cas. 457, it was held by the Court for Crown cases reserved in Nova Scotia, that the statutory rule, is to be applied notwithstanding the subsequent withdrawal of the comment—made in that case by prosecuting counsel—and notwithstanding the Judge's direction to the jury to disregard it. I observe no reference in the report to the effect of any such rule as that of art. 1019, though it was said by Henry, J., "The matter was in the highest degree material."

In *The Queen* v. *Coleman*, 2 Can. Cr. Cas. 523, the same conclusion was arrived at by the Court of Appeal for Crown Cases reserved in Ontario in the same year, though there also the comment had been withdrawn; and it was argued for the prosecutor that there had been no substantial wrong.

The same view was taken in *The King* v. *Hill* (1903), 7 Can. Cr. Cas. 38, 33 N.S.R. 253, in the Supreme Court of Nova Scotia.

The case of *The King* v. *King* (1905), 9 Can. Cr. Cas. 426, is a decision to the same effect but *à fortiori* as the withdrawal of the comment was made only by prosecuting counsel.

In *The King* v. *Aho* (1904), 8 Can. Cr. Cas. 453, it was held that a statement to the jury to the effect that the accused had failed to account for a particular occurrence when the onus was upon him, did not amount to a comment on failure to testify.

In *The King* v. *McGuire* (1904), 9 Can. Cr. Cas. 554, the question turned upon whether what had been said amounted to comment or not and it was held by the Supreme Court of New Brunswick that there had been comment.

The case of *The King* v. *McLean* (1906), 39 N.S.R. 166, 11 Can. Cr. Cas. 283, was also one in which the question was whether what had been said amounted to a comment or not, and it was held that, "an instruction by the Judge to the effect that the prisoner under the law had a right to remain silent," was not a comment. It is true that mention is not comment, and one can readily understand that there is much to be said for the view of Russell, J., to the effect that "as it becomes more gen-

erally known to jurors that a prisoner is competent to testify on his own behalf, there may be likely to exist a latent prejudice against one who does not avail himself of the privilege which it would be to the interest of an innocent defendant if the Judge were enabled to remove by discreet observations upon the policy of the law in that regard." By way of analogy, it may be pointed out that, where a rule of practice provided that no communication to the jury should be made, until after verdict, of the fact that money has been paid into Court, it has been held that a new trial should be ordered where counsel had referred to the fact that there had been payment into Court, though counsel had apologized for his statement and had withdrawn it. The cases are referred to in *Dickinson* v. *The "World"* (1912), 5 D.L.R. 148. Reference may also be made to *Longhead* v. *Collingwood S. Co.*, 16 O.L.R. 64.

In respect of decisions in cases in Great Britain, it was considered in *Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, that the article of the Imperial Criminal Appeal Act so far resembled article 1019 of our Code as to warrant reference to the decisions of England upon the question of the existence of substantial wrong or miscarriage.

In *Charnock* v. *Merchant*, [1900] 1 Q.B. 474, it was held that the conviction should be quashed where there had been illegally admitted evidence of a previous conviction, notwithstanding that the justices had stated that they had disregarded the fact of the previous conviction in deciding to convict.

It would appear that that case had been distinguished in later cases which arose in Scotland, see Phipson on Evidence, 5th ed., p. 534; *Ross* v. *Boyd*, 10 Sc. L.T. Rep. 750; *McAttee* v. *Hogg*, *ib.* 751, distinguishing *Charnock* v. *Merchant*, [1900] 1 Q.B. 474; and to the same effect see Best on Evidence, 1911, p. 607.

In *R.* v. *Bridgewater*, [1905] 1 K.B. 131, non-admissible evidence was taken in the cross-examination of the accused and the verdict was set aside, but in the concluding observation it was said "and the jury were not cautioned to disregard the answer." From that it might be inferred that the verdict might have been sustained if the caution spoken of had been given.

In *Rex* v. *Dickman* (1910), 26 T.L.R. 640, there had been

QUE.

K. B.

THE KING v. ROMANO.

Cross, J.

comment by counsel for the prosecutor upon the failure of the prisoner to have his wife testify respecting removal of certain bloodstains from a coat. The trial Judge had charged the jury to disregard that comment and on coming to give their verdict the foreman announced that they had disregarded the comment. The prisoner's appeal was dismissed.

If we give effect to this reasoning, as I think we should, it can no longer be said that forbidden comment by counsel for the prosecution will, in every case, constitute a wrong, which cannot be corrected by an appropriate caution given by the presiding Judge. In that case the mischief was held to have been validly eliminated. That elimination was possible in the particular case, because the comment had relation to failure to testify in respect of a particular matter and that matter was withdrawn from the jury. It was a case in which I would say, notwithstanding what appears in certain parts of the report in *Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, that the Court of Appeal has the duty of looking into the evidence and of forming an opinion upon the evidence whether, notwithstanding what has been done contrary to law, there has been a substantial wrong or miscarriage or not.

In *Barker* v. *Arnold* (1911), 27 T.L.R. 374, a question was improperly put to the accused in cross-examination as to his having been previously convicted. The justices at once intervened and no answer was given. The justices stated that the incident had been ignored by them in arriving at their decision. The appeal was dismissed.

In *Rex* v. *Hemingway* (1912), 29 T.L.R. 13, the prisoner was charged with burglary and the evidence in support of the charge was weak. The ground work for proof of previous convictions had not been laid. The prisoner gave his testimony. See *Rex* v. *Sullivan* (1913), 30 T.L.R. 94.

It may be opportune to add that it was held in *Rex* v. *Wann* (1912), 29 T.L.R. 240, 7 Cr. App. R. 135, that there had been a miscarriage of justice inasmuch as the Judge's summing up had not adequately stated the facts to the jury, and in the opinion of the Court "the omission or misstatement was such that

the jury *might probably* have been misled by it." That would seem to be going beyond what is provided for in Code art. 1019, though, as already indicated, there were expressions of opinion in *Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, that the meaning of the Imperial enactment and that of art. 1019 are the same.

And in *Rex* v. *Newton*, 7 Cr. App. R. 214, the conviction of a hardened offender was set aside when it appeared that, upon the verdict being given, some of the jurors recommended that the prisoner should receive a specified kind of punishment which was relatively trifling, and it was to be inferred that the jurors had made the recommendation or request because the evidence in support of the charge was weak.

By the Imperial Act, the prohibition to make comment is directed only to counsel for the prosecutor, the Judge being left free to make comment.

By our Evidence Act the Judge as well as counsel is forbidden to make comment.

Whether a withdrawal or rectification would be more or less effective when made by the Judge in respect of his own comment, than it would be in respect of comment by counsel, is a question upon which ethical refinement might be exercised indefinitely.

What can be said with certitude is that the purport of our Evidence Act manifests more solicitude for the interests of the accused person, in including the Judge as well as counsel in the prohibition.

The Criminal Code, however, art. 1019, declares the plain rule that, though something not according to law has been done, the conviction is not to be set aside, unless "in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

With much deference to those who have expressed themselves in a different sense, I consider that that does not mean the same thing as the provision of the Imperial Criminal Appeal Act above referred to. The latter enactment indicates that, upon certain specified grounds being made out, the appeal is to succeed; otherwise it is to be dismissed, and adds the proviso "that

QUE.

K. B.

THE KING v. ROMANO.

CROSS, J.

the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if they consider that no substantial miscarriage of justice has actually occurred."

This puts upon the Court of Appeal in England an inquiry the opposite of that which arises under article 1019, because it is a rule in English practice that once it has been shewn that evidence has been illegally admitted or excluded, the burden of establishing that there has not been a mistrial rests upon the party who supports the verdict. The question for the Court of Appeal in England would therefore be: "Has the prosecutor shewn that the prisoner may not have been prejudicially affected by the thing done not according to law?" But our law says that, admitting the fact of illegality, the Court of Appeal is not to set aside the conviction unless in its opinion some substantial wrong or miscarriage was thereby occasioned.

It is for the attacking party to establish that there has been a substantial wrong or miscarriage. I have no doubt that the Parliament of Canada was willing to go farther and did go farther than the Imperial Parliament in providing against the quashing of verdicts, and I believe in taking an Act of Parliament to mean what it says.

We are therefore, called upon to say whether, in our opinion, a substantial wrong has been done to Romano or not in view of the withdrawal of the forbidden comment. I consider that there has been a substantial wrong. The effect of the comment still dwelt in the minds of the jury notwithstanding the withdrawal. It could not be otherwise. The prisoner was inadvertently subjected to the effect of something which the law forbade. The case was not like *Dickman's* (*R.* v. *Dickman* (1910) 26 Times L.R. 640), where the comment related to an incident which could be eliminated. It bore upon the heart and substance of the case.

For that reason, and because of the weight to be attached to the decisions in the cases of *Corby*, *Coleman* and *Hill*. I would answer the questions in the affirmative and order a new trial.

LAVERGNE, J., dissented.

New trial ordered.

REX v. PUBLICOVER.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley, Drysdale, and Ritchie, JJ. March 27, 1915.

1. INTOXICATING LIQUORS (§ III A—57)—LIABILITY OF PURCHASER TAKING DELIVERY FROM CARRIER—PROHIBITED DISTRICT.

It is not an offence under the Nova Scotia Temperance Act (1910), as amended 1911, for the purchaser of liquor bought in a county under license to personally receive it from the express company on its arrival by railway at the town in which he resides where the prohibition clauses of that Act are in effect; sec. 30 of the Act which prohibits sending liquor or bringing or causing it to be sent or brought applies to the person or agent sending the liquor by a common carrier to the person in the municipality which is not under license and to the person carrying liquor for another at either end of the transit, but not to the purchaser personally taking delivery from the carrier as the consignee of liquor bought in a licensed district.

2. INTOXICATING LIQUORS (§ III H—90) SEIZURE AND DESTRUCTION—N.S. TEMPERANCE ACT.

Where there is no reason to suspect that intoxicating liquor consigned by rail from a licensed district to an unlicensed district in Nova Scotia is intended for sale or to be used otherwise than for the personal use of the consignee, the seizure of the liquor is not justified under sec. 36, N.S. Acts, 1911, ch. 33, and the magistrate should order it restored to the consignee.

MOTION to quash a summary conviction under the Nova Scotia Temperance Act. Statement

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

J. A. Knight, K.C., and *Arthur Roberts*, K.C., for the informant, *contra*.

GRAHAM, E.J.:—By the Nova Scotia Temperance Act, 1910, ch. 2, sec. 30, as amended 1911, ch. 33, it is provided as follows:— Graham, E.J.

"Every person who himself or by his clerk, servant or agent sends or causes or procures to be sent, or brings or causes to be brought from any place in the province liquor to (or to be delivered to) any person in any portion of this province where part I of this Act is in force '(exceptions not material)' shall be liable to a penalty, etc."

By section 33 there is a penalty upon any person for ordering any consignment of liquor in violation of provisions including section 9, which is the prohibiting section, in effect the same as the provision just quoted.

Sec. 46, as amended, 1911, ch. 33, provides for a search warrant to search premises for liquor kept for sale contrary to the

N. S.

S. C.

REX v. PUBLICOVER.

Graham, E.J.

provisions of part I, and, if found, for information and summons and a conviction and destruction of the liquor.

By the Act of 1911, ch. 33, sec. 36, it is provided:—

"(1) Where any inspector 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 . . Act, he may forthwith seize and remove the same."

"(2) The same 'if reasonably believing that liquor intended for sale or to be kept for sale in violation of the . . . Act, is contained in any vehicle or any public highway or elsewhere, or is concealed upon the lands of any person.'"

Then, when seized there are provisions for information and summons to shew cause why the liquor should not be destroyed.

By subsection (6) the claimant or person mentioned in the summons may shew that the liquor is his property and is not intended for sale or to be kept for sale in violation of the Act.

And by subsection 8:—

"If the magistrate finds that the claim of any person to be the owner of the liquor is established, and that it does not appear that it was intended to sell or keep such liquor for sale in contravention of the . . . Act, he shall dismiss the complaint and order that such liquor be restored to the owner."

The evidence shews that the half barrel of bottled whiskey came by express from Halifax to Bridgewater. The defendant himself went to the station, paid the express charges, and took it away on his sleigh. The inspector saw it and required him, opposite to the Bank of Commerce, where he was janitor, to take it into the bank and it was opened there and examined. The defendant said it was his own liquor and the inspector says in his evidence, on cross-examination:—

"I did not believe it was for sale or to be kept for sale after he told me."

And he seized it and took it to the courthouse and after the trial there was a conviction for the penalty and an order for its destruction. There was no pretence that he was in the business of selling or keeping for sale or anything of that kind or that this liquor was to be sold or kept for sale.

The only peculiarity about the case is that it is contended that under the Acts of 1910, ch. 2, sec. 30, the defendant Harry Publicover was a person who in the language of the conviction: "unlawfully did cause liquor to be brought to the said Henry Publicover," and is therefore liable. That is, he was bringing it, or causing it to be brought to himself. It is rather off to speak of bringing a thing to oneself, or bringing it to be delivered to oneself. And causing it to be brought, in that sentence, only means that the person is not to "bring or cause to be brought," (that is by himself or agent) to another person liquor from outside (but in the province) to a person in the municipality which is under the Act. If "person" is inapt to cover other than third persons where the expression "bring" or "brought" or "delivered to" is used it cannot be extended when the expression "caused to be brought" in the same sentence is used. I think it would hardly do to give the provision such a construction that a man would make himself liable to the penalty and forfeiture if in travelling by train from Halifax to Bridgewater he brought a bottle of liquor with him on the notion that he was bringing liquor to himself or to be delivered to himself.

The section, I think, is aimed at the person or agent sending the liquor by the carrier to the person in that municipality and also at the person carrying liquor or his agent at either end of the transit, but not at the person receiving it from the carrier.

There are other provisions and penalties for him, such as selling or keeping for sale. But I think there is not penalty for the person receiving it because these other penalties will in 99 cases out of a hundred catch him. And for the other case, as where he is bringing it for his own use that right seems to be preserved or respected by 1911, ch. 33, sec. 36, sub.-s. 8 already quoted.

But further, and here the information, conviction and order are very vague or altogether silent as to which provision or state of facts the liquor was seized under. The transit had ceased; perhaps it was in a vehicle. But whatever one of the provisions it was seized under, it is common to all of them that it must be liquor that was intended for sale or to be kept for sale. This

N. S.
S. C.
REX
v.
PUBLICOVER.
Graham, E.J.

is negatived by the evidence and not alleged in the conviction. For if it was the defendant's own liquor and not liquor to be sold or kept for sale then if, as was probably the case, the magistrate was going under 1911, ch. 33, sec. 36, he should (under sub-sec. 8) have ordered it to be delivered back to the defendant.

The conviction and order, in my opinion, must be quashed with costs.

Drysdale, J.
Ritchie, J.

DRYSDALE and RITCHIE, JJ., concurred.

Russell, J.

RUSSELL, J.:—The defendant ordered a quantity of whiskey from A. Monaghan to be sent to him in Lunenburg County. The whiskey was forwarded by the vendor and taken possession of by the defendant at the Bridgewater station of the Halifax and South Western Railway, whence it was transferred to the bank of which the defendant is janitor. While defendant was removing it from the bank to his house, it was seized by the inspector who summoned the defendant to answer to a charge framed under section 9 of the Nova Scotia Temperance Act, 1910, and defendant has been convicted under that section for causing the liquor to be brought to himself: Sec. 9 is as follows:

"No person shall by himself, his clerk, servant or agent send or cause to be sent, or bring or cause to be brought from any place in the province liquor to any person in any municipality in which this part '(of the Act)' is in force other than to a vendor appointed under this part, or a legally qualified physician, chemist or druggist."

No doubt the vendor in this case is liable under this section, and section 30, sub-sec. 1, which uses the same language in describing the offence and prescribes the penalty of fifty dollars for the first offence. But it is contended that the defendant is not liable under either section and that the statute as to the bringing or causing to be brought contemplates a case in which the liquor is brought or caused to be brought by the offender to some other person. I think this is a most reasonable construction.

The construction contended for by the prosecution would subject to a penalty a person who came from Bridgewater to Halifax, purchased a bottle of wine from a licensed dealer and

took it home with him for his own consumption; because the "person" to whom it is unlawful to cause the liquor to be brought, is the same person to whom it is unlawful to bring it. Indeed it may well be argued that it is a *reductio ad absurdum* to speak of a person bringing a bottle of liquor to himself.

It is obvious from subsection (8) of sec. 36, ch. 33 of the Acts of 1911, that liquor may be lawfully held and kept in places where the Nova Scotia Temperance Act is in force for the use of the person who so keeps it. This subsection, which is one of a number of subsections dealing with the seizure and forfeiture of liquor enacts that:

"If the magistrate finds that the claim of any person to be the owner of the liquor is established and that it does not appear that it was intended to sell or keep such liquor for sale in contravention of the Nova Scotia Temperance Act, he shall dismiss the complainant and order that such liquor be restored to the owner."

It seems to me that there were good grounds in the present case for just such a finding and restoration. The defendant swore that he ordered and purchased the liquor for his own use as a medicine; he made this statement to the inspector and the inspector says that when this statement was made to him, he did not believe the liquor had been purchased for sale, or was to be kept for sale. The magistrate has made no finding on this point, but has convicted the defendant simply on what he understood to be the legal effect of section 9.

There is a section of the Act of 1910 (sec. 33) which seems to make the defendant liable in this case to a penalty of fifty dollars for ordering the liquor from the Halifax vendor, and if that be the case it furnishes a very good reason why he should not also be subject to a penalty for receiving the liquor so ordered.

On the whole, I am inclined to think that the case should have been dismissed and that the conviction should now be quashed.

LONGLEY, J. (dissenting), for reasons given in writing, was of opinion that the conviction was right and should stand.

Conviction quashed.

ONT.

S. C.

LEUSHNER v. LINDEN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, and Magee, JJ.A., February 8, 1915.

1. APPEARANCE (§ I—3)—SPECIALLY ENDORSED WRIT—AFFIDAVIT—GOOD DEFENCE "UPON THE MERITS"—SUFFICIENCY OF.

The affidavit necessary with defendant's appearance to a specially endorsed writ under Ont. C.R. 1913, rule 56, must state that he has a good defence "upon the merits;" it is not sufficient that defendant swears he has a good defence to the action.

[*Robinson* v. *Morris*, 15 O.L.R. 649, followed.]

Statement

APPEAL from the order of RIDDELL, J.

G. F. Dyke, for the appellant.

J. R. Roaf, for the plaintiff, respondent.

The judgment appealed from was as follows:—

Riddell, J.

RIDDELL, J. (at the close of the argument):—To a specially endorsed writ, the defendant entered an appearance, which has been set aside by the Master in Chambers on the merits. The defendant now appeals.

The Rule governing such appearances is perfectly clear and precise, and does not admit of misunderstanding: "Where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action. . . . If the defendant fails to file an affidavit the appearance shall not be received. . . ." Rule 56 (1) and (4).

By this Rule there are two prerequisites which must be found in the affidavit: (1) a statement "that he has a good defence upon the merits;" (2) the nature of the defence with its facts. The Rule has the force of a statute, and must be observed. The affidavit in this case reads, "I have a good defence to this action." That this is not a compliance with the Rule is conclusively decided by *Robinson* v. *Morris* (1908), 15 O.L.R. 649, in the King's Bench Division. The same point was decided in the Appellate Division by a Court of which I was a member—there, indeed, under the circumstances of the particular case, we gave the defendant leave to file a better affidavit *nunc pro tunc*.

Whatever the merits of the proposed defence may be, I do not go into them—they may be developed fully in an appli-

ONT.
S. C.
LEUSHNER v. LINDEN.
Riddell, J.

cation, which I reserve leave to the defendant to make substantively, for permission to file a proper affidavit, etc.

The appeal will be dismissed with costs—the plaintiff undertakes not to proceed on his judgment until the 11th December, to enable such proposed motion to be made.

The attention of the defendant having been called to the defect of merit as well as of form, she must expect that any defence which she may set up will be closely scrutinised and rigidly dealt with.

The Rule being specific that the appearance shall not be received without an affidavit, and that the affidavit shall contain a statement that the defendant "has a good defence upon the merits," officers should not receive an appearance unless the affidavit does contain that statement. It is, perhaps, not to be expected that they will pass upon the sufficiency of the facts alleged to constitute a valid defence: but they may and should see that the affidavit is not defective in form.

THE COURT dismissed the appeal with costs.

Appeal dismissed.

BORDEN v. STANFORD.

N. S.
S. C.

Nova Scotia Supreme Court, Townshend, C.J., Graham, E.J., and Russell, and Drysdale, JJ. March 9, 1915.

1. TRUSTS (§ I D—21)—SUBSCRIPTION AGREEMENT—DESCRIPTION OF PARTIES—PRESUMPTION.

On a share subscription agreement with a firm of stockbrokers described as trustees but without further disclosure of the trust whereby certain others called the subscribers severally purchased the number of shares to which each had subscribed in a company subject to the N.S. Companies Act, it is not to be presumed that the stockbrokers are acting in trust for the company itself if the agreement is consistent with its being made in trust for themselves and associate underwriters, where the subscription below par would be subject to attack if the same were an original allotment.

2. CORPORATIONS AND COMPANIES (§ V E—217)—APPROPRIATION TO SUBSCRIBERS—SALE BY BROKERAGE FIRM—VALIDITY—ASSUMPTION.

Where a company is authorized by law to appropriate in commission to subscribers 10 per cent. of what it should otherwise have in its treasury as capital derived from subscriptions, and a sale at 7½ per cent. discount by a brokerage firm is attacked as illegal, but there is no evidence to shew that the broker is acting for the company, the Court may assume that such method has been adopted under which the broker might lawfully become entitled to the stock which he is agreeing to sell as by himself becoming the original subscriber under an appropriation of ten per cent. commission. (*Per* Russell, J., and Graham, E.J.).

N. S.

S. C.

BORDEN v. STANFORD.

Sir Charles Townshend, C.J.

APPEAL from a judgment of Longley, J., in favour of the plaintiff on a promissory note.

J. W. Murphy, for defendant, appellant.

W. C. Macdonald, for plaintiff, respondent.

SIR CHARLES TOWNSHEND, C.J.:—I have had some difficulty in reaching a conclusion in this case and was disposed to order a new trial. It was claimed by defendant that the note was void for two reasons. (1) That it was given for stock issued and sold in the formation of the capital of the company below par and therefore illegal, and that plaintiff being one of the directors must have been aware of the fact. And (2) that it was by reason of the fraudulent representation made to defendant on giving the note.

As to the first objection it was left in some doubt whether Wetherby in selling was acting as trustee for the company or was acting as trustee for others who had already acquired the shares. It is not to be assumed without proof that he acted for the company and thus did an illegal act. It was on this point I should have preferred further evidence. At the argument a new trial was suggested to defendant's counsel which he declined. As to the question of fraudulent representation I do not think the evidence sustains this ground. As the majority of the Court is of opinion that the appeal should be dismissed I do not feel strong enough in my own view to dissent.

GRAHAM, E.J., concurred with RUSSELL, J.

RUSSELL, J.:—The right of the plaintiff to recover on the note for which he certainly gave value in hard cash is disputed on two grounds. First, that the note was made on an illegal consideration, being given in payment for shares purchased from the company, and to be allotted to him in effect by the company without their receiving the full par value of the shares; secondly, that the prospectus on the strength of which the defendant subscribed for the shares contained untrue representations. If either of these grounds can be sustained it is undoubtedly the law that the burden is thrown upon the plaintiff to shew not only as he has done, that he gave value for the

note, but also that he was ignorant both of the illegality of the consideration and the misrepresentation in the prospectus or of whichever of these facts has been established. All that the learned trial Judge has told us about the matter is that he has given full attention to the authorities cited on behalf of the defendant and has come to the conclusion that the defendant Stanford has no defence to the action. I should like to have known much more than this. First, as to the alleged misrepresentation, it is contended that it was a false statement on the part of the promoters to say that the company had been

> incorporated for the purpose of acquiring two wholesale businesses named in the prospectus and also the establishing of certain stores in a list of towns named in the document, arrangements having been made with the most progressive and up to date retail businesses in the Province, etc.

The prospectus then names the various places with respect to which such arrangements have been made. It is this statement with reference to the alleged arrangements so made that is attacked as being untrue. I have read the evidence carefully without being able to discover wherein the statement is not in accordance with the facts. It is, I assume from the argument, true, that in many of the places named no businesses were established or taken over. But it is not thereby shewn that arrangements may not have been made which gave the right to take over businesses existing in every one of the places so named. It seems to me that more light would be needed on this point before it would be possible to say whether the representation was true or false. As the case stands I think I should have to say that the burden of shewing it to have been untrue which rests upon the defendant has not been satisfied.

The defence founded on the illegality of the consideration, in my opinion, also calls for further light. Under the Act of 1912 a company can appropriate in commission to subscribers ten per cent. of what it should otherwise have in its treasury as capital derived from their subscriptions. The agreement between the broker and the various subscribers is well within this margin, but the contention is that the seven and a half per cent. which the company is losing on these allotments is not a commission, and therefore not authorized by the Act of 1912 (ch.

N.S.

S.C.

BORDEN v. STANFORD,

Sir Charles Townshend, C.J.

15, sec. 19). That I do not know. There is nothing in the evidence to shew that the company may not have agreed with the broker, or with some person unnamed for whom the broker is trustee, to sell its stock on a commission of ten per cent., thus enabling the proposed original subscriber to make a profit of two and a half per cent. on the shares he offers to the public. There is no evidence, in other words, to shew that the broker is acting for the company in selling the shares at less than par. If such a proceeding would be illegal it must not be assumed, because the broker describes himself as acting in trust, that he must be a trustee for the company. If a mode can be suggested in which the broker could have become lawfully entitled to the stock which he is agreeing to sell, it must, I think, be assumed that this method has been adopted, unless there is evidence, which I have been unable to discover, that an illegal method has been resorted to. The case is one which involves hardship to one or other of the parties. I doubt if we have all the light on the matter that could have been afforded, but on the record as it stands I cannot see that the defence either of illegality or of misrepresentation has been sustained.

Drysdale, J.

DRYSDALE, J.:—This is an appeal from the judgment of Mr. Justice Longley in favour of plaintiff against the defendant as maker of a note for $925. It seems this note was given by defendant as part payment for some stock of the Canada Food Company under an agreement appearing at pp. 9 and 10 of the case. This note was cashed or discounted by the plaintiff. That is to say, the note was made and given to W. H. Wetherby and Co., by that firm endorsed, and at the instance of Mr. Wetherby, or of Wetherby and one Burgess, negotiated by procuring its face value from the plaintiff.

The defence argued before us is, first, that the note was given as part payment of a subscription for stock of the Canada Food Co., an incorporated company, such subscription being illegal in that the said shares were to be issued at a discount and secondly, that the prospectus of said company contained false and misleading statements that induced the subscription. Other than the agreement between Wetherby and Co., appearing

at pp. 9 and 10, and what is alleged to be the prospectus of the company on pp. 11 to 14 of the case, there is nothing to throw light on the original transaction or to support the defence set up.

The first answer made by counsel for plaintiff to the points raised, is that plaintiff is an innocent holder of the note for value without notice of any illegality and without notice of anything false or misleading in the so-called prospectus. It is said that plaintiff has not pleaded this position but I think the plaintiff's position in acquiring the note for value was fully gone into at the trial without any objection as to pleadings and any point as to want of pleadings is not now open. Of course if the plaintiff acquired the note for value during its currency without knowledge of any illegality or fraud in its inception the answer here attempted by defendant is of no avail. The burthen is on the defendant on the points raised. Let us examine the questions raised in point of time. First he says that the prospectus contained a fraudulent or false statement in that on its face it alleges that the Food Co. has been incorporated for the purpose of acquiring and operating the grocery business of two named firms, also the establishing of certain stores in various towns, arrangements having been made with the most progressive and up-to-date retail businesses in the province. It is now said that the words under-scored was a false and misleading statement, but I find absolutely no evidence in proof of such an allegation. For all that appears in the case these words may have been quite consistent with proof. This was the only attack made upon the prospectus in the argument before us and I think it was without support in the proof.

On the other point, namely, illegality, in that it is alleged the subscription was for shares at a discount, we are left in the case without the position of Wetherby and Co. being disclosed, and, in short, without any proof as to the allegation other than a reference to r. 2, the agreement on pp. 9 and 10, between Wetherby and Co., and the defendant. It appears that defendant signed this agreement putting opposite his name 25 shares under the heading: "For public issue," and under the amount

N. S.
S. C.
BORDEN
v.
STANFORD.
Drysdale, J.

column, $2,500. The document purports to be an agreement between Wetherby and Co., trustees of the first part, and a number of people who become parties thereto called "the subscribers." It provides for the delivery of certain shares of the preferred stock of the Food Co. at 92½ and certain shares of ordinary stock of that company as a bonus. Who are Wetherby and Co. trustees for? We are asked to assume that they are trustees for the Food Co., and to treat this document as an application by defendant to the Food Co. without any evidence being offered as to their position and without any explanation or disclosure as to the circumstances under which this agreement was made. It was suggested on the argument that all the facts should be disclosed and the true situation presented and with this in view a new trial was suggested by the learned Judge presiding, hearing the argument. Counsel for the plaintiff offered promptly to agree to a new trial for the purpose of a full disclosure of all the facts. This was objected to and refused by counsel for defendant who insisted that, under the proof as it stands, the case for the defence is made out and the argument proceeded leaving nothing on the point under consideration but the bald agreement on its face. We know Wetherby and Co. are stock brokers, and if this agreement, on its face, is consistent with an agreement for themselves in trust for themselves and their associates who underwrite and handle stocks, I do not think we should presume that they are acting in trust for the Food Co. Fraud or illegality is not presumed but requires to be proved, and I do not think this bare agreement on its face can be pointed to as proof of the illegality relied upon. I am of opinion the defendant has failed in the proof in his allegations both as to the prospectus and as to alleged *ultra vires* acts of the company in the issue of stock.

I think the plaintiff as the holder of the note in due course for value must recover and would dismiss the appeal.

Appeal dismissed.

COOK v. CANADIAN COLLIERIES.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 26, 1915.

1. RAILWAYS (§ II D—30)—OPERATION—COAL COMPANIES—DEFECTIVE APPLIANCES.

A coal company which operates wholly on its own lands in connection with its mines a railway and on it carries passengers and freight may properly be found negligent in operating its cars with a "link and pin" coupling long after the general introduction of safer and better methods, although the company may not be subject to the Railway Act, R.S.C. 1906, ch. 37, sec. 264.

[*Fralick* v. *G.T.R.*, 43 Can. S.C.R. 494, 10 Can. Ry. Cas. 373; *Stone* v. *C.P.R.*, 47 Can. S.C.R. 634, 13 D.L.R. 93, referred to.]

Statement

APPEAL by defendant from judgment of Clement, J.

Maclean, K.C., for appellant, defendant.

Leighton, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A., agreed in dismissing the appeal.

Irving, J.A. (dissenting)

IRVING, J.A., dissented.

Martin, J.A.

MARTIN, J.A.:—After a careful perusal of all the evidence I am satisfied that the learned trial Judge was justified in the view he took of the facts and in such case no legal difficulty exists to prevent the plaintiff from holding the judgment entered in his favour. The appeal, therefore, should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would maintain the judgment of the learned trial Judge.

While this is not an incorporated railway company, and the provisions of the Railway Act, R.S.C. 1906, ch. 37, sec. 264, sub-sec. (*c*), cannot be invoked, yet the defendants are operating a railway carrying passengers and freight and exposing their workmen to the same dangers as any duly incorporated railway company. The link and pin coupling is now a thing of the past in Canada on all operating railways, parliament in its wisdom, owing to the attendant danger to employees, having seen fit to legislate abolishing it.

It has been so long recognized as dangerous, and as for a considerable number of years safer and better appliances have been in vogue, I hold that the failure to adopt these appliances and to continue the antiquated system to the greater danger of its employees is a negligent act on the part of the defendants.

B. C.

C. A.

COOK v. CANADIAN COLLIERIES.

Galliher, J.A.

It may be said that it is hard to draw the line in such a case, and while on ordinary logging roads as we understand them in this province, or in underground workings in mines it might not be reasonable to exact the same degree of modern equipment, yet parties operating as the defendants here are, should, I think, be held to be negligent.

McPhillips, J.A.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Mr. Justice Clement in a negligence action—the learned trial Judge was sitting without a jury—and in giving a considered judgment has, by his findings of fact, held that the defendants were guilty of negligence and absolves the plaintiff from any contributory negligence. The evidence admits of these findings of fact, and, in my opinion, no such case has been made out upon this appeal—which would warrant their disturbance.

The couplings in use were certainly not of the most modern kind—but it could not be said that this alone would constitute liability—yet there must be a time when the more modern appliances should be adopted. When we have the almost obsolete couplings and a defective system as well, and the non-enforcement of rules of safety—if any such really existed—a complete case is made out of negligence for which the appellants must be held to be answerable. The cases which, in my opinion, support the conclusion to which I have come—upon this appeal—are *Fralick* v. *G.T.R. Co.* (1910), 43 Can. S.C.R. 494, Mr. Justice Duff, at pp. 519-520; *Stone* v. *C.P.R. Co.* (1913), 47 Can. S.C.R. 634, 13 D.L.R. 93. It is true this case to a large extent goes upon statutory duty—but Mr. Justice Anglin, at p. 108, said:—

> A finding of negligence on the part of the defendants is probably involved in the finding of such a defect; but a finding of negligence is not requisite where a breach of statutory duty causing the injury complained of has been established.

It is a case, however, that is most instructive upon the question so strenuously advanced in the present case—that the plaintiff was guilty of contributory negligence, and I would in particular refer upon this point to the judgment of Mr. Justice Anglin; and *Carrigan* v. *Granby* (1909), 16 B.C.R. 157.

I do not find it necessary to express an opinion upon the question as to whether the appellants are subject to the Railway Act (R.S.B.C. ch. 194). The appeal therefore should, in my opinion, be dismissed.

Appeal dismissed.

B. C.
C. A.
COOK v. CANADIAN COLLIERIES.

DONALDSON v. ACADIA SUGAR REFINING CO.

N. S.
S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Longley and Ritchie, JJ. March 9, 1915.

1. SHIPPING (§ I—1)—MOTOR BOAT—NEGLIGENT NAVIGATION—GRATUITOUS PASSENGER—LIABILITY.

Negligence of a gross description must be proved in an action for damages founded on negligent navigation resulting in injury to a passenger carried gratuitously in a motor boat.

[*Moffatt* v. *Bateman*, L.R. 3 P.C. 115; *Nightingale* v. *Union Colliery*, 35 Can. S.C.R. 67, referred to.]

2. SHIPPING (§ I—1)—NEGLIGENCE—SKILL OF SEAMEN.

While the law requires that a seaman should exhibit ordinary presence of mind and ordinary skill, an act or omission, in a moment of great peril, which contributes to a collision is not actionable negligence, although it turned out to have been the wrong thing to do, if it represented his best judgment at the moment of the emergency.

Statement

APPEAL from the judgment of Russell, J., in favour of defendants in an action claiming damages for negligence on the part of the servants and employees of defendants by reason whereof one Robert S. Donaldson was alleged to have lost his life. The action was brought by plaintiff, as father and administrator of the deceased, on behalf of himself and the wife and mother of deceased.

James Terrell, for plaintiff, appellant.

W. A. Henry, K.C., and *J. L. Ralston*, K.C., for defendants, respondents.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—As I understand the evidence in this case, there was no negligence on the part of the "Mikado," and, secondly, if there was any, the accident, in my opinion, was due to the negligence of the deceased, Donaldson. Donaldson was a sailor, and presumably understood managing the helm of the boat so as to give it proper direction and keep out of the way of other vessels. It is quite clear he was steering the motor boat, while Morrissey was engaged in fixing the engine, and that he was at the wheel just before the collision took place. It must have been he who suddenly changed the direction of the motor

N. S.

S. C.

DONALDSON v. ACADIA SUGAR REFINING CO.

Sir Charles Townshend, C.J.

boat in a southerly direction down the harbour, apparently intending to cross in front of the "Mikado," which resulted in the collision. I do not go into the mass of evidence on the subject, but simply give an extract from Captain John Blakeney's evidence describing just what occurred. He says:—

I came down the harbour on the usual course for the Woodside Refinery, and when I got down pretty well to the lower end of the Woodside Refinery wharf I noticed this motor boat by the bow of the little schooner that was lying to the north end of the new breakwater, and I saw she started to come out. She came out from the bow of this vessel, and he started up to the corner of the refinery wharf, as, I suppose, going to Halifax. He was going in that direction at that time. I watched him on what would be four points on my port bow. I started then to haul up a little, but keeping well down, to give him lots of room between me and the wharf. I gradually hauled in, starboarded my helm a little slowly. All of a sudden I noticed the motor boat changed her course in a southerly direction down the harbour. Just as soon as possible I rang the bell to stop the engine. I saw there was going to be a collision. I could not get clear of it.

At the same time I righted my helm. In a few seconds we struck about two feet from his stern.

Again, he says:—

If he had not changed his course I would have cleared him, and he would have gone clear of me. I kept him on my port bow all the time, just about according as he was going. I was going to pass round his stern. Next thing I saw he threw his wheel hard a starboard and came right round to my bow and started to cross me. Then I stopped my engines.

That this is a substantially correct account of what took place and the position of all parties just before and at the time of the collision is not disputed. In the words of the defendants' eighth defence:—

When the said motor boat left Woodside on the said occasion, the said steamship "Mikado" was approaching the wharf at Woodside on a course practically parallel and opposite to that of said motor boat. The said motor bearing four points on the port bow of the steamship "Mikado." These relative positions were maintained until the bows of the two boats had overlapped, when the course of the motor boat was suddenly directed to port, and the said motor boat crossed the bow of the said steamship "Mikado," and, although the engines of the said steamship "Mikado" were stopped as soon as the said change of course on the part of the said motor boat took place, a collision occurred by which the said deceased was precipitated into the water and drowned.

Surely the person who in this manner suddenly brought the motor boat in front of the steamer is to blame and responsible for the said accident which occurred, and that deceased did it can admit of no doubt, as Morrissey, the only other person in the boat, was engaged at the moment with the engine.

Now, it is not necessary for me to go into the evidence on this point more in detail, as it is clearly a correct account of just what occurred, and, if so, there can be no doubt that the proximate cause of the accident was the deceased's own negligence. Even if it be admitted that there was negligence on the part of the "Mikado," the deceased's own conduct and action in this respect would relieve it from liability.

Now, for a moment let us examine in what way it is contended that the "Mikado" was negligent. There are three specific reasons given—that is to say, her speed was greater than the regulations allowed—she did not give the blasts indicating her intended direction, and that a sufficient look-out was not kept. As to the look-out, it seems to me clear on the evidence that a good look-out was kept. One has only to read the captain's evidence to realise that he was keeping a careful look-out; that he saw the motor boat when she started out, and watched her movements until the collision occurred, and did all in his power to avoid it, or, at any rate, to minimise its effect when he saw it was inevitable. If he had had a dozen men on the look-out, the accident would not have been prevented, in view of the sudden change of direction in the motor boat. So as to the blasts. If he had given them all the way across the harbour, it could have made no difference. The direction of the motor boat north and the parallel direction of the "Mikado" itself, if kept, enabled the two vessels to pass each other with abundance of room to spare. There was no necessity for blasts, as before the accident occurred they had taken their direction. In fact, some witnesses say their bows had overlapped when the motor boat, without warning, suddenly changed its direction in front of the "Mikado."

So as to the speed at which the "Mikado" was going—it had no possible connection with the accident. If the "Mikado" had been going at half the rate she is said to have been going, she could not have stopped in time to save the collision brought about by the deceased's own act. It is very simple to speak of such matters as speed, blasts and look-out, but we must look further and ascertain whether any one of them, or all combined, brought about the accident, and must not overlook the fact that the whole situation was brought about in a few seconds by the

N. S.

S. C.

DONALDSON v. ACADIA SUGAR REFINING CO.

Graham, E.J.

deceased's own act, or, if not, by Morrissey's, which was the proximate cause of the accident. I have already said that, in my view, Morrissey was not to blame for changing the direction of the motor boat and that deceased was.

I agree with the learned trial Judge, not merely in all his reasons, but in the conclusion at which he arrived, and think this appeal should be dismissed with costs.

GRAHAM, E.J.:—Donaldson, the deceased, was drowned in Halifax Harbour owing to a collision between a motor boat, in which he was, as a favour and at his request, a passenger, and a tug, the "Mikado," of 29 tons burden, in the use of the Acadia Sugar Refinery Co.

His father has sued for damages that company and both the owner of the motor boat and Mr. Alexander Morrissey, the person in charge of her, a superintendent of building construction at the Woodside Refinery, on the Dartmouth side of the harbour, and with which he went and carried the men to and from their work.

First, I am of opinion that the action of the motor boat was the proximate cause of the collision. I take the finding of the learned Judge, and he appears to have adopted the testimony of Captain Blakeney, the master of the "Mikado," and I take also the testimony of Morrissey, who was in charge of the motor boat, as given at the coroner's inquest, the same day, and at the marine investigation. And if those are taken, I think the motor boat was clearly responsible for the collision.

The "Mikado" plies between Richmond and Woodside Refinery, and she was on this occasion coming to their wharf, and must pass on the seaward end of it and then go in alongside. As she was coming down the harbour, about to go into the wharf, the master, who was at the wheel, saw the motor boat lying alongside or just casting off from a schooner lying alongside of the breakwater on the refinery premises also, but to the south-east of this wharf. She was going to Halifax apparently. She had started from the breakwater a few moments before, but her tiller was knocked off the rudder head, and she went alongside the schooner, in order to fasten that, and she did so. Immediately she started, Morrissey discovered that one cylinder alone was working, and that left him going but half-speed. He left

N. S.

S. C.

DONALDSON v. ACADIA SUGAR REFINING CO.

Graham, E.J.

the wheel and got down to look after the engine. He says (this is on the marine examination):—

I was regulating the gasoline, to get the other engine working, and Donaldson says here is the "Mikado" going to run into us. We were then two or three lengths from the "Mikado." I took the wheel and turned the wheel, and just then the "Mikado" struck us. Q. How did you turn your wheel? A. At the moment I judged the "Mikado" was turning to come into the dock and I turned the wheel so as to let her go in. Turned it so she would go to port, but, instead of that, the "Mikado" was not turning. Q. You mean to say you made allowance for the "Mikado's" swinging? A. That she was swinging.

Now, his testimony as given at the inquest is to the same effect:—

After repairs to steering gear, we started out again. While oiling the engine, the boat circled around, and before I noticed the "Mikado" she was about twenty-five yards away. I then shifted my course, in order to avoid a collision, but it was too late to do so. At that moment Donaldson said to me, "We are going right into the 'Mikado.'" The "Mikado" then struck us on the starboard bow. Donaldson stood up on the deck of my boat and when the "Mikado" struck us he fell overboard under the "Mikado's" side.

Before passing, I think the Admiralty practice of the parties filing at the very first moment a preliminary act stating the material particulars of a collision is a good one. In the absence of that in such an action as this, this very early statement made on the same day is important. Now, from first to last, Morrissey will not say whether he asked the deceased to look after the steering or that the deceased did so while he was engaged at the engine, and this may be called frankness, if frankness consists in not saying one thing or the other. It is true there is a witness or perhaps another, who says that the deceased had his hand on the wheel, but whether that witness took for granted that the deceased had taken the wheel during this period or not is another story. Of course, he was right by the wheel. He would be in that boat any way. The evidence of the master of the "Mikado" has been the same throughout. Coming down the harbour he was about 150 or 200 yards to the westward of the wharf. He noticed the motor boat alongside of the schooner starting out. Thinking, as was the fact, that she was going to Halifax, he kept on a little more than usual, to give her more room and go round her stern. Then he starboarded a little to go into the wharf, his destination. This was known to be his

N. S.

S. C.

DONALDSON v. ACADIA SUGAR REFINING CO.

Graham, E.J.

destination by the person in charge of the motor boat. He says:—

All of a sudden I noticed the motor boat had changed her course in a southerly direction down the harbour. Just as soon as possible I rang the bell to stop the engine. I saw there was going to be a collision. I could not get clear of it. At the same time I righted my helm. In a few seconds we struck about two feet from his stern. I suppose my stem struck his boat on the starboard side.

Simson Hutt says:—

Q. When first did you see him? A. When she left the breakwater. Q. What did she do? A. I turned to attend to my work and I did not notice. Q. What did you see? A. I saw her as she swung in front of the "Mikado." Q. Which way did she swing? A. She swung to the left.

Morrissey says:—

A. I assumed that the "Mikado" was coming in on the face of the wharf, inside or outside. I did not notice where I was in relation to the wharf. Q. What did you do? A. I did not know whether we could avoid the collision, but I thought we could allow the "Mikado" to keep on turning and my boat to keep on turning.

She really tried to cross the "Mikado's" bow. The deceased fell overboard. I think that Morrissey was in fault first attending to the engine then and not attending to the steering until they were 25 yards apart and then giving his boat the wrong helm. There is a contention that the "Mikado" was going at too great a rate of speed and had no look-out. She was going at eight knots. She had four hands in all—a deck hand and two men in the engine-room, besides the master. With the master in the wheel-house was Mr. Mackenzie, the manager of the sugar refinery. It was a clear day on Halifax Harbour. The master, as usual, was steering, and he can keep a perfect look-out ahead. There was no better position for another look-out suggested, and one would say that more would not be required on a tug or steamer of that size on the harbour. The deck hand was aft. No one would say anything about the speed, I suppose, but it appears there is a harbour regulation that above George's Island the rate of speed is to be five miles an hour, and I suppose this may be said to be above George's Island. But the reason of the rule is, no doubt, for the avoidance of danger by ships backing out and going into the numerous docks on the Halifax side, and the Woodside Refinery was altogether out of Halifax jurisdiction and is a very quiet and secluded place.

But I am of opinion that neither of those things was the

proximate cause of the collision. They were remote. The eccentric conduct of the motor boat might take anyone by surprise. In *Tuff* v. *Warman*, 5 C.B.N.S. 573, 585 (Exchequer Chamber),

> The learned Judge (Willes, J.) told the jury that if the absence of a look-out was negligence on the part of the plaintiff, still, if the defendant also had a look-out and, nevertheless, insisted in a course that would inflict an injury, he would be liable though the plaintiff had no look-out, for that would not be the direct cause of the injury; that is to say, would not be a cause without which the injury would not have happened.

It is also contended that the "Mikado" should have signalled two whistles when she starboarded, to indicate to the motor boat that she was about to do so. In starboarding her helm she was taking the course she was expected to do by the motor boat. She had to turn into the wharf and she had to avoid the breakwater ahead of her and the schooner lying there. The master says:—

> I started then to haul up a little, but keeping well down, to give her lots of room between me and the wharf. . . . I gradually hauled in starboard; my helm a little steady. All of a sudden I noticed the motor boat changed her course in a southerly direction down the harbour.

That was the latest cause—the proximate cause.

Now, as to the signals. That depends on the construction of the rule. The master says:—

> Q. Why did you not sound your whistle? A. When I saw the motor boat coming she was going clear of me and I keeping clear. When she left the breakwater we were not meeting end on. He was about four points on my port bow.

I adopt the construction that was given to the rule in *The "Bellanoch,"* [1907] P. 170, by Lord Alverstone, C.J., and Kennedy, L.J.

The "Mikado" was starboarding to go into the wharf, her destination; not starboarding in relation to the motor boat. If it was the latter, she would have to indicate it to her. In other words, she was not taking a course regularly authorized by the rules. Of course, she was in sight of the motor boat, but she was in sight of many vessels, no doubt, in Halifax Harbour. It is only when the ships are in such a position that it is necessary for one to take a course in respect to the other. Then she must notify the other.

Lord Alverstone, C.J., p. 181, says:—

N.S.

S. C.

DONALDSON v. ACADIA SUGAR REFINING CO.

Graham, E.J.

It is true that art. 28 refers to the signals being given when vessels are in sight of one another, but the words immediately following, "in taking any course authorized or required by these rules," shew that it does not mean in sight at any distance, but in sight with reference to the manoeuvres which a vessel is authorized or required to take having regard to the other vessel approaching for the purpose of avoiding collision.

And Kennedy, L.J., p. 195:—

I am not at all desiring to put a narrow meaning on the words, "authorized or required," but authorized or required must surely relate to some action affecting the vessel's course at the period at which, according to the doctrine of the *"Beryl,"* 9 P.D. 137, a careful and competent seaman ought to act in order to avoid risk of collision, for then he is authorized to act, and, if he acts, he ought, under this rule, to notify the manoeuvre to the other vessel in the prescribed way.

Further, in my opinion, the want of the signal had no bearing on the accident. All that could be contended for was that the two whistles would have arrested the attention of those on the motor boat.

But they knew of the presence of the "Mikado," and that she was to go into the wharf.

In *The "Bellanoch,"* on appeal, [1907] A.C. 269, 270, Lord Loreburn said:—

The master of the "Canning" knew perfectly well what was the course of the "Bellanoch" and what her manoeuvre was, and the whistle could not have told him anything he did not know already and could not have affected his action.

I think the case against the "Mikado" has failed. In my opinion, therefore, the "Mikado" should be dismissed from the action.

Now, as to the motor boat. The question is whether she has been guilty of such negligence as would entitle a recovery against her for the death of the plaintiff. The difficulty is that the deceased was being carried gratuitously. I cannot distinguish this case from the case of *Moffatt* v. *Bateman*, L.R. 3 P.C. 115. There the defendant was driving the plaintiff gratuitously in a carriage to his work. Lord Chelmsford held that in such a case the defendant would only be liable if there was negligence of a gross description. I think this cannot be said to be "negligence of a gross description," and, if it was, the deceased, who was a sailor, was participating in it. This precludes his recovery.

The action must, I think, be dismissed.

Longley, J.

LONGLEY, J.:—In this case I do not consider that grounds sufficient to justify an action can be established against any of

the parties herein. The one was a steamship and the other was a tug or motor boat, and the whole space in time in which any likelihood of collision took place could not have exceeded thirty seconds. The motor boat was proceeding in her ordinary way from the wharf at the sugar refinery and the steamer "Mikado" was steaming in her usual course to her wharf on the Dartmouth side. The motor boat, which only a few seconds previously was going directly past her, suddenly turned round and headed so that she was underneath almost opposite the bow of the "Mikado," and the only thing that it was possible for the "Mikado" to do was to starboard her helm, so as to make the contact between the two as trifling as possible, which he succeeded in doing, and the boats met without doing any particular damage to one or the other, and, therefore, I hold that no blame and no visible ground of complaint can be made against the action of the "Mikado" in any case.

The plaintiff has also brought an action against the Anglins, who owned the motor boat, and against Morrissey, who had charge of her, and it becomes necessary, therefore, to look into the matter carefully and see what relation Donaldson, on whose behalf his father is bringing this action, stands in regard to the matter.

Donaldson, who was killed and for whose benefit this action is brought, asked to be taken to Halifax in the motor boat. The defendant, Morrissey, who was solely in charge of the motor boat then, was not inclined to take him, but finally agreed to his going on board. Morrissey knew at this time that he was a sailor and accustomed to handling boats. The instant that Morrissey began to get under way from the wharf at Dartmouth he found there was something the matter with his engine, and he proceeded at once to deal with it, a matter of about thirty seconds, leaving at the same time Donaldson, who is shown by other witnesses to have been steering the boat, sufficiently near and with his hand on the wheel to have steered it as he wished. In thirty seconds from the time that Morrissey went to see about the engine, the motor boat had, by some means or other, turned round at once on her course and was immediately under the bows of the "Mikado." Donaldson leaped then on to the deck and Morrissey followed him. They both attempted to jump on

N. S.

S. C.

DONALDSON v. ACADIA SUGAR REFINING CO.

Longley, J.

board the "Mikado," Morrissey succeeding and Donaldson failing. Although efforts were made to save his life, they failed, and he was drowned.

In such case it is clear that the owners of the motor boat, the Anglins, are not to blame and can be ruled out of the action entirely. Whether Morrissey was to blame or not depends upon one or two circumstances, which can only last thirty seconds. Was Donaldson in charge of the boat for thirty seconds? If so, he has no remedy, because it was his own negligence and mismanagement that led to her destruction. If he was not minding the boat and was looking on and informed Morrissey about four seconds before the boat struck that they were going into her, one cannot see or comprehend that he, an experienced sailor, should have allowed any such thing to happen. Morrissey's boat was aimed to clear the other beyond all doubt and was proceeding in that direction when he went to fix the engine, and while he was fixing the engine for about 25 or 30 seconds the danger occurred.

There is some attempt made at the present time to make out that there is no difference between "gross negligence" and negligence that is not gross, but I think that it will require a large exercise of the imagination to regard Morrissey as careless in that degree that he would sacrifice his own life and every person on board his boat by simply attending to the matter of the engine for a question of twenty-five seconds. I do not think, therefore, that any action will lie against the captain of the "Mikado."

In my opinion, the appeal should be dismissed.

Ritchie, J.

RITCHIE, J.:—Robert S. Donaldson was drowned in Halifax Harbour on June 7, 1913, in consequence of a collision between the steamer "Mikado," owned by the Acadia Sugar Refinery Co., Ltd., and a motor boat owned by Anglins, Ltd. The plaintiff is the father and administrator of Robert S. Donaldson, and brings this action on behalf of himself and his wife, Sarah Donaldson, the mother of Robert S. Donaldson. The motor boat was in charge of the defendant Morrissey. Negligence is the basis of the action, and it is charged against the three defendants, the Acadia Sugar Refinery, Ltd., Anglins, Ltd., and Morrissey.

I deal first with the case as against Anglins, Ltd., the owners

of the motor boat. The negligence charged against Anglins, Ltd., is said to consist of putting Morrissey, an incompetent person, in charge of the boat, and it is further said that the negligence of Morrissey caused the accident. If Morrissey was an incompetent person, I do not find any evidence establishing that Anglins, Ltd., knew or ought to have known it. But for the purpose of dealing with this branch of the case, and for this purpose only, I assume that Morrissey was negligent and that his negligence caused the accident. But even upon this assumption, the question of the liability of Anglins, Ltd., still remains for consideration. Donaldson was being carried at his own request without reward. He asked Morrissey if he could go across with him to Halifax. In reply, Morrissey pointed out to him that he would be safer and might make better time if he went on the "Mikado." It was suggested that Donaldson was in the employ of Anglins, Ltd., so far as coming back from Dartmouth to Halifax is concerned. I am unable to agree with this suggestion. Donaldson was not in the employ of Anglins, Ltd., in any sense. His father, the plaintiff, had a schooner, in which he brought sand from the Dartmouth side and sold it to Anglins, Ltd. Donaldson was a sailor on the schooner, assisting his father, the plaintiff. There was no duty cast upon Morrissey to take Donaldson across to Halifax, and, in doing so, he was not acting for Anglins, Ltd., but merely complying with Donaldson's request.. There was no authority from Anglins, Ltd., to take him.

The authorities cited by Mr. Ralston shew that before Anglins, Ltd., can be held liable, it is incumbent on the plaintiff to shew a consent on their part that Donaldson should be carried as a passenger. The evidence does not disclose any such consent, and, as I have said, it was not within the scope of Morrissey's duty to give such consent. When he did so, he was doing something not in the course of his employment. I am, therefore, of the opinion that the action as against Anglins, Ltd., must be dismissed.

Coming to the case against Morrissey, it is contended that he cannot be held liable unless the death of Donaldson was caused by his gross negligence. The word "gross," as applied to negligence, has been subject to the criticism of Judges in England, but Canadian provincial Courts are bound to accept and give effect to the term, because it has been accepted and given effect

N. S.
S. C.
DONALDSON v. ACADIA SUGAR REFINING CO.
Ritchie, J.

to by the Supreme Court of Canada. In *The City of Kingston* v. *Drennan*, 27 Can. S.C.R. 46, in the statute which imposed liability upon the city, the words "gross negligence" were used. The late Mr. Justice Sedgewick recognized the difficulty of distinguishing between gross and other degrees of negligence, but he defined the words "gross negligence" to mean "very great negligence." In *Nightingale* v. *Union Colliery Co.*, 35 Can. S.C.R. 65, at 67, Mr. Justice Nesbitt gave effect to the word "gross" as applied to negligence. I, therefore, accept the term "gross negligence," and understand it to mean "very great negligence," and I am of opinion that this is the kind of negligence which must be established against Morrissey before he can be held liable.

For this view *Nightingale* v. *Union Colliery Co.* is, I think, clear authority. In that case a railway company failed to properly maintain a bridge under their control, so as to ensure the safety of persons travelling upon their trains. It was held that the fact of such omission of duty did not constitute evidence of the gross negligence necessary to maintain an action for the death of a gratuitous passenger.

The case of *Harris* v. *Perry*, [1903] 2 K.B. 219, relied upon by Mr. Terrell, is, I think, distinguishable. The plaintiff in that case was an inspector appointed by the engineer of the railway company. Shaw, a timekeeper in the employ of the defendant company, invited the plaintiff to get on the train. Rowell was in the employ of the defendant company as superintendent of works. There was evidence from which an inference might be drawn that Rowell sanctioned the use of the engine by the superior officers of the contractor, of whom Shaw was one, for the purpose of transit along the line, and, further, that he knew that those officers invited the officers of the company to travel with them. The jury found that the plaintiff was on the engine with the permission of Rowell, and it was held that the defendant, through Rowell, must be taken to have constructively permitted the plaintiff to travel on the engine. The foundation upon which the judgment rested is not present in this case. But, if the case is inconsistent with *Nightingale* v. *Union Colliery Co.*, 35 Can. S.C.R. 65, it cannot be followed by this Court. In my opinion, Morrissey has not been shewn to have been guilty of the kind of negligence to which I have referred.

The charges of negligence against Morrissey are set out in par. 6 of the statement of claim. They consist of: (*a*) Not keeping a proper look-out. (*b*) Starboarding his helm, instead of porting it.

So far as the charge of not keeping a proper look-out is concerned, I assume it refers to the period of time when Morrissey was attending to the engine. I cannot say that this was "very great negligence," when he left Donaldson, a sailor, who had all the means of knowledge as to the approach of the "Mikado" that he had, close by the wheel in a position to see and to steer. As against Donaldson, I think Morrissey had a right to rely upon his keeping a proper look-out and steering.

I assume that Morrissey made a mistake when he starboarded his helm, instead of porting it, but, if so, this was when the danger was imminent. It was, to use the well-known phrase, "in the agony of the collision." His life was in equal danger with Donaldson's; he did what he thought was the best thing to do in the moment of extreme peril. Assuming that he did the wrong thing, made a mistake, he was not, in my opinion, guilty of "very great negligence."

[Reference to Marsden on Collisions at Sea (6th ed.), p. 3.]

It was urged that Morrissey should not have abandoned Donaldson and the motor boat at the moment of the collision. I do not think I need say more on this point than that it was apparently a case of life and death, and, therefore, a case of each man for himself. I think the case fails as against Morrissey and that, so far as he is concerned, the action must be dismissed.

I am far from being satisfied that the captain of the "Mikado" was not negligent, but the opinion of my brother Graham has convinced me that, if he was negligent, his negligence was not the proximate cause of the accident.

The action, therefore, in my opinion, must fail against the Acadia Sugar Refinery as well as against the other defendants.

Appeal dismissed.

SASK.

S. C.

MILLS v. HARRIS.

Saskatchewan Supreme Court, Newlands, Brown, Elwood, and McKay, JJ. March 20, 1915.

1. JUDGMENT (§ I A—1) — BY DEFAULT—SERVICE OF NOTICE OF MOTION—ABANDONMENT—DELAY—SASK. RULES OF COURT 224.

The service of a notice of motion for leave to enter judgment in default of defence upon a liquidated demand will not deprive the plaintiff of the right to sign judgment in default of defence under Sask. Rules of Court 224 without an order and without waiting for the return of the motion which was afterwards abandoned; and unexplained delay for a long time in moving against the judgment will disentitle the defendant to relief on the ground that he was misled by the service of the notice.

2. JUDGMENT (§ VII E—295)—APPLICATION TO SET ASIDE—LEAVE TO DEFEND—DELAY—RESTORATION OF PARTIES TO FORMER POSITION.

Where the entry of judgment is regular an application to set it aside and for leave to defend should be made as soon as possible after the judgment came to the defendant's knowledge, though some delay is not unnecessarily fatal to the application if the parties can be restored to their former position.

Statement

APPEAL from an order setting aside a judgment signed in default of defence, pending the return of a notice of motion for leave to enter judgment.

G. H. Barr, for appellant.

H. V. Bigelow, K.C., for respondents.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—On February 27, 1914, the plaintiff brought action against the defendants for the recovery of $3,423.66 and certain interest. The defendants duly entered an appearance in the action on March 24. From that time until June 13 negotiations took place between the solicitors of the respective parties, looking to a settlement of the differences between them. On the last-mentioned date the negotiations concluded with the following letter, written by the defendants' solicitors:—

RE MILLS V. HARRIS & CRASKE.

We regret to inform you that we cannot get from our client an order for the payment of the amount of your claim as we settled on. As yours is the only garnishee outstanding we have instructions to move to set it aside. Mr. Harris states that he will settle your claim as we agreed on just as soon as he gets the garnishee money. Meanwhile we will file a defence in your action. We presume there is nothing to do if you do not get settlement but to go to trial.

The plaintiff had issued a garnishee summons against the Canada National Fire Ins. Co., who apparently were owing the defendants some $10,000 under a fire insurance policy, and this is the garnishee referred to in the aforesaid letter.

On July 7 the plaintiff served notice of motion for judgment in default of defence, the same being made returnable for July 10. This was an unnecessary proceeding on the part of the plaintiff, because, his claim being in the nature of a liquidated demand, he could sign judgment in default of defence under rule of Court 224 without obtaining any order for that purpose. Realizing that he had taken an unnecessary step, the plaintiff, on July 9, and while the aforesaid motion was pending, signed judgment in default of defence for the full amount of his claim and costs. On the return of the motion, on July 10, counsel for the plaintiff withdrew his motion as being made inadvertently, at the same time stating that he had already signed judgment on July 9. Counsel for the defendants attended on that motion, and thus became aware that judgment had been signed against his clients. On the date of the withdrawal of the plaintiff's motion, his garnishee summons was set aside on the application of the defendants. On July 14 the plaintiff issued another garnishee summons, and, on the defendants' application, this summons was also set aside. On November 21 the plaintiff issued still another garnishee summons, and on November 27 the defendants applied to set this summons aside, and eventually succeeded in doing so. On November 28 the plaintiff issued still another garnishee summons, and under it the insurance company paid $9,425 into Court. No attempt seems to have been made to set aside this last-mentioned summons, presumably for the reason that there was no ground that could be conceived of by counsel for the defendants on which it could be set aside. On December 7 the defendants made application to set the plaintiff's judgment aside, first, on the ground that the judgment was signed pending a motion for judgment, and, alternatively, on the ground that the defendants have a good defence and counterclaim and should be allowed to plead same. It is contended that the signing of the judgment is a nullity, and that the defendants have the right to set it aside *ex debito justitiæ*. If the judgment is a nullity, then it would appear to follow that it should be set aside. But is it a nullity? In support of this contention, the case of *Neville* v. *MacMillen*, 20 D.L.R. 685, is relied on by counsel for defendants, and was relied on by the learned Judge in Chambers. That case is, in my opinion, clearly distinguishable. There the plaintiff launched a motion for judgment under rule of Court 135,

SASK.
S. C.
MILLS
v.
HARRIS.
Brown, J.

and on the ground that the defendant had no defence to the action. While that motion was pending, the plaintiff signed judgment in default of defence. [Reference to the judgment of Brown, J., *Neville* v. *MacMillen*, 20 D.L.R. 685.]

In the case at bar, the motion is for judgment in default of defence. There was no necessity for the motion, as the plaintiff soon discovered, but there was nothing in it inconsistent with signing judgment in default of defence, and the serving of the notice of motion did not, in my opinion, deprive him of that right. It did not have the effect of extending the time within which the defendant should file his defence; it rather pre-supposes that the defendant has not filed, and does not intend to file, a defence. As a matter of fact, where the plaintiff is required to apply for permission to sign judgment in default of appearance or defence, he is, in most instances, permitted to sign interlocutory judgment before serving his notice of motion. The judgment was, therefore, in my opinion, perfectly regular. But counsel for the defendants states that he was misled; that, in view of the negotiations and the notice of motion, he did not anticipate judgment being signed against his clients, at least until the return of the notice of motion. I can quite understand that such might be the case, and can sympathize with counsel's position in that respect. Had the defendants with promptitude made application to have the judgment set aside on the ground that counsel had been misled, I have no doubt that the application would have succeeded, and perhaps, under the circumstances, on terms favourable to the defendants. Rule of Court 235 expressly provides for such cases; and, apart altogether from the rule, the Court has inherent jurisdiction to set aside proceedings which indicate oppression. See *Beale* v. *MacGregor*, 2 T.L.R. 311. But the very great delay, and unexplained delay, on the part of the defendants disentitles them to any consideration on that ground in the present application.

It is, however, further contended, on the part of the defendants, that they should be allowed to defend on the merits of their proposed defence and counterclaim; that even delay on their part should not stand in their way unless the plaintiff would be irreparably injured. Where the judgment is regular, the application should be made as soon as possible after the judgment comes to the knowledge of the defendant, though some delay is

SASK.
S. C
MILLS v. HARRIS.
Brown, J.

not necessarily fatal to the application if the parties can be restored to their former position. The matter seems to be in the discretion of the Court: 18 Hals., p. 18, and cases cited under notes (l), (o) and (p). In this case the defendants had notice of judgment on July 10, and took no steps to set it aside until December 7. There is no explanation of the delay, unless it is to be inferred that counsel were too much occupied with applications to set aside garnishee summonses issued on the judgment. The plaintiff, after many attempts, apparently got a garnishee summons that would hold, and money has been paid into Court under it, more than sufficient to satisfy the plaintiff's claim.

In my opinion, this great delay on the part of the defendants, together with their whole attitude in the matter since judgment was signed, disentitles them to any consideration; and the plaintiff should not at this stage be disturbed in his present apparently secure position.

The appeal should, therefore, be allowed with costs, the application to the Local Master dismissed with costs, and the plaintiffs should have the costs of the appeal and the cross-appeal from the order of the Local Master to the Judge in Chambers.

Appeal allowed.

MILLS v. HARRIS.

SASK.
S. C.

Saskatchewan Supreme Court, Lamont, J. April 17, 1915.

1. PARTIES (§ II A—65)—JUDGMENT CREDITOR—FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—DEBTOR—NECESSARY PARTY.

In an action by a judgment creditor to set aside as fraudulent a conveyance by the debtor, where no relief is asked against the debtor and no special circumstances appear making it desirable to have him before the court, the debtor is not a necessary party to the action.

[*McDonald* v. *Dunlop*, 2 Terr. L.R. 177; *Bank of Montreal* v. *Black*, 9 Man. L.R. 439; *Scott* v. *Burnham*, 19 Gr. 234; *Beattie* v. *Wenger*, 24 A.R. (Ont.) 72; *Gallagher* v. *Beale*, 14 B.C.R. 247, followed; *Belcher* v. *Hudsons*, 1 S.L.R. 474, distinguished.]

Statement

APPEAL from an order of the local Master striking out defendants in a fraudulent conveyance action on the ground that they were neither necessary nor proper parties.

C. M. Johnston, for the plaintiff.

H. V. Bigelow, K.C., for the defendants.

Lamont, J.

LAMONT, J.:—The plaintiff, in his statement of claim, alleged that he had, in July, 1914, obtained a judgment against the de-

SASK.

S.C.

MILLS v. HARRIS.

Lamont, J.

fendants, Harris & Craske, for some $3,479. That the same had not been paid; that on October 30, 1914, these defendants, being insolvent, had assigned to the defendant Shierman a debt of $10,000 due from the C.N.F. Insurance Co. to them, with intent: 1. To defeat, hinder and delay the plaintiff and other creditors; 2. To give the defendant Shierman an unjust preference over the plaintiff's and the defendant's other creditors; and he claimed that the assignment should be set aside.

On behalf of Harris & Craske, an application was made to the Master in Chambers for an order striking them out of the action, on the ground that they were neither necessary nor proper parties thereto. The learned Master made an order striking them out. From that order the plaintiff now appeals.

The law seems quite clear that, in an action by a simple contract creditor to set aside a transfer or conveyance as fraudulent, the transferor or guarantor is a necessary party. See Cassels' Assignments Act, 4th ed., p. 92, and cases there cited. Does the same rule apply where the creditor has already obtained his judgment? The point has come before the Courts in a number of cases.

In *McDonald* v. *Dunlop*, 2 Terr. L.R. 177, Scott, J., struck out the judgment debtor as not being a necessary party. He said:—

> In cases like the present, where the plaintiffs have already obtained judgment and execution, I can see no reasons why the judgment debtor should be made a party where no relief is claimed against him. It seems that the mere fact of his participating in the fraud is not a sufficient ground for adding him a party for the purpose of rendering him liable for the costs of the action.

In *Belcher* v. *Hudsons*, 1 S.L.R. 474, it was held that the debtors were proper parties, but, in that case, the plaintiff, although he had one judgment against the debtors, was asking for judgment against them in a further claim, as well as to set aside the conveyance; the plaintiff, therefore, so far as that action was concerned, was a simple contract creditor.

In *Bank of Montreal* v. *Black*, 9 Man. L.R. 439, it was held by Taylor, C.J., that, to a bill by a judgment creditor to set aside a fraudulent conveyance made before judgment, the debtor was neither a necessary nor a proper party.

In Ontario the same principle was laid down by Mowat, V.-C., in *Scott* v. *Burnham*, 19 Gr. (Chy.) 234. In *Beattie* v. *Wenger*,

24 A.R. (Ont.) 72, Osler, J.A., expressed the opinion that, in a statutory action by an assignee for the benefit of creditors to set aside a conveyance as fraudulent, the assignor should not be made a party.

In *Weise* v. *Wardle*, L.R. 19 Eq. 171, it was held by Jessel, M.R., that a bankrupt is not a proper party to a suit instituted by the trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay, or defeat, his creditors. . . .

In the British Columbia Courts the matter has also received consideration in *Gallagher* v. *Beale*, 14 B.C.R. 247. . . . But in *Gibson* v. *Franklin* it appears that the Chief Justice of B.C. held that, in an action by a judgment creditor to set aside as fraudulent a conveyance of land from a man to his wife, the husband, though not a necessary, was a proper party to the action. Neither the facts of this case nor the reasons of the learned Chief Justice are given in the report, and it is, therefore, impossible to determine the ground of the decision.

These authorities lead me to the conclusion that in an action by a judgment creditor to set aside as fraudulent a conveyance by the debtor, where no relief is asked against the debtor and no special circumstances appear making it desirable to have him before the Court, the debtor is not a necessary party to the action.

It may well be that in the case of a transfer by a man to his wife where, from the relations of the parties, a presumption may arise that the wife, in taking the conveyance, was not an independent contractor, but merely registering the will of her husband, that if the plaintiff makes the husband a party to the suit, a Court would not make an order striking him out; but, generally speaking, where no special circumstances exist, and nothing more is shewn than that the debtor conveyed away his property, which is the case here, he is not, in my opinion, a necessary party to the judgment creditor's action. If not a necessary party, he should not be brought in. The appeal will, therefore, be dismissed.

Appeal dismissed.

N. S.

S. C.

THE PROVINCIAL FOX v. TENNANT.

Nova Scotia Supreme Court, Graham, E.J., Russell, and Ritchie, JJ. April 5, 1915.

1. CONTRACTS (§ I D—45)—MISTAKE—REFORMATION ON GROUND OF—NECESSARY PROOF.

To justify reformation on the ground of mistake, proof must be clear and convincing and upon testimony that is unexceptionable both with regard to the agreement actually made by the parties and the mutuality of the mistake from which the different agreement was inserted in the document sought to be reformed.

[*Irnham* v. *Child*, 1 Bro. C.C. 92; *Green* v. *Stone*, 54 N.J.Eq. 399, approved.]

2. CONTRACTS (§ II A—125)—CONSTRUCTION—"OWNER OF A CERTAIN BREED OF FOXES COMMONLY KNOWN AS BLUE FOXES"—INFERENCE.

It is not to be inferred that a written contract which recites that the vendor company is the "owner of a certain breed of foxes commonly known as blue foxes," and which provides for the sale of two pairs of blue foxes on specified terms, that the sale is one of foxes bred by the plaintiff company and not of foxes which it has purchased.

[*Provincial Fox Co.* v. *Tennant*, 18 D.L.R. 389, reversed.]

Statement

ACTION on a contract in writing made between plaintiff and defendant for the sale by the former to the latter of two pairs of blue foxes. The agreement reads in part:—

Whereas the said vendors are the owners of a certain breed of foxes commonly known as "blue foxes."

And whereas the said vendors have agreed to and with the said vendee for the sale to him of two pairs (two male and two female) blue foxes on the terms and conditions hereinafter mentioned.

And whereas the said vendee has agreed subject to the terms and conditions hereinafter mentioned to purchase from the said vendors the said two male and two female blue foxes.

Now this agreement witnesseth &c.

The agreement then provided, on payment of the consideration, for the delivery by the vendor to the vendee of foxes to be selected by the vendor, and that in case, by reason of the happening of any unforeseen event over which the vendor had no control, the vendor was unable to supply the foxes as agreed, the vendor should not be compelled to procure other foxes or to make delivery, but, in the event of the vendor not having in possession the foxes as in the agreement mentioned, then the vendor should refund the moneys paid and the agreement should become null and void.

The defence to the action was that it was verbally agreed between the parties that the foxes to be supplied were to be born of certain blue foxes then on a ranch in the vicinity of the

city of St. John, and that foxes born in Alaska were not to be delivered or accepted.

The cause was tried before Drysdale, J., who held that the written agreement could not be varied, but, scanning critically all the circumstances surrounding the parties at the time of entry and applying these to the subject matter that it was properly intended to deal with, the agreement, on its face, bore internal evidence of an intention to deal with the plaintiff company's own product.

Statement.

Judgment was given dismissing the action and in favour of defendant on his counterclaim for a return of the money paid.

[The judgment appealed from is given in full in the report of the previous case, 18 D.L.R. 389.]

V. J. Paton, K.C., and *J. R. Ralston*, K.C., for appellant.

F. L. Milner, K.C., for respondent.

GRAHAM, E.J., concurred with RITCHIE, J.

Graham, E.J.

RUSSELL, J.:—I think the learned trial Judge properly refused to decree a reformation of the written contract in this case. The defendant purchaser had made a previous contract for blue foxes, in which nothing was said as to the place of their birth. He explains that he did not read over the written contract now in question very carefully before signing it, because he had read the previous one. I have little doubt, under the evidence, that he intended this contract to be the same as the first one and to be an agreement simply for blue foxes. The plaintiffs' selling agent who made the contract with him, on behalf of the company, denies that there was any stipulation as to the blue foxes, the subject of the sale, being pups raised at St. John. To reform a written agreement under such a condition of the evidence would, I think, be wholly without precedent. On a later date the defendant wrote to the Fundy company, setting up an alleged verbal understanding that the foxes were to be the progeny of the blue foxes then being ranched at St. John, and the Fundy company replied that, if the defendant would return his contract, they would mail him a new contract containing this term. But he never returned his contract and it never was changed. It has not been shewn, so far as I am able to gather from the evidence, that the Fundy company had power to make a new contract on behalf of the plaintiff company or to abandon any

Russell, J.

N. S.

S. C.

THE PROVINCIAL FOX v. TENNANT.

Russell, J.

rights possessed by the plaintiff company under its contract of April 7. The plaintiffs' selling agent who conducted the business with the defendant swears that he never saw the letters to and from the Fundy company in reference to the making of a new contract containing the desired term as to the foxes being St. John bred until he saw it at the trial of the cause.

I should have thought it as well settled as anything could be that the negotiations preceding the execution of the agreement were merged in the writing. If this new term can be added, I do not see just what may not be added to what has been put in writing.

The attempt is not to prove the surrounding circumstances for the purpose of enabling the Court to interpret the writing as the parties must have intended it, but to import into the writing, by parol evidence of conversations between the parties, a term which it does not contain and which one of the parties says was never mentioned.

The learned trial Judge does not decide in favour of the defendant by importing the alleged oral term into the agreement. He does so by the legitimate method of looking at the surrounding circumstances and especially the previous dealings and the correspondence. So far as the previous dealings throw any light upon the matter, they favour the plaintiff's case. As already stated, there was a previous purchase as to which there was no pretence that there was any such term as that the foxes should be St. John pups. Referring to the making of the contract now under consideration, the following colloquy occurred between the defendant and the cross-examining counsel.

Q. Then you called up to see how much you could get the new contract at? A. Yes. Q. And you bid them down from $1,000 to $800? A. Yes. Q. You signed the first contract? A. Yes. Q. Have you a copy of it here? A. No, I don't think I have. Q. That was for blue foxes? A. Yes. Q. Did you say a word about foxes raised in New Brunswick? A. No. Q. And if you had got your second pair you would have taken them under that contract? A. I would have taken four pairs without a word. Q. There were four pairs of foxes altogether that you were buying? A. Yes. Q. And your two contracts were sent on for two pairs? A. Yes. Q. And because you sent in one too late you did not get them for $700? A. Yes. Q. And when did you go and get the two pairs that were sold under the first contract? A. Some time in October, 1913. Q. Those were foxes from Alaska? A. I could not say. Q. You did not understand they were pups raised in St. John. A. No, I knew they were not. Q. When this contract came to you,

this contract in question here, you read it over before you signed it? A. I don't know whether I did. I don't think I did. Yes, I think I read it over, but I did not pay much attention to it. I had read the previous one. Q. And you thought it was the same? A. Well I expected something a little different but I really forgot this about the pups being ranch born. Q. And later some one told you that blue foxes would not breed in this country? A. No, It was a doubtful case, I suppose, right through. Q. You never heard of it? A. I don't know that I heard it up to that time. Q. Sometime afterwards you did hear it? A. Yes. Q. And that report got spread around and it was difficult to sell blue foxes on that account? A. Yes. Q. That sort of killed the sale for blue foxes? A. It would, I suppose. Q. You were getting these foxes to re-sell? A. I gave a sale application.

This witness does not seem to have had any very clear idea what impression he wished to give the Court. Whether he read the contract or did not read it; whether he expected it to be the same as the first or a little different—if different, what difference he expected to find, seeing that he had forgotten about his desire to have the foxes ranch-born—whether he was getting these foxes to sell again, as he seems to say here, or had arranged for a ranch to put them in and was going to breed them for himself, as he says in another part of his evidence, it is quite impossible to be certain from his testimony on any of these points. He does not seem to remember clearly at one moment what he has deposed to a moment before.

As for the correspondence, with the exception of the portions already referred to, the only correspondence in the case, I think, is that which clearly shews that the defendant's reason for not fulfilling his contract was that he was unable to pay for the foxes because of his losses on the Stock Exchange. At the trial he sought to create the impression that these losses were largely mythical and had been put forward merely as a pretence for the purpose of working upon the sympathies of the plaintiff's agent. That performance would, indeed, be of a piece with his evidence at the trial as to the alleged term in the contract. When he was asked to explain why he did not have it inserted in the writing, he said he had really forgotten about his communication with Mr. Barker over the telephone in which he had insisted on this term. He could not have attached much importance to the term if he so soon forgot that there had been such a stipulation. His letter of June 12, 1913, points in the same direction, if I understand its bearing. He says, in that letter to Barker, "I trust you have succeeded in cancelling the two

N. S.

S. C.

THE PROVINCIAL FOX v. TENNANT.

Russell, J.

pairs of blue foxes, as per my telephone message to you, and would sooner cancel the last pair than the first."

Why should he prefer to cancel the last pair rather than the first if, as he now insists, the contract for the first pair was unconditional as to place of birth and that for the last pair was subject to the condition that they must be ranch-bred, as he now claims. If he had a preference, why did he not wish the first pair rather than the last pair cancelled?

The reason suggested at the argument why the defendant should insist on this term being inserted would be, to my mind, the strongest possible reason why the plaintiff would not be willing to insert it. It is suggested that a rumour had gone out that the Alaska blue foxes would not breed in captivity. That would be, it must be admitted, a good reason why the defendant would want pups bred in this country, but it would be a still stronger reason why the plaintiff should not undertake so impossible a contract.

It is only fair to the defendant, however, to bear in mind that the plaintiff company did not contract in absolute terms. They reserved to themselves an option to rescind the agreement repaying the deposit. But we must not, on the other hand, press this consideration too far. The plaintiff, it is true, might wish to be free because of the fear that the Alaska foxes would not breed. That is, no doubt, the defendant's theory. But it breaks down when we reflect that this was as striking a feature of the first contract, in which there is the same option reserved, but in which there was admittedly no stipulation as to the foxes being ranch-bred, as it is of the second in respect of which such a stipulation is claimed. Moreover, the reservation of such an option to rescind is amply accounted for by the possible apprehension on the part of the plaintiff that the supply of Alaska foxes might be very limited, or, as I think is the more probable explanation, that the market being a highly speculative one, the plaintiffs desired to retain for themselves the benefit of a possible rise in the market price and not be bound to deliver foxes on a future day at less than their market value.

I think, on the whole, that the surrounding circumstances, apart from the oral evidence of the defendant as to the alleged additional term, are wholly insufficient to impose on the plaintiff

the obligation for which the defendant contends, and that the decision of the learned trial Judge could not be supported without importing into the writing the alleged "communings" of the parties before the agreement was drawn up and sealed. This, I think, the learned Judge has unconsciously done.

The appeal should, therefore, in my opinion, be allowed with costs, and judgment for the plaintiff company.

RITCHIE, J.:—I agree with the learned trial Judge that this is not a case for reformation of the contract on the ground of common mistake. In order to get a decree for reformation, if the mistake is denied, an exceedingly strong case must be made out before the Court will take the somewhat dangerous course of departing from that which the parties have reduced to writing. It was said by Lord Thurlow, in *Irnham* v. *Child*, 1 Bro. C.C. 93, that the mistake "should be proved as much to the satisfaction of the Court as if it were admitted." The same view will be found in Story's Equity Jurisprudence, sec. 156. It may be that at the present day it is putting the position too high to say that the Court must have evidence equivalent to an admission, but a sound rule is, in my opinion, laid down in *Green* v. *Stone*, 54 N.J. Eq. Reps. 399, where it was held that, to justify reformation on the ground of mistake, the proof must be clear and convincing, and upon testimony that is unexceptionable both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was inserted in the document sought to be reformed. Of course, Judges are free to differ as to what is clear and convincing proof, but I do not know that any better working rule than the New Jersey rule can be stated. In this case I am of opinion that the proof does not come up to the standard which I have indicated. I, therefore, think a case for reformation has not been made.

The learned trial Judge, looking, as he had a right to do, at the surrounding circumstances, has interpreted the words, "blue foxes," used in the contract to mean blue foxes ranched in the vicinity of St. John, not born in Alaska. With respect, I am unable to agree. What does the phrase, "surrounding circumstances," mean? It does not refer to the negotiations or communings. I think it means that the Court, in getting at the

N. S.
S. C.
THE PROVINCIAL FOX v. TENNANT.
Ritchie, J.

intention of words used in a contract, has regard to the particular facts and circumstances in respect of which the words are used and construes them accordingly.

The words, "blue foxes," used in the contract make a definite description complete on the face of the contract. I must not add to, alter or vary the contract, but are the surrounding circumstances such that I should, by way of interpretation, say blue foxes really means not merely blue foxes, but blue foxes raised in the vicinity of St. John? I think not.

Dealing with the facts, the sale was conducted by Barker. He was a member of the firm of Barker & Williams, who were the selling agents of the plaintiffs. Another firm, called the Fundy Fox Co., was composed of Barker, Williams and F. A. Whelpley. It is uncontradicted on the evidence that the Fundy Fox Co. were not the selling agents of the plaintiffs for any purpose, but the company occupied the same offices as Barker & Williams. The defendant wrote a letter, not to the plaintiffs or Barker & Williams, but to the Fundy Fox Co., in which he stated that the verbal understanding with Barker was that the foxes were to be ranched in the vicinity of St. John and not born in Alaska. To this letter the Fundy Fox Co. replied, telling the defendant to send back his contract and his view would be met in a new contract. In my opinion, this is not to be taken into consideration as a surrounding circumstance. The Fundy Fox Co. were not the agents of the plaintiffs. But, in addition to this the correspondence took place after the contract had been made. It is uncontradicted that Barker had no knowledge of this letter until the trial. But, assuming that Barker wrote the letter, it is not a surrounding circumstance to which I can give weight. It was after his agency as sales agent had terminated, the contract of sale had been executed and delivered, and nothing that he could say or do at that time could be called a surrounding circumstance by which the contract should be interpreted. It can also, I think, be fairly said that the letter is not an admission on the part of the writer as to the original contract, but merely a statement that a new contract would be made to meet the view which the defendant set up. The defendant's evidence as to what Barker told him before the contract was executed is excluded by the contract, being merely

N. S.

S. C.

THE PROVINCIAL FOX v. TENNANT.

Ritchie, J.

a part of the communings or negotiations. The defendant's letters, when he was asking to be let off his contract, are, in my opinion, very much against the view that he had a right to complain of the way in which the contract was worded. If he really thought then that he had any such right, I think he would have set it up. A somewhat strong surrounding circumstance which makes, not for, but against the defendant's contention is that in the previous sale of blue foxes to the defendant no question was raised as to where they were born. It is also to be noted that it was not until after the present contract was made that the report got about that foxes born in Alaska would not breed here, and it was only in view of that report that the point became important. I have examined the cases cited on behalf of the defendant, but, in view of the facts of this case, I do not think that they are applicable. I cannot find on the face of the contract "internal evidence of an intention to deal with the company's own product." It says that the vendors are the owners of a certain breed of foxes commonly known as blue foxes, but because the plaintiffs own a certain kind of foxes known as blue foxes I think I cannot read into the contract that they are only selling foxes bred by them and not foxes acquired by purchase. The agreement, which is L.B. 14, shews that the plaintiffs bought forty pairs of blue foxes.

On the whole case I cannot find surrounding circumstances which would justify me in adding, by way of construction to the words, "blue foxes," in the contract, an addition limiting the words to blue foxes born in a particular place. In my opinion, the appeal should be allowed with costs.

Appeal allowed.

CARTER v. BELL.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 26, 1915.

1. MORTGAGE (§ VI G—121)—SALE UNDER POWER—PURCHASE BY MORTGAGEE —VALIDITY.

A simulated sale by the mortgagee of the mortgaged premises to himself in pretended exercise of the power of sale contained in the mortgage will be declared invalid and the mortgagee compelled to account on the basis of the price he obtained on the later sale he himself made.

[*Gordon* v. *Holland*, 10 D.L.R. 734, 82 L.J.P.C. 81; *Knox* v. *Gye*, L.R. 5 H.L. 656; *DeBussche* v. *Alt*, 8 Ch.D. 286; *Watt* v. *Assets Co.*, 74 L.J.P.C. 82, referred to.]

B. C.

C. A.

CARTER v. BELL.

APPEAL by defendant from judgment of Hunter, C.J.B.C., of June 23, 1914.

Mayers, for appellants, defendants.

Moresby, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal for the reasons given in the Court below.

Irving, J.A.

IRVING, J.A.:—Of the three points raised by Mr. Mayers on the argument, *viz.*, as to the pretended sale in 1899, the first may be disposed of on the ground that the finding of the learned trial Judge ought not to be interfered with. As to the second ground, that if Mrs. Carter did not release, she had notice and acquiesced in the mortgagees acting as owners in fee instead of a mere incumbrancer. Here, again, the conclusion of the learned Judge on the facts is of importance.

The following are relied on as acknowledgments made by her after the mortgagee took possession and collected the rents. She asked the late H. P. Bell to let her have a strip of the mortgaged land on the west of her house to be used as a passage way. In 1908, when Blanchard Bell proposed that she should buy the strip of land at the back of her lot, she said she could not afford to buy it. In 1913 the same suggestion was made by a Mr. Milbourne and the same answer given.

These instances establish, Mr. Mayers argues, that she knew that the Bells were claiming as owners, and amount to admissions on her part that she had lost or waived her right to redeem.

The mortgagee was entitled as of right to possession and was not bound to give any notice before entering, and there can be no doubt that in this case the mortgagee intended to take over the possession, rents and profits, but what is there to shew that she did anything inconsistent with her right to look to Mr. Bell as the mortgagee in possession or that he was not to account. It is sometimes a nice question as to what acts by the mortgagee constitute him a mortgagee in possession: *Noyes* v. *Pollock* (1886), 32 Ch.D. 53; but the acts done by a mortgagee in possession are hardly distinguishable from the acts that would be done by the true owner. She had no right to complain, and there was definite consent to forego her rights. I hesitate to say that the attitude taken by Mrs. Carter amounted to

acquiescence: as to what is acquiescence see *DeBussche* v. *Alt* (1878), 8 Ch.D. 286, at 314.

As to the third ground, that the Court will not grant to the plaintiff her equitable remedy in view of the staleness of her demand. The equity of redemption became vested in her in August, 1894, and she ceased to make payments of interest in 1896 and of taxes in 1898; and the action was not brought until 1914, so that 16 years have passed by without the plaintiff moving in the matter. As long ago as 1793 it was stated that 20 years' possession was a bar to the equity of redemption of a mortgagor; that rule, which remained in force in England till the Real Property Limitation Act of 1874 was passed, was adopted by the Court of Chancery by analogy to the rules of law, but, nevertheless, it was recognised that there might be cases "in which, after a length of time, though it might not be pleadable, the Court would hold that the bill came too late": *Pickering* v. *Lord Stamford* (1793), 2 Ves. 280. I agree with Mr. Mayers' contention that sec. 36 (of ch. 145) preserves the equitable doctrine of acquiescence, but I can see no reason why Mrs. Carter should be deprived of the full time allowed to mortgagors to bring their bill to redeem.

I would dismiss the appeal.

MARTIN, J.A.:—I am of opinion that the learned trial Judge reached the right conclusion, and, therefore, the appeal should be dismissed. Martin, J.A.

GALLIHER, J.A.:—I agree in the reasons for judgment of the learned Chief Justice below, and would dismiss the appeal. Galliher, J.A.

MCPHILLIPS, J.A.:—In my opinion, this appeal must be dismissed. The findings of fact of the learned Chief Justice are conclusive and are well supported by the evidence. The defence of laches and acquiescence wholly fails and is unsupported by any such evidence as would entitle effect being given to any such defence. McPhillips, J.A.

There is the merest suggestion of the possibility of there having been a quit claim deed obtained from the plaintiff whereby the mortgagee became possessed of the estate in the land freed of all right to redeem the same, but it is a most shadowy suggestion and is not even supported by a scintilla of evidence.

B. C.

C. A.

CARTER v. BELL.

McPhillips, J.A.

[*Watt* v. *Assets Co.* (1905), 74 L.J.P.C. 82, distinguished.]

It cannot be advanced for a moment, in my opinion, that upon the most indulgent view of the evidence led at the trial—that there ever was a conveyance of the equity of redemption to the mortgagee. The purported sale, declared invalid by the judgment appealed from, was unquestionably invalid—therefore, the position is this—not until the year 1910 was there a due exercise of the power of sale (the last payment of any interest upon the mortgage being made in the year 1897)—that being the case, how can the claim of the plaintiff to an account be resisted?

The lapse of time, in my opinion, in the present case has worked no injury to the defendant Agnes Bell, so far as her legal rights are concerned—although it may appear to do so—the fact is that the right of redemption in the mortgagor and his successor in title, the plaintiff, was always subsisting up to the time of the due exercise of the power of sale in 1910, and then the plaintiff became entitled to the account which has been directed.

[*Watt* v. *Assets Co.*, 74 L.J.P.C. 82, again referred to.]

In the present case the right of redemption always continued—it cannot be said that the plaintiff laid by upon any supposed rights, and it is not a case where the opportunities of explanation have gone by—in truth and in fact—that which was done cannot be supported in law.

In my opinion, no question arises for the consideration of the Statute of Limitations dwelt upon in argument by counsel for the appellant. Here we have a cause of action which arises and accrues to the plaintiff by reason of the exercise of the power of sale—a step only exercised in 1910, and as yet a large proportion of the moneys due and payable by the purchasers remain to be paid.

[*Knox* v. *Gye* (1871), L.R. 5 H.L. 656; *Piddocke* v. *Burt*, 63 L.J.Ch. 246, [1894] 1 Ch. 343; *Gordon* v. *Holland* (1912), 10 D.L.R. 734, 82 L.J.P.C. 81, referred to.]

The defendant Agnes Bell was in the position of a mortgagee in possession until the effective sale under the power of sale in 1910—and in the relation of a trustee to the mortgagor—and the Statute of Limitations is no bar—the relation of mortgagor and mortgagee being subsisting: see Fisher on Mortgages, Can.

ed., 1910, sec. 1743, p. 833; *Hood* v. *Easton*, 2 Jur. (N.S.) 729. Also in respect of the surplus moneys derived upon the exercise of the power of sale, the mortgagee holds the same in trust for the mortgagor and the Statute of Limitations is excluded: see Fisher on Mortgages, sec. 963, p. 494; *Banner* v. *Berridge*, 18 Ch.D. 254; *Warner* v. *Jacob*, 20 Ch.D. 220; *Re Bell, Lake* v. *Bell*, 34 Ch.D. 462.

McPhillips, J.A.

It, therefore, follows that, in my opinion, the judgment of the learned Chief Justice of British Columbia is right and the appeal should be dismissed.

Appeal dismissed.

WOOD v. ANDERSON.

ONT.
S. C.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 1, 1915.

1. DAMAGES (§ III C—80)—STALLION — BREACH OF WARRANTY—FIT FOR BREEDING—MEASURE OF DAMAGE.

The buyer suing for damages for breach of warranty that a stallion was fit for breeding purposes may recover as damages a sum made up of the price and interest, transportation expenses, and cost of keeping the horse a reasonable time until he could be sold, where there had been an offer to return him, but less the actual value of the horse.

[*Chesterman* v. *Lemb*, 2 A. & E. 129; *Ellis* v. *Chinnock*, 7 Car. & P. 1690, referred to.]

Statement

APPEAL from a judgment of Falconbridge, C.J.K.B., in an action for breach of warranty.

I. F. Hellmuth, K.C., and *E. G. Porter*, K.C., for the appellant.

W. D. M. Shorey, for the plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 28th September, 1914, which was directed to be entered by the Chief Justice of the King's Bench, after the trial of the action before him, sitting without a jury, at Belleville, on the 6th and 7th July, 1914.

The action is brought to recover damages for the breach of an alleged warranty on the sale by the appellant to the respondent of a Percheron stallion, and the complaint of the respondent is, that one of the stallion's front feet is malformed, and that, in consequence of this malformation, he was entirely useless for

ONT.
S. C.
WOOD
v.
ANDERSON.
Meredith, C.J.O.

breeding purposes, for which, to the knowledge of the appellant, he was purchased and intended to be used; and complaint is also made of the formation of the hind legs of the stallion, but that complaint was not, in the view of the Chief Justice, sustainable.

Apart from the question as to whether or not there was any warranty, and, if there was, the nature of it, which depends upon documentary evidence—the correspondence between the parties, by which the contract was constituted—the questions for decision were questions of fact as to which there was a direct conflict of testimony; and upon this conflicting testimony the learned Chief Justice found that the defect in the stallion's front foot existed from the stallion's birth, and was not, as the appellant contended, the result of any improper treatment or want of proper treatment of the respondent, and that this defect rendered the stallion unfit for breeding purposes. In coming to his conclusion the learned Chief Justice accepted the testimony of the respondent and his witnesses, although it was opposed to a large body of evidence adduced by the appellant, as well as to the testimony of the appellant himself. It is impossible for us to reverse these findings. There was evidence which, if believed, warranted them, and we cannot say that the findings were clearly wrong. The letters written on the 25th April and the 20th May, 1913, by the respondent, the first of them four days after the stallion reached Coulee, in the Province of Saskatchewan, to which point he had been shipped from the neighbourhood of Belleville, strongly support the contention of the respondent. It is true that the first of these letters is open to the observation made as to it by counsel for the appellant, which was that the complaint was not clearly directed to the defect of which the respondent complains and which has been found to have existed; but any force that there might have been in the observation is done away with by the second letter, which refers plainly to that defect.

That the appellant knew that the stallion was for breeding purposes is clear from the correspondence; and the law applicable is also clear, and is that: "If a contract be made to supply an article for a particular purpose, that purpose being the essen-

tial matter of the contract, so that it appears that the buyer relies on the seller's skill or judgment, then if the goods are of a description which it is in the course of the seller's business to supply, the seller is bound (whether he be the manufacturer or not) to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. A sale for a particular purpose may be inferred from the nature and circumstances of the transaction:" Leake on Contracts, 6th ed., p. 267.

If it had been necessary for the respondent to establish an express warranty, he has, in our opinion, done so, for the statement of the appellant in the letter of December, 1912, that the horse was a fine young Percheron stallion, and that "he could get all the mares that he should have, never leave the stable," was in substance and effect a warranty that he was fit for breeding purposes.

The appellant also complains that no deduction was made from the purchase-price for the actual value of the horse. It was stated during the argument that the evidence shewed that the horse was of no value for any purpose, but it appears from an examination of the evidence that the statement was incorrect. The only evidence as to the value of the horse was the testimony of the respondent, who said that he was of no value to him (p. 8), and that he did not sell him because he could get nothing for him (p. 22), and the testimony of Gardhouse, a witness called for the respondent, who said that he would make a work-horse, but not a very good one. This evidence does not establish that the horse was worth nothing, but the contrary. What the respondent evidently meant, by stating that the horse was of no value to him, was, that he was of no value for breeding purposes, for which the respondent bought him, and his statement as to the reason for his not having sold the horse is not sufficient, in the absence of any statement that any effort was made to sell him; that no effort to sell was made is, I think, apparent from the correspondence, which shews that the respondent had it in mind to return the horse to the appellant unless some other arrangement should be come to with him.

The respondent is entitled as damages to the price paid for the horse and the expense of transporting him to Saskatchewan

ONT.
S. C.
WOOD
v.
ANDERSON.
Meredith, C.J.O.

and interest on the purchase-price, all of which the learned Chief Justice allowed; and, having offered to return the horse, he is also entitled to recover all expenses necessarily caused by the horse lying on his hands until he could be sold, this being limited to a reasonable time; and from these sums there should be deducted the actual value of the horse: Leake on Contracts, 6th ed., p. 782; Mayne on Damages, 6th ed., p. 198; *Caswell* v. *Coare* (1809), 1 Taunt. 566; *Chesterman* v. *Lamb* (1834), 2 A. & E. 129; *Ellis* v. *Chinnock* (1835), 7 Car. & P. 1690.

The proper course, in these circumstances, is to direct a reference to ascertain what the horse is worth and the amount that should be allowed to the respondent for keeping him for a reasonable time until he could have been sold, unless the appellant elects to pay this latter amount and to take back the horse; and, if he so elects, the horse is to be given back to him upon request; and, if the parties are unable to agree as to the amount to be allowed for his keep, there will be a reference to ascertain it. In case of a reference, further directions and the costs of the reference will be reserved to be dealt with by a Judge of the High Court Division in Chambers. In *Caswell* v. *Coare*, where the purchase-price was recovered, it was directed that the horse should be redelivered to the defendant.

As success upon the appeal is divided, there will be no costs of it to either party.

Judgment accordingly.

ALTA.
S. C.

RUDYK v. SHANDRO.

Alberta Supreme Court, Hyndman, J. January 18, 1915.

1. PRINCIPAL AND AGENT (§ II A—5)—AGENT'S AUTHORITY—RIGHTS AND LIABILITIES OF PRINCIPAL—ELECTION CASES.

Agency in election cases differs from agency in ordinary business transactions inasmuch as, in the case of an election, the agent constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him but which may be directly contrary to the expressed directions of the person whose agent he is held to be.

2. ELECTIONS (§ II D—75)—ELECTION FRAUDS—ELECTION EXPENSES—LEGITIMACY OF—CRIMES.

Payment of legitimate election expenses are to be made through the candidate's official agent in an election subject to the Elections Act, Alta.; but as no penalty or punishment is prescribed by the Act for

the payment of such expenses personally by the candidate, his doing so is not a corrupt practice invalidating the election but is merely a prohibited act probably punishable under the Criminal Code as a wilful disobedience of a provincial statute.

ALTA.
S. C.
RUDYK v. SHANDRO.
Statement

PETITION under the Controverted Elections Act, 1907, filed by Paul Rudyk, one of the defeated candidates in the election for the electoral district of Whitford to avoid the election of the respondent, Andrew S. Shandro, who was returned at the provincial general elections held on April 17, 1913, as member for said district. The petition contained the usual charges of corrupt practices.

A. F. Ewing, K.C., *C. F. Newell*, K.C., and *A. Macleod Sinclair*, for petitioner.

A. G. MacKay, K.C., for respondent.

Hyndman, J.

HYNDMAN, J.:—At the trial the following charges were either abandoned or dismissed, namely: Clauses 3 (*b*), (*c*), (*d*), (*e*), (*f*), (*h*), (*k*), (*l*), (*o*), (*r*), of particulars and clauses 13 (*a*), and (*c*) of the particulars.

As to the remaining charges undisposed of I will first deal with the charges of bribery. Clause 3 (*a*) of particulars relates to the payment alleged to have been made by Alexander Shandro, agent and brother of the respondent, to one Mike Dymchuk on the day of the election to induce him to vote for the respondent and to bring voters to poll 17 to vote for the respondent.

It appears that Alex. Shandro was appointed agent in writing for his brother, the respondent, to act as scrutineer or agent at poll 17 on election day. He drove to the home of Wasyl Chlibecki, who lived in this polling division, and slept there the night before election. Alex. Shandro says that he did not know the people in that poll. Chlibecki told Shandro he thought there were some voters in Dymchuk's "corner" who would vote for respondent. Shandro knew Dymchuk six or seven years. Shandro and Chlibecki drove together to Dymchuk's place early on election day and Alex. Shandro says he asked him if he would take some of the people to the poll on the way. Dymchuk and Chlibecki both say that Shandro paid Dymchuk $3 at the time and Dymchuk says he paid him $2 after the poll closed. Alex. Shandro, whilst admitting that he had the conversation in ques-

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Hyndman, J.

tion and requested Dymchuk to carry some people on the way, denies that he was either asked for or gave him any money at this or any time. Mr. MacKay's student, Howson, who was assisting him in the defence, also testified that Chlibecki, shortly before going into the witness box stated to him in the hallway that Shandro did not pay this money. Chlibecki contradicts Howson. From what I could judge of these witnesses, I am of opinion that there must have been a misunderstanding between them as to the effect of their conversation. Chlibecki did not witness the payment of the $2 and Dymchuk's testimony was not entirely satisfactory as to the exact "spot" where it was paid, but I fail to comprehend why these two men apparently without any interest in the case or any antipathy towards respondent should come forward and testify to the payment in the manner they did. Mr. MacKay contended that it was unreasonable to believe these witnesses because Dymchuk did no work after arriving at the poll as $5 was good pay for a day's work. However, he drove three voters there, and Shandro being a stranger in the locality and it being an unfavourable poll for the respondent, I do not think it extraordinary that Dymchuk did nothing further during the day. He did exactly what he promised in the morning. Taking the whole evidence and the circumstances into consideration I am forced to the conclusion that such payments were, in fact, made.

As to the question of agency, Mr. MacKay argued that the written authority to Shandro to act as scrutineer was a limited one only and the respondent should not be bound by any illegal acts of his outside the scope of such authority. Agency in elections, however, has not been treated in the same manner as in ordinary commercial transactions. Reference to McPherson's Election Law of Canada (1905), pp. 861, 862.

In the matter under consideration we find that, in addition to Alex. Shandro having this written authority, he is the brother of the respondent. He drove a long distance the day before election so that he might act as scrutineer for his brother at poll 17. He did not content himself with merely attending to his duties as scrutineer, but shewed his interest in the election on behalf of the respondent by asking Chlibecki if there was

anyone he might hire to work for Shandro and to bring voters to the poll. Chlibecki referred him to Dymchuk and they both drove to the latter's house and arranged with him to carry three persons to vote. These acts and the relationship of the two Shandros, coupled with the written authority as scrutineer, force me to the conclusion that Alex. Shandro was the agent of the respondent in this regard. From the authorities I gather that the relation is more on the principle of master and servant than of principal and agent in the ordinary common law; that agency is a result of law to be drawn from the facts in the case and from the acts of individuals. It is a question for the Court whether, upon the aggregate of all these things taken together, of which each in itself is a little, though some, evidence, the person is shewn to have been employed to such an extent as to make him, upon the common sense, broad view of it, an agent for whom the candidate would be responsible. (See Jelfs' Corrupt and Illegal Practices Prevention Acts, 1883 to 1895, 3rd ed., pp. 70, 71.) I conclude, therefore, that Alex. Shandro was in this instance the agent for the respondent and find the charge proven to my satisfaction.

Para. (*g*) of para. 1 of order, as amended at the trial, charges the respondent with having corruptly paid to Jordia Lastiuka the sum of $10 to induce him to vote for the respondent and to buy drinks for the purpose of inducing electors to vote for the respondent, and at a later date a further sum of $10 for a like purpose, etc., etc. Lastiuka testified that he knew Shandro and met him before the election in Vegreville. He promised to have a meeting in the deponent's district; Lastiuka asked the respondent to give him some money to spend among his friends; he wanted the money to buy drinks and meals. Shandro gave him $10, in the hotel at Vegreville, part of which he said he spent in treating farmers from his district. Respondent asked him to call a meeting and handed him some bills to put up throughout the locality. Lastiuka accordingly advertised the meeting and posted up the bills. On the night of the meeting Lastiuka asked for pay for the work he had done and Shandro gave him $10. Witness demanded $15, but was refused the extra amount and was told

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Hyndman, J.

$10 was sufficient. Respondent admitted making both payments but says that about two months previously in Edmonton Lastiuka handed him $10 to pay his school taxes for him, which Lastiuka admits, and Shandro now contends that he did not pay these taxes and when he handed the first $10 to him it was merely a return of this sum. Respondent admitted, however, that at the time of the payment in the hotel nothing was said about taxes, and, according to Lastiuka, the first time he heard of this was after the election (the exact time being very uncertain) when Shandro told him this $10 was the tax money which he had held.

If this was respondent's intention at the time, I think, under the circumstances, being a candidate, and knowing the law with respect to bribery, as a prudent man he should have made it abundantly clear at the time that this was a return of the tax money. I do not think the witness would have been quite so generous in treating the farmers if he had understood it was his own money; the fact, too, that respondent trusted him to call a meeting, post up his bills, etc., shews that he was considered of some value as a worker and supporter, and, therefore, in the absence of a clearer explanation, I am bound to hold that this payment was made for the purpose of influencing Lastiuka in the election.

As to the second $10, although under the Election Act it was illegal for the respondent to make the payment except through his official agent, still I am of opinion that the remuneration was fair and reasonable for the work which witness had done in calling the meeting. The effect of the payment made personally by the candidate I will deal with further on.

Clause 3 (*i*) and (*j*) of particulars. That on April 5, 1913, the respondent corruptly paid Onysko Scheramata $10, to induce him to vote for him and to induce others to vote for him, and that on April 10, 1913, respondent promised to pay said Scheramata $5 per day for assisting him in his election and later, namely, in the month of July, 1913, in pursuance of said promise, the respondent paid Scheramata the sum of $40. Payment of the sums is admitted by the respondent but he contends that it was in respect of lawful

expenses, and that his only offence was that of paying directly moneys which, by sec. 293 of the Election Act, should have been paid by or through his official agent.

The evidence, in effect, is as follows: The parties met in the Alberta Hotel, Vegreville, on April 5, Shandro told Scheramata that he wanted him to drive speakers for him during the election to such places as might be indicated from time to time. Scheramata was to be paid $5 per day, and on being asked if he had any money replied he had not, and Shandro advanced him $10. He says this money was to pay for meals, etc., and that he kept an account of it, which came to more than $10, but did not receive the difference from Shandro. The only work he did was driving speakers about the riding. He never drove Shandro himself, but went where he was directed with supporters. He did not work continuously, and says that the eight days at $5 included election day. Now, it appears that he had considerable difficulty in collecting the debt. He never rendered any itemized account but merely claimed $40 for eight days' driving at $5 per day. Having failed to collect from Shandro, on July 4, 1913, the claim was placed in the hands of Ewing and Harvie, solicitors, who wrote a letter to respondent threatening that unless the amount was paid by return mail a writ would be issued against him. On receipt of this demand Shandro, on July 26, 1913, paid Scheramata personally by cheque on the Merchants Bank of Canada, Vegreville branch, on which is written, "in full payment, hire rigs, eight days at $5."

Scheramata says that in April there was nothing said as to how electors should vote, that he was not asked to do anything except drive Shandro's agents wherever he was ordered. There is no evidence whatever that this money was paid for any other purpose than stated. He did the work he agreed to do and I am of opinion that the remuneration for a man and team at $5 per day under the circumstances was fair and reasonable.

Mr. Sinclair laid stress on the fact that Scheramata testified the eight days included election day. However, I am satisfied that Shandro believed Scheramata actually did drive eight days excluding election day, and, according to the evidence, Scheramata did no work that day. He merely voted, and on

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Hyndman, J.

his way to the poll "picked up" John Scheramata, and on his way home drove the returning officer. As John Scheramata was an Edmonton man having no vote in Whitford constituency I cannot see anything in the evidence which would amount to proof of the charge of conveying voters to the poll.

I conclude, therefore, that, so far as this clause is concerned, there was no corrupt intent on the part of the respondent, but that his offence consists in a breach of sec. 293 of the Election Act. Clause 3 (*m*) of particulars, that the respondent on April 2, 1913, at Vegreville, corruptly paid to one Elarian Mandryk the sum of $10 to induce him to vote and to induce others to vote for the respondent.

I am not satisfied with the evidence of the witness Mandryk. He swore that Shandro paid him $10 in the hall near the water-closet of the Alberta Hotel for the purpose of "making him silent" as he had been working for the petitioner. He testified that Shandro said, "Take this and don't talk against me among the people, neither for or against me." After this he worked for Rudyk for eight days at $5 per day and said nothing to Rudyk about Shandro's payment until after election day. Shandro emphatically denies this payment. He says he never had anything to do with Mandryk that day; that witness never asked him for money and that he never gave him any. Now, even if the above were all the evidence on the point, I do not think I would be justified in deciding against respondent, but, on cross-examination, Mandryk admitted that about two weeks prior to the trial he stated in the presence of Michael Ostrowsky, Alex. Shandro, Nick Boychuk, and the respondent that he did not receive the money in question. This statement was reduced to writing (ex. 2), and witnessed by the three parties above-mentioned. Although Mandryk denies signing the paper he admits that it contains what he actually stated. All the others say that he did in fact touch the pen. On being asked why he told a different story he answered that he was not at the time on oath and that now, having been sworn to tell the truth, he would do so. I think, therefore, in view of these events, I would be placing a premium on falsehood if I were to accept the evid-

ence of such a witness as Mandryk, especially in view of Shandro's contradiction, and accordingly find the charge not proven.

Clause 3 (*p*) of particulars as amended is to the effect that respondent did pay to one Solowan $5 per day for driving during the election, etc. I find that the expenses incurred were legal expenses, that the respondent paid $25 personally, and that his offence consists only in paying directly that which should have been paid through his official agent, and my general remarks hereafter will apply to this charge.

Clause 4 (*a*), (*b*), and (*d*), and clause 12 (*i*) and (*j*) of particulars charge the returning officer, William Hawilliack, who is a brother-in-law of the respondent with instructing persons to pull down and himself pulling down pictures and literature posted up by the petitioner, etc. The evidence on these charges is meagre and very unsatisfactory, and, without dealing with the legal effect of such acts, if proven, I unhesitatingly dismiss the petition so far as they are concerned.

Clause 5 (*a*) of particulars. This charge is to the effect that poll 16, Soda Lake, did not open until about 9.45 a.m. on election day, that the Deputy Returning Officer and Poll Clerk were not sworn as required by law; that the D.R.O. did not shew the ballot box to such persons as were present at the polling place so that they might see that same was empty, as required by the Alberta Election Act. The evidence is clear that the poll did not open until between 9.30 and 9.45 a.m. owing to a misunderstanding on the part of the Deputy Returning Officer as to where the poll should be held, but with the exception of this I find everything else was quite regular and the respondent and his agent innocent of any complicity in the matter. I am satisfied that the delay in opening this poll had no material effect on the general result of the election. There were fifty-one voters on the list, forty-six of whom voted, and the petitioner had a majority of twelve over respondent, the vote standing as follows: Connolly 2, Rudyk 27, Shandro 15, and two rejected ballots.

Clause 5 (*b*) of particulars: That at poll 15, Hairy Hill, no poll was held on election day and no votes were taken, although many electors attended for that purpose and were prevented

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Hyndman, J.

from voting by reason thereof. There is no dispute as to the facts. It appears that the key of the ballot box became lost. No one present seemed to have courage enough to open it in any other way and consequently no votes were taken at this poll. I find, however, that respondent was not responsible in any way and that there was no wilful intent on the part of anyone concerned. I am of opinion that this event had no material effect on the result of the election. The number of voters on the list was 42, whereas the final majority for respondent over petitioner in the election was 187. Of course, it might be possible for more than 42 to vote under the provisions of the Election Act which permits persons not on the list but who are nevertheless entitled to vote to do so by taking the necessary oath. But on examination of the statement of the Returning Officer, form 51, sec. 233 of the Act (ex. 1) I find that the average vote in each poll was 55 and that the highest number at any poll was 97; moreover that the greatest number of names on any polling list in the district was 126. It is to my mind, therefore, quite improbable that the final result would in any way have been affected even had this poll been regularly held and every legitimate vote in the division voted in favour of the petitioner.

Clause 6 (*a*) of particulars: This relates to three voters, George Danyluik, N. Gazliuk and George Kutosch, who, it is alleged, voted at poll 9 and were not duly qualified electors.

There is no evidence as to how they voted or that the respondent was in any way connected with them. There is also some doubt as to whether they knew they were not entitled to vote. The witness Kutcher himself admitting that although he was scrutineer for Rudyk he was not sure of the boundaries of the district. I conclude therefore as to this that no corrupt practice has been proved as against the respondent or his agents.

Clause 3 (*n*) of particulars: That John Scheramata, agent of respondent, corruptly offered $200 to Zenko Mytkytka to induce him to vote for respondent, and to stay away from poll 7 on election day. At the conclusion of the evidence on this charge I intimated I believed no real or serious offer had been made, and I am still of that opinion. The chief witness for the petitioner himself admitted that he and Scheramata were more

or less chaffing one another and that he regarded the occurrence merely as a "joke." I therefore dismiss this charge.

Clause 14 (*a*) of particulars charged that respondent instructed the enumerator of poll 8 to mark the names of four electors off the list because he anticipated that such persons intended not to vote for respondent. I find from the evidence that two of these, viz., Wasyl and Fedor Ungorian did not live in the Whitford Riding and the enumerator was justified in striking their names off the official list. I do not think that Shandro attempted to press the enumerator to do anything improper and believed that some or all of these persons were not entitled to vote in the constituency. I therefore dismiss this charge.

Clause 17 (*a*) of particulars: This alleges that the respondent was and is disqualified from being a member of the Legislative Assembly of the Province of Alberta in that he is not a British subject. The evidence adduced in connection with this charge proved to be rather peculiar and interesting.

It appears that respondent was born in Austria on March 9, 1884, emigrated to Canada with his father, Steve Shandro, about the year 1899 and settled in the district where he now lives. On October 31, 1904, he went through the usual formalities leading to his naturalization and subscribed the usual affidavits before Mr. C. W. Cross, Commissioner in and for the N.W.T. and certificate of naturalization was issued on February 8, 1905. At this date, therefore, respondent would be about one month under twenty-one years of age. If these were the only facts incidental to his status as a British subject it might be necessary for me to decide whether or not the said certificate of naturalization was valid because Shandro was at the time under twenty-one years, but evidence was adduced proving that Steve (or Stefan) Shandro, father of respondent, became a naturalized British subject on October 3, 1903. Respondent lived with him after that date and before he became twenty-one years of age and therefore, under the Naturalization Act, was already a British subject and became such before he attained his majority and his own certificate was therefore, super-

ALTA.

S. C.

RUDYK v. SHANDRO.

Hyndman, J.

fluous. [Sec. 35 of the Naturalization Act, R.S.C. ch. 77, referred to.]

This complaint is therefore dismissed.

Clause 4 (*a*), (*c*), (*d*); clauses 10 (*a*); 11 (*a*); 12 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*n*), (*j*); 13 (*b*), of the particulars: These charges relate to the arrest of the petitioner at the instance of the respondent the night previous to the election, viz., on April 16, 1913, and that respondent and his agents advised and warned electors not to vote for petitioner because he was in gaol and to vote for him would be useless. The facts are substantially as follows: It appears that on March 25, 1913, the Hon. C. W. Cross, Attorney-General, wrote a letter to the petitioner, copy of which is as follows:—

Personal.

Dear Sir.—If you are desirous of having any appointments made of Justices of the Peace, Notaries or Commissioners in connection with my department during the election, kindly wire to me at Government offices, Edmonton, and the appointment will be attended to at once by Mr. Thom.

Wishing you every success in the coming election and with best regards,

I am, Yours very truly,

(Sgd.) C. W. CROSS.

Paul Rudyk,
Whitford, Alberta.

The petitioner did not receive this letter until about a week before election whilst he was passing through Whitford Post Office district. It appears the petitioner had been a friend of the Attorney-General for a long time, was an active Liberal and supported Mr. Cross in his several elections in the city of Edmonton, that the petitioner intimated to the Attorney-General before the letter was written that he intended being a candidate and states that Mr. Cross wished him every success.

At a Liberal convention held on March 29, the respondent was nominated as the Liberal candidate for the Whitford riding. Certain friends of the petitioner also wished to nominate him but he refused to allow his name to go before the convention and stated that he proposed running as an Independent Liberal, and from that time onward was active in promoting his interests as a candidate throughout the locality. The nationality of the majority of the electors in the district was that of the parties hereto, either Austrian or Russian, and although there were also

two English speaking candidates, Hughson and Connolly, it was conceded that only one of foreign birth would have any great hope of success and the real contest was conceded to be between petitioner and respondent.

About April 13, the petitioner read and interpreted the letter referred to at a meeting at which Andrew Shandro was also present. Respondent asked to see the letter, which Rudyk shewed him and he carefully read it and understood contents. It appears from the evidence that Rudyk's object in using this letter was to lead the people to believe that he was a friend of the Attorney-General and that if elected to the legislature he would have quite as much influence with the Government as the regular Liberal nominee, Shandro, and there is evidence to the effect that he boasted to some extent that the respondent could not produce such a letter from any member of the cabinet. The respondent, evidently, was much concerned about the effect the letter would have on the minds of the electors, and, not being able to understand why the Attorney-General should favour one who was not the regularly nominated Liberal candidate, on April 15, had a telephone conversation with Mr. Cross with regard to it. He was informed by Mr. Cross that no such letter had ever been written, that he had had no correspondence of any nature with Mr. Rudyk for a number of years and he could not possibly understand how he had such a letter in his possession. With this assurance from Mr. Cross, the respondent conceived the idea of putting an end to the effect of it by procuring Rudyk's arrest on the charge of forgery and by means of a search warrant getting the letter away from him, and to that end sent for Robert Stewart, a justice of the peace living about 10 miles distant, asking him to come to respondent's house, which Mr. Stewart did. As a matter of fact, the letter was a genuine one signed by Mr. Cross himself but which evidently for some reason or another at the time of the telephone conversation he had forgotten, and it was quite proper for the petitioner to use the letter in any legitimate way. On arrival at Shandro's residence the justice of the peace found also present one Mike Ostrowsky and others. Mike Ostrowsky, although a resident of Edmonton, appears to have been a very active

ALTA.

S. C.

RUDYK v. SHANDRO.

Hyndman, J.

worker in this district in the interests of Shandro. He was connected with a newspaper called the "Russian Voice," and took a very active part in the scheme to have Rudyk arrested and the letter rendered useless by means of a search warrant. In fairness to the justice of the peace, who was also an active agent of Shandro, I must state that he advised against such a proceeding but without effect.

On the afternoon, therefore, of that day an information (ex. 6) was laid by respondent in part as follows:—

> That Paul Rudyk, of Edmonton, Alberta on or about the 13th day of April, A.D. 1913, at Edward in the said Province did unlawfully forge a letter signed C. W. Cross, Attorney-General of Alberta, or did have a letter in his possession alleged to have been signed by C. W. Cross, said letter if signed by C. W. Cross is a forgery. Said C. W. Cross stating so; said C. W. Cross states said letter never signed by him.

and a warrant to apprehend (ex. 7) and warrant to search (ex. 8) were issued, the warrant to search reading in part as follows:—

> that there is reason to suspect that Paul Rudyk, of Edmonton, has in his possession a letter signed "C. W. Cross, Attorney-General" alleged to have been forged, Mr. C. W. Cross stated never wrote said letter.

Evidently Shandro had some misgivings as to the genuineness of Mr. Cross' letter because it was arranged that the arrest should not be made unless a telegram was received at Pakan from Mr. Cross confirming the telephone conversation and which he promised to send that day. As respondent was due at a meeting in the evening at a point a considerable distance from his home he drove away with one Rudimer Pratish about four o'clock in the afternoon, leaving Stewart and Ostrowsky in the house. It was arranged that the warrants should be delivered to Constable Schreyer, of the N.W.M.P. with instructions that he should arrest Rudyk only on condition that the expected telegram came to Pakan from Mr. Cross, Ostrowsky and Stewart drove off with the papers and placed them in the hands of Mr. Schreyer on the above conditions. Whether or not Schreyer got the expected telegram, it is not clear, but at any rate, that same night at the conclusion of a meeting Rudyk was holding at Smoky Lake school-house with seventy-five or eighty people present, just after he finished his speech Constable Schreyer

appeared and demanded the letter, which petitioner gave him. The constable placed it in his pocket, shewed him the warrant and placed him under arrest.

It appears Schreyer's intention was to take him to the home of Stewart, a very long distance away, but at the request of the petitioner, instead, he was taken to Dr. Lawford, J.P., at Pakan, as he was the nearest magistrate. They arrived at Lawford's house about 3 o'clock in the morning. As there was no accommodation for prisoners, he sent them to the hospital till the morning, when he released the petitioner on his own recognizance till April 18, and Rudyk was thus enabled to be present about the opening of Pakan poll, and was also at Smoky Lake poll about one or two o'clock p.m. On April 18, Dr. Lawford further adjourned the case for one week in order to receive the information from Stewart, J.P., and Shandro was notified of this adjournment. At the end of the week Rudyk was telephoned to not to attend as Lawford had failed to receive the papers from Stewart and the case was further postponed to the 28th of the month. Although Shandro was duly advised of these dates, he did not appear, and on the 28th the charge was formally dismissed by the justice for want of prosecution.

There is a feature of the case which deserves some attention, and, to my mind, has a very great bearing on the attitude of mind and motives of Shandro and Stewart. There were, apparently, no instructions whatever given to the constable as to where petitioner should be taken after arrest. Under ordinary circumstances he would be brought before the justice who issued the warrant, and the constable proposed doing that, and no doubt would have done so had not Rudyk urged otherwise. Stewart, on the eve of the election, instead of remaining at home, went to a poll ten miles distant so that if the constable had done the usual thing and taken him before the issuing magistrate he would have found on arrival that he was not available, which, no doubt, would have meant the detention of the petitioner during the whole of the seventeenth and thus deprived him of any work which he might have done in the support of his candidature on this important day.

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Hyndman, J.

The only commendable thing on the part of the respondent in this reprehensible affair was his candid confession that in doing what he did he was not acting in the public interest or with a view of assisting in the administration of justice, but simply and solely with the object of furthering his own election. As he said, "The main object in arresting Rudyk was to stop Rudyk taking away my votes."

Although there is evidence that Shandro believed the Cross letter a forgery, still seeing, as he did, the official letter-head and every appearance of genuineness on the face of the letter, for decency's sake, at any rate, or as a generous and, I might say, sportsmanlike opponent, he might at least have postponed the arrest of Rudyk until after election day as he must have known that Rudyk was a man of substance, had lived in the country for many years, and had no intention of departing from the province.

The petitioner contends that this action on the part of Shandro and the advice or warnings not to vote for him had a very detrimental effect on his election, in that many persons would be confused and misled and would not know what effect, if any, such arrest would have if he were elected, and that a large number of electors would naturally be prejudiced by reason of these things. I find it difficult, however, to come to that conclusion. Although the evidence is conflicting, I believe it was a well-known fact and was discussed by electors at a number of polls that Rudyk had been arrested. In fact, at Smoky Lake school, the night before election, he was arrested immediately at the conclusion of the meeting and there must have been some persons who witnessed this. Granted that even only one person knew it at that time, it is reasonable to suppose that news of such an occurrence, affecting as it did one of the principal candidates would spread very rapidly in that mysterious manner which such news does, and there is no telling where the reports would end. However, I was rather surprised that no evidence was given by any witness to the effect that a single elector had been influenced by the knowledge or report of the arrest. If anyone did vote against or refrained from voting for

Rudyk on this account it is strange that some elector was not brought forward to state the fact at the trial of this petition.

I do not think it falls under the head of intimidation or undue influence either at common law or under sec. 26 of the statute unless, at any rate, it could be proven that it did actually operate to intimidate or restrain from voting some one or more of the electors in the district. I therefore come to the conclusion that, reprehensible as the conduct of the respondent was in this regard, I do not think, on the evidence, that it amounts to any of the matters contemplated by the Elections Act as a cause for declaring the election void.

Referring to the payment of legitimate expenses made personally by respondent, but which, nevertheless, under the Elections Act are not permitted but must be made by the official agent, in my opinion, these offences do not fall under the head of corrupt practices, but are merely prohibited acts. No penalty or punishment is prescribed in the Elections Act for the commission of this offence and would, therefore, I presume, be subject to the punishment prescribed by the Criminal Code which deals with offences against provincial statutes, for which no punishment or penalty is prescribed.

So far as these offences are concerned, therefore, I conclude that, in themselves, they do not constitute a ground for avoiding the election. As a consequence, therefore, of my findings as to the payments made to Mike Dymchuk by Alexander Shandro, agent of the respondent, and the payment to Lastiuka made by the respondent personally, and other findings, it is my duty to declare the said election void, and as a further result of such findings, the said respondent, Andrew S. Shandro, is therefore incapable during the next eight years of being elected to or sitting in the Legislative Assembly or any municipal council and of being entered on the voters' list or registered as a voter and of voting at an election and of holding any office at the nomination of the Crown or any municipal office.

The petitioner shall have his general costs, but shall not be entitled to tax the witness fees in connection with such charges as have not been proven at the trial.

Judgment accordingly.

ALTA.

S. C.

RUDYK v. SHANDRO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. February 19, 1915.

1. ELECTIONS (§ II D—75)—ELECTION FRAUDS—BRIBERY, SUFFICIENCY OF CHARGE.

A charge of personal bribery against a candidate at an election which, if sustained, would cause the candidate's disqualification must be established beyond a reasonable doubt and not upon a mere balancing of probabilities.

Statement

APPEAL from the judgment of Hyndman, J., 21 D.L.R. 250.

A. Macleod Sinclair, for petitioner, respondent.

A. G. MacKay, K.C., for defendant, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—In this appeal—one from Hyndman, J.—the only thing open for our consideration is the finding that a corrupt practice had been committed by the appellant, Shandro, one of the candidates in the election, with the result imposed by sec. 269 of the Alberta Election Act (ch. 3, of 1909), of rendering him incapable of being elected to and sitting in the legislative assembly or any municipal council, and of being entered on any voters' list or registered as a voter, and of voting at an election and of holding any office at the nomination of the Crown or any municipal office. The date of the election was April 17, 1913.

The item of the particulars upon which the learned Judge made this finding is—as amended during the course of the trial —as follows:—

> In or about April, 1913, a few days before April 17 (the precise date intended seems to be the 8th), the respondent (Shandro) at Vegreville paid to Jordaki Lastiwka at Shalka Post Office, Alberta, the sum of $10 and corruptly requested the said Jordaki Lastiwka to use the said sum of $10 to buy drinks for the purpose of inducing the electors of the said constituency of Whitford to vote for the respondent. The respondent corruptly promised to pay the said Jordaki Lastiwka a further sum later on. On or about April 16, 1913, the respondent corruptly paid to the said Jordika Lastiwka the sum of $10 to induce the said Jordika Lastiwka to vote for the respondent and to induce others to vote for the respondent.

This charge is obviously laid in view of sec. 256 of the Elections Act.

The charge clearly is intended to be one falling under the

latter portion of the section, and to state it briefly to be as follows: That Shandro on April 8, himself corruptly paid Lastiwka $10 "for the purpose of corruptly influencing"—not Lastiwka but—"the electors" of the constituency "to vote for" Shandro.

Not every act which is made illegal is a "corrupt practice." The latter is defined in sec. 2, sub-sec. 3 to "mean and include bribery . . . or an act declared to be . . . a corrupt practice by this or any other Act of the legislature of Alberta or recognized as such by the common law of parliament."

As to the payment of $10 alleged to have been paid by Shandro to Lastiwka on April 16, the learned Judge says:—

> Respondent (Shandro) asked him (Lastiwka) to call a meeting and handed him some bills to put up throughout the locality. Lastiwka accordingly advertised the meeting and posted up the bills. On the night of the meeting Lastiwka asked for pay for the work he had done and Shandro gave him $10. Witness (Lastiwka) demanded $15 but was refused the extra amount and was told $10 was sufficient.

Both Shandro and Lastiwka so far agree. As to this payment of $10 the learned Judge says:—

> Although under the Election Act it was illegal for the respondent to make the payment except through his official agent, still, I am of opinion that the remuneration was fair and reasonable for the work which witness (Lastiwka) had done in calling the meeting.

It was an illegal act but not a corrupt practice. So, the corrupt practice of which the learned Judge finds the respondent guilty, is in connection with the payment of the $10 on April 8.

Shandro's account of the payment of this $10 is this: About the middle of March, Shandro and Lastiwka met in Edmonton. Lastiwka explained that he owed some taxes and gave Shandro $10 with which to pay the taxes asking him to make the payment to the tax collector, one Warnliack, who lived in the same neighbourhood as Shandro, and whom he frequently met. On April 8, Shandro and Lastiwka met in Vegreville. Lastiwka asked Shandro for some money. Shandro said: "What do you want it for?" Lastiwka said: "I got to buy some things before I go home and I am broke." Shandro said: "I have that $10 that you gave me that day to pay Warnliack, if you want that, here it is, and I gave him that; and he went away." Later on the

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Beck, J.

same day they met again, and it was then that the arrangement was made that Lastiwka should call a meeting on Shandro's behalf. Lastiwka agrees absolutely with Shandro so far as relates to the meeting in Edmonton at which Lastiwka gave Shandro the $10 to pay his taxes to Warnliack and also so far as relates to $10 paid subsequently to the election for Lastiwka's services in connection with calling the meeting including Shandro's refusal to pay him more than $10, although he claimed $15, and also the fact of the payment by Shandro to Lastiwka of $10 in Vegreville on April 8.

Where they differ is as to what took place when Shandro gave Lastiwka the $10 in Vegreville; Lastiwka denies that anything was said by Shandro indicating that it was a return of the $10 given him to pay Lastiwka's taxes. Lastiwka's evidence is very confused, some of the confusion being accounted for by reason of his evidence being given through an interpreter who was evidently illiterate in English at all events. Lastiwka's evidence on the point of difference is briefly as follows:—

I saw him (Shandro) once out here in Vegreville; I spoke to him. I can't remember straight away what took place at that conversation. I asked him when he was going to call his meeting down at our place. He said if we needed a meeeting he would call one.

"Q. What was done at that time? A. Then we had lots and lots of my friends round there; and *if you give me something, to spend money;* our friends called a meeting. Q. What was *done*? A. He said he could not do it at that time. I pay you, if you call my meeting later; then I would not call; he gave me $10. Q. What did he say, when he gave you the $10? A. I have to call a meeting; of course it is too late to put notices in; I have to go and call the people to the meeting for the 16th. Q. Did he say anything in addition to telling you you should call a meeting when he gave you the $10? A. He told me to go round and call a meeting, ask them to come there. Q. What else did he say about the $10. A. No, nothing, he gave me $10. I buy a drink. . . . Q. Did he mention what he gave you the $10 for? A. No, I think he gave it for meeting purposes. . . . Q. Why did he

give you $10 at Vegreville? A. I just asked it. I do not know what he meant. Q. What did you ask him then? A. Sometimes I like to spend a couple of dollars in town. Q. Why did you ask him about this money, did you ask him for $10? A. No, I just asked him to give me some money. I like to spend it. Q. Why did you like to spend it; why was it you wanted to spend the money just at that time? A. I want to get my breakfast, and might have a drink. I like sometimes to have it. . . . Q. What did he say when he gave you the $10? A. Mr. Shandro paid me the $10, then said—if you go down and call my meeting. Q. Did he say anything beyond that? A. No. He gave me his notice and if be too late to put that notice in, go round and call the people and I be there on the 16th night."

He says it was only after the election that Shandro told him that the $10 given him in Vegreville was the $10 he had received from him to pay taxes.

Referring to the same $10 in cross-examination:—

"Q. You asked him to give you some money? A. Yes. Q. You borrowed $10 from him? A. I asked him for some money and Mr. Shandro gave me $10. Q. Did you say, loan me $10? A. We never talked over nothing. Q. That $10 had nothing to do with the posting of the bills? A. No."

In the result, Shandro's evidence is that Lastiwka having asked for money Shandro said I will give you back the $10 you gave me to pay your taxes. Lastiwka's evidence is: that nothing was said about it being a return of that money; that Shandro gave it simply because he was asked and said nothing of any purpose he had in giving it.

[Reference to judgment of Hyndman, J., for which see previous case.]

The only evidence I can find which tends to support the learned Judge's statement that Lastiwka "asked the respondent to give him some money to spend among his friends; he wanted the money to buy drinks and meals" is the somewhat involved answer I have already quoted:—

> Then we had lots and lots of my friends round there, and if you give me something, to spend money, our friends called a meeting.

But if this means what the learned Judge appears to con-

ALTA.
S. C.
RUDYK
v.
SHANDRO.
Beck, J.

clude from it alone, it seems to me to be contradicted by other evidence I have quoted of Lastiwka himself. Again Shandro not only now contends that the $10 was a return of the tax money, but swears that it was distinctly so stated at the time. Furthermore, there is no evidence in the stenographer's notes before us indicating that Shandro admitted "that at the time of the payment in the hotel nothing was said about the taxes;" his evidence is all positively to the effect that it was expressly mentioned.

If the learned Judge has in his notes of evidence anything indicating any such admission by Shandro, which has been omitted by the stenographer—a thing which sometimes happens —the learned Judge must undoubtedly have misapprehended the evidence, for, beyond question, such an admission—coming, as it must have, if at all, after Lastiwka's evidence and after Shandro's positive and reiterated statement to the contrary—would have called forth some remark or further examination by counsel on either side, which certainly would have, yet does not, appear in the stenographer's notes. At all events these notes contain all the evidence before us, and we must confine our consideration to what there appears. Still, further, the undisputed fact that, on the day preceding the election Shandro refused to pay Lastiwka more than $10 though he urged the payment of $15 for his work in connection with the calling of the meeting naturally leads to the conclusion that he had not attempted a few days before to bribe a man in whom he was now not afraid to incur ill feeling against himself.

The trial lasted several days and there was an interval between a partial hearing at Vegreville and one at Edmonton. It is not surprising, therefore, if the fact be, as I suspect it is, that the learned Judge's recollection of the evidence failed him when he came to write his report. Even taking the evidence as the learned Judge puts it and taking the reasons he gives for his conclusion, I am convinced from the tone of his remarks that he made no distinction in the principle of decision applicable to the question of disqualification—the result of disqualification is a very serious curtailment of the respondent's civil status—*diminutio capitis*, the civilians would call it, and I think

should be dealt with in the same way as if the charge were a criminal one. That is to say, I think a charge which, if proved, has so serious a consequence of that character, is required to be established beyond a reasonable doubt, and that the fact, if it be so, that the respondent failed to act as a prudent man is not enough from which to infer the intent necessary to constitute the essential element of the offence charged. If bribery or other corrupt practice is clearly proved against a candidate, there should be no hesitancy in finding him guilty and the penalty imposed by the statute is, in my opinion, not too severe. In the present case, however, as I have indicated, it is clear to me that the learned Judge's finding of disqualification should be reversed because the evidence fails to establish the charge, my explanation of the learned Judge's expressed opinion to the contrary, being that, under circumstances which need occasion no surprise, he either misapprehended or failed to recollect accurately the evidence, and that even if we ought, perhaps, to assume that his impression after hearing the entire evidence is more likely to be correct than our conclusions from a written report merely of the evidence relating to the precise charge, yet it is reasonably clear that he acted upon a wrong principle in considering the evidence in respect of this charge—a right principle in respect of all the others—only from the point of view of a balancing of the probabilities and not of the proof of a quasi-criminal charge beyond a reasonable doubt.

The appeal should be allowed with costs and the disqualification removed.

Appeal allowed.

OLYMPIC STONE CONSTRUCTION v. MOMSEN & ROWE.

British Columbia Court of Appeal, Irving, Martin, Galliher, and McPhillips, JJ.A. February 26, 1915.

1. BILLS OF SALE (§ I—5)—SALE OF SHIP—REGISTRATION—NECESSITY OF WRITTEN INSTRUMENT.

Where a boat is not registered and it is not shown that she ought to have been registered, a written instrument will not be held to be essential to evidence her sale.

[*Benyon* v. *Cresswell*, 12 Q.B. 899, 900, applied.]

APPEAL from judgment of Gregory, J.

Statement

B. C.

C. A.

OLYMPIC STONE CONSTRUCTION CO. v. MOMSEN & ROWE.

Irving, J.A.

D. S. Tait, for appellant, plaintiff.

Bodwell, K.C., for respondents, Broley & Martin.

E. A. Lucas, for respondents, Momsen & Rowe.

IRVING, J.A.:—Plaintiffs (an incorporated company) were the owners of a tug boat, "Rip Rap." Momsen & Rowe were ship and yacht brokers, dealing in boats, and had a lien on the "Rip Rap" and her engine to secure the payment of two notes for $1,625. When, on November 10, 1913, the first of the two notes became due, Momsen & Rowe sent an agent (Maxon) to interview the plaintiff company, and, at or after the interview, Maxon said that he thought the boat would suit Messrs. Broley & Martin, who were carrying on business on the Fraser River, and the following resolution was then passed:—

It was moved and seconded that Mr. Bowman be empowered to make, sign and transfer the company's interest and title to any parties who may hereafter purchase the company's boat. All copies of papers in connection therewith to be forwarded to the company's office at Victoria and any moneys received by Mr. Bowman to be paid into the company's account at the Bank of Toronto, Victoria, and also that this motion in no way permits Mr. Bowman to enter into any agreements that may endanger the company's interests except and for the sole purpose of effecting the *sale* of the boat. Carried.

Notice of this resolution was furnished to the defendants Momsen & Rowe by handing a copy to Maxon.

Bowman and Maxon took the "Rip Rap" from Victoria, where she was lying, to the Fraser River, and shewed her to the other defendants, Broley and Martin. Broley and Martin were willing to buy her, but they had not sufficient cash; a three-handed deal was then arranged by which Momsen & Rowe gave possession of the boat to Broley and Martin on the terms set out in the following document:—

NEW WESTMINSTER, B.C.,
Dec. 2nd, 1913.

Received from Messrs. Broley & Martin an accepted draft for $1,000 (one thousand) as part payment on gas tug, powered with a 35 H. Corliss engine. Sale price of tug to be $3,000 (three thousand dollars) clear from all debts. Momsen & Rowe agree to accept for balance of payment of $2,000 (two thousand dollars) certain machinery as described, shown to, and passed on by Mr. Bowman of the Olympic Stone Construction Co., of Victoria, said machinery to contain the following pieces:—

One hoisting engine ($1,500) 2 years old, used only 3 months;

One swing gear ($245) 2 years old, never used;

One set of derrick timbers framed, and derrick irons complete ($500)

3 months old, never used; all to be free from all debts, liens, mortgages, etc., and all of which are in first-class condition and located at Cranes ship yard, New Westminster.

In the event of Messrs. Broley & Martin wishing to exchange their 35 H. Corliss engine for a larger one, Messrs. Momsen & Rowe agree to take back same within a period of 12 months from date, provided said engine is in perfect running order, and allow Messrs. Broley & Martin the list price of said engine less 10% (ten) to be applied on part of purchase price on a larger Corliss engine, when purchased from Momsen & Rowe.

MOMSEN & ROWE,
per O. A. Momsen.

Broley & Martin
N. & B.
Witness:
E. Rice.

It will be observed that Momsen & Rowe did not forget their own interests in this contract, under which they received the whole $1,000, payable in cash.

On April 30, 1914, the plaintiffs brought this action, claiming, as against the defendants Broley & Martin, the return of the "Rip Rap," and, as against the defendants Momsen & Rowe, damages for selling the boat without authority. Momsen & Rowe counterclaimed for the $1,625. This counterclaim was dismissed without costs and without prejudice to the right of the defendants Momsen & Rowe (or the bank which held the notes) to bring a fresh action in respect of the $1,625. Judgment was given in the original action against the plaintiffs, and from that judgment this appeal is taken.

Bearing in mind the fact that the defendants, Momsen & Rowe, were interested in the boat, and that they held two notes made by the plaintiffs for the price of the engine, the terms of the resolution, in my opinion, call for a sale for cash, and no authority was given to Bowman to make the barter which was carried through by Momsen & Rowe. The inquiry addressed by Mr. Martin to Bowman (p. 40) as to his authority shews that he appreciated the applicability of the doctrine of *caveat emptor*.

The difference between a sale and a barter is well known and need not be enlarged upon. The cases cited by Mr. Bodwell will not justify us in calling an authority to an agent to sell an authority to *barter*. The legal effect of a contract of sale may be the same as that of a contract of barter, but the authority for one is not an authority for the other. The plain reading of the authority given to Bowman was to sell for cash.

B. C.
C. A.
OLYMPIC STONE CONSTRUCTION v. MOMSEN & ROWE.
Irving, J.A.

The implied authority of a factor does not include an authority to barter: *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616; nor to delegate his authority: *Cockran* v. *Islam* (1814), 2 M. & S. 301; *Solly* v. *Rathbone* (1814), 2 M. & S. 298.

Apart from the written authority, I think we must hold that Bowman, who was the company's general manager, had power to bind the company: see *Doctor* v. *People's Trust* (1913), 16 D.L.R. 192, 18 B.C.R. 382; and clauses H. and O. of the company's powers and the power of delegation in sec. 91 of Table A, and, therefore, the plaintiffs are not entitled to recover.

The boat, being unregistered, might be transferred without a document in writing. The cases cited by Mr. Bodwell establish that point. I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—As to the point of this transaction being a sale or a barter, I am of the opinion that, on the facts, the learned Judge below was justified in holding it to be the former: *Hands* v. *Burton* (1808), 9 East 349; *Saxty* v. *Wilkin* (1843), 11 M. & W. 622; 25 Hals. 109, par. 216. The case of *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616, is of no assistance to the plaintiff in determining this question, because there the transaction was stated in the written note to be "considered a barter transaction"; therefore, it was not open to the parties to treat it otherwise.

Then as to there being a necessity for a written transfer of the vessel. It is admitted that she was not registered, and it is not proved that she ought to have been, which the plaintiff should have done if he wished to bring her within the Act; otherwise a written instrument is not essential: *Benyon* v. *Cresswell* (1848), 12 Q.B.D. 899, 900; *cf.* Erle, J. Of this case it is said, in MacLachlan on Shipping (1911), 32, that it is

> . . . a decision which clearly implies that at common law the legal property in a ship may be transferred without a bill of sale; and there is no reason to suppose that the provisions of the Sale of Goods Act, 1893, with regard to the transfer of property as between buyer and seller do not apply to ships, except in cases where the Merchant Shipping Act makes a bill of sale necessary.

And *cf.* *Batthyany* v. *Bouch* (1881), 4 Asp. M.C. 380, 50 L.J.Q.B. 421, as to the Act of 1854 not applying to an agreement to transfer a registered ship, but to the instrument of trans-

fer itself, and that such an agreement may be enforced by an order for specific performance: *cf.* Act of 1894, secs. 24 *et seq.*

Applying the foregoing conclusion to the facts found by the learned trial Judge (which finding is supported by the evidence), it follows that the appeal should be dismissed.

GALLIHER, J.A.:—I am, with some regret, I may say, forced to the conclusion that this appeal must be dismissed.

I think, upon the evidence and the authorities, that Bowman had power to make the deal which, under the circumstances, seems to me not to have been in the best interests of the company.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Mr. Justice Gregory, and, in my opinion, the learned trial Judge came to the right conclusion. The action called in question the sale of an unregistered tug boat called the "Rip Rap"—a sale was authorized by a resolution of the board of directors of the plaintiffs, and Mr. Bowman, the managing director of the plaintiffs, was authorized to effect the sale and execute the necessary transfer of title thereof. McPhillips, J.A.

The learned trial Judge has expressly found that the sale was made with the authority of the managing director, and with this finding I cannot find any good reason to disagree.

The evidence adduced at the trial to establish the plaintiffs' case is most unsatisfactory, and it is impossible to take any other view upon it than that arrived at by the learned Judge.

It was very strongly argued by counsel for the appellants that the present case was one which should have been determined upon the principle as laid down in *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616-618 (22 R.R. 500)—that is, that the managing director had no authority to sell or authorize a sale—save for money and that the transaction was one of barter—and that, therefore, no property passed.

In my opinion, the transaction was not one of barter. What is barter? In Stroud's Judicial Dictionary, 2nd ed. (1903), vol. 1, at p. 168, we find the following:—

> This word (barter) is used by us for the exchange of wares for wares (Termes de la Ley: Cowel).

Chalmers' Sale of Goods, 7th ed. (1910), at p. 5:—

B. C.

C. A.

OLYMPIC STONE CONSTRUCTION v. MOMSEN & ROWE.

McPhillips, J.A.

Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is not a contract of sale but is a contract of exchange or barter (Bullen & Leake Prec. of Plead. 3rd ed. p. 151; *Harrison* v. *Luke* (1845), 14 M. & W. 139—French Civil Code art. 1702)—But if the consideration for such transfer consists partly of goods and partly of money, it seems that the contract is a contract of sale (*Aldridge* v. *Johnson* (1857), 26 L.J.Q.B. 296; *Sheldon* v. *Cox* (1824), 3 B. & C. 420, where the goods had been delivered and the action was brought for the money balance. . . .)

Aldridge v. *Johnson*, *supra*, was a case where 32 bullocks, valued at £6 a piece, were to be exchanged for 100 quarters of barley at £2 per quarter, the difference to be paid in cash, and the contract was treated as a contract of sale.

Then, in *South Australian Ins. Co.* v. *Randell* (1869), L.R. 3 P.C. 101, the question as to what constituted a sale as compared with a bailment was considered, and Sir Joseph Napier, at p. 108, said:—

> The law seems to be concisely and accurately stated by Sir William Jones in the passages cited by Mr. Mellish from his treatise on Bailments, pp. 64 and 102 (3rd ed.). Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity and not for the return of this identical subject matter in its original or an altered form this is a transfer of property for value—it is a sale and not a bailment.

And at p. 113 further said:—

> It comes to this that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes.

In the present case the transaction was clearly in view of what has been declared to be the law a sale—not a barter—the terms of the sale were $1,000 and machinery valued at $3,000, and there was sufficient acceptance and receipt to oust any possible contention on the part of the plaintiffs based upon the Statute of Frauds and the property passed. In my opinion, therefore, the learned trial Judge arrived at the right conclusion, and the judgment should be affirmed and the appeal dismissed.

Appeal dismissed.

TP. OF COLCHESTER NORTH v. TP. OF ANDERDON.
TP. OF GOSFIELD NORTH v. TP. OF ANDERDON.

ONT.
D. C.

Ontario Drainage Court, G. F. Henderson, K.C., Drainage Referee.
May 6, 1915.

1. MUNICIPAL CORPORATIONS (§ II G—240)—DRAINAGE—NATURAL WATER COURSE—COST OF WORK—POWER OF REFEREE—R.S.O. CH. 198, SEC. 67, SUB-SEC. A, PAR. 2.

Under the Municipal Drainage Act, R.S.O. 1914, ch. 198, sec. 67, sub-sec. *a*, p. 2, the Drainage referee has discretion to refuse to allow the work to be carried out, where the cost of the work is out of proportion to the benefit to be derived from it, but, such discretion must be exercised upon judicial principles and before it can be exercised a legal principle must be found underlying such exercise.

2. WATERS (§ II—60)—PROPERTY OWNERS—NATURAL FLOW OF WATER—DIVERSION—INJURY OF NEIGHBOUR.

Every property owner is entitled to the natural flow of water through his property, but no one is entitled by artificial means to send water forward to his neighbour to the detriment of his neighbour.

3. MUNICIPAL CORPORATIONS (§ II G—240)—DRAINAGE ACT—ENGINEER'S REPORT—WORK NOT DONE INSTRUMENTALLY—EXPENSE—RESULT—JUSTIFICATION.

The engineer making the report authorized by the Drainage Act is justified where the character of the land permits and where the territory covered is necessarily large and where practically the same result can be accomplished, in not doing his work instrumentally, and thus saving a large bill of expense to the persons concerned in the scheme, although had he done his work with instruments he could justify his action under the Act.

[*Sutherland* v. *Romney*, 30 Can. S.C.R. 495, distinguished.]

4. MUNICIPAL CORPORATIONS (§ II G—240)—REPORT BY ENGINEER—"INJURING LIABILITY"—"OUTLET LIABILITY"—DISTINCTION IMPERCEPTIBLE—SCIENTIFIC WORK—POWER OF REFEREE.

Where the engineer making the report for the municipality is right in the theory upon which he acts and where the distinction between "injuring liability" and "outlet liability" is so fine as to be almost imperceptible and he assesses for "outlet liability", he will be upheld, although it would have been more scientific if he had assessed for injury liability; the Drainage Referee has the power to change the assessment of the engineer if he thinks proper to do so.

[*Orford* v. *Aldborough*, 7 D.L.R. 217, referred to.]

5. COSTS (§ II—60)—DRAINAGE ACT—DRAINAGE REFEREE—POWER TO MAKE RULES REGARDING.

Subject to the general rules, as to costs under the Drainage Act, the Drainage referee has power to make any order he may see fit, as to the payment of costs and may make a general rule that in all drainage cases for the year 1915, each party must pay its own costs, unless in some special case the referee thinks such general rule would not be reasonable.

Statement

APPEAL by the townships of Colchester North, Sandwich South and the town of Essex, also an appeal by township of Gosfield North, against the report of J. J. Newman, O.L.S., engineer for the township of Anderdon, and the plans, specifications, assessments and estimates accompanying the same.

ONT.

D. C.

TP. OF COLCHESTER NORTH v. TP. OF ANDERDON.

Statement

The drainage work originated by petition to the council of Anderdon, which township sent on its engineer, Newman, and by his report, which was provisionally adopted by the council of Anderdon, an extensive drainage work was provided for by dredge cuts in the course of the river Canard, a natural creek or watercourse in the township of Anderdon. The total cost of the work, including bridges (and bridge over the M.C.R.R.), was $106,444.80, and this amount was distributed over seven municipalities, lands and roads in the respective appellant townships being assessed as follows:—

Colchester North—Lands (benefit) $200, (outlet liability) $46,404.10; roads (outlet liability) $3,605; total, $50,209.10. Sandwich South—Lands (outlet liability) $913.25; roads (outlet liability) $84; total, $997.25. Essex (Town)—Lands (outlet liability) $746.55; roads (outlet liability) $425; total, $1,171.55. Gosfield North—Lands (outlet liability) $10,537.25; roads (outlet liability) $775; total, $11,312.25.

The remaining townships were assessed as follows:—

Anderdon—Lands (benefit) $9,005, (outlet liability) $8,506.80; roads (benefit) $2,274.20, (outlet liability) $905; for highway bridges, $8,100; for M.C.R. bridge, $8,000; total, $36,791. Malden—Lands (outlet liability) $1,224; roads (outlet liability) $175; total, $1,399. Colchester South—Lands (outlet liability) $4,234.35; roads (outlet liability) $330; total, $4,564.35.

J. H. Rodd, for Colchester North, Sandwich South, and Town of Essex.

R. L. Brackin, for Gosfield North.

T. G. Meredith, K.C., and *J. M. Pike*, K.C., for Anderdon.

The Referee.

G. F. HENDERSON, K.C. (REFEREE):—There are two appeals in question, one launched by the townships of Colchester North and Sandwich South and the town of Essex against the township of Anderdon, and the other launched by the township of Gosfield North as against the other townships interested, and each including as a party defendant or respondent, the Michigan Central Railway, in one case by the name of the Canada Southern Railway. The railway company has delivered a pleading in the action, but has taken no part in the hearing other than to ask at the outset that whatever the event might be it should not be visited with an order for costs.

The drainage scheme in question is one prepared by Mr. J. J. Newman under instructions from the township of Anderdon, and is a scheme for the improvement of that portion of the river Canard which runs through the township of Anderdon. This river—notwithstanding the uncomplimentary remarks passed upon it by some of the witnesses, I think is entitled to its old time-honoured name of river—has its rise in some small swales in the township of Gosfield North, assumes a defined course in the township of Colchester North, then runs through the township for about 11 miles until it enters Anderdon, through which it proceeds for some fourteen miles into the Detroit River. Mr. Newman's report proposes improving nine miles of that course ending at a point where his proposed drain will come to the dead level of the Detroit River, a point beyond which it would, of course, be useless to attempt any improvement. There is no criticism of the outlet, nor is there any serious criticism as to the size of the drain.

Mr. Flater, an engineer whose evidence is always received with respect, suggested that the drain would be unnecessarily large, but he did not give any calculation or make any recommendation as to exact size. He based his evidence almost entirely upon text-book experience, and did not support it by going into all the elements which I think necessary to justify a complete criticism of the capacity of the proposed drain. Mr. McCubbin agrees with Mr. Newman in thinking a drain of the size proposed to be necessary, and according to the other evidence on that ground I am satisfied that the drain is not unduly large. I mention this phase in passing merely to dispose of the question as raised by the evidence, and I mention it at the outset because the objection raised in the evidence was not pressed by counsel in argument, counsel, I think, appreciating that the evidence would not warrant him in pressing the objection.

Mr. Rodd, for Colchester North, and the appellants in that appeal, calls attention to the fact that there would have been under the former state of the law a doubt as to the sufficiency of the petition and as to the effect of the delay in the preparation of the report over a period of time during which ownership has changed by reason of death and otherwise, and he mentions these points, not as objections in law to the legal sufficiency of the

ONT.

D. C.

TP. OF COLCHESTER NORTH v. TP. OF ANDERDON.

The Referee.

report, but as points which he thinks it proper to mention and points which the Court should have in mind in considering the strictly legal objections. I mention them in passing to shew that Mr. Rodd's argument in that regard has been appreciated. His third point is that the cost of the work is out of proportion to the benefit to be derived from the work, and that if that is a fact I should exercise discretion and refuse to permit the work to be carried out. The authority conferred upon the Drainage Referee under sec. 67 of the Act is very wide indeed. Mr. Rodd is probably right in contending that I have discretion, under subsec. (*a*) of par. 2 of that section, but he no doubt would agree with me that any discretion must be exercised upon judicial principles, and in order to exercise that discretion I must find a legal principle underlying such exercise.

My difficulty is that the evidence is uniform to the effect that there is no portion of the Canard River which is a proper outlet, in the strict sense, for a scheme under the Municipal Drainage Act. I would have had some hesitation in speaking frankly on that subject if this scheme were not under way, for there are many places in this Province where trunk courses such as this are very doubtful as to their sufficiency as drainage outlets. The Canard River is the only outlet for a very large section of what many people consider to be the finest land in the Province of Ontario, and the situation arising from the evidence in this action is one which must be most seriously considered.

In dictating this judgment (as I usually do) in the presence of a large number of people who are personally interested in the result of this litigation, and desiring that they should properly appreciate the motive which leads me to decide as I propose to decide, I feel very anxious that they should realize the very serious position in which this portion of the township of Essex has been for some years past, and that they should appreciate the fact, which is a fact as well as a matter of law, that they have for some years past owed their drainage to the generosity of their neighbours who own lands through which the Canard River runs. The law of this Province is that every man is entitled to the natural run of water through his property, but no man is entitled by artificial means to send one drop of water forward to his neighbour to the detriment of his neighbour. The people who own flats, as they are called, along the valley of the Canard River, have been for

many years submitting voluntarily to a burden, which on this evidence I find to have been constantly increasing, of water sent down upon their flat lands from the other portions of the drainage area. It is a fortunate thing that they have thought well to bear that burden. If I am right in my understanding of the law, any man at the outlet of any one of these subsidiary streams might at any time have asked for an injunction restraining those upstream from sending water down that stream on to his land without carrying it to a proper outlet.

Now, I have in many cases in the past (and I have no doubt I will in the future) found some means of permitting small drainage schemes to be constructed where there is a considerable doubt as to the sufficiency of their outlet, but that is no reason why parties undertaking a work of improvement of a main drainage scheme (even though the work of improvement has been long delayed) should not obtain the assistance which the Drainage Act is intended to give them.

I must assume, because there is no criticism of the assessments, that Mr. Newman has properly adjusted the assessment between the several parties interested. I must assume also that the owners of the flats are paying their full share of the assessment for the benefit which this drain will give them, and that Mr. Newman has properly taken into account the fact that they are going to derive benefit as well as being relieved from the water which is brought down upon them.

Too much stress cannot be laid upon the fact that the Canard is the only drainage outlet for this whole area, and too much stress cannot be laid on the fact that this part of the country cannot be cultivated without drainage. The evidence is not altogether distinct upon this record, but we all know that this is a part of the country where drainage is absolutely essential to the cultivation of the farms, and if the Canard were not used as a drainage outlet the farmers throughout this whole area would, practically speaking, have to go out of business. Therefore what seems to be a large expenditure becomes comparatively a small amount in view of the enormous amount of the value of the several properties interested in this drainage work. Therefore the contention that the cost of the drainage scheme is out of proportion to the benefit to be derived is met by the fact that after all the

ONT.

D. C.

TP. OF COLCHESTER NORTH v. TP. OF ANDERDON.

The Referee.

real benefit which is being derived from this scheme is that something is now to be done which should have been done many years ago. There is no portion of this western peninsula of Ontario which can be drained too much. I have no hesitation in coming to the conclusion that this is a necessary drainage work, and the only regret is that it was not undertaken and carried through by the township of Colchester North when Mr. Laird made his report some years ago, at a time when labour was cheaper and the result now sought to have been accomplished could have been accomplished at a much less cost.

Mr. Rodd's further contention is that the assessment for outlet should be an assessment for injuring liability, and that the evidence shews that the engineer did not make an examination sufficient to justify him in making an assessment for injuring liability.

It may seem impertinent for me to make any suggestion concerning a decision of the Supreme Court of Canada, and I refer to the decision in the case of *Sutherland* v. *Romney*, 30 Can. S.C.R. 495, only to emphasize the fact that in administering the Drainage Act as I do (notwithstanding the strict reading of that judgment by the late lamented Mr. Justice Gwynne in that case) I do so, not in any spirit of disregard of his judgment, but knowing that with the development of modern times, conditions have so changed that the public mind requires that the Act be so administered with just so much disregard of technical interpretation as one may feel justified in giving to it as regards any particular case which arises at a particular time.

Mr. Newman has been exceedingly frank in this case, and he gave some evidence as to his method of procedure which, if the Act were interpreted as strictly as a technical reading of the *Sutherland* case would call for, would perhaps necessitate the setting aside of his report; but while I see that plainly, I see on the other side that my plain duty is to say to Mr. Newman that he has acted honestly and honourably in giving the evidence that he did in the box, and that I consider what he did was rightly done. Everything depends upon the character of the land. There may be a piece of country where an engineer cannot properly make a report without the careful calculations which the statute indicates, and which the *Sutherland* case appears to render necessary. On the other hand, in a country such as that with which we have to

deal in this case (and still more markedly in the plains to the west of this portion of the country), it would be almost silly for an engineer to waste time in undertaking instrumental examinations to do something which he can easily do as a result of his observation. If Mr. Newman had gone over this very large area with his instruments he could have justified his action under the Act, and he could have brought in a correspondingly large bill of engineering expenses to the farmers who are concerned in this scheme. I am satisfied he accomplished practically the same result as if he had done his work instrumentally, and that in going about it as he did he acted properly.

It is a very open question whether the assessment on lands in Gosfield North should be for injuring liability or for outlet liability. I have more than once pointed out that there are cases where the line between injuring liability and outlet liability is so fine as to be almost imperceptible. In the case of *Oxford* v. *Aldborough*, 7 D.L.R. 217, an explanation of what I mean will be found, and with that reference it is unnecessary for me to explain further what I mean. I have no evidence here other than that of Mr. McCubbin, and a slight reference of Mr. Newman, upon which I can say whether or not there would be any difference in the amount of the assessments if Mr. Newman had assessed for injuring liability instead of for outlet liability. I am quite satisfied that it was competent for an engineer in this case to assess either one way or the other. I am inclined to think that it would have been somewhat more scientific if he had assessed the lands in Gosfield North as for injuring liability because of their distance from the proposed drainage work; but after all, he is right in the theory upon which he acted, that inasmuch as the drains in Gosfield North and Colchester North have never had an outlet in law and this scheme will give them an improved outlet in law, they are therefore properly assessable for outlet. My impression is that if the assessment had been for injuring liability instead of for outlet liability it would have been higher than it is; I cannot imagine how it could have been lower; and therefore I have no hesitation in accepting the evidence that at all events it can make no difference. If I had thought it would make any difference, I would have power, with the consent of the engineer, to substitute the one term or the other at the head of the column, but in my view of the case that is not necessary.

ONT.

D. C.

TP. OF COLCHESTER NORTH v. TP. OF ANDERDON.

The Referee.

In this rough way I think I have covered the objections which have been raised, and it seems to me that they must fail and that both appeals must be dismissed.

Some criticism was directed against the assessment for bridges. Mr. Newman's report provides that the township shall pay sixty per cent. and the drainage area forty per cent. of the cost of construction of highway bridges, and that these shall in future be maintained by the drainage scheme as a whole. Permanent structures are provided, and maintenance is not expected to be a serious item. Mr. Brackin is apprehensive lest some of these highway bridges shall be destroyed in some way and that his clients will have to reconstruct them. It is not likely that that contingency will arise; and the only criticism offered in evidence overlooks the fact that the evidence establishes that the bridges have to be enlarged, not lessened in size. In this case the fact is that the water artificially brought to the Canard by the scheme in the appellant townships is injuring the approaches to the bridges to such an extent that further approaches will be necessary even if the scheme is confined within the banks of the proposed work.

Mr. Meredith:—I do not know whether Your Honour, where you make an inspection, make any reference to it.

THE REFEREE:—I do if I rely upon it. I do not rely upon anything I saw on this particular inspection. It was simply helpful.

Mr. Meredith:—I do not know whether Your Honour intended to say anything about the extent to which the value of the lands would be increased by this drain.

THE REFEREE:—Do you wish me to? Mr. Meredith suggests that I should find upon the evidence the extent to which the lands (which in the evidence had been called flats) along the Canard will be increased in value by the proposed work. The contention of the appellants is that Mr. Newman's valuation of these lands in their present condition is $15 an acre. They accept that valuation, and I do not understand that the respondent objects to it as a valuation. Mr. Baird, who has had an exceedingly wide experience in this section of country, and is, in my opinion, well qualified to speak on questions of value (not as a real estate operator but as a well informed drainage engineer), says that these flats after being drained will be the very best

land in the township, and they will be worth $100 an acre. We attempted an inspection the other day. The weather was so bad that I did not attempt to rely upon anything which we saw during the course of the inspection, but we did see enough to appreciate the fact that this is a very valuable country and that the farms are highly productive, so I see no reason whatever why Mr. Baird's evidence should not be accepted; and my finding on the evidence is that the flats there now worth $15 an acre will after the improvement be worth $100 an acre.

As to costs: I have to-day for the first time to put into force in this county a new procedure. Strong representations have been made to those in authority over us with regard to the large amount of legal expenses incurred in this portion of the Province in connection with drainage trials. I have done my best to check expenditure of that kind, and sometimes think I have made myself a little absurd because of the frequency with which I advise the farmers to spend their money in digging drains instead of fighting law suits. This year I found that it was the intention of those in authority to change the Act and eliminate costs from drainage trials. As a matter of experiment I have promised for the year's end, or rather during the balance of this year 1915, to make each party pay its own costs in any case where I feel that that can be done within the bounds of reason. There are many cases where I think it cannot be done, but clearly in a case such as this that can be done. It is not my own idea, but it is an experiment which is going to be tried out during the year 1915; unless in a very exceptional case, any assessment appeal during this year will have that result as to costs. Because of the experiment now being tried as to costs in these cases, each of the parties interested shall pay its own costs; those, of course, as between solicitor and client to be taxed if thought necessary by any party. Each appellant will pay to the clerk the sum of four dollars attendance, and affix the sum of four dollars in stamps to my report.

Mr. Meredith:—With regard to the costs of Anderdon, are they to be charged to the whole scheme or charged to Anderdon alone?

THE REFEREE:—Charged to lands and roads in Anderdon.

Mr. Meredith:—Just the same as they are in the others?

THE REFEREE:—Yes.

Appeals dismissed.

ONT.

Annotation

Municipal Corporations

Annotation — Municipal Corporations (§ II G—240)—Drainage — Natural watercourse—Cost of work—Power of Referee.

BY J. M. PIKE, K.C., OF THE ONTARIO BAR.

POLICY.—In matters of drainage and other business of local concern, the policy of the Legislature is to leave the management largely in the hands of the localities, and the Court should be careful to refrain from interference—the meaning of which is always a large outlay for costs—unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights: *per* Boyd, C., *Re Stephens and Tp. of Moore*, 25 O.R. 600, at 605.

PETITION.—Under sec. 3, sub-sec. 1, of the Municipal Drainage Act, R.S.O. 1914, ch. 198, the petition is to be of "the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners), as shewn by the last revised assessment roll to be the owners of the lands to be benefited in any area as described in such petition within any township, etc." The opinion of Mr. Justice Cameron, in *Re White and Tp. of Sandwich E.*, 1 O.R. 530, has been adopted by the Legislature in enacting the above section, and *Re Robertson and Tp. of N. Easthope*, 16 A.R. (Ont.) 214, is no longer an authority. The "last revised assessment roll" means the last revised assessment roll at the date of the petition, of its presentation, of the granting of its prayer, and of the instructions given to the engineer in compliance with it, and governs all the proceedings taken under the petition: *Challoner* v. *Lobo* (1901), 1 O.L.R. 156, (C.A.) 32 Can. S.C.R. 505.

Petition should describe a real drainage area which should bear some reasonable proportion to the size and extent of the drainage scheme: *Re Duane and Tp. of Finch*, 12 O.W.R. 144.

OUTLET AND INJURING LIABILITY ASSESSMENT.—Owing to the changes in the statute, much of the old law on the subject is now obsolete. *Orford* v. *Aldborough* (1912), 7 D.L.R. 217, is a decision of the Court of Appeal of Ontario illustrating the application of present sec. 77 of the Municipal Drainage Act and sub-secs. 3 and 4 of sec. 3 of said Act.

The township of Aldborough sent on its engineer, under sec. 77, in pursuance of a complaint made by one Graham, whose lands lay along the course of Fleming creek and Kintyre creek, and were damaged by waters brought down by artificial drains, under the Municipal Drainage Act and under the Ditches and Watercourses Act, leading into Fleming creek and Kintyre creek. Many of these drains were in the township of Orford, an upper township. The engineer recommended the improvement of Kintyre creek below the lands of Graham so as to afford an outlet for the waters brought down, and assessed lands in the upper township, Orford, for a distance of some ten miles along the course of the Fleming creek. A portion of Fleming creek had not been artificially improved, although drainage work had been done in some places. There was considerable low land between the high banks on either side of the creek. The Referee treated the matter as if the rights of the parties depended upon the flow in the actual waterway owing to the quantity of land between the high banks and the actual waterway being so extensive and valuable. The Referee

ONT.

Annotation

Municipal Corporations

Annotation *(continued)*—**Municipal corporations** (§ II G—240)—**Drainage—Natural watercourse—Cost of work—Power of Referee.**

found that the old outlet had never been a proper outlet for the waters conducted to it, and he held that as the waters brought down occasioned injury, the engineer was justified in relieving the injured lands and in assessing the lands which caused the injury accordingly. He further proceeded to illustrate the practical distinction between injuring and outlet liability as follows:—

(1) Where lands can be more effectively drained after the construction of the drainage work than before because they will then have an outlet which they did not have before, they are assessable for outlet liability.

(2) Where lands are effectively drained, but where their waters are not taken to a sufficient outlet, so that legally speaking they have no outlet at all, and the drainage work will give them a sufficient outlet, they are again assessable for outlet liability. The test is, that, in order to enable an assessment for outlet liability, the drainage work must be necessary, in fact or law, to enable or improve the cultivation or drainage of the land assessed.

(3) He then goes on to say that where, in the course of his examination, the engineer finds lands suffering injury from water brought from upper lands by artificial means, and his proposed work will pick this water up and carry it to a sufficient outlet, he can assess for injuring liability the lands from which the water causing the damage is so artificially brought. He says that this is usually on pretty much the same state of affairs as the second kind of outlet liability, but from the opposite point of view, the test now being the existence of injured lands seeking relief, not higher lands seeking outlet, and that it follows that the extent of liability differs in each case as set out in the respective sections.

(4) In making the assessment, benefit should first be taken into account, then outlet liability and then injuring liability, although probably in many cases, as was the case here, in practical result, outlet liability and injuring liability will run side by side.

The Referee upheld the assessment on Orford. The Court of Appeal affirmed the decision of the Referee.

Garrow, J.A., 7 D.L.R. 217, at 227 says:—"There is, upon the face of things, no good reason why injuring liability should stand upon one foundation and outlet liability upon another and a different one. It must surely often happen that certain sections or lots in a drainage scheme are liable for both."

Garrow, J.A., further says, 7 D.L.R. 217, at 227: "It is not, in my opinion, necessary in this case to discuss the general question of the riparian right of drainage into natural watercourses for the purposes of agriculture. The facts in the cases of *Re Tp. of Elma and Tp. of Wallace*, 2 O.W.R. 198, and *McGillivray* v. *Tp. of Lochiel*, 8 O.L.R. 446, to which counsel referred and upon which he relied, were very different. Fleming creek and Kintyre creek, both, although small, entitled in strictness to be called watercourses, long ago lost their natural condition and became part of an artificial drainage system created under the drainage laws of the Province. The law permits that to be done. And, when it is done, the part of the system which was once a natural watercourse is entitled to no particular immunity,

ONT.

Annotation

Municipal Corporations

Annotation(*continued*)—Municipal corporations (§ II G—340)—Drainage—Natural watercourse—Cost of work—Power of Referee.

under the law, over the other parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers, at a proper and sufficient outlet. The law at least aims at affording complete relief from the common enemy, and not merely a nominal or paper relief, or the relief of one section of the locality at the expense of another."

While in *McGillivray* v. *Lochiel*, above referred to, it was held that a lower riparian proprietor could not sue the upper riparian proprietor for damages where the upper riparian proprietor drained directly into the stream, there was no holding or opinion given in that case to the effect that such upper riparian proprietor discharging his waters artificially into the stream would not be liable to assessment at the instance of a municipality lower down the stream.

In *Orford* v. *Howard*, 27 A.R. (Ont.) 223, which is referred to in *Orford* v. *Aldborough*, *supra*, Lister, J.A., at p. 226, says: "There was much evidence given as to whether the drains in Orford caused more of the water to flow from their lands into Howard than would naturally have found its way there. The Referee found that such was the effect of the Orford drains, and I think the evidence sustains his finding." And at p. 229, Lister, J.A., further says: "And now the question is again presented upon the construction of sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R.S.O. ch. 226, the Municipal Drainage Act. Sub-sections 3 and 4 of this Act correspond to sec. 590 of the Consolidated Municipal Act, 1892. For the appellants it was argued that sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.) does not change or alter the meaning of sec. 590 of the Consolidated Municipal Act, 1892, as construed by the cases before cited, and therefore the liability of lands in an upper municipality to contribute to the cost of a drainage work constructed by and in a lower municipality must in the circumstances here be governed by those cases. I must dissent from this contention. There is, in my opinion, nothing in the language of the sub-section to warrant such a view. A comparison of sub-secs. 3 and 4 with sec. 590 makes it perfectly apparent, as it appears to me, that the Legislature in enacting these sub-sections had in view the cases of *Re Orford and Howard* and in *Re Harwich and Raleigh*—(the case of *Broughton* v. *Grey*, was then pending)—and intended to alter and extend sec. 590 so as to impose upon lands in a municipality from which water has by any means been caused to flow upon and injure lands in another municipality a liability to contribute to the cost of a drainage work such as the one in question here, without regard to whether such water has been caused to flow upon and injure such lands either immediately or by means of another drain or by means of a natural watercourse into which it has been conveyed and discharged for the purpose of being carried away. The language of the sub-section is clear and unambiguous. In plain terms it declares that if by any means water is caused to flow upon and injure the lands of another municipality, the lands from which such water is caused to flow may be assessed, etc. The sub-section obviously refers to waters artificially caused to flow and which would not otherwise find their way to the lower lands. The words (upon which the judgments in *Broughton* v. *Grey* largely proceeded) in sec. 590, 'then the lands that use or will use such drain when constructed as an outlet either immediately, or by means of

ONT.

Annotation

Municipal Corporations

Annotation *(continued)*—**Municipal corporations** (§ II G—240)—**Drainage—Natural watercourse—Cost of work—Power of Referee.**

another drain from which water is caused to flow upon and injure lands,' are omitted from both sub-sections. Then sub-secs. 3 and 4 distinguish assessment liability for 'outlet' from liability for 'injury' occasioned to the lower lands from the waters of the upper lands being caused to flow upon and injure them. The former liability is founded upon the benefit which the upper lands will derive from the construction of an outlet or an improved outlet: see cases *supra;* and the latter liability arises not by reason of any benefit that the upper lands will derive but in respect of the injury sustained by the lower lands resulting from the waters of the upper lands being caused to flow upon and injure the lower lands. This liability is, by sub-sec. 3, termed 'injuring liability.' Sub-section 4, which relates to 'outlet,' was obviously intended to overcome, and, in my opinion, does overcome, the decisions before cited, by providing that lands using a drainage work as an outlet either directly or by means of any other drainage work, or of any swale, ravine, creek, or watercourse, may be assessed as for outlet. Manifestly sub-secs. 3 and 4 are framed so as to enlarge the liability created by sec. 590, at least to the extent before indicated. To place any other construction upon sub-sec. 3 would, as it seems to me, defeat its plain object. Upon the evidence I do not think that what occurred when the council of Howard referred the report back to the engineer can be regarded as an interference with his 'independent judgment.' I do not think the other objections raised and argued are fatal to the report. The appeal must be dismissed with costs." Osler, J.A.: "I agree in the result, but I do not think it is necessary in this case to decide whether the law laid down in *Broughton* v. *Grey and Elma* (1897), 27 Can. S.C.R. 495, has been changed by the recent legislation." Maclennan and Moss, JJ.A., concurred. Appeal dismissed.

As to the judgment of the drainage engineer and the weight to be given to his conclusions, the judgment of Garrow, J.A., in *Re Anderdon and Malden and Colchester South*, 8 D.L.R., at p. 814, is instructive: "Into the details of the criticisms of the assessment by the appellants' experts, I do not propose to enter. It has in such matters of 'much or little' been the custom in this Court—wisely, in my opinion—to rely very much upon the conclusions of the engineer in charge. He is a statutory officer, sworn to do his duty. He has necessarily to make a close and careful examination and study of the whole premises, and his deliberate conclusions ought not, in my opinion, to be disregarded, except under clear evidence of error, or unless a question of law is involved."

"Sufficient outlet" is defined by sub-sec. *(m)* of sec. 2 of the Municipal Drainage Act to mean the safe discharge of water at a point where it will do no injury to lands or roads. In *McGillivray* v. *Lochiel*, 8 O.L.R., at p. 450, Garrow, J.A., says: "Of course a running stream with sufficient banks to contain the water would usually be a sufficient outlet. But the question is one of fact. For instance, a stream already fully occupied in carrying the water properly belonging to it would not be a proper outlet for foreign water brought to it by a ditch constructed under the Act, if the inevitable result would be to cause the water to overflow upon the lands of the owners down stream. And that appears to be the situation in the present case. The plaintiff asserts that the learned Referee has found upon apparently sufficient evidence that the effect of these award drains, as they are called, and

ONT.

Annotation

Municipal Corporations

Annotation *(continued)*—Municipal corporations (§ II G—340)—Drainage—Natural watercourse—Cost of work—Power of Referee.

particularly of Nos. 1 and 2, is to increase the overflow upon the plaintiff's lands, and he therefore reached the conclusion that the outlets were insufficient. I agree with his conclusion as to these award drains Nos. 1 and 2. These carry a considerable body of foreign water into the stream immediately above the plaintiff's lands, where the stream has already lost its current and has almost become a lagoon, and must very considerably increase the flooding of the plaintiff's lands."

At p. 172 of 26 A.R. (Ont.), in *Young* v. *Tucker*, Lister, J.A., says: "The evidence shews that the ditch conducted and discharged into the swale on Campbell's land a very considerable volume of water which would not otherwise have come there; that the swale or marsh was not a proper and sufficient outlet for the water so brought down and discharged there; and that the plaintiffs were injured by the water from the swale overflowing and flooding their land. What the defendant did was negligently done, and he is, therefore, answerable for the consequences of that negligence."

Drainage water must go not merely to an outlet by means of which it satisfactorily escapes from the lands which are being drained, but to a sufficient outlet which, as defined, means safe discharge of water at a point where it will do no injury to lands and roads; and sec. 3, sub-sec. 4, as it now stands, shews that it is not sufficient in order to escape from liability simply to shew that the first discharge was into a swale, ravine, creek or watercourse: see *Young* v. *Tucker*, 26 A.R. (Ont.) 162; *Orford* v. *Howard*, 27 A.R. (Ont.) 223; *McGillivray* v. *Lochiel*, 8 O.W.R. 446; *Re Elma and Wallace*, 2 O.W.R. 198; *per* Garrow, J.A., *Huntley* v. *Marsh*, 14 O.W.R. 1035-1036.

DRAINING INTO NATURAL WATERCOURSES.—In *McGuire* v. *Tp. of Brighton*, 7 D.L.R. 314, Mulock, C.J., at p. 315, says: "Mr. Porter relies on what is, we think, a correct statement of the law, the proposition of law that the defendants have the right to drain surface water into the creek in question, it being a natural watercourse, provided that no greater volume of water is turned into the creek than, according to its natural capacity, it can take care of. He did not elaborate the proposition thus fully, but what I have said is a fair paraphrase of the proposition. According to Mr. Porter, the evidence shews that, before the defendants drained any surface water into the watercourse, it periodically overflowed its banks. It is still in its normal condition, having never been deepened nor had its capacity increased. It, therefore, must follow that, when the defendants brought into it a larger volume of water, they increased the overflow; and, thus increasing the overflow, they are liable for doing what they have no right to do, namely, turning into this watercourse a volume of water in excess of its natural capacity—thus having committed a wrong for which they must answer in damages or by injunction."

The case within reported of *Colchester North* v. *Anderdon* is the latest exposition of the law on the subject as to the right to assess lands of an upper township draining into a natural watercourse by artificial means where overflow is caused on the lands in the lower township adjoining the watercourse. The subject is discussed in Proctor on the Drainage Acts, pp. 35 to 44.

AS TO WHAT CONSTITUTES A WATERCOURSE.—See *Yukon Gold Co.* v. *Boyle Concessions*, 19 D.L.R. 345; *Beer* v. *Stroud*, 19 O.R. 10. At p. 18 of

Annotation *(continued)*—**Municipal corporations** (§ II G—240)—**Drainage—Natural watercourse—Cost of work—Power of Referee.**

ONT.

Annotation

Municipal Corporations

Beer v. *Stroud*, Boyd, C., held that it was not essential that the supply should be continuous and from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. The opinion of Boyd, C., was concurred in in the Court of Appeal in *Arthur* v. *G.T.R.*, in 22 A.R. (Ont.), p. 89.

In *Re Harwich and Raleigh*, 21 A.R. 677, at 687, Maclennan, J.A., held that the fact that a stream with generally well-defined banks spreads out at certain intermediate points into something like a pond or small lake does not make the whole of it less a watercourse. See also *Williams* v. *Richards*, 23 O.R., at p. 656, for discussion as to rights of riparian owners. See also Angell on Watercourses, 7th ed., p. 245; Gould on Waters, 2nd ed., pp. 521, 526, 527.

HIGHWAYS.—The care of highways is the paramount duty of a municipality, and where an engineer did not provide in his report for the repair of a highway, the report was set aside by Mr. Hodgins, Q.C., Drainage Referee: *Tp. of Euphemia* v. *Brooke*, 1 C. & S. 358. This would include the care of highway bridges and approaches where the same were damaged or injured by flood waters and required repairing or rebuilding in consequence thereof.

In the *Colchester North and Anderdon* case, *intra*, the engineer provided that the township should pay 60 per cent. of the cost of the bridges and the drainage area 40 per cent., and that the bridges should in future be maintained by the drainage scheme as a whole. Permanent structures were provided. The engineer's report was upheld by the Referee.

Re TRANSCONTINENTAL TOWNSITE CO.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. February 22, 1915.

1. CORPORATIONS AND COMPANIES (§ VI C—330)—WINDING-UP—LIQUIDATION—EFFECT ON PROPERTY RIGHTS—SPECIFIC PERFORMANCE—RESCISSION.

The discretion of the Court under sec. 22 of the Winding-up Act, Can., is properly exercised by granting leave to sue a company in liquidation for specific performance of an agreement for exchange of lands or in default that the agreement be declared cancelled, so that plaintiff may recover his own lands of which the company in liquidation had been allowed to take possession.

Statement.

APPEAL from the Master granting leave to institute an action in this Court and proceed to trial notwithstanding the winding up.

E. Spice, for applicant.

W. H. Curle, contra.

Macdonald, J.

MACDONALD, J.:—Section 22 of the Winding Up Act, ch. 144, R.S.C., provides that,

After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

MAN.
K. B.
RE TRANSCONTINENTAL TOWNSITE CO.
Macdonald, J

The granting of leave is discretionary. The Master has exercised his discretion, granting leave to bring action. Should this be interfered with?

The plaintiff in the action is the Plainview Farming Co., Ltd., hereinafter referred to as the plaintiff, and the defendant is the Transcontinental Townsite Co. The plaintiff entered into an agreement in writing with the defendant for the sale to the defendant of certain lands part of section nine (9), township twenty-two (22), and range five (5), west of the third meridian, in the Province of Saskatchewan, for the price or sum of $30 per acre, transfer thereof to be made by the plaintiff as soon as the said G.T.P. Branch Lines Co. should have definitely located their station grounds, and the area of part of the said land surveyed and the area thereof determined. In consideration whereof the defendant agreed to sell and convey to the plaintiff certain other lands, being a portion of the east half of the said section nine (9), for the price of $30 per acre, the transfer to be made by the defendant as soon as the said railway company should have definitely located their station grounds and the land to the south of the right-of-way surveyed and the area thereof determined, and also to pay in cash a sum equal to $30 per acre for the number of acres by which the area of land transferred to it should exceed the area of land transferred by it, together with interest.

In and by the said agreement it was further agreed that the said agreement should be completed within one year from September 2, 1913, when each of the said parties should by transfers in the usual statutory form convey the land by them respectively agreed to be conveyed as aforesaid.

By the statement of claim issued it is alleged that the G.T.P. Branch Lines Co. has definitely located its station grounds and the land to be conveyed by the plaintiff to the defendant has been surveyed and the area determined and the land to be transferred to the plaintiff by the defendant has been surveyed and the area thereof determined.

The plaintiff also alleges being ready and willing to perform the said agreement, but that the defendant refuses to perform the same. The plaintiff asks for specific performance of the agreement, or in default that the agreement be declared cancelled and at an end.

There does not appear to have been any money changed hands between the parties, and all that the plaintiff asks is that the agreement be carried out, or in default that they get their own property back. The plaintiff's rights seem to me even stronger than the case of a mortgagee, whose right to proceed by action against a company being wound up seems recognized: *Lloyd* v. *David Lloyd & Co.*, L.R. 6 Ch.D. 339.

Counsel for the defendant states that sales have been made to various purchasers of parts of the property purchased from the plaintiff, and that the hardship both upon the defendants and upon the purchasers would be very great if the plaintiffs are allowed to proceed. This would indicate that the defendants have entered into possession of the plaintiff's property, entered into agreements of sale with respect to it, and the plaintiffs have nothing, neither money for their property nor yet any control over the property itself. Counsel for the defendant further urges that a little delay will enable the defendant to complete and fully carry out their agreement with the plaintiff, and thus the hardships referred to be averted. This protection, no doubt, will be granted later, but in the meantime I am of the opinion that the plaintiffs are entitled to proceed with their action, and the appeal must be dismissed, with costs in the cause to the plaintiff.

Appeal dismissed.

LA PLANTE v. KINNON.

Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. March 20, 1915.

1. CONTRACTS (§ IV C 1—345)—LABOURER—HIRED FOR SEASON—WAGES MONTHLY RATE—PAID AT END OF TERM—RECOVERY OF WAGES—COMPLETION OF TERM.

Where a farm labourer has hired for the season at a certain sum per month, but the wages are not to be paid until the end of the season, the contract is an entire one and the employee is bound to complete the term before he can recover any wages.

[*Owen* v. *James*, 4 Terr. L.R. 174, followed; *Mousseau* v. *Tone*, 6 W.L.R. 117, distinguished.]

Statement

ACTION for the recovery of wages, the plaintiff having worked for the defendant as a farm labourer.

T. J. Blain, for appellant.

H. F. Thomson, for respondent.

SASK.

S. C.

LA PLANTE v. KINNON.

BROWN, J.

The judgment of the Court was delivered by

BROWN, J.:—The evidence given at the trial before the learned District Court Judge is conflicting as to the terms of the hiring. According to the plaintiff's version, he was hired at $35 per month until harvest, and during harvest was to get harvest wages. He worked until harvest, and then demanded harvest wages. The defendant refused to give any increase in wages, contending that the hiring was for the season at $35 per month. The plaintiff thereupon left the defendant's employ, although notified by the defendant that, if he did so, he would not get anything. According to the defendant's version, the plaintiff was hired at $35 a month for the season, and, with the exception of a little money for tobacco and other small necessities, the wages were not to be paid until the end of the term when the plaintiff had threshed his grain. The learned trial Judge dismissed the action, and must, therefore, have accepted the defendant's version of the contract. A contract such as the defendant has set up is an entire one, and the plaintiff is bound to complete the term before he becomes entitled to recover anything. The facts of this case are practically the same as those in the reported decision of ex-Chief Justice Wetmore, in *Owen* v. *James*, 4 Terr. L.R. 174. In that case the learned trial Judge held that the plaintiff could not recover, and he there refers to the leading authorities on the question. [Reference to vol. 20, Halsbury, at p. 84, and *Mousseau* v. *Tone*, 6 W.L.R. 117.] There is no evidence that would justify a finding that the plaintiff was a domestic servant, as contended for by counsel, and I, therefore, do not consider it necessary to deal with the contention raised by him of special privilege in such cases.

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

Appeal dismissed.

HOUGHTON v. CANADIAN NORTHERN R. CO.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 19, 1915.

1. JURY (§ V—90)—DAMAGES—EXCESSIVE—SETTING ASIDE—WHEN UNREASONABLE AND PERVERSE.

Although the amount of the general damages awarded by the jury's verdict in a railway accident case may seem to the Appellate Court to be very high, such is not a ground for setting aside the verdict and granting a new trial unless the Court finds that the verdict was unreasonable and almost perverse.

[*Cox* v. *English*, [1905] A.C. 168, 170; *Pickering* v. *G.T.P. R. Co.*, 50 Can. S.C.R. 393; *Pickering* v. *G.T.P. R. Co.*, 24 Man. L.R. 544, applied; *Johnston* v. *G.W. R. Co.*, [1904] 2 K.B. 250; *Toronto R. Co.* v. *King*, [1908] A.C. 260, 261, referred to.]

Statement

APPEAL to reduce the damages awarded by a jury in an injury action.

O. H. Clark, K.C., for appellant, defendant.

Isaac Pitblado, K.C., and *Hoskin*, K.C., for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M., concurred in dismissing the appeal.

Richards, J.A.

RICHARDS, J.A.:—I concur in the result and would dismiss the appeal except as to the $5,000 allowed for punitive damages. I differ from my learned brothers only in this, that I cannot say that, in view of the unusual facts of this case, the damages allowed by the jury seem too large. Considering the different heads of damage that may be considered by a jury in such a case as this, which are quoted in my brother Haggart's judgment, and the loss suffered by the plaintiff under each of those heads, I am unable to see that the amount assessed by the jury is excessive.

Perdue, J.A.

PERDUE, J.A.:—I agree with the conclusion at which my brother Haggart has arrived, that although the amount of the general damages seems to be very high, no sufficient ground has been shewn for interfering with the verdict of the jury. There are one or two matters which I would desire to emphasize inasmuch as they directly affect the question of damages.

The accident to the plaintiff was caused by the negligence of the defendants. A passenger train on defendants' railway ran off the rails and the car in which the plaintiff was travelling,

MAN.

C. A.

HOUGHTON v. CANADIAN NORTHERN R. CO.

Perdue, J.A.

after running some distance on the ties, fell over on its side and came to a sudden stop. The plaintiff, who was a heavy man, was thrown forward violently and fell astride of a seat, thereby sustaining severe injury. At the time of the accident the plaintiff was a vigorous, healthy man, 43 years of age. He appears to have been a man of good business capacity, and his earning power was large. He states that he had been making $6,500 a year from commissions and salary received from several companies with which he was connected, in addition to large sums made from dealings in real estate and other private enterprises.

The injury necessitated a very severe operation and was attended with much suffering extending over a considerable period of time. Abscesses formed in the prostate gland and that organism was completely destroyed. There is a permanent stricture of the urethra causing great inconvenience and apprehension. The plaintiff has by reason of the accident and the surgical operations been rendered hopelessly impotent and sterile.

I will take in order the several heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation, as enumerated by *Cockburn*, C.J., in *Phillips* v. *South Eastern R. Co.*, 4 Q.B.D. 406.

Firstly, bodily injury sustained. There was abundance of evidence to shew the severity of the injury and the permanent character of the same. Secondly, the pain undergone. It is shewn that the plaintiff's sufferings were intense for a considerable period, and that he suffered more or less severely until the wound became healed some 5 or 6 months after the operation. Thirdly, the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent. The plaintiff shews that he has lost bodily strength, that his physical and mental energies have been affected, that he has lost his ambition and capacity for work, that he suffers from a permanent stricture causing great inconvenience and necessitating continued medical care, that he had lost all sexual power. Fourthly, the expenses incidental to attempts to effect a cure, or to lessen the amount of the injury. The expenses incurred by the plaintiff, up to the time of the trial, for surgical

and medical services, hospital charges, nursing, medicine, etc., amounted to some $1,960, and at that time he was still under a doctor's care. Fifthly, the pecuniary loss sustained through inability to attend to his business and the temporary or permanent character of it. There is evidence to shew that the plaintiff has been unable to resume his former business activities, that he sustained loss through being unable to attend to his various employments and enterprises, that he is discouraged and despondent and has lost his capacity for work, and that by reason of his impaired physical condition he was giving up work. His bodily injuries are of a permanent nature and the jury might infer from the facts given at the trial that his earning capacity had suffered a severe and permanent depreciation.

It will thus be seen that there was evidence to justify the jury in awarding damages upon every one of the five heads above enumerated. Although the sum total of the damages appears to me to be very large—larger than I might have given if I were trying the case—still that is not a ground for interfering with the verdict. The question was lately considered by this Court in *Pickering* v. *G.T.P. R. Co.*, 24 Man. L.R. 544, affirmed in the Supreme Court, 50 Can. S.C.R. 393. The Chief Justice of Manitoba in giving judgment in this Court said:—

> The jury is the proper tribunal to judge this matter, and the verdict is not to be set aside merely because, in my judgment, I would have given much less: *Toronto* v. *King*, [1908] A.C. 260. I cannot say that the verdict was unreasonable and almost perverse, which seems to be the measure required in granting a new trial: *Cox* v. *English*, [1905] A.C. 168, 170.

Applying this to the present case, I am of opinion that this Court would not be justified in setting aside the verdict and granting a new trial.

As the defendant succeeded in obtaining a reduction of the judgment to the extent of $5,000, being the exemplary or punitive damages, there should be no costs of the appeal to either party.

CAMERON, J.A., concurred in dismissing the appeal. Cameron, J.A.

HAGGART, J.A.:—The question here is the amount of damages to which the plaintiff is entitled. Are they excessive? The action was tried before Galt, J., with a jury. The jury gave a Haggart, J.A.

MAN.

C. A.

HOUGHTON v. CANADIAN NORTHERN R. CO.

Haggart, J.A.

verdict for $32,000 general damages and $5,000 exemplary or punitive damages. At the opening of the argument of the appeal, counsel for the plaintiff abandoned the exemplary or punitive damages, saying that he could not find authority for sustaining this part of the verdict, and confined his argument to the support of the $32,000 general damages.

The defendants urge that *Johnston* v. *G.W.R. Co.*, [1904] 2 K.B. 250, is an authority in their favour. There it was held that the rule laid down in *Praed* v. *Graham*, 24 Q.B.D. 53, that a new trial will not be granted on the ground of excessive damages unless, having regard to all the circumstances of the case, the Court is of opinion that the amount is so large that no twelve men could reasonably have given it—must be construed in the light of other decisions of the Court of Appeal, *e.g.*, *Phillips* v. *L. & S.W. R. Co.*, 5 Q.B.D. 78, the effect of which is that a verdict may be set aside and a new trial granted if the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of the damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages.

Vaughan Williams, L.J., in his reasons on p. 258, says:—

> In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the quantum. In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial. But I am not prepared to say that that is so in the present case.

The above case referred to in *Johnston* v. *G.W. R. Co.*, namely, *Praed* v. *Graham*, 24 Q.B.D. 53, was a case where the plaintiff obtained a verdict in an action for libel and the Court held that it would not grant a new trial on the ground of excessive damages unless it thought that, having regard to all the circumstances of the case, the damages were so large that no jury could reasonably have given them, and Lord Esher, M.R., on p. 55, discusses the question in these words:—

> I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the

whole of the circumstances of the case, come to this conclusion only, "We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them," then they ought not to interfere with the verdict.

If, then, the Court is to apply the same rule when considering the amount of damages as when considering the weight of evidence and the substitution of the opinion of Judges for that of the jury, I would refer to the comparatively recent case of *Toronto R. Co.* v. *King*, [1908] A.C. 260, 261, where it was held that the Court of Appeal was in error in setting aside the judgment for the plaintiff and ordering a new trial when there was evidence on both sides of negligence and contributory negligence properly submitted to the jury. Lord Atkinson, who delivered the judgment of the Court, in summing up the reasons, says:—

> The jury have practically found these issues in favour of the plaintiff. They are the tribunal entrusted by law with the determination of issues of fact and their conclusion in such matters ought not to be disturbed because they are not such as Judges sitting in a Court of Appeal might themselves arrive at.

Phillips v. *S.W.R. Co.*, 5 Q.B.D. 78, 5 C.P.D. 280, was a motion for a new trial on the ground of insufficiency of damages. The rule was made absolute for a new trial on the ground of the inadequacy of the damages found by the jury upon facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim. On p. 407, Cockburn, C.J., says:—

> But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict.

It is difficult in this case to measure the compensation by money. The plaintiff was an active business man; he is maimed

MAN.

C. A.

HOUGHTON v. CANADIAN NORTHERN R. CO.

Haggart, J.A.

for life; he has endured months of suffering; submitted to surgical operations, and there is evidence of the after effects upon his health. There is also evidence of considerable expense being incurred, and of his diminished energy and power to actively carry on business.

I cannot find that the jury took into consideration matters which they should not have considered, nor can I find that they have applied a wrong measure of damages, and although as a juror I would not have given as large an amount, I could not find that the damages were so large that no jury could reasonably have given them. I realize that perhaps the same arguments that were urged by the plaintiff might be used in support of a much larger verdict than the one in question, because money cannot accurately measure the injury, and, as I have said, the fact that we as Judges would give a smaller verdict is not a justification for interfering.

Here is a corporation operating a large public utility, and it might not be able to stand the pressure of a succession of large verdicts such as that given in this case, and if juries continue to give large verdicts against these corporations, and appellate Courts are reluctant to interfere with the conclusions of juries, then the only recourse is for such corporations to apply to the Legislature to limit the amount as they have done in the case of the Employers Liability Act and the Workmen's Compensation Act.

I would dismiss the appeal.

Appeal dismissed.

B.C.

C. A.

LEDINGHAM v. SKINNER.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 26, 1915.

1. EXECUTORS AND ADMINISTRATORS (§ IV A—80)—PROOF OF CLAIMS—CORROBORATION—DEGREE OF PROOF.

The corroborative evidence required in proof of a claimed cause of action against the estate of a deceased person under the Evidence Act, R.S.B.C. 1911, ch. 78, sec. 11, must be of a material character, supporting the claimant's case, although not necessarily sufficient in itself to establish the case.

[*Thompson* v. *Coulter*, 34 Can. S.C.R. 261, applied; *Varasseur* v. *Vavasseur*, 25 Times L.R. 250, and *Doidge* v. *Mimms*, 13 Man. L.R. 48, referred to.]

APPEAL by plaintiff from judgment of Hunter, C.J.B.C., of June 23, 1914.

F. C. Elliott, for appellants, plaintiffs.

D. S. Tait, for respondents, defendants.

MACDONALD, C.J.A.:—In my opinion, the evidence is not such as to warrant the reversal of the judgment appealed from It does not satisfy me that either David Hoggan or William Hoggan contracted to pay for the board and lodging which formed the basis of the plaintiff's claim. The plaintiff's wife, afterwards added as a co-plaintiff with her husband, R. L. Ledingham, was the adopted daughter of David and William Hoggan. It was, therefore, quite natural that David and William Hoggan should be entertained as a guest by the plaintiffs. The frequency and length of David Hoggan's visits have, I am satisfied, been very greatly exaggerated. Even if the evidence of the one plaintiff can be admitted as corroborative of that of the other, as to which I find it unnecessary to express an opinion, the whole is so unsatisfactory as to justify a refusal to give effect to the plaintiff's claim against the representatives of the deceased persons.

Subsequent events militate very greatly against the plaintiffs' claims. Plaintiff R. L. Ledingham swears that David Hoggan agreed to pay for his board and lodging when he had won his case in the Privy Council. That case is commonly known as the "Settlers' Rights Case." This is not quite as it is pleaded, but I will take his sworn statement and that of his wife and co-plaintiff in preference to the formal pleading. Judgment in the Privy Council in David Hoggan's favour was delivered on July 22, 1907. On July 30, 1906, plaintiff R. L. Ledingham had borrowed $1,000 on a promissory note from David Hoggan, and on September 21, 1907—that is to say, two months after David Hoggan had won his case—Ledingham re-paid $500 on account of the note, and, as he swears, after David Hoggan's death re-paid the balance to William Hoggan, David Hoggan's executor. Ledingham's explanation of this is not at all satisfactory. His repayment of these moneys was inconsistent with his claim that at that time he was entitled to a large sum of money from David Hoggan for board and lodging. The appeal should be dismissed.

B.C.
C.A.
LEDINGHAM v. SKINNER.
Irving, J.A.

IRVING, J.A.:—For the protection from unfounded claims it has always been a rule of the Courts that claims against the estate of a deceased person should be examined with jealous suspicion: *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch.D. 1, applied in a case somewhat similar to this; *Doidge* v. *Mimms* (1900), 13 Man. L.R. 48. That rule was originally a rule of practice, but since 1900 it has been made a rule of law. That statute, now sec. 11, ch. 78, R.S.B.C. 1911, has not extended the rule, but merely changed it from a rule of practice to a rule of law.

In the present case, which was dismissed by the Chief Justice for reasons then given, but of which we have not been furnished copies, we were led to believe by appellant's counsel, on his opening, that the plaintiffs' claim was hardly disputed, and that it was only a question as to the sufficiency of the corroborative testimony that prevented judgment being given for the plaintiffs. On hearing the other side, a very different question or series of questions are presented for our decision. As we have not the findings of fact by the learned Chief Justice, it is necessary for us to go into the evidence at some length.

The action launched in April, 1913, is brought against the executors of the late Wm. Hoggan (who died in December, 1912), for board and lodging furnished to his brother, David Hoggan, for 572 weeks, viz., from April 1, 1897, to April 23, 1908, and also for board and lodging furnished to the late William Hoggan for 33 weeks, viz., from April 23, 1908, to December 6, 1909. The action was brought by the husband of a niece of the two Hoggans in respect of board and lodging in the home of the plaintiff and his wife in Victoria, on two distinct contracts made with each of the two brothers, David and William, by the plaintiff the wife, no one else being present at the interviews when the alleged contracts were made.

The making of the contracts is questioned. The fact that David Hoggan did spend some time in the Ledingham home, either as a guest or a lodger, is not disputed, but that he was there for weeks and weeks is denied, and the rate per week is said to be excessive.

I have read the evidence and I agree with the conclusion reached by the Chief Justice. Having regard to the great lapse

of time, this is a case which should be considered with jealous suspicion, and I would hold that the plaintiff has not proved either of the contracts with David or William he relies on.

I will take the alleged contract with David first, which was supposed to have been made in 1897. The relationship of the parties throws considerable light on the questions at issue, and, therefore, it will be convenient to describe the parties and their occupations. The two Hoggans, David and William, were brothers—both bachelors—who lived at Nanaimo, and there carried on business in partnership as grocers. The plaintiff Mary Ledingham was their niece, who had been brought up by their mother. Another member of their family was Thomas Aitken, who also lived at Nanaimo. David Hoggan and others, one of whom was Samuel Waddington, had taken up land near Nanaimo, in what is known as the Island Railway Belt, and had brought an action against the E. & N. Railway Co. to establish his right to that land as "an actual settler" for agricultural purposes within the meaning of the B.C. Settlement Act (1883), 47 Vict. 14. His case was carried to the Privy Council, where he was beaten, the decision being that he was in no sense an actual settler for agricultural purposes. The decision was given in the spring of 1894: see *Hoggan* v. *Esquimalt*, [1894] A.C. 429, 63 L.J.P.C. 97. At that time David Hoggan, who was about sixty years of age, had, in addition to his grocery business at Nanaimo, some 790 acres on Gabriola Island and some lots in the city of Vancouver. The plaintiff Mary Ledingham was married and living in Victoria, with her husband, the plaintiff Robert Ledingham, and there was also living (in Victoria, I think) William Ledingham, a brother of Robert. This brings us down to the fall of 1896, when, according to plaintiff, David came to his house and remained there until his death, which took place on April 23, 1908. He came to Victoria (as I understand Robert Ledingham to say) to carry on with greater convenience a campaign in the legislature to secure an amendment to the Settlement Act, so that his rights as a settler would be recognized. In this campaign William Ledingham was to assist him. The arrangement, we are told, was that the property claimed was, in the event of success, to be divided equally between David Hoggan, William Ledingham and one Hawthornthwaite.

B. C.

C. A.

LEDINGHAM v. SKINNER.

Irving, J.A.

On February 10, 1904, the legislative campaign came to an end by the passage of an Act under which David Hoggan was declared entitled to his grant, and, it was conceded, a grant was issued to him shortly after. As the claim for board runs from April, 1897, to April, 1908, it may be convenient to continue the history of the Settlers' Rights litigation. The right of the provincial legislature to pass the Act of February 10, 1904, was questioned, and the case ultimately carried to the Privy Council: see *McGregor* v. *E. & N. R. Co.*, [1907] A.C. 462. In 1906 Hoggan brought an action for a declaration of title to the minerals, and obtained judgment: see *E. & N. R. Co.* v. *Hoggan* (1908), 14 B.C.R. 49.

In the spring of 1897, according to Robert Ledingham, David wanted to pay his board bill from the fall up to that date, and he offered $20, which sum apparently was accepted in full to that date. The plaintiff then gives this evidence:—

> Well, he says Bob, I haven't got—my wife and I—I haven't got much money and he says, you know I have been to the Privy Council and I have spent all I had there and he says he was trying to do what he could, but we came to an arrangement right there that we would not look for any pay until he gained his case, that is, he was to pay us when he gained his case, and he was to pay us well if he won the case, and if he did not win the case we were to be paid anyway.
>
> THE COURT:—What amount?
>
> A. There was no amount made, that is it. He was to pay us well if he won the case, and if he did not win it he would pay us. Because he hadn't any money, but he had property you see. And we went through the whole conversation—and he couldn't realize very much on his property at that time. You see property was not worth but very little.

That is the contract sued on. The other plaintiff, Mary, gave the following account, the nature of which was to justify the amount of the *per diem* charge:—

> Q. Now do you remember a conversation with David Hoggan in the spring of 1897? A. Yes.
>
> Q. When some arrangement was made. Now, tell us what the conversation was, if you remember it. A. Well, he had been with us then for perhaps a week or so, and he offered us some money, at least he offered my husband, and my husband would not take it, but he left it on the table, and he said, I must make some arrangement—you won't take anything, now, he said, I am going into this case, I think I will be able to fight the thing out, but I haven't any means, any money only a small income, and if you will see me through the case, help me along, he said, I will see you are paid when I win the case.
>
> Q. Speak louder please. A. He said he would see we would be paid if he won the case, but whether he won it or not we would be paid anyway;

be paid well if he won it, but paid anyway, because you know, he says, I have some property.

After Mary Ledingham had given this and further evidence in support of her husband's claim, she was, at the suggestion of the learned Chief Justice, but on the application of the plaintiff's counsel, added as a party plaintiff, and the hearing proceeded.

The first question raised before us on the appeal is as to the sufficiency of Mary Ledingham's corroboration to satisfy the statutory rule. [Reference to R.S.B.C. ch. 78, sec. 11.]

This differs from the Nova Scotia statute referred to in *McDonald* v. *McDonald* (1902), 33 Can. S.C.R. 145, but is identical with the Ontario statute dealt with in *Thompson* v. *Coulter* (1903), 34 Can. S.C.R. 261. Mrs. Ledingham being, in my opinion, an opposite, or at any rate an interested, party, I do not think her evidence can be regarded as corroborative: see also *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250, where two persons made a joint claim, Channell, J., said it was necessary to have independent corroboration in addition to what was supplied by each telling the same story as the other.

The defence is that what board and lodging was afforded by the plaintiffs was to be expected, having regard to the relationship between David Hoggan and Mary Ledingham, and the promises (if made) were made in a general way, and Mary Ledingham and her husband looked for their reward, not to any contract, but to her uncle's generosity: *cf. Farina* v. *Fickus*, [1900] 1 Ch. 331, 69 L.J. Ch. 161; *Montreal Gas Co.* v. *Vasey*, [1900] A.C. 595, 69 L.J.P.C. 134. I do not think she can be regarded as an independent witness: *Rawlinson* v. *Scholes*, 79 L.T. 350. Nor can I consider her evidence corroborative as to his rewarding her, as what she says is consistent with compensation being allowed by his will or otherwise: *per* Lindley, L.J., *Re Finch* (1882), 23 Ch.D. 267; cited by Killam, J., in *Thompson* v. *Coulter* (1903), 34 Can. S.C.R. 261. Nor do I find satisfactory corroborative evidence of a contract in any of the other evidence adduced. If, therefore, the Chief Justice dismissed the action on that ground, or because there were rebutting circumstances, I agree with him. That disposes of the first alleged contract.

The plaintiff's second string to that bow was that William, after David's death, agreed to pay the claim. As to this, the plain-

B. C.

C. A.

LEDINGHAM v. SKINNER.

Irving, J.A.

tiff's evidence is not corroborated by any one but his wife's, and her testimony tells a somewhat different tale.

Then as to the claim against William for board and lodging supplied to him. The case rests on the evidence of two discredited witnesses, and I think the Judge was justified in dismissing this claim also.

It was argued as Mary Ledingham had been made a party at the suggestion of the Chief Justice, that the rule laid down in *Vavasseur* v. *Vavasseur*, 25 T.L.R. 250, does not apply. I do not think the plaintiffs can now put forward such an argument in view of the application being made by and in her presence, nor can the Court look at what led up to the amendment.

But, assuming there was a promise such as the plaintiff relies on, I am not satisfied that David Hoggan did occupy the room reserved for him for the long period claimed, for the following reasons:—1. The time charged for far exceeds the time occupied by the campaign carried on in Victoria; 2. The evidence of Waddington and Kirkham (who have no interest in this action) satisfies me that David Hoggan was not a continuous visitor at Victoria, but spent nearly all his time in Nanaimo. 3. The letter produced (ex. 1, p. 197) speaks of "being in Victoria for the last week. I came down to meet a niece and nephew, etc." "I am speeling in Bob's house. They are camping out." 4. Ex. J. September 24, 1905, shews that he was living at Nanaimo and his death occurred at Nanaimo. On the whole, I would say that the statement with which Robert Ledingham opened his evidence, *viz.*, that he remained at his house from 1897 till his death in 1908 was untrue, and I am also satisfied by the evidence that the charge of $15 per week was excessive for the accommodation afforded, particularly when it is contrasted with the $20 given by David Hoggan, in the spring of 1897, for what he had received in the winter of 1896-1897.

I would regard the sum of $700 a very fair remuneration for what they gave David and William, and, as William paid Mary Ledingham that sum in November, 1910, I would dismiss the action on that ground. Her explanation as to why he paid her that sum seems to me unsatisfactory. For one reason the sum of $700 is altogether out of proportion to the expense of two women going to California to stay with their uncle.

MARTIN, J.A.:—I find myself unable to take the view that the learned trial Judge reached a wrong conclusion, and, therefore, the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—At the close of this case I was prepared to give judgment dismissing the appeal. Further consideration confirms me in that view.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal is from the judgment of the Chief Justice of British Columbia (Hunter, C.J.), and raises a question which, it seems to me, is concluded by authority and statute law—that is, the action is one requiring corroboration. The learned Chief Justice did not give a written judgment, but counsel states that he proceeded upon the ground of lack of corroboration.

The evidence in the case is at some considerable length, and the trial would appear to have extended over a period of three days—in a review of the evidence, which was very exhaustively gone over upon the appeal by counsel for both sides—I cannot bring myself to any other conclusion than that arrived at by the learned Chief Justice, and it is a case which is peculiarly one for the trial Judge, in that the evidence is relative to a claimed cause of action against the estate of a deceased person.

The statute law which calls for consideration is to be found in the Evidence Act (R.S. 1911, ch. 78), being sec. 11 thereof.

The statute law of British Columbia is in the identical words of the Ontario Act (R.S.O. (1897) ch. 73, sec. 10), which received the consideration of the Supreme Court of Canada in *Thompson* v. *Coulter* (1903), 34 Can. S.C.R. 261. [Reference to statement of Mr. Justice Killam at p. 263.]

I am of the opinion that there is a lack of corroboration, even were the action to be looked at as one by Robert L. Ledingham alone, but if the action is to be looked at as being one by both the husband and wife—Robert L. Ledingham and May Ledingham (May Ledingham being added as a party plaintiff at the trial)—then there is the additional difficulty of establishing corroboration. [Reference to *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250, at 252.]

In my opinion, this appeal can be decided upon this point alone—that the action fails by reason of there being the absence

B. C.

C. A.

LEDINGHAM v. SKINNER.

McPhillips, J.A.

of that corroboration which is the prerequisite to the right to judgment being in favour of the plaintiffs.

In arriving at the conclusion which I have—upon this appeal—it is with some very considerable regret, as it is abundantly clear from the evidence that the plaintiffs did give most kindly care to the late William Hoggan—who so long was in delicate health—and were most solicitous for his welfare, and their acts and deeds are to be commended, but, unfortunately, fail of establishing a cause of action sufficient in law. In my opinion, the appeal should be dismissed.

Appeal dismissed.

ALTA.

S. C.

KERLEY v. CITY OF EDMONTON.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. February 19, 1915.

1. APPEAL (§ VII L—480)—REVIEW OF FACTS—DAMAGES—REVIEW BY APPELLATE COURT.

Unless the conclusions to which the judge or jury arrives in assessing damages are clearly erroneous, the quantum should not be interfered with on appeal.

[*McHugh* v. *Union Bank*, [1913] A.C. 299, 10 D.L.R. 562, applied.]

Statement

APPEAL by the plaintiffs to increase damages in a personal injury action.

Frank Ford, K.C., for plaintiffs, appellants.

J. C. F. Bown, K.C., for defendant, respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiffs are husband and wife and their claim is for damages for injuries sustained by the wife in a street car accident caused by the negligence of the defendant's servants. The action was tried by my brother Hyndman, who gave judgment in favour of the plaintiffs for $2,045, being $1,045 for special and $1,000 for general damages. The appeal is a somewhat unusual one, being by the plaintiffs who secured the judgment, who ask that the amount be increased.

[Reference to Mayne on Damages (8th ed.) at p. 689.]

New trials have been ordered, however, on the ground of inadequacy of damages allowed by a jury, *e.g. Phillips* v. *L. & S.W. Ry. Co.*, 5 Q.B.D. 78, *Church* v. *Ottawa*, 25 O.R. 298 (affirmed on appeal to Court of Appeal) though no case has been brought to

my attention of a case where the damages had been assessed by a Judge, but I am prepared to assume that the rule is the same in the case of a Judge as of a jury. From the rule, however, it is apparent that the appellants must shew not that the amount of damages is not such as we might have awarded, but that there has been some mistake on the part of the trial Judge in reaching the conclusion he has. The particulars of special damage are set out in the Statement of Claim, and amount to $3,530.85, of which nearly $2,000 purports to be actual out of pocket expenses.

Some weeks after the injury, Mrs. Kerley went to Montreal accompanied by her son and a nurse. Her husband followed her later. The expenses connected with these trips, also board, nurses' and doctors' bills in Montreal, are included as part of the special damage. The chief item which does not represent a payment is one of $1,500, which is claimed for loss of time by Mr. Kerley in attendance upon his wife in Edmonton and Montreal. The evidence shews that the amount is an estimate of the loss of profit in his business which he sold shortly before his wife went to Montreal, which profit he considered he would have made if he had kept the business and remained in Edmonton. In addition to this there is over $1,000 claimed which is directly attributable to the Montreal trip, and if the trial Judge was of opinion that the plaintiffs were not justified in making this trip at the expense of the defendants and deducted the whole amount, it would reduce the amount of special damages to less than the sum which he allowed.

The plaintiffs claim that these expenses are properly allowable because the trip was advised by the physician. The evidence hardly bears this out. The doctor in attendance says that Mrs. Kerley was living at home with her family, that she was not strong enough to look after the house, and that she was in consequence suffering some mental worry and he wanted to get her away from it and asked her where she would like to go, and she said Montreal. Now it is quite apparent that that does not mean that he advised her to go to Montreal, for it is clear that something much less expensive would have answered his purpose. She would be entitled to some change which would entail some expense, but it need not be anything like as great as a trip to Montreal, and need not involve the sacrifice by Mr. Kerley of his business, the claim

ALTA.

S. C.

KERLEY v. CITY OF EDMONTON.

Harvey, C.J.

in respect of which seems rather remote in any event. Then the items in respect of expenses in Edmonton are chiefly for services of doctors, nurses and attendants in respect of most of which there is no evidence as to their reasonableness. As to the doctors' charges, they are for services before the trip to Montreal and after the return and for services "preparing for these professional examinations," using his own words, which mean apparently something connected with the trial. It is by no means clear that Mrs. Kerley's condition after the Montreal visit was properly attributable to the accident. When she left, the doctor who attended her in Edmonton was away, so for some time at least she was not under the doctor's care. Mr. Kerley says that after she arrived in Montreal she became ill and required a doctor, and that for at least a month "he was there off and on practically every second day." This doctor's bill is put in at $200. There is no evidence explaining the cause of this illness, which may have been something entirely apart from the injuries resulting from the accident. Then assuming that the doctor's attendance was not "off" at all, we would have 15 visits proved for which a claim is made for $200.

The evidence thus leaves much to be desired as to establishing the reasonableness of this bill even if any of it is allowable. The same, though in a less degree, is the case with the nurses' and assistants' expenses. It is quite apparent therefore that much latitude must be left to one who has to determine just what proper allowance should be made.

We do not know what the calculation of the trial Judge was to reach the amount he arrived at, and we cannot therefore say that he made any mistake in his calculation. In the case of *McHugh* v. *Union Bank* (1910), 3 A.L.R. 166, this Court set aside the judgment of the trial Judge because it could not find how the amount of damages was arrived at in a case in which the amount could be determined partly by calculation as in such a case as this, but the Judicial Committee of the Privy Council, [1913] A.C. 299, 10 D.L.R. 562, restored the trial judgment. At p. 568 the following expressions are used:

> The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be Judge or jury, has often a difficult

task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give.

From the facts to which I have referred it is far from clear to my mind that the amount allowed by the trial Judge was erroneous, and, therefore, it should not be interfered with by this Court. The principle just enunciated applies with equal if not greater force to the assessment of general damages. It is argued that the male plaintiff was entitled to some damages for the deprivation of the society of his wife and that the reasons given by the trial Judge show that his allowance was limited to the wife's loss. A complete answer to this seems to exist in the fact that no claim whatever is made in the statement of claim for any such damages. Objection is also taken to the fact that the trial Judge exercised his own judgment on the question of the permanent character and extent of the physical and mental injuries, formed from his observation of her in the witness box, in preference to accepting the evidence of the medical witnesses.

The evidence of the doctors on this point is naturally opinion evidence, and in this case they do not speak with the confidence one finds in some cases, though that is, perhaps, a reason why greater value should be attached to their opinion. The trial Judge, however, had the opportunity of observing Mrs. Kerley as a witness, and, if he could not take advantage of the benefit gained by that fact, it is somewhat difficult to see the force of what is said in the above quotation from the judgment in the *McHugh* case. There is no other ground, as far as I can see, on which it can be said that his judgment in this respect is erroneous.

I am of opinion, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

ALTA.

S. C.

KLUKAS v. THOMPSON & CO.

Alberta Supreme Court, Ives, J. January 14, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION — INJURIES WHILE CHANGING CLOTHES—COURSE OF EMPLOYMENT.

A workman who was injured by the collapse of temporary stairs on which he was proceeding a few minutes before the hour for commencing his day's work to another floor for the purpose of changing into his working clothes left there on the previous day, is entitled to compensation as for an injury arising out of his employment under the Workmen's Compensation Act, Alta.

[*Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62, referred to.]

Statement

ACTION for damages at common law, and for compensation under the Workmen's Compensation Act (Alta.).

L. T. Barclay, for plaintiff.

O. M. Biggar, K.C., for defendant, Thompson & Co.

Hyndman, for defendant, Reade & Co.

Ives, J.

IVES, J.:—This is an action in damages arises out of an accident which occurred on May 6, 1914, resulting in permanent injury to the plaintiff.

There is an alternative claim set up under the Workmen's Compensation Act, should the plaintiff be found to be not entitled to recover under his common law right.

The facts shewn by the evidence are as follows: Read, Macdonald and Brewster, Ltd., were the general contractors for the erection of a building in the city of Edmonton and Thompson and Co. had sub-contracted the plastering of the building. The plaintiff is a plasterer by trade, and was employed on the work by Thompson and Co.

To carry on the work and enable the different workmen to reach the two upper floors of the building, the general contractors had erected a temporary stair, there being two flights between the first and second floors and between the second and third floors, the flights in each case being divided by a landing half-way between the floors. This stair was inside the building. There was also a stair outside the building providing a means of access to the different floors. The plaintiff had been at work on the premises since April 30 preceding the accident. On the morning of the accident, May 6 two carpenters on the work, named Wenzel and Morrison, in the employ of the general con-

tractors, commenced shifting the stair between the second and third floors. This was to enable the plastering to be done at a point where the original position of the stairs prevented.

The plaintiff entered the building at about 7.45 o'clock; his hour of commencing work was 8 o'clock. His object in arriving a few minutes before 8 was to enable him to change into his working clothes, which were left on the premises each night, and be ready for work on time.

On the night of May 5, he had left his clothes on the third floor, and on the morning in question he proceeded to ascend to the third floor. On reaching the second floor he swears that he continued without interruption on to the first or second tread of the flight beginning at the second floor, that he saw a workman, Pardon, by name, on the stair a few steps ahead of him carrying a hod of brick, but is most positive that no one else was in view, that he was bound to have seen anyone else about there, and further, that there was nothing to indicate that any unusual caution was necessary in connection with the use of the stair. He also swears that the lower tread of the stair was in place, that if it had been removed, he must have noticed its absence. He had only proceeded one or two steps when the stair gave way, and the plaintiff, with the man Pardon fell to the basement.

The fall so injured the plaintiff's leg that it had to be amputated below the knee. The evidence of the men Wenzel and Morrison is quite as positive as the plaintiff's. They say that *at the time* the stair gave way Morrison was at the top on the landing, holding the stair with a rope fastened around the top tread, not to support the stair, but to enable him to swing it, and that Wenzel was at the bottom on his knees between the stair stringers, his body bent forward and over in the course of fastening the end of the stringers to the second floor, the stair having been shifted out from its original position against the wall a distance of from ten to fifteen inches. They both say that they did not see the plaintiff until the stair fell, but Morrison did see Pardon on the stair and was preparing to let him pass. Wenzel also swears that he had removed the bottom tread in

ALTA.
S. C.
KLUKAS v. THOMPSON & CO.
Ives, J.

order that he might have more room in bending forward between the stringers in his work.

The witness Pardon, who could only have been a second or two ahead of the plaintiff at the foot of the stair swears that when he arrived there the stairs did not look safe, that he noticed the bottom tread had been removed, and that he asked, "Is it all right?" and some one answered, "Yes, go ahead," or words to that effect. He also swears that both Wenzel and Morrison were there in the places they state. He did not see the plaintiff following him. He says that having the load of brick, 90 or 100 pounds weight, on his shoulder, made the absence of the bottom tread quite distinct to him.

Now, I do not think the plaintiff is swearing falsely, but that he is quite convinced he saw neither the dangerous condition of the stair or the two carpenters, yet, in the face of the evidence of Wenzel and Morrison, corroborated by Pardon, I must find that the conditions were as stated by them. Upon this finding I think the defendants must be exonerated from any charge of negligence, and the action for damages dismissed.

I now come to the matter of the plaintiff's claim for compensation under the Act, and I must confess that it has given me considerable difficulty to determine whether the accident "arose out of" plaintiff's employment. If the facts above stated come within the judgment of the House of Lords in *Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62, then I think that decision should govern.

The first test I shall apply to the facts of the case is the phrase, "sphere of employment." No order was violated by the plaintiff, so that there was no prohibition which "limited the sphere of employment" on the one hand or "directed certain conduct within the sphere of employment" on the other. The plaintiff was not doing work "which he had not been engaged to perform" nor was he "in territory with which he had nothing to do." See *Conway* v. *Pumpherston Oil Co.*, [1911] A.C. 660.

Not having any prohibition to deal with, the "sphere of employment" must be determined upon a general view of the nature of the employment and its duties. If the plaintiff was

doing those duties he was within, if not, he was without his sphere. If at the time of the accident plaintiff was arrogating to himself duties which he was neither engaged nor entitled to perform, then the accident did not arise "out of his employment," and he cannot recover.

I will now apply a further test, viz., was the risk one reasonably incidental to his employment? Can he say, "the accident arose because of something I was doing in the course of my employment," or "the accident arose because I was exposed by the nature of my employment to the danger that this stair would give way?" I think the plaintiff can very properly assert both, and that the circumstances he has shewn justify a finding that the accident arose out of his employment. I cannot conclude from the circumstances that the plaintiff by his conduct exposed himself to any new and added peril not involved in his contract of service, or that he was arrogating to himself duties which he was not engaged or entitled to perform.

The plaintiff is, therefore, in my opinion, entitled to compensation, with costs, under the Act, severally from the defendants, against which defendants are entitled to set off their costs of the plaintiff's action for damages.

If the parties cannot agree upon the amount of the compensation I will fix it upon application.

Judgment accordingly.

NEPAGE v. PINNER.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, and McPhillips, JJ.A. February 26, 1915.

1. MECHANICS' LIENS (§ VI—46)—SUB-CONTRACTORS—RIGHT TO LIEN—EXTENT OF—R.S.B.C. 1911, CH. 154.

Under the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, the lien of a sub-contractor will attach when he has completed his contract, or if the contract provides for progress payments on account, a lien would attach for the amount of each instalment as it became due; and in the absence of evidence that either the whole or some part of the contract price was due or payable to the sub-contractor at the time of payment by the owner to the principal contractor of the only sum which accrued due to the latter before his abandonment of the contract, the sub-contractor cannot rely upon such payment to establish his lien.

[*Turner* v. *Fuller*, 12 D.L.R. 255, 18 B.C.R. 69, and *Rosio* v. *Beech*, 9 D.L.R. 416, 18 B.C.R. 73, applied.]

B. C.

C. A.

NEPAGE v. PINNER.

Macdonald, C.J.A.

APPEAL by plaintiff from judgment of Lampman, County Judge, of May 7, 1914.

Crease, K.C., for the Opera House.

Jackson, for Hannington, mortgagee.

MACDONALD, C.J.A.—The plaintiffs claim a mechanics' lien against the property of the Victoria Opera House Co., Ltd., as owners, and others as encumbrancers. In the view I take of the case, no question arises with respect to the encumbrancers. The Opera House Co. let an entire contract for the erection of their opera house to the defendants, Pinner & McLennan, with whom plaintiffs contracted for the installation of the electric plant for the lump sum of $14,000. When the opera house was nearing completion, namely, on January 28, 1914, the owners made a payment of $50,000 to the contractors, leaving a balance of what the contractors claim would be due them on completion of about $15,000.

There is no evidence that on January 28 the plaintiffs had completed the work under their sub-contract. We were referred to an item in a time-slip dated January 26 as evidence of the last work done on the sub-contract, but that time-slip is not verified, nor is there any evidence that in fact that item was the last item of work done under the sub-contract. I must, therefore, accept the only real evidence of the fact of completion, and it is to be found in the plaintiffs' letter of February 16, in which they declare that they had finished the work, and the certificate of the owners' architect of the same date verified that claim. The fact, therefore, is not disputed that on that date the plaintiffs had completed their sub-contract and the extra work which they had undertaken, and which is not in question in this appeal.

The said sub-contract provides for payments by the contractors during the progress of the work, and there is no evidence that anything was due or unpaid under the terms thereof on January 28. Upon being paid the said sum of $50,000, the contractors abandoned the work, and the building, it is admitted, is not yet completed. It is not seriously contended, therefore, that there was, after the payment of the 28th January, anything due or payable by the owners to the contractors.

B. C.

C. A.

NEPAGE v. PINNER.

Macdonald, C.J.A.

These facts lead to the question, did a lien attach in favour of the plaintiffs before the $50,000 was paid to the contractors? If so, then I think it would be enforceable, notwithstanding that at the time of the filing of the lien in question in this action, namely, February 17, 1914, nothing was then due or payable by the owners to the contractors. As I read the Mechanics' Lien Act, the lien of a wage earner under a daily hiring would attach on the completion of the day's work, and so from day to day. The lien of a contractor or sub-contractor would attach when he had completed his contract, or, if the contract provided for interim payments on account, a lien would attach when each payment became due or payable to the extent of the amount thereof.

In the case of the sub-contract in question, aside from the provision for progress payments on account, no part of the contract price might ever become payable. Until the contract should be substantially completed, the payment of the price would be contingent. I think a lien cannot attach in respect of money not payable, and which may never become due or payable.

In the absence, therefore, of evidence that either the whole or some part of the contract price was at the time of the payment of the said sum of $50,000 due or payable to the plaintiffs —in other words, that their right to it was no longer contingent— they cannot rely upon that sum or any part of that sum as being a sum payable from the owner to the contractor in respect of which a lien in their favour attached.

On February 16, when a lien might have attached had there been moneys payable by the owners to the contractors, there were none such; hence the plaintiffs cannot, in my opinion, succeed. The appeal should be dismissed.

GALLIHER, J.A.:—The plaintiffs here are sub-contractors for the electrical wiring and fixtures in the Victoria Opera House Co., Ltd., against whose property they have filed a lien. Their contract with the contractor provided (art. 9) that they should be paid, upon architects' certificates, 75% monthly as the work progressed.

No certificates were issued except the final certificate of acceptance, dated February 16, 1914, so that at the time the

B. C.
C. A.
NEPAGE
v.
PINNER.
Galliher, J.A.

$50,000 was paid by the Opera House Co. to the contractors on January 28, 1914, there were no outstanding progress certificates issued by the architects shewing any amounts payable to the sub-contractors—in fact, the architects say they had nothing to do with the sub-contractors as to issuing certificates.

In the statement given the Opera House Co. by the contractors, dated January 21, 1914, and upon which the sum of $50,000 was advanced to the contractors on January 28, there is nothing to shew that there was any money due these sub-contractors, unless the item No. 4, $2,194, electrical extras, refers to the plaintiffs, but, even if that is so, the plaintiffs abandoned their appeal as to extras.

In the evidence of Mr. Matson and Mr. Elliott, two of the directors of the Opera House Co., they admit that the sum paid ($50,000) was upon the representation of the contractors that they must have money to pay off the sub-contractors, who were waiting at their door, as the bank would not advance them any more, and it was upon these representations that the money was advanced. This payment of $50,000 was, as I view it, an acknowledgment by the Opera House Co. that on the date, January 28, 1914, they owed that amount to the contractors, the balance being left for adjustment.

Now, if the plaintiffs' lien had attached at or prior to the making of this payment, they are entitled to have it enforced, as there was on that date moneys in the hands of the company due the contractors more than sufficient to cover plaintiffs' claim.

Where a sub-contractor undertakes to do certain work and supply materials for a lump sum without any stipulation as to payment before completion, I take it his lien would attach only on completion of his work, and, if there was no money then due from the owner to the contractor, under our Mechanics' Lien Act, sec. 8, his lien must fail.

That was decided by this Court in *Turner* v. *Fuller*, (1913) 12 D.L.R. 255, 18 B.C.R. 69; and *Rosio* v. *Beech* (1913), 9 D.L.R. 416, 18 B.C.R. 73.

The affidavit of McKenny, of the plaintiffs' firm, shews (A.B. 241) that up to December 12, 1913, they had received on account of their contract, $8,280, and, as there is no evidence before us of any estimates of work done under the contract up to that

time, it may be that this amount represented the full 75% of the value of work done, so that I fail to find evidence that there was money due plaintiffs under progress estimates, but, if the plaintiffs have shewn in their evidence that the work under their contract was completed (I exclude extras) before the payment over of the $50,000 on January 28, 1914, then the lien for the balance unpaid would attach.

If the question had been asked plaintiffs' witnesses, Was the work done under your sub-contract (not including extras) completed before payment over to the contractor on January 28? there would have been direct evidence one way or the other, but, instead of this, the Court is left to wade through a mass of tangled evidence and asked to find from that whether it was so completed.

Turning to ex. 59, pp. 239 and 240 A.B., we find the following letter:—

Victoria, B.C.,
February 16th, 1914.

Messrs. Rochfort & Sankey,
Victoria, B.C.

Re Victoria Theatre.

Gentlemen:—

We beg to state that we have finished the electrical installation work on the Royal Victoria Theatre, according to plans and specifications; also all extras ordered through yourselves and the agents of the Victoria Theatre Company. If at any future date inferior materials, or defective work, under our contract, should appear, we shall, on notice from yourselves or the Victoria Opera House Co., make same good at our expense.

Hoping to receive your written acceptance of the job, we are,

Yours very truly,
NEPAGE, MCKENNY & Co.
By

And the architects' certificate in reply:—

W. D'O. Rochfort — E. W. Sankey
Associate Architects,
505-506 Union Bank Bldg., Victoria, B.C.
A. S. Kendle, Manager. Phone 1804.

Messrs. Nepage McKinney Co., February sixteen, 1914.
Electrical Contractors,
Seattle, Wash.

Gentlemen:—This is to certify that we have inspected the electrical installation in the Royal Victoria Theatre, and hereby accept same as satisfactory, in accordance with your letter to us of even date.

Yours truly,
W. D'O. ROCHFORT & E. W. SANKEY,
per A. S. Kendle, Manager.

B. C.

C. A.

NEPAGE v. PINNER.

Galliher, J.A.

Standing alone, these point to a completion on February 16, 1914, but, if there is sufficient other evidence to shew that, notwithstanding these were dated as above, as a matter of fact the work under plaintiffs' main contract was completed before January 28, 1914, then their lien should attach.

The only evidence we have been directed to is on p. 237 A.B., where, in the statement filed, ex. 14, there is eight hours' work charged to job No. 683 (which is sworn to as the job number under the contract, the other numbers having reference to extras) and eight hours' work to the same number on the 26th of the same month.

Counsel states that this was the last work done under the contract, but none of the witnesses have said so, and we are asked to infer that such is the case simply because there appears in the material before us no later entry of work charged to that number. I think it would be dangerous to so assume, and that the plaintiffs have failed in shewing that their work under the contract was completed, or that there was anything due them, so that their lien would attach at the time the $50,000 was paid over. The plaintiffs' appeal must fail.

McPhillips, J.A.

MCPHILLIPS, J.A.:—In my opinion, the appeal must be dismissed. I entirely agree with the learned trial Judge. It is amply clear upon the evidence that there is no sum due or payable to the contractors, and, further, the case is one of non-completion of contract by the contractors; and, in my opinion, sec. 8 of the Mechanics' Lien Act (ch. 154, R.S.B.C. 1911) precludes the establishment of the claimed lien. The cases which, in my opinion, support the conclusion at which I have arrived are the following: *The S. Morgan Smith Co.* v. *The Sissiboo Pulp*, 35 Can. S.C.R. 93; *Farrell* v. *Gallagher* (1911), 23 O.L.R. 130; *Turner* v. *Fuller* (1913), 12 D.L.R. 255, 18 B.C.R. 69; *Rosio* v. *Beech*, 9 D.L.R. 416, 18 B.C.R. 73; *Fitzgerald* v. *Williamson* (1913), 12 D.L.R. 691, 18 B.C.R. 322.

Appeal dismissed.

INDEX OF SUBJECT MATTER, VOL. XXI., PART 3.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XXI., PART 3.

BRAUCHLE v. LLOYD.

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.
February 15, 1915.

1. CONTRACTS (§ V C 3—402)—RESCISSION—GROUNDS—MISREPRESENTATION —WAIVER.

The right to set aside a contract for misrepresentation by the other party which was unintentional and did not amount to fraud may be waived or released by payments made thereon after the untruth of the misrepresentation had been clearly revealed.

[*Re Bank of Hindustan*, 42 L.J. Ch. 771, applied; *Morse* v. *Royal*, 12 Ves. 373, and *Moxon* v. *Payne*, L.R. 8 Ch. 881, distinguished.]

2. VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND—RESCISSION OF— MISREPRESENTATION.

An innocent misrepresentation as to the value of land on a sale thereof is not upon the same footing as a misrepresentation as to facts which cannot be matters of opinion, as a ground for repudiating the contract in the absence of fraud.

Statement

APPEAL from judgment at trial of an action in the District Court.

C. C. McCaul, K.C., for the plaintiff, respondent.

Frank Ford, K.C., and *W. J. A. Mustard*, for defendants, appellants.

Scott, J.

SCOTT, J., concurred with STUART, J.

Stuart, J.

STUART, J.:—I think this appeal should be allowed with costs and the action dismissed with costs. Assuming all the complaints of the plaintiff to be true and that serious misrepresentations of fact had been made to her at the inception of the contract, it is admitted that after she discovered the truth and had learned that the defendants had made misrepresentations to her, she, nevertheless, made a payment or payments on the contracts. She told the defendants, so she says, that they had not been telling her the truth. Then, merely because of some further assurance from these same people as to the ultimate prospect of profit, she made a payment. Clearly she then decided to take the lots without being influenced by the original representations. These were cast aside. She knew the facts represented to her did not exist. She affirmed the contract and is now driven to complain that she relied again upon assurances given by men whose statements she then, at any rate, knew to be untrue.

And what were the second assurances? Merely that the lots were worth $600 a piece, and that they would assure her $600 for them in the spring. This in reference to lots she had already

ALTA.
S. C.
BRAUCHLE v. LLOYD.
Stuart, J.

paid something on, which she had been interested in as a purchaser for some months, which she had inquired about, and this from men who had misled her already. I am unable to see how the plaintiff can now fall back upon the original misrepresentations. And with respect to the second assurances as to value, it seems to me that she was not then in a position of ignorance on that subject, but knew, or at least must be held to have known, as much about the matter as the vendors. I can see little reason for assuming any special relationship of confidence or trust even in the first place, and certainly none at a time when she had learned that there was every reason to withhold confidence and to mistrust.

The well-known principle of affirmance after discovery of the real truth should be applied. That is the law, and I do not think we should whittle it away merely because a woman of mature years appeals to our sympathy for her loss in real estate speculations.

I quite agree with the principle laid down in *Morse* v. *Royal*, 12 Ves. 355, 373-4, and in *Moxon* v. *Payne*, L.R. 8 Ch. 881; but those cases rest clearly upon the existence of actual fraud in the first instance. But the learned trial Judge, in his judgment, spoke as follows with regard to fraud: "It is not apparent from the evidence at all that Mr. Lloyd was actively mixed up in any fraud in the matter nor does it appear that Mr. Musselman was guilty of any actual fraud." He rested his judgment entirely on the view that an untrue statement had been made as to the value of the property and the advisability of the purchase as an investment. In the face of the direct finding of the trial Judge that there was no actual fraud, it seems to me that it is going rather far for a Court of Appeal to find that such fraud existed. In *Nocton* v. *Lord Ashburton*, 83 L.J. Ch. 784, Lord Haldane, delivering judgment, in the House of Lords, in a case where the trial Judge had found no actual fraud or deceit, but the Court of Appeal had made a contrary finding, and declared the appellant defendant to have been guilty of fraud, said:—"I think that to reverse the finding of the Judge who tried the case and saw the appellant in the witness-box was, in the circumstance of this case, a rash proceeding on the part of the Court of Appeal." It seems to me that in this case also, where admittedly

ALTA.
S. C.
BRAUCHLE v. LLOYD.
Stuart, J.

there are possibilities of misunderstandings and of words being honestly spoken in one sense and understood in another, it would be rash to declare persons to have been guilty of fraud whom the trial Judge declared not to be so. Of course, if it were a question of what constituted fraud in a legal sense (if there is any such thing) upon admitted facts or facts actually found by the trial Judge, a Court of Appeal may, no doubt, in some cases take a different view, but that principle cannot apply here, and it would appear to me to be confined to cases where a clearly established fiduciary relationship exists. I do not think there is any warrant or precedent for extending the principle of fiduciary relationship such as exists between trustee and *cestui que trust* solicitor and client, parent and child, to the case of a long previously existing relationship of Sunday-school teacher and pupil, when the pupil has reached such an age as to be able to secure a position as housekeeper in a theological college.

The case, in my view, must be treated in appeal as one of innocent misrepresentation, and the requirements of confirmation and acquiescence are then not nearly so strict. In *Re Bank of Hindustan*, 42 L.J. Ch. 771, the head note, which correctly represents, I think, the view of Wicken, V.-C., is:—

> The right of a person dealing with a company to set aside (as against the company) a contract founded on the latter's unintentional misrepresentation may be waived or released expressly or indirectly but cannot easily be waived by anything the person does or omits *while the falsehood of the misrepresentation remains doubtful*.

In the present case the payment was made after the untruth of all the misrepresentations had been clearly revealed, unless it be the representation as to value upon which the trial Judge rested his judgment. And with regard to that, I think, as I have said, the plaintiff had by the time she made her payment every opportunity to ascertain the value of her purchase and knew just as much about the matter as the defendants. I think it is exceedingly dangerous to place a representation as to value upon the same footing in all respects as representations as to actual facts, which cannot be matters of opinion.

Beck, J.

BECK, J.:—This is an appeal from the judgment of His Honour Judge Crawford in favour of the plaintiff. The action is one for the rescission of two agreements for the purchase of land by the plaintiff from the defendants on the ground of misrepresenta-

ALTA.
S. C.
BRAUCHLE v. LLOYD.
Beck, J.

tion. The particulars of misrepresentation are:—(1) A representation that the lots were within the limits of the city of North Battleford; whereas they are about two and one-half miles from the centre of the city and are beyond the limits of the city. (2) A representation that a street railway line was in course of construction to run past the lots; whereas this was not the fact.

The plaintiff is a woman. What her age is does not appear. But, whatever it is, she is, no doubt, much younger than Musselman, the agent of the defendants, whose representations were the main cause of her entering into the agreement. She and Musselman had come from the same town in Ontario, where they had known each other well, Musselman being a "Church Worker" and at one time the plaintiff's Sunday-school teacher. The land in question was in North Battleford, where the plaintiff had never been. Musselman and members of the defendant firm had been there. The transaction took place in Edmonton. The plaintiff had never engaged in any real estate transactions before, and she so informed Musselman and the defendants. They were real estate agents. It is almost obvious that she spoke the truth when she said that she relied entirely upon Musselman and the members of the defendant firm. Under the circumstances she could scarcely have done otherwise. At all events, she does not appear to have consulted any one else, and she says that she felt she could rely upon Musselman because of his standing and their relationship in the east. Under these circumstances I think that what took place between the plaintiff and the defendants or their agent should be viewed and dealt with with more strictness against the latter than had they been dealing with a man who had, or might be supposed to have had, much business experience and who obviously was relying upon his own independent judgment and not at all upon those with whom he was dealing; in other words, with one who was dealing with them at arm's length.

There is a conflict of evidence on a number of material points; and, although the learned Judge has not found one way or the other upon all or perhaps any of these points, it seems clear from the tone of his judgment that he accepts the plaintiff as a truthful witness.

Her story is this:—She met Musselman in the street in

Edmonton. He stopped her. They talked. He asked her if she had invested in any lots yet—she had only shortly before come to Edmonton; this was the first time they had met. She said no. He asked her to come to the defendants' office and told her about the lots in question. She said she did not know anything about real estate and did not like to undertake anything of the kind without taking advice or getting someone to go in with her. He coaxed her, pressed her; said it was a good proposition; that he would like her to have a good chance on it; that he wished to shew her that he was a good friend out here as well as in the east. So she went to the defendants' office. There she saw one of the members of the firm, to whom she was introduced by Musselman, who remained and took part in the conversation. They shewed her a blue print, she says: "They said it was a good buy; the payments would be easy; there were eight railways." She thought the blue print produced at the trial was that shewn to her, "because it had those marks on it. There was eight railroads on it." She continues, recounting the conversation:—"They said, 'This would be the centre of the town' (indicating on the blue print) 'and our subdivision is out in this direction.' So I said, 'How far would that be if it was in Edmonton?' I said, 'Supposing we take the office down here as the centre of Edmonton, and this' (indicating) 'the centre of North Battleford, how far out Jasper Avenue would they be?' and Musselman said, 'That would be like away out Jasper Avenue as far as 12th Street from here'" (a distance, in fact, of about 5,500 feet), "'which is the best selling property in this city.' Those were the words he used." She made a down payment of $25 and was given a receipt. Asked why she bought the lots, she said: "I took Musselman's word, because he said, 'Let me shew you I am a friend here as down east. *If these lots are not as I tell you, we will see you get your money back,*' and Mr. John Lloyd said so, too." This was in April, 1912. The balance of the purchase price was to be paid $10 a month.

She went back to the office to get her formal agreement about April 25. She says, "They told me how good the lots were; what a good buy it was;" that she agreed to take two more lots, and paid $60 on account. Continuing her evidence, she says: "They said North Battleford" (she had previously said she had never heard of the place before) "had eight railroads,

ALTA.
S. C.
BRAUCHLE v. LLOYD.
Beck, J.

which Edmonton did not have, and that it would not be very long before North Battleford would be a larger place than what Edmonton is; they said there was a street railway there; it is going to Phoenix Park. It will be passing your lots; they are building there now; but it will not be long before they will be passing these lots."

Much of this is denied by Musselman and one of the defendants. But, as I have said, the trial Judge seems to have accepted the plaintiff as a truthful witness, and, even if we assume those on the other side to be so also, I can well understand that, with their extremely optimistic views and their interest in disposing of the property, they used expressions which might, by reason of the ambiguity of their meaning and intent, under ordinary circumstances, be properly interpreted as perhaps not more than exaggerated commendation and the expression of an honest, though mistaken, opinion, while they were such as, by a person of the plaintiff's inexperience and sense of unlimited confidence in Musselman and his associates, would be taken as having a more definite meaning and as meaning what, in reality, she interpreted them to mean; and I think that the defendants must be held responsible upon the meaning she appears to have been justified in taking from ambiguous statements; that, under the circumstances of her complete reliance upon them, they were bound to make their meaning clear beyond question, and if the result of what they said to her was not unreasonably to create a false impression in her mind, the fault must be attributed to them. I am satisfied that she was led to believe that the land was much nearer to the centre of the town than it in fact is; that it was within the limits; that it was in a part of the town where great development was about to take place; that a line of street railway was under construction or at least about to be constructed, and would, every one supposed, run past the property. These things were not true, and, though not all precisely stated in the particulars of misrepresentation, are sufficiently indicated therein or covered by the evidence as to permit us to give effect to them. In my opinion, misrepresentation is established. The plaintiff, however, made a payment after she had discovered the falsity of the representations, and it is urged that this constituted a confirmation of the contract, which

ex hypothesi was therefore voidable. Here is part of her evidence:—

THE COURT:—Why did you make a payment after you found out the representations as to the car line and location of the lots were untrue?

A. Because this man in the office said: "I wouldn't part with those lots; they are very valuable; they are worth $600 a piece." He said: "I will assure you your $900 a piece for those lots next spring." He said: "I would hold them."

The one who made these statements to the plaintiff was one Wheeler, an employee in the office of the Lloyd Realty Co.

The defendants cannot escape responsibility for these statements. The payment was made by the plaintiff only in reliance on these statements. If they seek to take the benefit of them, they must bear the burden which they carry with them. These statements resulted in the benefit to them of the payment, which they now set up as a confirmation. They must be held to have received that payment subject to the burden of the condition that these statements were true. It is not a question what remedy lies upon these statements turning out to be false, but what aspect do they place upon—how do they qualify—the payment. The plaintiff had been deceived by Musselman, the defendants' selling agent, and also by one or more of the defendants themselves. She had gone back to them on finding out that the representations made to her about the lots were not true. She told them that she wanted her money back. William Lloyd told her that, if she ever got it back, it would be by suit in Court. No doubt it may well be said that by this time the plaintiff had lost confidence in the defendants and Musselman. Later on she called again at the defendants' office and again asked for her money back. It was on this occasion that she saw, not Musselman or any of the defendants, but Wheeler, and it was he that made to her the statements I have quoted. Though she may have lost confidence in the defendants and Musselman, there is nothing to indicate that she had reason to distrust Wheeler beyond his being in their employment, and, at all events, he succeeded in inspiring confidence in himself, which resulted in her accepting his statements. The effect of those statements, under the circumstances, was, it seems clear to me, the same as if the plaintiff had said to Wheeler: "The Lloyd Realty Co. and Musselman have deceived me; the lots are not as they

ALTA.
S. C.
BRAUCHLE v. LLOYD.
Beck, J.

represented them to be; they refuse to return what I have paid on account of the purchase price and say that it's only by going to the expense, risk and inconvenience of an action in Court that I can get my rights, but *if, as you say, the lots are certain to bring* $600 *each in the spring, I will* hold them. Here is the past due payment." Surely the payment is so qualified that, when set up as a confirmation, it is properly said that the alleged confirmation, if a confirmation at all, was a conditional one—conditional on the truth of the statements which were the sole inducement for the payment, and the condition not having been fulfilled, the confirmation is ineffective.

In *Morse* v. *Royal*, 12 Ves. p. 371, it is said:—

> But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence; as an act, done with all the deliberation, that ought to attend a transaction, the effect of which is to ratify that, which in justice ought never to have taken place.

In *Moxon* v. *Payne*, L.R. 8 Ch. 881, it is said:—

> Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of these facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a compromise or confirmation of any value in this Court, the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection.

At the time of the payment the parties were not at arm's length; the plaintiff had not equal knowledge with the defendants, for she had no knowledge whatever of the value of the lots; she was not free from the influence of the defendants, for, through Wheeler, who must be accounted their agent, they had again acquired her confidence, and after that she had no independent advice. I cannot see how, even assuming entire honesty on Wheeler's part, the payment, under these circumstances, can be deemed a confirmation in the absence, at all events, of any alteration of the defendants' position following the payment. I would, therefore, dismiss the appeal with costs.

Simmons, J.

SIMMONS, J., concurred with STUART, J.

Appeal dismissed.

ALTA.

Annotation

Annotation—Contracts (§ V C 3—402)—Right of rescission for misrepresentation—Waiver.

Rescission of an executory contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth: *Eisler* v. *Canadian Fairbanks Co.*, 8 D.L.R. 390, (*Derry* v. *Peek*, 14 A.C. 337, applied).

Where the purchaser of land or other real estate had taken possession, he could not, at common law, afterwards avoid the contract and reclaim the purchase-money or his deposit, because the intermediate occupation was a part execution of the agreement, which was incapable of being rescinded. And "where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*": *Hunt* v. *Silk* (1804), 5 East 449; *Blackburn* v. *Smith* (1849), 18 L.J. Ex. 187, 2 Ex. 783. But in equity, and the equitable rule must now prevail, the mere possession of the property taken under a contract of sale, which is vitiated by fraud or other sufficient cause, does not prevent the court ordering a rescission of the sale and a reconveyance of the property upon equitable terms if the situation of the parties has not been altered in any substantial way: *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221. And the court can give compensation for the possession had by ordering, if necessary, an account of the rents and profits taken, or the payment of an occupation rent: *King* v. *King* (1833), 1 M. & K. 442. And in the converse case where the vendor is entitled to set aside a conveyance the court will decree the land to stand as security only for what has been paid with interest: *Addison* v. *Dawson* (1711), 2 Vern. 678; *Aylesford (Earl)* v. *Morris* (1873), 42 L.J. Ch. 546, L.R. 8 Ch. 484.

Notwithstanding the fact that a vendee was induced to purchase timber lands through the vendor's misrepresentations as to the number of acres thereof, rescission of the contract of purchase will be denied the former after he had entered into a contract with the vendor under which the latter had begun to carry on lumbering operations on the land for the vendee, on the ground that, as the parties could not be placed in their original positions, both contracts must stand: *Eaton* v. *Dunn*, 5 D.L.R. 604.

The defendant bought a house and lot from the plaintiff for $1,400, purchase money to be payable by instalments of $10 a month. The contract further provided that unless the amounts were punctually paid, all payments made should be forfeited and all rights of the defendant cease and determine, and the plaintiff be at liberty to re-enter. The defendant paid the first three instalments, although after paying the third he became aware of misrepresentations of the plaintiff inducing the contract. He refused to pay the fifth instalment, but continued to hold possession. The plaintiff brought this action for possession, and claimed for use and occupation since the last payment on the contract. The defendant counterclaimed for rescission and return of his money paid, and in the alternative damages for the misrepresentations. It was held that the defendant had by his conduct affirmed the contract after knowledge of the misrepresentations, and the plaintiff was entitled to judgment for possession unless the defendant should elect to pay the proper value of the property, having regard to the amount to be deducted as compensation for misrepresentations. If he declined to do this, the measure of the defendant's damages would be the amount

ALTA.

Annotation

Annotation *(continued)*—**Contracts (§ V C 3—402)—Right of rescission for misrepresentation—Waiver.**

which he had paid, less a proper occupation rent: *Webb* v. *Roberts*, 16 O.L.R. 279 (D.C.).

An executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent, but the rule does not extend to executory contracts: *Angel* v. *Jay*, [1911] 1 K.B. 666; *Abrey* v. *Victoria Printing Co.*, 2 D.L.R. 208, 3 O.W.N. 868; *Reese River Co.* v. *Smith*, L.R. 4 H.L. 64; *Adams* v. *Newbigging*, 13 App. Cas. 308; *Angus* v. *Clifford*, [1891] 2 Ch. 449, and see *Kinsman v. Kinsman*, 5 D.L.R. 871, 3 O.W.N. 966, reversed on other grounds by 7 D.L.R. 31.

A communication from a person representing a real estate agent made to an owner of land from whom he was trying to get a contract of option for the purchase of his property, that there were no other property transactions going on in the neighbourhood in which this property was situated, although the person making the communication may have known that his principal had been buying other pieces of property in that neighbourhood, is not a misrepresentation *dans causam contractui* which would be ground for rescission, where the parties were dealing at arm's length and there was no duty of disclosure: *Kelly* v. *Enderton*, 9 D.L.R. 472, [1913] A.C. 191, 107 L.T. 781, affirming *Kelly* v. *Enderton*, 5 D.L.R. 613, 22 Man. L.R. 227.

An agreement for the sale of land whereby the purchaser was to take the property at "its fair actual value" to be fixed by the vendor may be rescinded, where it appears that the vendor fraudulently made the purchase price of the property several hundred dollars in excess of "its fair actual value" the purchaser being a woman who lacked business experience and who was unable to form an opinion herself as to the real value of the property, notwithstanding that she went into possession and leased part of the land and sold another part, it appearing that she had not become aware of the fraud until the action: *Larson* v. *Rasmussen*, 10 D.L.R. 650.

A representation by the purchaser of land to the vendor that he was buying for himself and not for a third party to whom he knew the vendor would not sell, although false, is not a representation material to the contract or one resulting in any damage to the vendor as its immediate and direct consequence, so that a sale which the vendor was induced to make by such false representation cannot be rescinded on the ground of fraud: (*Bell* v. *Macklin* (1887), 15 Can. S.C.R. 576, followed). *Nicholson* v. *Peterson*, 18 Man. L.R. 106.

Although it may no longer be open to the party defrauded to avoid the agreement, he may have a remedy for the fraud by action for damages or compensation for the loss occasioned by it, provided the fraud amounts to a substantive cause of action against the party who committed it. Campbell, C.J.: *Clarke* v. *Dickson* (1858), 27 L.J.Q.B. 223, E. B. & E. 148; Blackburn, J., in *Reg.* v. *Sadlers' Co.* (1863), 32 L.J.Q.B. 337, 10 H.L.C. 404. But in such action he cannot recover any damages which might have been prevented by avoiding the contract when he had the opportunity, if any, of which he did not avail himself; as the loss upon shares which he might have repudiated before they fell in value, or the deterioration of goods which he might have returned: *Ogilvie* v. *Currie* (1868), 37 L.J. Ch. 541; *Waddell* v. *Blockey* (1879), 48 L.J.Q.B. 517, 4 Q.B.D. 678. See *Arnison* v. *Smith* (1889), 41 Ch.D. 348.

ALTA.

Annotation

Annotation *(continued)*—**Contracts (§ V C 3—402)—Right of rescission for misrepresentation—Waiver.**

Delay is not imputable against the party defrauded until he has knowledge of the fraud, or at least such means of knowledge as he was bound to avail himself of: *Browne* v. *McClintock* (1873), L.R. 6 H.L. 434; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218. And it lies upon the party against whom the fraud is established and who charges the delay to prove the knowledge in the other party, and the time of acquiring it: *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221; *Arnison* v. *Smith* (1889), 41 Ch.D. 348. Delay is no answer to a substantive action for damages caused by fraud, at law or in equity, except under the Statute of Limitations: *Peek* v. *Gurney* (1873), 43 L.J. Ch. 19, L.R. 6 H.L. 377.

Avoidance of the agreement involves a restitution of the parties to their original rights and property; it can be effected only upon this condition, and, therefore, only so long as such restitution is possible: *Western Bank* v. *Addie* (1867), L.R. 1 H.L. (Sc.) 145, 164; Bramwell, L.J., *Clynoweth's Case* (1880), 15 Ch.D. 13, 20. A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo;* for a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages: *Sheffield Nickel Co.* v. *Unwin* (1877), 46 L.J.Q.B. 299, 2 Q.B. 214. Where the contract has been completely executed, there cannot be rescission for misrepresentation unless fraudulently made: *Seddon* v. *North-Eastern Salt Co.*, 74 L.J. Ch. 199, [1905] 1 Ch. 326.

The party who has once determined his election to affirm a fraudulent contract cannot afterwards avoid it upon the discovery of additional incidents of fraud; the effects of such discovery being only to corroborate the fraud which has been waived, and not to revive the right of avoidance: *Campbell* v. *Fleming* (1834), 3 L.J.K.B. 136, 1 A. & E. 40; *Law* v. *Law* (1904), 74 L.J. Ch. 169, [1905] 1 Ch. 140. But the disaffirmance of a contract in fact may be supported by any grounds of fraud subsequently discovered: *Wright's Case* (1871), 41 L.J. Ch. 1, L.R. 7 Ch. 55.

Delay in determining his election may operate presumptively in affirmance. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined: *Clough* v. *L. & N.W. Ry.* (1871), 41 L.J. Ex. 17, L.R. 7 Ex. 26; *Martin* v. *Pycroft* (1852), 22 L.J. Ch. 94, 2 DeG. M. & G. 785; *Morrison* v. *Universal Insce.* (1873), 42 L.J.Ex. 415, L.R. 8 Ex. 197; *Sharpley* v. *Louth Ry.* (1876), 46 L.J. Ch. 259, 2 Ch.D. 663.

But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are: the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy: *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

Non-performance for a considerable lapse of time, or under such circum-

ALTA.

Annotation

Annotation (*continued*)—**Contracts (§ V C 3—402)—Right of rescission for misrepresentation—Waiver.**

stances as manifest the intention of abandoning it, may be treated as a rescission of the contract: *Davis* v. *Bomford* (1860), 30 L.J. Ex. 139, 6 H. & N. 245.

Where an agreement had been made between a mortgagor and the mortgagee for the former to give up possession and release all his interest to the mortgagee, which was not acted upon, and twelve years afterwards the mortgagee sold under his power as mortgagee, it was held that the agreement had been abandoned and that the mortgagor retained equity of redemption and was entitled to the surplus of the purchase-money: *Rushbrook* v. *Lawrence* (1869), 39 L.J. Ch. 93, L.R. 5 Ch. 3. Where land had been sold in lots, subject to covenants with the vendor not to carry on the trade of a beer shop, and the vendor afterwards suffered beershops to be opened and himself supplied them with beer, he was held to have waived and rescinded the covenants over all the lots: *Kelsey* v. *Dodd* (1882), 52 L.J. Ch. 34.

If the party, upon discovering the fraud, affirms the contract by some unequivocal act, he cannot afterwards revoke his election; and as he cannot approbate and reprobate, he cannot elect to affirm the contract in part, and avoid it in other part, unless the two parts are so severable as to form independent contracts: *Clough* v. *L. & N.W. Ry.* (1871), 41 L.J. Ex. 17, L.R. Ex. 26; *United Shoe Manufacturing Co.* v. *Brunet*, 78 L.J.P.C. 101, [1909] A.C. 330, 18 Que. K.B. 511.

Where a person was induced to undertake work for another for a certain sum upon a fraudulent misrepresentation of the quantities, and, after discovering the fraud, continued and completed the work, it was held that he could claim payment only according to the contract price: *Selway* v. *Fogg* (1839), 8 L.J. Ex. 199, 5 M. & W. 83.

Where a person had been induced by fraudulent misrepresentations to take a lease of a mine and had continued to work the mine after discovery of the truth, he was held to have lost the right of disclaiming the lease: *Vigers* v. *Pike* (1842), 8 Cl. & F. 562.

Where the party defrauded, after full knowledge of the fraud, gave notice that he insisted on the performance of the contract by a certain time, otherwise he should consider it at an end on the ground of the delay, he was held to have affirmed the contract, though it was not afterwards performed within the time stated: *Macbryde* v. *Weekes* (1856), 22 Beav. 533.

Misrepresentation by the director of an incorporated company inducing a contract between him and the company gives the company the right, not merely to a future judicial rescission of the contract by a judgment of the Court, but to repudiate the contract by its own act: *Denman* v. *Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed 15 D.L.R. 241.

Where the plaintiff was induced to buy shares of the capital stock of an insurance company upon its manifesting and expressing a "fixed intention, readiness and capacity" to commence its regular insurance business in a certain city on a fixed date, the existence or non-existence of that "intention" is a fact, and, if the plaintiff entered into the contract to buy and parted with the purchase price on the faith of the statements made in respect of such intention, and those statements were material, his right

ALTA.

Annotation

Annotation (*continued*) —**Contracts** (§ V C—402)—**Right of rescission for misrepresentation—Waiver.**

(if misled) to rescind the contract is the same as if he acted on and was misled by a representation of any other material fact. (*Per* Fitzpatrick, C.J.): *International Casualty Co.* v. *Thomson*, 11 D.L.R. 634, 48 Can. S.C.R. 167, affirming *Thomson* v. *International Casualty*, 7 D.L.R. 944.

REX v. BURGESS.

N. S.

S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley, and Drysdale, JJ. January 2, 1915.

1. CRIMINAL LAW (§ II D—56)—CRIMINAL INFORMATION FOR LIBEL—APPLICATION FOR LEAVE TO FILE.

Leave to file a criminal information for libel can only be granted by the Full Court in Nova Scotia, *i.e.*, the provincial Supreme Court, sitting *en banc;* a single Judge, although presiding over a Court for the disposal of criminal business in a county, has no jurisdiction to grant the leave.

[*R.* v. *Beale*, 1 Can. Cr. Cas. 235, 11 Man. L.R. 448, and *R.* v. *Labouchere*, 12 Q.B.D. 320, 15 Cox C.C. 415, referred to.]

Statement.

DEMURRER upon a criminal information for libel. An application had been made to Drysdale, J., sitting as a Court for the disposal of criminal business at Sydney in the County of Cape Breton, for leave to exhibit a criminal information against the defendant for the publication in a paper known as the "Canadian Commonwealth" of a criminal libel reflecting upon a society or large body of the public known as the Knights of Columbus. The prosecutor was Charles Lorway, Esq., Clerk of the Crown at Sydney, and the libel complained of was the publication by defendant in said "Canadian Commonwealth" of the words of an oath alleged to be taken by members of the society, fourth degree.

The learned Judge having granted the application, defendant demurred on the ground that the information and the matters therein contained were not sufficient in law to compel him to answer thereto. Subsequently, on hearing counsel, it was ordered that the record and all proceedings herein be transmitted to the Clerk of the Crown at Halifax for the purpose of argument of said demurrer before the Supreme Court *en banc*.

The following questions were also referred for decision to said Supreme Court *en banc*:—

1. Upon said record was the informant justified in law in giving notice of trial of said information for the sittings of said Court at Sydney?

N. S.

S. C.

REX v. BURGESS.

2. If the giving of said notice of trial was not justified should the defendant have costs of attendance pursuant to said notice?

H. Mellish, K.C., in support of demurrer.

W. F. O'Connor, K.C., and *A. D. Gunn*, K.C., *contra*.

The judgment of the majority of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—There has been published, and it is alleged that the defendant published it, a very serious libel upon a society known as the Knights of Columbus. The publication consists of an oath required as it is alleged to be taken by the members of that society, a secret society, which alleged oath no doubt is grossly a fiction. And the applicant has applied for leave to exhibit a criminal information. He did not avail himself of the ordinary remedy, for a criminal libel before a magistrate and the grand jury, but has sought to avail himself of this extraordinary remedy. He did not apply to the Full Court in Halifax, but applied on circuit to one of the learned Judges of this Court, "sitting as a Court for the trial of criminal cases" at Sydney. The application was granted by the learned Judge, and an information was filed in the office of the prothonotary and Clerk of the Crown at Sydney in the following terms:—

"Record of Information.

"Pleas before our lord the King. In the Supreme Court of Nova Scotia, Crown Side, of His Majesty's Supreme Court of Nova Scotia, at the sittings of the Supreme Court, Crown Side, at Sydney in the county of Cape Breton, in the year of our Lord 1914.

"Cape Breton County, Sydney.

"Be it remembered that Charles Lorway, Esq., Clerk of the Crown at Sydney in the county of Cape Breton, province of Nova Scotia, of His Majesty's Supreme Court, Crown Side, for the county of Cape Breton, province of Nova Scotia, before the King himself, who for our said lord the King in this behalf prosecutes in his proper person, came here into the Supreme Court, Crown Side, of His Majesty's Supreme Court, before the King himself, at the Supreme Court, Crown Side, at Sydney in the county of Cape Breton, province of Nova Scotia, on the 25th day of February, A.D. 1914. And for our said lord the King brought into the said court before the King himself

N. S.

S. C.

REX
v.
BURGESS.

Graham, E.J.

a certain information against Edwin H. Burgess, which said information follows in these words, that is to say:—

"'In the Supreme Court, Crown Side, Cape Breton County, to wit:

"'Be it remembered that Charles Lorway, Esq., Clerk of the Crown at Sydney, in the county of Cape Breton, province of Nova Scotia, of His Majesty's Supreme Court, Crown Side, for the County of Cape Breton, province of Nova Scotia, before the King himself, who for our said lord the King in his behalf prosecutes in his own proper person comes here into this Court before the King himself, on the 25th day of February, A.D. 1914, in His Majesty's Supreme Court, Crown Side, at Sydney, in the county of Cape Breton. And for our said lord the King gives the Court here to understand and be informed that Edwin H. Burgess did publish without legal justification or excuse a defamatory libel on or about the 3rd day of January, A.D. 1914, at Baddeck, in the county of Victoria, in a paper called the "Canadian Commonwealth," bearing date January 3rd, 1914, a paper purporting to be printed at Baddeck in the county of Victoria, and with a general circulation throughout the counties of Victoria and Cape Breton and elsewhere in the province of Nova Scotia, of and concerning the Knights of Columbus, a fraternal society or organization consisting of many members residing in the county of Cape Breton and elsewhere throughout the province of Nova Scotia, and said fraternal society or organization exists in Cape Breton county and elsewhere in the province of Nova Scotia, contrary to the statute in such cases made and provided, the said defamatory libel being contained in the following article which was printed in the said Canadian Commonwelath of Januray 3rd, 1914, the said article tending to excite the hatred of the people against all persons belonging to the Order of the Knights of Columbus and conduces to a breach of the peace.

"'Knights of Columbus' oath, fourth degree: (Here follows the alleged oath.)'"

There has been a demurrer filed on the part of the defendant and several grounds for quashing the information thereon have been urged before us.

N. S.

S. C.

REX v. BURGESS.

Graham, E.J.

In my opinion the learned Judge had not power to grant the application. It should have been made to the Full Court at Halifax. It is quite obvious that the practice in England was for such an application to be made to the Court of King's Bench, sitting at Westminster.

By the statute 4 & 5 Wm. & M. ch. 18, it is provided:—

> "Whereas divers malicious persons have more of late than in times past procured to be exhibited and prosecuted informations in their Majesties' Court of King's Bench at Westminster against persons in all the counties of England, &c., that after 1693 the Clerk of the Crown in the said Court of Kings' Bench for the time being shall not without express order to be given by the said Court, 'exhibit, receive or file any information for any of the causes aforesaid or issue out any process thereupon before he shall have taken recognizance,' &c., &c."

And by sec. 6, that nothing in this Act shall extend to any other information than such as are or shall be exhibited in the name of their Majesties' coroner or attorney in the Court of King's Bench for the time being, commonly called the Master of the Crown Office, anything, &c.

The jurisdiction of the Supreme Court of Nova Scotia was conferred by statute, and what was conferred was the jurisdiction of the Courts of King's Bench, Common Pleas and Exchequer in England: Provincial Laws, 1774, ch. 6, p. 183. I refer also to R.S. (Third Series), ch. 23, sec. 1, passed before Confederation. By the Acts of 1758, ch. 13, sec. 36, Provincial Laws, p. 20,

> "All indictments, process pleadings and trials and the rules of evidence upon any trials for any felonies or misdemeanours either by the common law of England or by virtue of this Act shall be according to the usage, practice and laws of England."

Sec. 25 of R.S.N.S. 1900, ch. 155:—

> "Every action and proceeding in the Supreme Court and all business arising out of the same except as hereinafter provided, shall so far as is practicable and convenient, be heard, determined and disposed of before a single Judge
>
> "(2) A Judge sitting elsewhere than in the Supreme Court *in banco* shall decide all questions coming properly before him, but may reserve any case, or any point in any case, for the consideration of the Supreme Court *in banco*.

N. S.
S. C.
REX
v.
BURGESS.
Graham, E.J.

"(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court."

Before passing from that provision it must be remembered that the former Equity Court was by the Judicature Act fused with the Supreme Court and provision had to be made for that. And for the trial of actions other than equitable actions provision was thus made for the trial of those by a single Judge sitting as a Court.

In respect to trials, under "Sittings at Halifax," it was provided, sec. 26:—

"There shall be two regular sittings of the Court in Halifax in each year for the trial of civil causes, one to commence," &c. (fixing the times).

"Sec. 27: There shall be two sittings of the Court for the disposal of criminal cases," &c.

"Sec. 28: There shall be as heretofore five circuits in the province," &c.

Under the spring and autumn circuits, in the Judicature Act, R.S.N.S. 1900, ch. 155, sec. 29, there is this provision:—

"The Supreme Court shall sit in the several counties twice a year for the trial of causes and issues, whether they are legal or equitable, and whether they are to be heard and determined with or without a jury, as follows," &c.

As to the Cape Breton circuits, there have been changes in the dates of the sittings by the Acts of 1903, ch. 56, and of 1903-4 ch. 16.

After dealing with civil cases, sec. 3 of the latter Act provides:

"At Sydney there shall also be three regular sittings of the Court in each year for the trial or disposal of criminal causes—one beginning on," &c., &c.

Of course by the B.N.A. Act the criminal law and procedure in criminal matters is assigned to the Parliament of Canada, while the province may constitute the courts of criminal jurisdiction.

By the Criminal Code of Canada, sec. 2, sub-sec. 35: "Superior Court of criminal jurisdiction" "means and includes . . . in the province of Nova Scotia the Supreme Court."

Coming to Jurisdiction, Part XI., sec. 577, it is provided as follows:—

Sec. 577: "Unless otherwise specially provided in this Act,

N. S.
S. C.
REX
v.
BURGESS.
Graham, E.J.

every Court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such Court to try wherever committed within the province if the accused is found or apprehended or is in custody within the jurisdiction of such Court, or if he has been committed for trial to such Court or ordered to be tried before such Court," &c.

Section 580 provides:—

"Every superior Court of criminal jurisdiction and every Judge of such Court sitting as a Court for the trial of criminal causes and every Court of Oyer and Terminer and general gaol delivery has power to try any indictable offence."

This brings me to the Crown Rules.

By sec. 576 of the Criminal Code,

"Every superior Court of criminal jurisdiction may at any time with the concurrence of a majority, make rules of Court not inconsistent with any statute of Canada which shall apply to all proceedings relating to any prosecution proceeding or action instituted in relation to any matter of a criminal nature or resulting from or incidental to any such matter and in particular,—

"(*a*) For regulating the sittings of the Court or of any division thereof, or of any Judge of the Court sitting in Chambers except in so far as the same are already regulated by law.

"(*b*) For regulating in criminal matters the pleading practice and procedure in the Court including the subjects," &c.

The Judges of this Court made Crown Rules first in 1889, but these will be found in the Crown Rules in an appendix to the Nova Scotia Judicature Act and Rules, 1900. They do not deal with the sittings of the Court or Judges.

Rule 2 provides as follows:—

"No order or rule annulled by any former order shall be revived . . . and where no other provision is made by these rules the present procedure and practice remain in force."

Under "Custody of Records," there is Rule 3:—

"The Clerk of the Crown in each county shall have the care and custody of the records and other proceedings on the Crown Side in that county."

Then Rule 41:—

"With the exception of *ex officio* informations filed by the Attorney-General on behalf of the Crown, no criminal information or information in the nature of a *quo warranto* shall be exhibited, received or filed without express order by the Court, nor shall any process," &c.

Rule 43:—

"The application for a criminal information shall be made to the Supreme Court by a motion after ten days' notice thereof in writing and within a reasonable time after the offence complained of," &c.

Referring to all of this legislation it is quite clear that the practice in England had been to make the application for leave to file a criminal information of this nature to the King's Bench, not to a single Judge, up to the time their Crown Rules were passed, and that power was continued (I admit expressly) by the Crown Rules to be exercised by "the King's Bench Division," a Divisional Court of the High Court of Justice, but never by a single Judge. And down to the time of the Nova Scotia Crown Rules the jurisdiction and practice in England was by statute adopted and followed.

No one attempted to cite a case in which a single Judge, whether sitting as a Criminal Court or in Chambers, ever granted such leave. And applications have been made to the Full Court.

In King on Criminal Libel, p. 205, there is this passage:—

"The procedure for obtaining a criminal information for libel is by a motion for a rule *nisi* before the Full Court—in Ontario, the Divisional Court—on affidavit by and on behalf of the complainant who is called the relator."

The 25th section of the Nova Scotia Judicature Act which I have cited would be *ultra vires* if an attempt was thereby made to change the criminal procedure of the Court and to enable a single Judge sitting as a criminal Court to dispose of a matter which the criminal law required the Full Court to dispose of: *The Queen* v. *Beale*, 1 Can. Cr. Cas. 235, 11 Man. L.R. 448, citing decisions of the Ontario Court of Appeal. It is dealing with civil cases chiefly.

Of course a Judge may sit in Chambers anywhere to dispose of a matter, and he may sit in an equitable matter as a Court any-

N. S.
S. C.
REX
v.
PURGESS.
Graham, E.J.

where, but the provisions as to circuits contemplates trials, not such a matter as this.

Then the sections of the Criminal Code, 577, 580, contemplate trials by a single Judge sitting as a Court. Of course a Judge in Chambers may by express legislation do many things. But in respect to such an application as this I can find nothing in the criminal law which altered in the province the existing practice or conferred power on a Judge sitting as a Court as he does on circuit power to grant a criminal information.

Then, coming to the Crown Rules again, unless another provision is made in these rules the present procedure and practice remain in force. Do rules 41 and 43, by using the expression "Court" and "Supreme Court," change the procedure and practice then existing and enable a Judge sitting as a Court on the circuit now to do what only the Full Court at Halifax could formerly do? They contain a very apt expression to designate the Full Court.

The Judges had no authority to make rules "inconsistent with any statute of Canada," including, I should say, any pre-confederation statute passed by the province bearing on criminal procedure still in force. And they could only make regulations respecting the sitting of the Court "except in so far as the same are already regulated by law."

Dealing with the proper construction of the rules there are many places where this expression is found—"Court or a Judge." Take *certiorari*, rules 27-37. The application for a writ of *certiorari* shall be to the "Court or a Judge," and we find that expression in those rules throughout. The same in an application for a writ of *habeas corpus:* Rule 147.

Then "mandamus," Crown Rules 54-69. The application is to be "made to the Court after ten days' notice of the motion, and in the vacation to a Judge in Chambers for a summons to shew cause."

Then Rule 71:—

> "An application for a writ of prohibition on the Crown Side shall be made to the Court after two days' notice of motion in all criminal causes or matters;" (and in civil proceedings on the Crown side) "a motion is to be made to the Court or by summons before a Judge at Chambers."

In these cases just mentioned surely "Court" means the Full Court. We have always given it that construction. I think it also means Full Court in respect to the granting of an information in the nature of a *quo warranto* when it was not intended to give a Judge in Chambers jurisdiction and the expression Court or Judge is not used at all.

If that is so, then in the two rules we are considering, 41 and 43, "Court" or "Supreme Court" would mean the Full Court.

I see no good reason for our Judges changing the practice and I do not believe they intended to do so. It would be the last thing they would think of doing, giving a single Judge, sitting as a Court, power to do what in England and Ontario required a Divisional Court and in other provinces the Full Court. And if the intention had been to give the power to a single Judge, why not use the usual expression "the Court or a Judge"? It is so much more convenient to hear such a matter in Chambers than when trying causes.

I think, too, it is inexpedient that a single Judge should have the power. In England where the Court alone has the power there has still been great diversity of conclusion as the cases reviewed in *Reg.* v. *Labouchere*, 15 Cox C.C. 415, 12 Q.B.D. 320, shew. It will be much worse in Nova Scotia if this power is given to single Judges, resulting, of course, in unreported decisions. It will be noticed that this information is exhibited in the name of Mr. Lorway, the Clerk of the Crown at Sydney, for the county of Cape Breton. This results from obtaining leave at Sydney. He, in this information, prosecutes as the Attorney-General does on the *ex officio* information. In England the King's coroner and attorney, commonly called the Master of the Crown Office, discharges this duty.

When our Legislature introduced the English jurisdiction and practice generally the corresponding officer would, I suppose, be the Clerk of the Crown at Halifax, *cy pres*. Now, while we have eighteen Clerks of the Crown in Nova Scotia, one for each county, to have the care and custody of the records, I think it is excessive to have eighteen King's Coroners or Masters of the Crown Office in a small place like Nova Scotia when they are so economical in England in this matter.

In my opinion the leave to file a criminal information for libel

N. S.

S. C.

REX
v.
BURGESS.

Drysdale, J.

cannot be granted by a single Judge even sitting as a Court. Therefore there must be judgment for the defendant on the demurrer with costs, to be paid by the prosecutor.

DRYSDALE, J.:—This is a case in which while sitting as a Court for the disposal of criminal cases at Sydney I allowed a criminal information to be exhibited against the defendant for the publication of an atrocious libel upon a society or large body of the public known as the Knights of Columbus.

The question whether a Judge sitting [illegible] county for the disposal of the criminal business of the [illegible] has jurisdiction to hear such an application was not argued before me, and the question whether such an application can only be allowed by the Full Court was not considered. Counsel, as well as myself, assumed the Court had jurisdiction and that the Crown Rules providing procedure respecting criminal informations applied to the Court whilst in session at Sydney.

The power of a Judge sitting in a county as a Court for the disposal of criminal business to hear and allow such an application as was granted in this case has been raised by demurrer to the information exhibited and the question with others fully argued. Whilst I am not satisfied that the Court sitting for the disposal of criminal business in a county is without jurisdcition, I agree that the best practice is to require that such extraordinary applications should be made to the Full Court, and I agree that as a matter of good practice all such applications should be referred to the Court *en banc*.

I thought at the time the libel was an atrocious one affecting a large body of the public, and that a case for a criminal information was made within the modern rule so fully considered and established in the case of *The Queen* v. *Labouchere*, 12 Q.B.D. 320. For this reason I granted the rule. I adhere to the opinion I formed then on the merits.

I think there is nothing in the point raised as to the omission of the concluding part of the form in the information exhibited.

Judgment for defendant with costs.

ARNPRIOR v. U.S. FIDELITY AND GUARANTY CO.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin JJ. February 8, 1915.

1. BONDS (§ II B—15)—FIDELITY OF EMPLOYEES — RENEWAL OF BOND — CONTENTS OF APPLICATION.

A new bond replacing an expiring bond of fidelity insurance in the same company and in favour of the same employer upon the same risk is a "renewal" of the original insurance, and the answers of the assured on the application for the original bonding are to be looked at and their materiality considered in an action on the new bond issued without fresh questions to the assured where the original answers were stipulated to be the basis of the bond then applied for "or any renewal or continuation thereof or of any substituted bond."

[*Town of Arnprior* v. *U.S. Fidelity*, 20 D.L.R. 929, 30 O.L.R. 618, affirmed; *Jordan* v. *Provincial Provident*, 28 Can. S.C.R. 554, considered.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (20 D.L.R. 929, 30 O.L.R. 618), reversing the judgment at the trial in favour of the plaintiffs.

W. M. Douglas, K.C., and *J. E. Thompson*, for the appellant.

Watson, K.C., and *R. J. Slattery*, for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK:—I concur in the opinion of Mr. Justice Idington and would dismiss the appeal with costs.

Davies, J. (dissenting)

DAVIES, J. (dissenting), for reasons given in writing was of the opinion that the appeal should be allowed and the judgment of the trial Judge restored.

Idington, J.

IDINGTON, J.:—Appellant is a municipal corporation in Ontario. Its tax collector in 1904 applied to respondent to become his surety to appellant. It did so by its bond upon faith of representations made in answer to some eighteen questions. At foot thereof the then mayor of appellant signed as such the following:—

It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same that may be issued by the United States Fidelity and Guarantee Company to the undersigned, upon the person above named.

Dated at Arnprior, Ont., this 10th day of June, 1904.

Of these questions and answers Nos. 11 and 12 are all that are necessary for us to look at for our present purpose. They are as follows:—

Q. 11. To whom and how frequently will he account for his handlings of funds and securities? A. He accounts to treasurer daily, or when he has collected funds.

CAN.

S. C.

ARNPRIOR v. U. S. FIDELITY AND GUARANTY CO.

Idington, J.

Q. 12. (*a*) What means will you use to ascertain whether his accounts are correct? A. Auditors examine rolls, and his vouchers from treasurer, yearly.

(*b*) How frequently will they be examined? A. (*b*) Yearly.

The auditors never had, when these answers were made, in fact examined a single collector's roll and never, in any succeeding year over which by renewals this obligation of respondent extended, was such examination made. The answer was palpably untrue and should not have been made by any one having due regard to his own honour.

It is urged that the mayor was entitled to presume that the auditors had discharged their statutory duty. The mayor had no right to presume any such thing unless and until, as his duty as mayor bound him to do, he had examined and inquired and been in some way misled. It is the duty of the mayor to see that every officer of the corporation is doing his duty. And so far as that related to the duties of an auditor it did not involve a re-examination of the work, but to see that the methods laid down in law therefor had been duly observed.

The respondent was entitled to presume that he had discharged that duty and spoke whereof he knew in answering these questions as he did. It was a matter of fact upon which the bond, as it plainly states, must rest as a condition precedent to liability thereon.

It was, moreover, when read in light of the frame of the question and the agreement quoted above from the foot of the memorandum, an undertaking that the auditors would discharge their clear statutory duty.

That undertaking is made, by the memorandum so signed by the mayor, the basis of the said bond, or any renewal or continuation of the same, and by the terms of the bond itself it is shewn that it was upon the faith of the said statements setting forth the nature and character of the office or position to which the employee had been appointed, the nature and character of his duties and responsibility, and the safeguards and checks to be used upon him in the discharge of said duties, and same being warranted to be true, that appellant entered into said bond; and it is stipulated in said bond that if the statement shall be found in any respect untrue the bond shall be void.

Such must be the result of its untruth unless by reason of the statute which I am about to refer to, that stipulation is rendered inoperative.

Then it is said the bond sued upon was given, as in fact it was given, the following year without any repetition of that statement of fact and undertaking and, therefore, cannot be made a foundation for respondent to rest its defence thereon.

This bond refers as the other had to the employer (*i.e.*, the appellant) having delivered to the respondent

> a statement in writing setting forth the nature and character of the office or position to which the employee has been elected or appointed, the nature and character of his duties and responsibilities and the safeguards and checks to be used upon the employee in the discharge of the duties of said office or position, and other matters, which statement is made a part hereof.

What statement can be referred to if not that which in fact had been delivered by the employer the year before? No other has been suggested, but its identification does not rest upon that alone, for the memorandum above quoted expressly anticipates its use as basis for "any renewal or continuation" thereof.

I think it is no straining of the language used to say it is a renewal of the bond given in 1904 on faith of such answers as already dealt with.

In all its terms save as to dates it is identical.

I, therefore, hold it is founded upon the answers already referred to as delivered in 1904, and respondent entitled to rely thereupon and the assurance given therein and memorandum at foot thereof; subject to what may be set up by virtue of the statutory provisions contained in section 144 of the Insurance Act of 1897.

Turning to a consideration of that section which is the third, if not chief, point relied upon by appellant herein, I think the whole section must be read together and due regard be had to the history thereof if we would correctly interpret and construe any single sub-section thereof.

The words in sub-section 2, "unless such terms, condition, stipulation, warranty or proviso, is limited to cases in which such statement is material to the contract," are pressed upon us as the governing part of the sub-section, and as requiring in

CAN.
S. C.
ARNPRIOR
v.
U. S. FIDELITY AND GUARANTY CO.
Idington, J.

each insurance contract an express statement that "the statement in the application" to be made a possible ground of avoidance of the contract "is material to the contract."

I am unable to see what good the expression of any such statement in the contract could serve. It is quite clear that the insistence of it might become very embarrassing. In the multiplicity of questions often put and answered, many may be properly put and answered in the way of eliciting information, yet when taken alone may be immaterial. Is it to be supposed that the legislature intended that the insurer must under pain of losing the benefit of such answers, select the material from the immaterial and expressly tell the applicant that those immaterial are of no consequence and may be answered falsely or truly as he pleases, for they are of no consequence?

Again he may think quite properly that a question which he deems to be material should be put and answered; and yet a Judge or jury may afterwards take an entirely different view of it and hold it immaterial and then his whole safeguard is gone as to the remaining answers though all may have been found false; for the moment he stipulates by general terms for too much, he loses the benefit of what he would otherwise have been entitled to.

I admit that it would be possible to frame a policy in which each question and answer could be set out and the expressed statement of its materiality be declared, but with an express provision that if found immaterial that would not affect any other, or the stipulation in relation to any other, and so on through the whole complex maze of questions.

I cannot think the insured would benefit much by that sort of a bringing home to his mind which is the only object suggested of expressing in the bond something declaring the materiality of what he was answering. Indeed, taking the words in question literally and trying so to apply them, eventually leads to so many absurdities that I cannot think the object of the legislature was that which is suggested. I, therefore, seek another meaning to the words.

The insured is amply protected by observing the whole scope and purpose of these sections and reading the words relied upon in relation thereto, and so read I see no difficulty. The stipula-

tion, no matter what it is, must only be good or held good so far as it relates to any statement in question which is material and not beyond. In other words I should read it as if the purpose of the sub-section was to limit the operation of such a condition, stipulation, etc., to cases in which it is material. So read the whole sub-section is made operative and to harmonize with the rest of the section and the insured gets the substantial benefit intended. The other way contended for renders the latter part of the sub-section useless and indeed an absurdity.

In any way one can read the curious phrase there are difficulties. Let us choose that presenting the meaning which best accords with the rest of the whole section.

It is said the case of *Jordan* v. *The Provincial Insurance Co.*, 28 Can. S.C.R. 554, is distinguishable because the word "material" appeared in some way in the policy there in question. I do not so read the condition in which it did appear as at all complying with the present contention. It does not profess to do so. It does not specify that any particular statement or set of statements were material. It was rather a stipulation quite independent of what the words I have dealt with seem if taken in the literal way argued for here to require. It simply declared that the fraudulent or misleading statement of a fact material to the contract in the application should render the certificate void, which is quite another thing. It does not earmark, as it were the answers and express anything as to their meaning or import. It does not enlighten the applicant any more than the insured was here.

But it seems quite clear that the principle upon which this Court proceeded in that case, rightly or wrongly, forbids the interpretation contended for. Then since that case or rather the facts upon which it is founded took place the legislature expressly added to sub-section 1 the following:—

(*a*) Nothing herein contained shall exclude the proposal or application of the assured from being considered with the contract, and the Court shall determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the said application or proposal.

This is clearly intended to settle the general scope and purpose of these sub-sections in the way of protection of the insurers in the same way as the respondent claims it is protected herein.

CAN.

S. C.

ARNPRIOR v. U. S. FIDELITY AND GUARANTY CO.

Idington, J.

The insurers were as a class long ago such gross offenders that the legislature had to step in and protect the insured against themselves and the judicial interpretation of the law of contract.

Let us not by disregarding that presumably considered by all men as settled and so acted upon for many years, start another area giving chances to have another crop of gross offenders in the person of the insured class. If the materiality is left to the Courts and juries, as the legislature evidently intended, then both classes of offenders will, it is to be hoped, be kept in such check as equity and good conscience may require.

It is to be further observed that in such cases as presented herein the insured was not in fact the applicant and thus was not brought within the literal terms of the sub-section.

I think the appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—The statutory provisions to be applied are now contained in section 144 of the Ontario Insurance Act. That section is as follows (pp. 443 and 444, Cameron's Life Insurance):—

144. (1) Where any insurance contract made by any corporation whatsoever, within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract, and unless so set out, no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commencement of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary.

(*a*) Nothing herein contained shall exclude the proposal or application of the assured from being considered with the contract, and the Court shall determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the said application or proposal.

(*b*) A registered friendly society may instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein by particular references those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not in the instrument of contract itself set out, and the society shall at or prior to the delivery over of such instrument of contract deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

(2) No contract of insurance made or renewed after the commencement of this Act shall contain, or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing

that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is limited to cases in which such statement is material to the contract, and no contract within the intent of section 2 of this Act, shall be avoided by reason of the inaccuracy of any such statement, unless it be material to the contract.

(3) The question of materiality in any contract of insurance whatsoever shall be a question of fact for the jury, or for the Court if there be no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary, contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity.

(4) Nothing in sub-sections 1, 2, and 3 of this section contained shall be deemed to impair the effect of the provisions contained in sections 168 to 173 inclusive, or the effect of the provisions contained in section 55 of *The Act respecting the Insurance of Live Stock.*

Section 144, sub-section 4, amended by 4 Edw. VII. ch. 15, sec. 5:—

Sub-section 4 of section 144 of the Ontario "Insurance Act," is amended by adding at the end thereof the following words:—

"Or the effect of the provisions contained in the Act of Ontario passed in the fourth year of His Majesty's reign and intituled 'An Act respecting Weather Insurance.'"

"Insurance contract" must be read in connection with section 2, sub-sections 37 and 41, and, it may be observed, includes among other things insurance of property against any loss or injury from any cause whatsoever. I have come to the conclusion that the representations made upon the applications for renewal which were contrary to the fact had the effect of invalidating the contract for renewal upon which the action is brought, and that there is nothing in the relevant enactments disentitling the company to set up such invalidity as a defence. It is unnecessary to consider what would have been the proper construction of sub-section 1 before the enactment of sub-clause (*a*). The effect of sub-section 1 read with sub-clause (*a*) appears to me to be that as regards representations set out in an application or proposal the insurance company is entitled to rely upon the legal rule by virtue of which an insurance contract brought about by misrepresentations of fact material to the contract is thereby invalidated *ab initio*.

I do not think these provisions require that this rule of law should be set out in the contract of insurance. In other

CAN.

S. C.

ARNPRIOR v. U. S. FIDELITY AND GUARANTY CO.

Duff, J.

Anglin, J.

words, I do not think that the statute has made this rule of law inoperative unless it is embodied by an express stipulation in the insurance policy. It cannot, I think, be questioned that the representations referred to are made in a document which is properly described as an "application or proposal" within the meaning of the statute. The statements themselves were made by the appellants for the purpose of the application which was made by their officer. That is sufficient to dispose of the appeal.

ANGLIN, J.:—With not a little reluctance, because not satisfied that the defence which has prevailed is meritorious, I find myself constrained to concur in the dismissal of this appeal.

So far as it deals with the construction of sub-section 2 of section 141, of the Insurance Act (R.S.O. 1897, ch. 203), I am, with great respect, convinced that the decision in *Jordan* v. *Provincial Provident Institution*, 28 Can. S.C.R. 554, was wrong and that the *Village of London West* v. *London Guarantee and Accident Co.*, 26 O.R. 520, was rightly decided. But I feel bound to follow the *Jordan* case, 28 Can. S.C.R. 554, until it has been reversed by competent authority. In view of the certificates given on behalf of the municipal corporation when renewals of the policy in question were obtained, it may be that sub-section 2 would not aid it, if construed as it contends it should be.

On the other questions involved in the appeal I have found no reason to differ from the conclusions reached in the Appellate Division of the Supreme Court of Ontario.

Appeal dismissed with costs.

SASK.

S. C.

CORISTINE LIMITED v. HADDAD.

Saskatchewan Supreme Court, Newlands, Elwood, and McKay, JJ.
March 20, 1915.

1. DEPOSITIONS (§ I—4c)—MATERIAL WITNESSES—RESIDENT IN OTHER PROVINCE—APPLICATION TO TAKE EVIDENCE—PLAINTIFF CO. EMPLOYING AND MAKING APPLICATION—APPLICATION BONA-FIDE.

Where material witnesses are resident in another province and cannot be compelled to leave that province to give testimony at the trial, the fact that such witnesses are in the employ of the plaintiff company on whose behalf the application is being made to take their evidence under commission will not disentitle the company to an order to take the evidence where the court is satisfied that the application is *bona*

fide, that the witnesses can give material evidence and that the examination will be effectual.

[*Murray* v. *Plummer*, 11 D.L.R. 764; *Fidelity Trust Co.* v. *Schneider*, 14 D.L.R. 224, distinguished.]

SASK.

S. C.

CORISTINE LIMITED v. HADDAD.

APPEAL from an order dismissing the application of the plaintiff to examine witnesses in Montreal.

F. L. Bastedo, for appellant.

B. T. Graham, for respondent.

The judgment of the Court was delivered by

McKAY, J.

McKAY, J.:—The plaintiff is an incorporated company, carrying on business in the city of Montreal, in the province of Quebec, and the defendant resides in the judicial district of Swift Current, in this province.

The plaintiff sues for $350, being the amount of an account claimed to be due and owing by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, namely, one Persian lamb jacket, $350. The plaintiff also claims interest on this amount at the rate of 8% per annum, agreed to be paid by the defendant.

The defendant denies the plaintiff's claim; and, in the alternative, sets up that the plaintiff warranted and guaranteed the jacket to be first-class, etc., but that the jacket delivered did not fulfil the terms of the guarantee, etc., and, in the further alternative, pleads sec. 16 (1) of ch. 147, R.S.S. (Sales of Goods Act), and that the jacket is not reasonably fit for the purposes required, etc.; and that, after notice of its defects, setting them out, he returned the jacket to the plaintiff, and that it is still in the possession of the plaintiff; and also pleads non-fulfilment of sec. 10 of ch. 73, R.S.S. (Foreign Companies Act). In reply, the plaintiff joins issue, and claims that the jacket has been returned to defendant after having been repaired, and sets out facts to shew that the Foreign Companies Act does not apply herein.

I give the above summary of the claim and defence to shew that there is nothing of a complicated nature in this action—in fact, it is an ordinary action on an account.

The plaintiff has no absolute right to give the evidence of its witnesses otherwise than in open Court before the trial Judge, but r. 365, under which the application is made, reads:—

The Court or judge may, in any cause or matter where it shall appear *necessary for the purposes of justice*, make any order for the examination

SASK.

S. C.

CORISTINE LIMITED v. HADDAD.

McKay, J.

upon oath before the Court or judge, or any officer of the Court, or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

This is a copy of the English rule, and the practice under the English rule is stated (with authorities cited) in the Annual Practice, 1915, p. 656.

It seems to me that all the propositions are fully satisfied by the affidavit filed in support of the application, made by the director of the plaintiff company. Apart from the fact that he expressly swears the application is made *bona fide*, I am satisfied it is so made, and he shews that the issues are such as the Court ought to try, and that the witnesses can give material evidence, and that the examination will be effectual.

The affidavit also satisfies me that the plaintiff cannot compel the attendance of these witnesses at the trial. The director swears he has asked them if they would be willing to go to Swift Current to attend the trial of this case, and they both state that they are unable to go, owing to family as well as business reasons, and they are not willing to go to Swift Current to give evidence in this action. Now, it seems to me this is the best of reasons that they cannot be examined at the trial—namely, that they cannot be compelled to attend. Although they are both in the employ of the plaintiff company, it is not shewn that the plaintiff could compel their attendance, and I see no way by which the plaintiff could do so; and the fact that they are in the employ of the plaintiff is not a conclusive reason for refusing the application. [Reference to *Cock* v. *Allcock*, 21 Q.B.D. 1, 180.]

The plaintiff depends upon the evidence of these two witnesses to make out his case, and they refuse to attend trial; it cannot compel them to attend and it asks that their evidence be taken under r. 365.

On the other hand, the defendant urges that, as there is likely to be a conflict of evidence, the trial Judge should be in a position to study the witnesses on both sides, their demeanour, etc., and that, as he intends to attack the veracity of the witness Kosh, it will be impossible for him to sufficiently instruct foreign counsel without going to Montreal.

It must be at once conceded that these are very strong objec-

SASK.

S. C.

CORISTINE LIMITED v. HADDAD.

McKay, J.

tions, but I do not think they are sufficient for refusing the order in this particular case. As to the latter objection, I think that, as the issues raised are not of a special or difficult nature, counsel in Montreal can be sufficiently instructed to carry out an effective cross-examination. As to the former, all commission evidence is subject to the same objection. I thoroughly realize the importance of having all evidence, if possible, taken before the trial Judge, and that this practice should not be lightly departed from. But occasions will arise when we must, for the purposes of justice, depart from this well-established practice, however reluctantly we may do so. One of the leading cases in the matter of issuing commissions to take evidence abroad is *Cock* v. *Allcock*, already referred to. [Reference to statement of Lord Esher, M.R., at p. 181.]

Under the circumstances of this particular case, I am of the opinion that the refusal of the application would be depriving the plaintiff of not only "reasonable facilities for making out its case," but the only means it has of making out its case and thereby doing it a positive injustice.

I have carefully examined the authorities referred to by the learned District Court Judge, and it seems to me all these cases can be distinguished from the case at bar. In three of these cases there was an element of fraud.

[Reference to *Murray* v. *Plummer and Lockhart*, 11 D.L.R. 764; *Fidelity Trust Co.* v. *Schneider*, 14 D.L.R. 224, 25 W.L.R. 611; *Union Investment Co.* v. *Perras*, 12 W.L.R. 76; *Canadian Ry. Accident Ins. Co.* v. *Kelly*, 8 W.L.R. 738; *Toronto Mfg. Co.* v. *Ideal House Furnishing*, 17 W.L.R. 621.]

It was suggested that we ought not to disturb the discretion exercised by the learned District Court Judge in refusing the order; in answer to this I quote Cotton, L.J., in a similar application: *Berdan* v. *Greenwood*, L.R. 20 Ch.D. 767. . . .

On the whole, I am of the opinion that this appeal should be allowed, and the order of the learned District Court Judge reversed. Costs to be costs in the cause throughout.

Appeal allowed.

ALTA.

S. C.

Re CHRISTENSON.

Alberta Supreme Court, Harvey, C.J. February 22, 1915.

1. EVIDENCE (§ II M—363*d*)—PRESUMPTIONS—INTESTACY.

The presumption is that a testator intended to dispose of his entire estate and not to die intestate as to the whole or any part thereof. [40 Cyc. 1409, referred to.]

Statement

MOTION to construe a will.

J. F. Lymburn, for the widow.

W. J. A. Mustard, for the executor.

Harvey, C.J.

HARVEY, C.J.:—The will of the deceased is on a blank printed form, and the blanks appear to be filled in by some one who was not a professional man. The printed part relating to the disposition of the property is as follows:—

First, I give and direct that my execut hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be. Second, after the payment of such funeral expenses and debts I give, devise and bequeath. (Then follows a considerable blank space followed by the clause for appointment of executor.) Lastly, I make, constitute and appoint to be execut of this my last will and testament, hereby revoking all former wills by me made.

The first clause is filled in to read "executors." The second clause has the following words written at the end, "to Jens Buhl of Lindsay Platte Co. Nebraska." And the blanks in the last clause are filled in, "Jens Buhl of Lindsay Platte Co. Neb." and "tor." One witness is described as of Lindsay, and the other as of Omaha, Nebraska. The will is dated April 20, 1914, and the testator is described as of Edmonton, Alberta. The testator left a widow, but no children. The widow now asks for a declaration that there is an intestacy under the will, in which event she would be entitled to the whole estate after payment of debts. I have no evidence before me as to the extent of the debts, but it is admitted by counsel that the whole estate consists of a half interest in a lot in Edmonton worth a few hundreds of dollars and the rights under a homestead entry made by the testator during his lifetime.

In Jarman on Wills, ch. XII., it is stated that

In the construction of wills the most unbounded indulgence has been shewn to the ignorance, unskilfulness and negligence of testators;

and that

In modern times instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly.

In 40 Cyc. 1409 it is stated that

> The presumption is that a testator intended to dispose of his entire estate and not to die intestate as to the whole or any part thereof.

Now, the terms of the will leave no room to doubt that the testator had no intention of leaving anything to his wife, and therefore, if there is an intestacy, effect will not be given to any expressed intention. It is also clear that he did intend to give something to the person whom he names as his executor. The extent of such gift, however, is not made clear in language ordinarily used. We might add after the disposing clause, "my homestead rights," or "my interest in the Edmonton lot," or "one hundred dollars," and then we would have a sentence of common language with a definite meaning, any one of which dispositions, however, would leave an intestacy in part, and for no one of which is there the slightest support in the will. We might also add the words, "all my property," which would leave no intestacy, but for which I see almost as little warrant.

However, taking the language as it is, it appears to me that the words, "after payment of such funeral expenses and debts," form an elliptical expression leaving something understood. If anything such as I have suggested were added, the words to be understood appear to me to be some such words as these, "out of what is left of my property," and there being no such words at the end, the words to be understood perhaps should be, "what is left of my property," and we would have the clause reading, "what is left of my property after the payment of such funeral expenses and debts I give, devise and bequeath to Jens Buhl," which would be a complete disposal of everything. This is, perhaps, not really filling in any words, but merely reading words which are clearly omitted and must be understood on the presumption, which appears justified, that the testator intended something. Something of this sort appears to have been the view of Bacon, V.-C., in *Perkins* v. *Fladgate* (1872), L.R. 14 Eq. 54, 41 L.J. Ch. 681, where he held that the words, "after these legacies are paid I leave to my sister, Mary Perkins, without any power or control whatever, of her husband John Perkins," disposed of the residue, being of opinion that the testator intended to dispose of all his property; in other words, presuming against intestacy.

Perhaps it would be sufficient to decide the case on this

ALTA.

S. C.

RE CHRISTENSON.

Harvey, C.J.

reasoning, but there is another aspect which appears to lead to the same conclusion.

Prior to the Wills Act of 1830 (1 Wm. IV. ch. 40), the executor took beneficially any undisposed of property, but by that Act it was provided that thereafter he should not do so unless it appeared by the terms of the will that he was to take it beneficially. Though at that time the executor only took the personalty, now that real property goes to him and is disposed of as personalty I think the principle may be treated as general. In the present case it is clear that the testator intended to benefit the executor, and though it may be argued that he has not shewn his intention to benefit him as to all the property, still there appears to me much force in the view that the intention is clear enough to prevent the operation of the statute. Considering all the grounds I have mentioned, I have come to the conclusion, though not without some feeling of doubt, that the proper construction of the will is one which declares that Jens Buhl, the executor therein named, takes the whole beneficial estate.

I have less feeling of doubt that this construction gives effect to the real intention of the testator than I have as regards his expressed intention by reason of the facts which I have now to consider.

By this construction the widow is deprived of all benefit under the will, and she now applies for relief under the Married Women's Relief Act (ch. 18 of 1910, 2nd sess.). By this Act, if the widow takes less under the will than she would take in the event of intestacy, the Court may make her such allowance out of the estate as may be just and equitable, and to that extent set aside the testator's disposition.

Section 10, however, provides that

> Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act.

It is contended that this means that what would be a complete defence to an action for alimony will be a complete defence to an application such as this.

In her affidavits in support of this application the widow states that she is 33 years old and has two sons of 10 and 12 years of age, the offspring of a former marriage, that she has no property for the support of herself and her sons except a half interest in an

Edmonton lot transferred to her by deceased and her dower rights in some property in the United States, that she married her husband in June, 1910, in Montana, and came with him to Alberta in August following, where she remained in Edmonton, and he went on to a homestead. She says that at the time of the marriage he owned a ranch in Montana and some cattle, and that she had some cash and chattels, and that she advanced him certain sums which he never repaid.

I am of opinion that I need not consider these claims for moneys advanced, for if they were not gifts she can make her claim for the return against the estate.

In June, 1911, she brought action for alimony against the deceased. This action was settled by an agreement between the parties made on October 18, 1912, by which the defendant gave the plaintiff in settlement of her claim a one-half interest in the Edmonton lot to which reference has been made, which lot, apparently, was practically all the property he had.

By the agreement, the widow, the then plaintiff,

> expressly covenants and agrees that she will not at any time hereafter make any claim whatsoever against the party of the second (? first) part for alimony or support and by these presents hereby releases the party of the first part from all claims or rights against the real or personal property of the party of the first part which she may have or may hereafter acquire by reason of being the lawful wife of the party of the first part.

It is admitted by counsel that after the marriage the ranch in Montana was sold by deceased without the knowledge of his wife, but whether before or after the agreement does not appear. It is in respect of that that the widow has an action now pending in the Montana Courts claiming dower rights. It seems probable the property was sold before the agreement and the proceeds put in the lot in Edmonton, since that was all the property of the deceased at the time of his death for which he had expended money. If the widow succeeds in establishing her right to dower she will have a life interest in a one-third share in that property, of which, if the proceeds were all used in purchasing the Edmonton lot, she has already had a half interest absolutely. Prior to ch. 13 of 1901, by which the wife takes all of the property of a deceased husband who dies intestate leaving no children, she took only a one-half interest.

It may be assumed that the reason for the change of the law in this respect was due to the fact that in this new country the wife

ALTA.

S. C.

RE CHRISTENSON.

Harvey, C.J.

frequently, if not generally, does as much towards acquiring the property as the husband, and that if he had made a will he would probably have left it all to her when he had no children.

Both of these reasons are absent here. The wife, if she lived with her husband at all, did so only for a few months, and probably furnished little if any assistance towards acquiring the property he left. He did make his will and did not leave her anything. He had already provided for her in a manner which was apparently satisfactory to both, and which gave her what under the former law would have been as much as she would have taken at death in intestacy, which, if he were near her own age, might reasonably have been expected not to occur for many years.

Without deciding definitely whether the agreement is binding, or, if so, would be an absolute bar to the present application, I am of opinion that the applicant has not made out a case such as would justify me, in the interests of justice and equity, in interfering with the testator's disposition of his estate.

The costs of the application for construction of the will should, I think, come out of the estate, even though that involves the payment by the successful party. I see no reason, however, why the other application should not be paid by the unsuccessful party, and as they were both treated practically as one I will dispose of both without costs.

Order accordingly.

CAN.

S. C.

HUGHES v. NORTHERN ELECTRIC AND MANUFACTURING CO.

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

1. CORPORATIONS AND COMPANIES (§ IV D—460)—COMPANY'S INDEBTEDNESS—MORTGAGE — CONSIDERATION REAL AND EXPRESSED—MORTGAGE ULTRA VIRES—STOCKHOLDERS.

The discharge of the company's indebtedness and the securing of financial aid to the company for the future may be shewn to be the real consideration for a mortgage given by the company on two of its three stockholders selling out their holdings to the third, although the expressed consideration of the mortgage was the price fixed for such holdings; such mortgage made by a mining company when it had no other means of procuring money for operating is not *ultra vires* even as to the excess of the expressed consideration above the indebtedness assumed and paid off or cancelled by the arrangement so made by the continuing stockholder.

[*Northern Electric* v. *Cordova Mines*, 31 O.L.R. 221, reversed; *Trevor* v. *Whitworth*, 12 A.C. 409, and *G.N.W.* v. *Charlebois*, [1899] A.C. 114, distinguished.]

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 31 O.L.R. 221, *sub nom. Northern Electric and Mfg. Co.* v. *Cordova Mines*, reversing the judgment at the trial in favour of the defendants.

Wills & *Wright*, for the appellants.

McKay, K.C., for the respondents.

SIR CHARLES FITZPATRICK, C.J. (dissenting):—I agree with Mr. Justice Idington. Sir Charles Fitzpatrick, C.J. (dissenting)

DAVIES, J.:—I agree with Mr. Justice Duff. Davies, J.

IDINGTON, J. (dissenting), was of opinion, for reasons given in writing, that the appeal should be dismissed, the cross-appeal allowed with costs throughout, and the declaration made as prayed for and injunction granted with such references as needed to work out the result. Idington, J. (dissenting)

DUFF, J.:—The appellants, Hughes and Mackechnie, and the respondent, Kirkegaard, were the owners of a mining property in the township of Belmont, which they transferred to Cordova Mines Ltd. (a company they had incorporated for the purpose of acquiring the property) in consideration of the issue to themselves and their nominees of all the authorized capital stock of the company fully paid. Duff, J.

Cordova Mines, Ltd. having issued all its capital stock in payment for the mine, it was necessary that money should be borrowed to carry on operations. These operations were extensive and were made possible by loans to the company from Hughes, Mackechnie and Kirkegaard in equal shares. In April, 1912, Cordova Mines, Ltd. was indebted to Hughes, Mackechnie and Kirkegaard in respect of these loans, including moneys then advanced to the extent of over $43,000.

At this time Hughes, Mackechnie and Kirkegaard had drifted apart in their ideas as to the policy to be adopted in carrying on the company's affairs. Hughes and Mackechnie were on one side, Kirkegaard on the other. None of them was willing to advance more money unless his policy was adopted. A deadlock ensued. This deadlock was finally broken and the continuance of operations secured by an arrangement whereby

CAN.
S. C.
HUGHES v. NORTHERN ELECTRIC AND MFG. CO.
Duff, J.

Hughes and Mackechnie sold their shares to Montgomery, who was Kirkegaard's solicitor and trustee, for $60,000, payment of this amount to be secured by a mortgage from the company to Hughes and Mackechnie on the mine. Kirkegaard was to provide for the proper operation of the mine and to spend at least $3,000 per month in its development.

The form in which this arrangement was expressed and carried out consists of (1) an agreement between Hughes and Mackechnie of the first part, Joseph Montgomery, trustee, of the second part, and Peter Kirkegaard of the third part, dated April 23, 1912; (2) a supplemental agreement between Hughes and Mackechnie of the first part and Joseph Montgomery of the second part, dated 30th April, 1912; and (3) a mortgage from Cordova Mines Ltd. to Hughes and Mackechnie, dated April 30, 1912.

The substance of the arrangement, so far as it affected the company, was set out and embodied in a minute of its directors held on April 30, 1912, as follows:—

> It was explained to the meeting that all moneys required by the company for expenses had heretofore been advanced by the three directors equally, and Messrs. Hughes and Mackeeknie did not now desire to continue making advances, but were willing to dispose of their stock to other parties who were willing to guarantee the payment of the purchase price by a mortgage on the company's property, and it was considered advisable in the interests of the company that this should be done provided all shareholders consented thereto.

All the shareholders of the company concurred in this arrangement.

It was part of the agreement that the sum of $43,000 owing by the company was to be wiped out. All the debts owing by the company at the time of the arrangement were paid, and it was not contemplated that any further debts should be incurred. On the contrary, it was expressly provided that until the first payment had been made on the mortgage, all costs and expenses should be paid by Montgomery and his associates so as not to become a lien or charge on the company's property.

The result of the transaction was to free the company from its overdue debt of $43,000, and to obtain for it the new advances necessary for carrying on its operations and improving its property.

Hughes and Mackechnie, in pursuance of the agreement, transferred their shares to Montgomery, Kirkegaard's solicitor and trustee, and Kirkegaard proceeded to operate the mine and advanced to the company large sums of money for that purpose. He and others associated with him made payments on account of the purchase money on the shares amounting to $19,000 or thereabouts to Hughes and Mackechnie. Thereafter the mortgage having fallen into arrear Hughes and Mackechnie, the appellants, brought proceedings against Cordova Mines Ltd. on the mortgage and on April 30, 1913, upon consent of the company, judgment was pronounced for the immediate sale of the mortgaged premises and directing possession to be delivered to Hughes and Mackechnie.

More than a year after the mortgage, the company incurred a debt to the plaintiff, respondent, the Northern Electric & Man. Co. Ltd. The present action was brought by the plaintiff, respondent (*a*) to recover from the company the sum of $817.09 in respect of goods sold to it; (*b*) to have it declared that the mortgage above mentioned was illegal and *ultra vires* and a fraud as against the creditors of the company including the plaintiff, respondent, and that the consent judgment in the mortgage action brought by appellants was also void.

On September 11, 1913, Cordova Mines Ltd. and Peter Kirkegaard filed a defence to this action. They admitted the debt owing by Cordova Mines Ltd. to the Northern Electric & Man. Co. Ltd., but denied insolvency and denied that the mortgage was illegal or fraudulent.

Since the commencement of this action judgment by default was obtained by the respondents, the Northern Electric & Man. Co. Ltd., on September 22, 1913, for the sum of $817.09 against the mining company and execution was issued in respect of this debt on September 26, 1913.

At the trial Cordova Mines Ltd., having changed its solicitors, asked leave to amend its defence, and, after most of the evidence was in, a new defence on the part of Cordova Mines Ltd. was filed, denying the making of the mortgage, saying that if made it was *ultra vires* and void, and claiming that it should be set aside.

CAN.

S. C.

HUGHES v. NORTHERN ELECTRIC AND MFG. CO.

Duff, J.

Mr. Justice Middleton delivered judgment dismissing the action as against all the defendants (other than the defendant, Cordova Mines Ltd. against whom judgment had already been entered as stated above for $817.09) and declaring that the mortgage in question was a good and valid mortgage, and ordering the plaintiffs to pay to the defendants (other than the defendant Cordova Mines Ltd.), their costs.

The plaintiffs, the Northern Electric & Man. Co., Ltd., appealed to the Appellate Division; Cordova Mines, Ltd. did not serve any notice of appeal, but counsel for it appeared on the argument.

The Appellate Division on April 6, 1914, allowed the appeal in part, declaring that the *mortgage was ultra vires to the extent that it exceeded the liabilities of the Cordova Mines Ltd.* cancelled by the arrangement made at the time the mortgage was given, but valid to the extent of such liabilities.

It is no longer seriously argued that the mortgage is impeachable as in fraud of creditors.

I have not been able to discover any solid ground upon which the plaintiff obtains a *locus standi* to attack a transaction as *ultra vires* which was entered into a year before he became a creditor of the company. Another question ought to be disposed of *in limine* which is suggested by the dissenting judgment of Mr. Justice Riddell. It is the question whether the judgment of the second Appellate Division ought not to be reversed and the action dismissed on the ground that it was not competent for Mr. Justice Middleton to amend the pleadings in such a way as to permit the company being a party defendant only to attack the mortgage as *ultra vires*. I do not think it is necessary to pass upon the question whether or not on a proper construction of the Ontario Judicature Act and the Consolidated Rules the learned trial Judge had power to make the order he did make. I do not think that question arises. The learned trial Judge exercising such of the powers of the Supreme Court of Judicature for Ontario as were vested in him as trial Judge had, unquestionably, power and authority to hear and pass upon an application by one of the parties for leave to make such an amendment and as necessarily involved therein to adjudicate

upon the question whether or not the authority conferred upon him by the Consolidated Rules was broad enough to enable him to make such an order. It seems to be quite clear that he did pass upon that question, that he held authority to be vested in him to grant the amendment and to adjudicate upon the issue raised by the amendment as trial Judge. It seems obvious enough that neither the learned trial Judge nor any of the counsel present supposed that he was trying the issue as arbitrator or in a proceeding *ex viâ* or *ultra vires* or in any manner contrary to the course of the Court. It may be added that the learned trial Judge having tried the issue and pronounced judgment upon it, it seems self-evident that this judgment necessarily involved an adjudication to the effect that he had jurisdiction to pronounce it, an adjudication which as that of a Judge exercising the authority of a Superior Court of general jurisdiction to decide upon the scope of its own jurisdiction is binding upon the parties until reversed on appeal. The judgment of Mr. Justice Middleton was not challenged, as I understand it, in the Court of Appeal by either of the parties on the ground that he had not jurisdiction to pronounce it, and having regard to what took place at the trial I do not think it would have been open to either of them to raise that question. For the same reason I think the point is not open here; and it may be added indeed that the question was not raised by either of the parties in this Court.

As to the merits. It is, of course, not contended that the mortgaging of its property for the purpose of securing the payment of the purchase price of shares bought by one of its shareholders for his own benefit would in itself, special circumstances apart, be within the powers of this company; but the broad common sense of the matter seems to be that the company being overwhelmed with debts, the shareholders being involved in disagreements, making effective administration impossible, and the plan which was proposed and carried out promising an escape from these difficulties and prosperity for the company's undertaking as against ruin otherwise certain, the transaction ought not to be regarded as outside a reasonable application of the doctrine of *ultra vires* merely because it involved as one of its

CAN.
S. C.
HUGHES
v.
NORTHERN ELECTRIC AND MFG. CO.
Duff, J.

incidents as part of the consideration moving to one of the shareholders for services in procuring payment of the company's debts and further advances to enable it to carry on its business a guarantee or payment of a limited part of the purchase price of shares in the company, the purchase of which was of the very essence of the plan decided upon. The two points to be considered in every such question are, first, is the power to enter into the challenged transaction, if not expressly given, *primâ facie* vested in the company by implication as being reasonably necessary to enable the company to carry on its authorized undertaking? And secondly, if notwithstanding it is *primâ facie* given by implication from necessity is it the proper inference from all the instruments defining the company's objects and powers and prescribing the regulations for the conduct of its business that such a power has been denied? On the first question, Lord Blackburn's observation in *Mackay* v. *Dick*, 6 App. Cas. 251, to the effect that in business "impossible" and "impracticable" are convertible terms should be borne in mind. "Necessary" here means necessary in the business sense. I think the observation of Lord Macnaghten in *Parkdale Corporation* v. *West*, 12 App. Cas. 602, quoted in Mr. Shepley's factum, are pertinent; and I think a case of necessity in this sense has been abundantly established. As to the second point, our attention has not been called to any provision of the Ontario Companies Act expressly forbidding such a transaction, and I do not think any argument has been advanced which goes very far to establish ground for implying such a prohibition. It seems to have been assumed in the Court below that the transaction is by analogy to be treated as governed by the rule (judicially established) which incapacitates a company from purchasing its own shares in the absence of authority expressly given. With great respect, I am unable to discover the analogy.

There is another ground, however, upon which, in my judgment, the attack fails. As mentioned above the company was at the time of the transaction indebted to the three persons interested in the sum of $43,000. It was admittedly a part of the arrangement that this debt was to be wiped out or merged in the mortgage debt and I think it is clear that such was the effect of

the transaction. It would, of course, have been within the power of the company in the circumstances existing to have procured the discharge of its liabilities by a tender at the price of $60,000 and to have given a mortgage to secure this sum. If the transaction had taken that form with the consent of all the shareholders and parties interested, it would have been unimpeachable. Again, the transaction might have taken the form of a mortgage securing the payment of $43,000 to the mortgagees the amount of the company's liabilities discharged and of a further sum of $17,000 for the benefit of the purchaser as in part payment of the purchase price of shares. If it had taken this latter form nobody would have thought of disputing the validity of the mortgage as a security for the sum of $43,000; and I understand the majority of the Court of Appeal to have held that to the extent to which liabilities of the company were in fact discharged by the parties to the arrangement, the mortgage ought to be treated as a valid security. Now, it appears to me to be indisputable that as the transaction could have been expressed in such a form as to make it unimpeachable as a security for $43,000, that is to say, as the transaction in its substance was to that extent *intra vires* and inexpugnable, any objection based upon the form of it must have been curable by a subsequent agreement between the parties declaring that the mortgage should stand as security for this sum of $43,000. In fact as mentioned above, the sum of $19,000 has been paid by Kirkegaard and had been paid by him at the date when judgment was recovered against the company in the foreclosure action. It appears to me to follow that the judgment in the foreclosure action must be held to have precisely the effect of an agreement such as I have suggested. The decision of the Judicial Committee in *Great North-Western Central R. Co.* v. *Charlebois*, [1899] A.C. 114, appears to be beside the point. In the transactions which came into question in that case the persons having control of the company sought by a consent judgment to impart legal authority to arrangements which, in their essence were of such a character that the company had no power to enter into them. The impeached transactions had been made to assume a form in which on the surface they appeared

CAN.
S. C.
HUGHES
v.
NORTHERN ELECTRIC AND MFG. CO.
Duff, J.

to be within the powers of the company. The consent judgment was only the final step in the scheme which from its commencement was never anything else but a fraud upon the company's powers. Their Lordships held that the judgment being a consent judgment could take no higher validity than the *ultra vires* agreement upon which it was based.

The principle of that decision can, I conceive, have no application to this case where the transaction to which the judgment gives effect is in so far as effect is given to it by the judgment unimpeachable in substance; and for the short reason that it was not beyond the powers of the company but within the powers of the company by a valid agreement to disembarrass the transaction of the objectionable features which concerned the form of it alone and to giving legal and binding effect to the substance of it.

For these reasons I think the appeal should be allowed and the judgment of Mr. Justice Middleton restored.

Anglin, J.

ANGLIN, J., also, for reasons given in writing, thought that the learned trial Judge was right, and his judgment should be restored and the appellants should have their costs in this Court and the Appellate Division.

Brodeur, J.

BRODEUR, J.:—I concur in the opinion of my brother Duff.

Appeal allowed.

ALTA.
S. C.

Re CUST.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Walsh, JJ. February 16, 1915.

1. TAXES (§ V A—180)—SUCCESSION TAX—DIRECT TAX—PROVINCIAL JURISDICTION.

So far as it relates to property within the Province of Alberta, the Succession Duties Ordinance provides a scheme of direct taxation and is within the competence of the provincial legislature.

[*Cotton* v. *Rex*, 15 D.L.R. 283, [1914] A.C. 176; *Rex* v. *Lovitt*, [1912] A.C. 212, considered; *Re Cust*, 18 D.L.R. 647, reversed.]

Statement

APPEAL from a judgment of Beck, J.

O. M. Biggar, K.C., and *G. P. O. Fenwick*, for the Attorney-General.

Frank Ford, K.C., for Dinwoodie.

E. B. Edwards, K.C., for the executors, respondents.

The judgment of the Court was delivered by

HARVEY, C.J.:—An application was made to Mr. Justice Beck by the executors of the will of the deceased to determine whether the succession duty payable under the Succession Duties Ordinance in respect of specific lands devised should be paid by the devisee or by the executors out of the residue. Upon the argument, in some manner the question of the validity of the Ordinance arose, and the Attorney-General of the province was notified. After further argument at which he was represented, the learned Judge decided that the Ordinance was *ultra vires* the Legislature, on the ground that the duties were indirect taxes. The Attorney-General now appeals.

The deceased at the time of his death was domiciled within the province, and all of the property he left was physically situate within the province, so we are not confronted with any set of facts similar to that in any of the several cases that have been decided by the Judicial Committee, but the learned Judge bases his conclusion upon some of the statements and reasoning in the judgment delivered by Lord Moulton in *Cotton* v. *Rex*, [1914] A.C. 176, 15 D.L.R. 283.

In that case the question to be determined was whether duty in respect of certain moveable property locally situate in the United States of America was payable to the province of Quebec, where the deceased was domiciled at the time of his death. There were two grounds of objection urged: first, that the Quebec statute did not apply to such property, and secondly, that if it did it was *ultra vires*. The judgment of the Privy Council decides that the statute does not apply and that the appeal should be allowed. It then proceeds to deal with what by virtue of that decision had become a hypothetical case covered by the second branch of the argument. It is in this second branch of the case that the reasoning and statements relied on by the learned Judge appear. It is urged by counsel that, inasmuch as the *Cotton* case was decided on the ground first mentioned and could not have been decided on the second ground since there were no facts existing in the case to support that branch of the argument, this Court should not feel itself bound by that part of the judgment. I cannot accept this view. The fact that, having decided that the Act did not intend to tax property out of the province, it was immaterial to the disposition of that case to decide what would

ALTA.

S. C.

RE CUST.

Harvey, C.J.

be the result if the Act had so intended, appears to me a stronger reason why a subordinate Court should feel itself bound by such last-mentioned decision, because it must have been intended as a guide for future legislation or decisions. That this is the case is also apparent from a statement in the judgment on p. 187 (15 D.L.R. 287):—

> The latter of the two questions is of the greater practical importance, in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the Province," so that a decision depending on the presence of these words would have no application to the present state of legislation.

I am of opinion, however, that the expressions used in the judgment must be deemed to refer to the matter under consideration, and that there would be great danger in assuming that they were intended to have any wider application. Thus, when it is said on p. 195 (15 D.L.R. 293),

> The whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons,

which, in the opinion of the Committee, determines that they are indirect taxes, it seems to me that it must be considered that the succession duties referred to are those under consideration imposed upon property locally situate outside the province, for the illustration given is that of taxes on property in New York, and these remarks are prefaced by this statement appearing on p. 193 (15 D.L.R. 292):—

> It remains to consider whether the succession duty imposed in the present case would be within this definition (i.e. of "direct taxation") if it be taken that the duty is imposed on all the property of the testator *wherever situate*.

The conclusion reached, therefore, on that branch of the *Cotton* case, can have no application here, since the only question here is in respect to duty on property in the province. Moreover, the reasoning does not, to my mind, apply to the Ordinance in question here.

After quoting certain provisions of the Quebec statute, the judgment proceeds as follows, p. 194 (15 D.L.R. 293):—

> Their Lordships can only construe these provisions as entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration who may (and as we understand in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or more accurately from the person interested therein.

The plan of our Ordinance is entirely different from that. Instead of a person who has no claim to or interest in the estate being called on to pay the duties, they are payable by the executor or administrator, who is, under our law, the legal owner of all the estate, both real and personal, and whose duty it is to pay all the debts and other liabilities of the estate, not out of his own property, but out of the assets of the estate in his hands. As to duty in respect to property in the province, he has no need to go to any one to recover the duties paid, because he pays them out of the property itself, which is directly liable. It may happen that a specific property is bequeathed in respect to which there is duty payable. In such case the Ordinance (sec. 19) gives the beneficiary the option of paying the duty and taking the whole property, but it is the duty of the executor either to deduct the duty or collect it before delivering the property to the beneficiary.

The executor or administrator, before the grant of probate or administration, is required to give a bond for the payment of the duty (sec. 6), but it is limited to the payment "of any duty to which the estate of the deceased coming into the hands of the said executor or administrator may be found liable." This is the only personal liability that is imposed on the executor or administrator, and it is no more of a personal liability than is imposed by the bond to be given by an administrator before grant of administration to administer the estate according to law.

Eighteen months is allowed for payment of the duties, with provision for an extension of time in the case of estate not coming into the hands of the executor or administrator at once, thus making ample provision to obviate the necessity of the executor being required to pay otherwise than out of the assets of the estate. The executor or administrator is usually referred to as the personal representative. Inasmuch as by our law he takes the real as well as the personal estate, the word "personal" may be dropped, and he is the *representative* of the estate or of those entitled to the benefit, and any payment of liability of the estate made by him is as much a direct payment by the estate or the beneficiaries as any payment made through an agent or other representative can be. Under these provisions the duties appear to come within the definition of direct taxation as accepted in the *Cotton* case, and this appears to have been the conclusion

ALTA.
S. C.
RE CUST.
Harvey, C.J.

reached in *Rex* v. *Lovitt*, [1912] A.C. 212, in which the question was whether duty was payable under the New Brunswick statute upon moneys deposited in a bank in that province the property of a person who died domiciled in Nova Scotia. It was contended on the argument that the statute was *ultra vires* in attempting to impose duties on such property. The Judicial Committee held that the property was in the province of New Brunswick and that the duty was payable under the statute.

The provisions of the New Brunswick statute referred to in the judgment are to the same effect as the provisions of our Ordinance, and it is stated in the judgment at p. 223 that

> These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator.

If it is within the power of the province to levy the duty when only the property is within the province, it certainly could not be less within its power when the owner at the time of his death is domiciled within the province.

It is quite clear that there was no intention in the *Cotton* case to qualify the decision in the *Lovitt* case, for Lord Moulton says, on p. 196, "in the case of *Rex* v. *Lovitt* no question arose as to the power of a province to levy succession duty on property situated outside the province," which remark also indicates that all that they intended to deal with in the *Cotton* case was such power. I am of opinion, therefore, that the present case is really governed by the *Lovitt* case, which appears to me to establish the validity of the Ordinance so far as it levies duties on property within the province. This also was the opinion of Mr. Justice Clement, the distinguished author of a work on the Canadian Constitution, in *Re Doe* (1914), 16 D.L.R. 740, the only case to which my attention has been directed in which the province's power as regards property in the province has been heretofore questioned.

In the numerous cases which have been dealt with by the Privy Council there has been no suggestion that the Acts were invalid *in toto*, but only so far as they were beyond the power of the Legislature, and even if some of the provisions of the Ordinance

ALTA.
S. C.
RE CUST.
Harvey, C.J.

are *ultra vires* I see no reason why the provisions which are *intra vires* should not be valid.

In all the cases on succession duties the matter has been dealt with as one of taxation simply, but it appears to me that in so far as the law is one dealing with property in the province, it might be considered under the head of "property and civil rights in the province," a subject assigned to the provincial jurisdiction. If an Act were passed declaring that upon the death of any one one-half of his property within the province should become the property of the province, I do not see how it could be seriously argued that such an Act would be *ultra vires*, whatever might be said about its wisdom and justice; and when the objections that might be urged on these grounds are forestalled by making the amount taken by the state only a small percentage, with reasonable and just exceptions and exemptions as has been attempted in the Ordinance in question, it appears to me that the essence has not been changed. In this aspect the duties are not in fact a burden on the estate at all, and hence not of the nature of taxes, but are in reality that portion of the estate which the province appropriates, to that extent interfering with the rights of testamentary disposition and inheritance. It is not necessary, however, to rest the validity of the Ordinance upon this aspect, as, for the reasons I have stated, it seems that so far as it relates to property situate within the province it is direct taxation within the meaning ascribed to that term by the Privy Council cases. I would allow the appeal. By arrangement there will be no costs.

Appeal allowed.

BOYDELL v. HAINES.

B. C.
S. C.

British Columbia Supreme Court, Gregory, J. March 1, 1915.

1. VENDOR AND PURCHASER (§ I—1)—ABSTRACT OF TITLE—DUTY TO FURNISH.
It is necessary for a vendor to furnish an abstract of title only if the purchaser demands it.

2. VENDOR AND PURCHASER (§ II—33)—REMEDIES OF VENDOR—VENDOR'S LIEN—ENFORCEMENT.
A vendor suing to enforce an agreement for sale of land on the purchaser's default is not entitled to pursue concurrently the remedies of personal judgment against the purchaser and of foreclosure and sale of the lands.
[*Hargreaves* v. *Security Investment*, 19 D.L.R. 677, (Sask.), followed.]

B.C.

S.C.

BOYDELL v. HAINES.

3. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF AGREEMENT—ABILITY TO MAKE RESTITUTION—NECESSITY OF.

In order to claim rescission of his agreement to purchase lands the purchaser must have a present ability to make restitution; it is not enough that he alleges he can get in the interest in them that he has sold and then make restitution in case the decree gives him that relief.

Statement

ACTION by the plaintiff to recover an instalment due on an agreement for sale given by him to the defendant Haines. The defendant contended that the plaintiff was not entitled to judgment, on the following grounds:—(1) That the vendor never furnished an abstract of title and that the property duly registered in the name of the plaintiff is encumbered with two mortgages, the first of which, for $8,000, matured before the instalment for which he is now sued became due; (2) that the plaintiff never gave the thirty-day notice required by the agreement for sale; and (3) that the plaintiff is not entitled to a personal judgment and foreclosure, with a reference to the registrar to ascertain the amount now due under the agreement.

Fell, K.C., for plaintiff.

Phelan, for defendant Haines.

F. C. Elliott, for defendant Middleton.

H. E. A. Courtney, for defendants Ryan & Lang.

Gregory, J.

GREGORY, J.:—As to the first objection, it appears to me to be fully met by the plaintiff. There is no doubt, on the evidence, that the defendant knew of the existence of these mortgages at the time he entered into his agreement to purchase, and that title to the property had been duly investigated by his agents. The plaintiff also testifies that he told the defendant Haines of the existence of the mortgages, and said that he intended to pay them off out of the moneys to be received by him from the defendant. He gives no evidence as to what Haines said in reply to this, and I think it must be taken that he agreed to it, for he afterwards went into possession, subdivided the property, and entered into an agreement for sale of an interest in it. This seems to me to bring this case within the decision of *Wallace* v. *Hesslein* (1898), 29 Can. S.C.R. 171. He knew the state of the title and waived all objections (if any) to it.

The authorities quoted to shew that it is a vendor's duty to furnish an abstract of title are, of course, unquestionable; but it is not necessary for him to do this without a demand,

and no demand was made in the present case until the 21st October, and the trial took place on the 26th of the same month. It is quite clear that this demand was an afterthought. If further proof of this was required, it is shewn by the fact that in a previous action for interest overdue this defence was not raised.

As to the second objection that the plaintiff has not given the thirty-day notice required by the agreement, it seems to me that that notice has no application to an action on a covenant for the payment of an instalment. An examination of the agreement shews that the object of the notice is to enable the vendor, without the aid of the Court, to himself declare the agreement to be null and void and forfeit the moneys already paid after the expiration of the notice. The plaintiff has not attempted to do that here, but brings his action on defendants' covenant to pay on the date named.

As to the third objection, I think it is good: see *Hargreaves* v. *Security Investment Co.*, 19 D.L.R. 677, where the Supreme Court of Saskatchewan *en banc* dealt with this very question arising, as in the present case, out of an agreement for the purchase and sale of property.

The defendant counterclaims for rescission of the agreement and return of the cash payment made by him and a reference to the registrar, and, in the alternative, for an order directing the plaintiff to discharge the mortgages registered against the property.

It seems to me that he entirely fails. While it may be admitted that a purchaser is entitled to have an encumbrance of which he had no knowledge discharged before he makes any payment (other than the payment made when the contract was entered into), it is quite a different thing to say that he can insist upon having an encumbrance discharged of which he had full knowledge at the time he entered into his contract, and it seems to me that, having had this knowledge, having entered into the agreement, taken possession and resold an interest, it must be taken that he agreed with the plaintiff that the plaintiff should be allowed, as he states, to pay the encumbrancers out of the moneys to be received from the defendant.

It is also to be noted that, while the plaintiff is seeking re-

B. C.

S. C.

BOYDELL v. HAINES.

Gregory, J.

scission and a return of his money, he makes no allegation nor does he attempt to prove that he was at all times ready and willing to perform his part of the contract, and it is quite clear to me that he was not ready, and that he is only seeking a way of escape from his obligation. In any case he cannot have rescission unless he is in a position to immediately make restitution—it is not enough for him to say he can get in the interest he has sold and then make restitution. It would, however, be unfair to require the defendant to make his payments without being properly secured; he is entitled to see that his money is applied on the mortgages.

The result is that the counterclaim will be dismissed, and the plaintiff will be entitled, not to a personal judgment, but to an order for the payment by the defendant Haines of the amount sued for, with interest and costs, into Court on or before May 1 next, and, in default of such payment, all his right, title and interest and of anyone claiming through or under him, in and to the lands, be absolutely barred and foreclosed, and the agreement sued on declared void and at an end.

The plaintiff will be entitled to both the costs of the action and of the counterclaim.

As between the plaintiff and the other defendants, the plaintiff is entitled to no costs, as they were made party defendants by the plaintiff as a matter of precaution and for his own protection—they were not parties to the agreement and put in no defence—the presence of their counsel at the trial imposed no additional expense on the plaintiff; they, on the other hand, are not entitled to any costs for attendance of counsel, for they knew that no personal judgment was claimed against them, Mr. Fell having so stated at the beginning of the trial, when their counsel said they were only present to prevent such personal judgment. The apparent claim against them, in the statement of claim, was clearly a typographical error, the letter "s" being added to the word defendant in two places, making it appear that they were parties to the agreement when they knew they were not.

It is unnecessary to refer to the third mortgage for $1,000, for it was given after the agreement, registered after it, and was, therefore, subject to it, and no encumbrance on the title. As

some complications may arise after the payment of the money into Court or otherwise, there will be general leave to apply.

Judgment accordingly.

B. C.

S. C.

BOYDELL v. HAINES.

N. S.

S. C.

O'MULLIN v. EASTERN TRUST CO.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley and Drysdale, JJ. January 2, 1915.

1. EMINENT DOMAIN (§ III C—150)—EXPROPRIATION OF LANDS—COMPENSATION—LIFE TENANT AND REMAINDERMAN.

Apart from any damage to the tenant for life in respect to inconvenience or injury independently of the value of the property, the compensation awarded in eminent domain proceedings is to be held for the remainderman and the interest only on the fund paid to the tenant for life where by the terms of the trust the property was not to be sold until the latter's death.

[*Smith* v. *G.N.R. Co.*, 23 W.R. 126; *Leedham* v. *Chawner*, 4 K. & J. 458, applied; *Young* v. *Midland R. Co.*, 19 A.R. (Ont.) 265, 281, referred to.]

2. EMINENT DOMAIN (§ III C—150)—EXPROPRIATION OF LANDS—COMPENSATION—LIFE TENANT AND REMAINDERMAN.

A ten per cent. allowance for compulsory taking in eminent domain proceedings is really a part of the value and is to be similarly treated as between a tenant for life and a remainderman; it is error to direct the ten per cent. to be paid to the life tenant.

Statement

APPEAL from a judgment of Russell, J., in an action to determine the disposition of the sum of $21,830 paid by the Government of Canada under the provisions of the Expropriation Act.

T. S. Rogers, K.C., and *J. McG. Stewart*, for appellant.

H. Mellish, K.C., for respondent.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—The property, 99 Pleasant St., has been expropriated by the Government of Canada under the Expropriation Act by the deposit of a plan and description, and it therefore has a good title.

The parties interested have agreed with the Minister that the sum of $21,830 is sufficient compensation for the land, and accepted the same, and that sum is held by the Eastern Trust Co., the trustee under the will of the late Patrick O'Mullin. The plaintiff has a life interest, and the residuary legatee, the remainderman who takes on his death, is the Society of Jesus. The real interests appear from this clause of the will:—

Ninth: I direct that my said brother Robert O'Mullin shall have the option, which option shall be exercised by him within six months after my

N. S.

S. C.

O'MULLIN v. EASTERN TRUST CO.

Graham, E.J.

decease, of taking possession of the house and premises, the remainder of the furniture, pictures, plate and silverware therein contained, now owned and occupied by me, and known as No. 59 Pleasant St., in the city of Halifax, and of having the possession and use of the said house and premises (and their contents) for his personal occupation so long as he shall live, free from any charge for rent of the same on condition that he do annually pay the taxes of whatsoever kind that may from time to time be assessed upon said house and premises and contents, and also the premiums of insurance thereon during such time as he may possess, use, and occupy the same, and on further condition that he during the said period do keep the said house and premises in good repair; and if my said brother Robert O'Mullin shall pre-decease me, or in case that my said brother shall survive me, then on the death of my said brother, or when and so soon as his occupation of, or his right hereunder to occupy the said house and premises shall cease and determine, I direct that my said nephew John Coll O'Mullin shall have the option, which option shall be exercised by him within six months after the happening of any of the events hereinbefore mentioned, whichever of such events shall first happen, of taking possession and of having the possession, occupation and use of the said house and premises and contents on the like terms and conditions as are hereinbefore expressed with regard to my said brother Robert O'Mullin, for so long as my said nephew shall live; and in case my said brother and my said nephew, and each of them respectively shall pre-decease me, or in case they or either of them shall survive me, and they and each of them respectively shall fail to exercise the option or options hereinbefore expressed, or in case the survivor of them shall fail to possess, occupy and use the said house and premises, or in case such survivor's occupation or his right to occupy the said house and premises shall cease, or upon the death of the survivor of them, whichever event shall first happen, then I direct that the said house and premises and contents shall be sold by the Eastern Trust Co., which is hereinafter appointed my trustee, and that the proceeds of such sale shall form a part of the residue of my estate.

It appears that Robert O'Mullin did not avail himself of his option under the will, and the plaintiff thereupon exercised his right thereunder and was in possession when the property was expropriated. This action is brought against the Eastern Trust Co. to determine what disposition is to be made of the compensation money.

Under sec. 15 of the Expropriation Act it is quite clear that each one of these parties, or both together, may agree with the Crown for the sale of his or their interest, and may, for a compensation to be agreed upon, convey to the Crown.

Then, by sec. 22 it is provided that the compensation "agreed upon or adjudged" shall stand in the stead of such land or property, and the claim upon such property shall be converted into a claim to such compensation or to a proportionate amount thereof.

In the first place I am of opinion that this Court may deal

with this matter at this stage and has ample power to apportion or dispose of this money under its general jurisdiction: *Clark* v. *Seymour*, 7 Sim. 67; *Bulmer* v. *Bulmer*, 25 Ch.D. 409, at 412; and *Condliff* v. *Condliff*, 29 L.T.N.S. 831.

The learned Judge who heard this action has directed that the whole of the 10% allowance for compulsory taking should go to Mr. O'Mullin, the tenant for life. This view, I think, is not correct. This is the admission in the evidence in regard to that matter:—

"(It is admitted that in making up the compensation of $21,390, 10% was added to the valuation as an allowance for compulsory taking and is included in that sum.)"

It appears that this 10% is really part of the amount of the value and is included in it.

Of course there might be a case in which a tenant for life would sustain damage in respect to inconvenience or injury independently of the value of the property, but that is not this case.

In the case of *Re Wilde's Estate*, 16 Ch.D. 601, Hall, V.-C., says: "No distinction can be drawn between the additional 10% for compulsory purchase and the rest of the purchase money."

The remainderman as well as the tenant for life suffers from the compulsory taking.

In regard to the mode of disposition of the purchase money, the plaintiff contends he is entitled to the value of his interest in the property in a lump sum to be paid to him now, and the trustee contends that the money should be invested and the interest paid to the plaintiff for life. At least the remainderman is not a party to the action and has not consented to this apportionment and payment over of the fund.

I am of opinion that the trustee would not be justified in paying to the tenant for life any portion of this sum now, as by the terms of the trust the property was not to be sold and the proceeds realized and paid over by the trustee among other things until the death of the tenant for life: *Smith* v. *G.N.R. Co.*, 23 W.R. 126; *Leedham* v. *Chawner*, 4 K. & J. 458; Godefroi on Trusts, 438.

Irrespective of the question of the trust, Meredith, J., in the case of *Young* v. *Midland R. Co.*, 19 A.R. (Ont.) 265, at 281, under statutes resembling these, has strongly intimated that the

N. S.
S. C.
O'MULLIN
v.
EASTERN TRUST CO.
Graham, E.J.

proper course is an investment of the purchase money and payment of the interest upon it to the tenant for life where others interested object to the apportionment of it in lump sums to each. If, however, the Society of Jesus consents to this apportionment, it is perfectly clear that the trustees are justified in paying over to the tenant for life and remainderman their respective proportions to be determined by a referee.

In the latter contingency the parties are agreed as to the computation to ascertain the amounts payable to each if the principle of disposition is determined, and therefore there need be no reference.

It appears that the plaintiff's expectancy of life is 16.85 years, and that the proportion of the computation agreed on payable to him now would be $11,982.01, and to the remainderman $9,377.99. But, lacking that consent, the money will have to be invested for the present and the interest paid to the plaintiff.

I agree with the learned Judge that the amount expended upon the property by the plaintiff cannot be regarded. He cites authority for the position. The appeal will be allowed and the decree varied as I have indicated. The costs of each out of the fund.

Judgment accordingly.

MAN.
C. A.

REX v. KUZIN.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 3, 1915.

1. WITNESSES (§ I A—4)—COMPETENCY NOTWITHSTANDING DEATH SENTENCE.

A person under sentence of death is competent as a witness on the trial of another for a criminal offence.

[*R. v. Hach*, 16 Can. Cr. Cas. 196, followed; *R. v. Webb*, 11 Cox C.C. 133, distinguished.]

2. WITNESSES (§ I A—4)—PRISONER SENTENCED TO DEATH—WITNESS ON INDICTMENT OF ANOTHER.

Sec. 1064 of the Criminal Code giving special directions for the safe custody of a convict sentenced to death does not interfere with the powers conferred by sec. 977 upon Courts of criminal jurisdiction to order the convict to be produced as a witness on the trial of an indictable offence.

Statement

CASE referred by the trial Judge for the opinion of the Court of Appeal.

H. P. Blackwood, K.C., for the Crown.

A. V. Darrach, for the accused.

HOWELL, C.J., concurred with RICHARDS and CAMERON, JJ.A.

RICHARDS, J.A.:—The accused is charged with the crime of murder. Counsel for the Crown applied to the assize Judge, Mr. Justice Metcalfe, for an order, under sec. 977 of the Criminal Code, to enable him to call, as a witness for the prosecution, one Prokofy Malkoff, who had previously been convicted of murder and sentenced to death, and who is now held as required by sec. 1064 of the Code, awaiting the carrying out of that sentence.

To get the opinion of this Court, as to whether he had power to grant the order, the learned trial Judge refused the application, but, at once stated a case, asking the following questions:—

"(1) Was I right in refusing the application?

"(2) Should I have ordered Malkoff to be produced as a witness?

"(3) Have I jurisdiction to compel his attendance?

"(4) Is Malkoff (a person under sentence of death) a competent witness?"

Three cases were cited to this Court on the argument. In *The Queen* v. *Webb*, 11 Cox C.C. 133, Lush, J., in 1867, held that a person under sentence of death was attainted and civilly dead, and refused to allow him to be called as a witness.

In *Graeme* v. *Globe Printing Co.*, 10 C.L.T. 367, the Master in Chambers, at Osgoode Hall, held, following *Reg.* v. *Webb*, that a person under sentence of death was not a competent witness. In a note to that case it is stated that, in 1865, Byles, J., admitted the evidence of a person under sentence of death.

In *The King* v. *Hatch*, 16 Can. Cr. Cas. 196, McLeod, J., held that such a person was a competent witness.

Formerly a person under sentence of death was not a competent witness. The conviction and sentence caused him to be attaint, and the attainder destroyed his competency.

In Comyn's Digest, vol. 7, p. 447, it says: "So a person attainted or convicted, of treason, or felony, shall not be a witness."

Viner's Abridgement, vol. 12, says, at p. 27: "Persons that have been attainted of felony, though pardoned shall not be of a

MAN.

C. A.

REX v. KUZIN.

Richards, J.A.

jury or witnesses." And see *R.* v. *Castlemaine*, Raymond 379; *Collier's Case*, Raymond 369, and *Brown* v. *Crashaw*, Bulstrode, 154.

It was not the sentence but the attainder that destroyed the competency.

In 1867, when Lush, J., ruled as above in *The Queen* v. *Webb*, it was doubtful whether the disability, imposed by the attainder resulting from the sentence of death, had been removed by statute 6 & 7 Vict. ch. 85, sec. 1. But in 1870, there was passed in England the Act, 33 & 34 Vict. ch. 23, the first section of which says:—

"No confession, verdict, inquest, or judgment of or for any treason or felony or *felo de se* shall cause any attainder."

It seems to me that, by enacting that the verdict, or judgment, should not cause an attainder, the above removed all difficulty in the way of calling, as a witness, a person under sentence of death, or under any other sentence, as it prevented the following, from the conviction, of those consequences which destroyed the competency.

Substituting "indictable offence" for "felony" section 1033 of our Code uses exactly the same language as that last above quoted.

Sec. 977 of our Code provides that,

> "when the attendance of any person confined in any prison in Canada . . . is required in any Court of criminal jurisdiction in any case cognizable therein by indictment, the Court or Judge may make an order upon the warden, or gaoler, or upon the sheriff, or other person having custody of the prisoner . . . to himself convey such prisoner to such place."

The section places no limit on the words "any person confined in any prison," and there is nothing in it that puts a person, confined under a death sentence, in a different position from that of any other person confined in prison. Unless restricted by some other provision of the Code it clearly gives power to the Judge to cause a person under sentence of death to be brought to Court as a witness. But it is suggested that sec. 1064 does interfere by preventing the removal of the person so

under sentence from the place where he is held awaiting execution. It says:—

> "Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without permission, in writing, of the Court or Judge before whom such convict has been tried, or of the sheriff."

I think that the above does not interfere with exercise of the powers given by sec. 977. The two sections must be read together, so as to give effect to both. It seems to me that, so doing, I should hold that section 1064 is directory and enacted for the purpose of safely keeping the person so under death sentence until the sentence is carried out, and that it must be subject to section 977.

I would answer the first question asked by the learned trial Judge in the negative, and the second, third and fourth questions in the affirmative.

PERDUE, J.A., concurred with RICHARDS and CAMERON, JJ.A. Perdue, J.A.

CAMERON, J.A.:—At the trial of this case the Crown proposed to call as a witness one Prokofy Malkoff, a prisoner in the gaol of the Eastern Judicial District, who had been convicted of murder and sentenced to death. The application was refused by Mr. Justice Metcalfe, the trial Judge, who reserved a case on the points involved, submitting the following questions for the opinion of this Court:— Cameron, J.A.

"(1) Was I right in refusing the application?

"(2) Should I have ordered Malkoff to be produced as a witness?

"(3) Have I jurisdiction to compel his attendance?

"(4) Is Malkoff (a person now under sentence of death) a competent witness?"

The incompetency of a person who has been convicted of a crime to give evidence was early established in England. The origin and history of the law are set out in Wigmore on Evid-

MAN.

C. A.

REX v. KUZIN.

Cameron, J.A.

ence, secs. 519-524. The ground of the exclusion was that "the man who has been guilty of a heinous crime cannot be trusted in any respect, therefore cannot be trusted in his testimony." In 1724 Chief Baron Gilbert, Evidence, 139, said: "The second sort of persons excluded from testimony for want of integrity are such as are stigmatized. Now there are several crimes that so blemish that the party is ever afterwards unfit to be a witness." *Ibid.* 519. According to Greenleaf on Evidence, 1842, sec. 373, the enumeration of these crimes thus rendering the perpetrator infamous is difficult. "The usual and more general enumeration is treason, felony and the *crimen falsi.*" All treasons and almost all felonies were punishable with death. But the extent and meaning of the term *crimen falsi*, borrowed from the Roman law, is nowhere laid down with precision. Wigmore, Evidence, sec. 520. It is clear also that it was the judgment and not the guilt that thus rendered the person infamous in law. *Ib.* sec. 521. But the Legislatures of nearly every jurisdiction have long since either entirely abolished or narrowly restricted the disqualification by conviction of crime. The earliest statute seems to have been that of England in 1843 (Lord Denman's Act, 6 & 7 Vict. ch. 85, sec. 1), Wigmore 524.

This disqualification seems to have been regarded as one of the incidents of Attainder. "When it was clear beyond all dispute that the criminal was no longer fit to live he was called *attaint* and could not before the Evidence Act, 1843, be a witness in any Court. . . . The consequences of attainder were (1) forfeiture; (2) corruption of blood:" (Encyc. Brit. Article, Attainder).

> The section of Lord Denman's Act referred to enacted that "no person hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence . . .; but that every person so offered may and shall be admitted to give evidence . . . notwithstanding such person offered as a witness may have been previously convicted of any crime or offence."

In a note to this section it is stated in Taylor on Evidence, sec. 1347. "Lush, J., is reported to have ruled that, notwithstanding these words, a person under sentence of death is incap-

able of being a witness: *R.* v. *Webb*, 1867, in 11 Cox C.C. 133, Sed. qu. In *R.* v. *Fitzgerald*, 1884, unreported, the evidence of a convict was admitted, and *R.* v. *Webb* not followed (Harrison, J.). In that case Lush, J., said, "A person under sentence of death stood in a different position from an ordinary felon. Under the old law a person attainted and sentenced to death was deemed civilly dead, and he did not think his capacity as a witness was restored by the 6 & 7 Vict. ch. 85, sec. 1, and he could not therefore receive his evidence." Apparently, therefore, the ground taken by Lush, J., was not that the disqualification by crime was not removed by the statute, but that the disqualification still subsisted as an incident of the civil death of the person sentenced to death. As noted, the judgment of Lush, J., was given in 1867. In 1870 the Forfeiture Act, ch. 23, 33 & 34 Vict. was passed, by which it was enacted in sec. 1, "From and after the passage of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture upon outlawry." This is identical in terms with sec. 1033 of our Criminal Code, with the exception of the proviso, and with the substitution of "indictable offence" for "felony."

Sec. 1 of the Canada Evidence Act, R.S.C. 1906, ch. 145, enacts: "A person shall not be incompetent to give evidence by reason of interest or crime."

Apart from the effect of the Act of 1870 the text-writers regard with disapproval the decision of Lush, J., in *R.* v. *Webb*; Taylor, Evidence, supra; Roscoe, Criminal Evidence, 104. Archbold, Criminal Pleading, at p. 455, says of it: "But this decision was prior to the Forfeiture Act, 1870 (33 & 34 Vict. ch. 23), and seems to be inconsistent with the provisions of that Act."

In *Graeme* v. *Globe Printing Co.*, 10 C.L.T. 367, an order to examine a prisoner sentenced to death was refused. Reference is there made to *Regina* v. *Gregoris Mogni*, reported in the London Times, March 3, 1865, where Byles, J., admitted the evid-

MAN.
C. A.
REX
v.
KUZIN.
Cameron, J.A.

ence of a prisoner under sentence of death. In *R.* v. *Hatch*, 16 Can. Cr. Cas. 196, McLeod, J., of the Supreme Court of New Brunswick held that a prisoner under sentence of death was a competent witness.

It, therefore, seems clear that neither on the ground of the civil death of a proposed witness who is a prisoner under sentence of death nor on the ground of his conviction of crime can the competency of such witness be questioned.

The other question to be determined arises from the apparent conflict between two sections of the Code.

Section 977 of the Code provides:—

"When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any Court of criminal jurisdiction in any case cognizable therein by indictment, the Court before whom such prisoner is required to attend, or any Judge of such Court or of any Superior Court or County Court, or any chairman of General Sessions, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner,—

"(*a*) to deliver such prisoner to the person named in such order to receive him; or,

"(*b*) to himself convey such prisoner to such place.

"2. The warden, gaoler or other person aforesaid, having the custody of such prisoner, when so required by order as aforesaid, upon being paid his reasonable charges in that behalf, or the person to whom such prisoner is required to be delivered as aforesaid, shall, according to the exigency of the order, convey the prisoner to the place at which he is required to attend and there produce him, and then to receive and obey such further order as to the said Court seems meet."

Sec. 1064 of the Code further provides:—

"Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the

gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without permission, in writing, of the Court or Judge before whom such convict has been tried, or of the sheriff."

The object of the latter section is obviously to provide for the safe custody of the prisoner while under sentence of death to prevent attempts to escape suffering the penalty of the law. It is surely in accordance with the due administration of justice that sec. 1064 should be read subject to the provisions of sec. 977. The value of the evidence lies wholly within the competence of the jury. It might be of vital importance either for the Crown or for the defence, and it should not be excluded on account of the directory character of the provisions of sec. 1064 the object of which is perfectly plain.

In the result the answer to the first question must be given in the negative, and the remaining three questions in the affirmative.

HAGGART, J.A., concurred with RICHARDS and CAMERON, JJ.A. Haggart, J.A.

Answers accordingly.

ALBERTA LOAN & INVESTMENT CO. v. BERCUSON.

ALTA.
S. C.

Alberta Supreme Court, Simmons, J. March 5, 1915.

1. LANDLORD AND TENANT (§ III A—73)—RIGHTS AND LIABILITIES—DEFECTIVE WATER SYSTEM—LEAKAGE—PRESUMPTION OF NEGLIGENCE.

Leakages of water occurring frequently through the ceiling from the upper to the lower floors of a building which was occupied by various tenants, but over which the proprietors had sole control of the construction and maintenance of the water system, may raise a presumption that there was a defect in maintenance for which the proprietors may be held liable in damages to their tenants, although the place was not rendered untenantable.

ACTION for rent and counterclaim for damages. Statement

G. H. Ross, for the plaintiffs.

M. W. Macdonald, for the defendant.

SIMMONS, J.:—I find that from the beginning of 1912, or shortly after the beginning of 1912, until the defendant vacated the premises about the end of March, 1914, there were a number of times when water came through the ceiling—on two Simmons, J.

ALTA.

S. C.

ALBERTA LOAN & INVESTMENT CO. v. BERGUSON.

Simmons, J.

occasions in the month of February, 1912, and coming through in considerable quantities. The period of time over which the leaks occurred, and the frequency of their occurrence, has raised the presumption that there was a defect in the maintenance of the water system. The water system was one common to a large block and one over which the plaintiffs had sole control, so far as the construction and general maintenance is concerned, and these leakages or escapes of water over such a period of time and of so frequent occurrence, raises the presumption that there was a defect in the maintenance. That presumption might be a matter of an explanation by the plaintiffs, but this they have not stated, and I must hold them liable for defects in maintenance. I do not think, though, that the escapes of water were such as to render the place untenable by the tenant, and there is only, then, the assessment of damages and the question of fixtures. As to the fixtures, there is nothing in the evidence to suggest they were other than those incidental to the business carried on by the defendant, and so constructed. The defendant, however, takes the risk that he was not injuring the property of the landlord in removing the same, and of becoming liable for any injury occasioned by such removal. The evidence on that head is not very satisfactory, but I am satisfied that there was some injury done to the floor and some to the ceiling, and I hold the defendant liable in damages on that head, in the removing of the fixtures, for harm that he has done to the premises in the sum of $25.

There should be no costs; the plaintiff should be entitled to his costs on the action and the defendant on his counterclaim, to be set-off each against the other, and the result would be no costs.

Judgment accordingly.

N. S.

S. C.

CAMERON v. BEATON.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley and Drysdale, JJ. January 2, 1915.

1. ELECTIONS (§ IV—94)—CONTESTS—TRIAL—PROCEDURE.

Where a charge involves disqualification of the municipal councillor whose election is contested, it should be proved beyond a reasonable doubt to warrant a finding adverse to him.

[*Per* Russell and Graham, JJ.]

Statement

APPEAL from the judgment of McGillivray, Co. Ct. J., unseating and disqualifying a municipal councillor.

D. McNeil, K.C., and *T. Gallant*, for appellant.
J. L. Ralston, K.C., and *D. McLennan*, for respondent.

N. S.
S. C.
CAMERON v. BEATON.
Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the decision of the County Court Judge, Dist. No. 6, setting aside the election of the respondent, Cameron, on the grounds of bribery and undue influence.

In my opinion the evidence against respondent on these grounds is of the most flimsy and unsatisfactory character, and in no way justifies the decision arrived at. The only pretence of bribery is in the evidence of John Rankin. This witness says:—

I was a supporter of Beaton. I came to vote for Beaton. I voted for Beaton. I met Cameron about the middle of the day. I was talking to Cameron. We spoke in Gaelic. He is a neighbour of mine. He intended to be elected. He never said he would do anything for me after being elected. He never said anything about making my son postmaster. Cameron said to me in Gaelic that I would get the Fenian money if I voted for him. I don't think he said "You ought to vote for me because it is the Conservatives that are getting this Fenian money." I knew I would get the bounty anyway.

Probably this last sentence escaped the notice of the Judge below, as I observe, in quoting the evidence, he omits it. This was unfortunate, as it qualifies all that goes before. Surely to treat the evidence of this witness as shewing bribery by the respondent is stretching the effect not only to the utmost limit but beyond what is reasonable. The witness himself had already stated that "he never said he would do anything for me after being elected," and as to the Fenian money, "I knew I would get it any way," shewing that he did not understand the conversation as an inducement to vote for respondent. Had respondent added, "if you don't vote for me you will not get the bounty," there might have been some force in the charge. This man, too, it must be remembered, was an opponent of the respondent.

As to the other evidence on which the charge of bribery is upheld, I do not think it deserves serious discussion, as in no one of them is to be found any promise or offer or inducement to get the witness to vote.

Turning to the other ground of undue influence, I am of opinion that it is wholly unsupported by evidence, unless it is to be held that a drunken row at the polling booth is to be so considered. As a matter of fact no one was prevented from voting. Probably the partisans of each candidate used their utmost efforts to secure

N. S.

S. C.

CAMERON v. BEATON.

votes, and I do not see that there was anything wrong in their doing so.

I cannot help observing that the Judge has introduced some reasons not appearing in the evidence which no doubt influenced his judgment. He says:—

Sir Charles Townshend, C.J.

> The respondent is a sympathiser with the present party in power in the Dominion and is supposed to have some knowledge as to whether these bounties would or would not be paid. People manifested a considerable anxiety about their success in getting these bounties. For that reason I hold that promises of this nature would affect the freedom of an elector so interested in getting the bounty.

Where the learned Judge gets his information is not apparent, and I cannot think he was at liberty to suggest motives and reasons not disclosed in the evidence before him.

Taking the view I have of the main question, it is not necessary to discuss the objection of respondent as to the irregularity of service of the petition. I think, however, that respondent having appeared and taken part in the trial is a waiver of the defective service, if it was defective, on which at present I express no opinion.

In my opinion the order of the Judge below must be set aside with costs here and below, and respondent declared to be duly elected.

Russell, J.

RUSSELL, J.:—I attach not much importance to the charge of bribery consisting of the offer of employment on public works, nor to the charge of undue influence. I do not, however, think that the charge of bribery in connection with the Fenian Raid bounty money can be so easily dismissed. The charge is one that involves disqualification, and it should therefore, I think, have been proved beyond a reasonable doubt to warrant a finding adverse to the successful candidate. It is, moreover, the case of a mere attempt at the worst which did not succeed, the voter having cast his ballot against the candidate who thus canvassed him. There is always room for a possible misunderstanding in such cases. The witness himself did not clearly deny that the canvass might have been only an argument to persuade him that he ought to vote for the party that had been instrumental in securing the Fenian bounty. He thinks it was not that, and says that respondent's words were "you will get the Fenian bounty if you vote for me." The voter says he knew he would get the bounty any way. The respondent, it is true, did not take the

witness-stand himself as he might have done, but there are many reasons why a member may not wish to submit to cross-examination other than the danger of being compelled to disclose a violation of the election law. On the whole, seeing that the charge is one that involves disqualification, that it was at most an attempt to bribe, and that the precise purport and motive of the communication may have been misunderstood, I should be inclined to give the respondent the benefit of the doubt, reversing thereby the decision of the learned County Court Judge and dismissing the petition.

Graham, E.J.

GRAHAM, E.J.:—I concur in the opinions just read by the CHIEF JUSTICE and RUSSELL, J.

Longley, J.
Drysdale, J. (dissenting)

LONGLEY and DRYSDALE, JJ., dissented.

Appeal allowed.

Re KILDONAN AND ST. ANDREWS ELECTION.

MAN.
K. B.

Manitoba King's Bench, Mathers, C.J.K.B. February 13, 1915.

1. ELECTIONS (§ IV—94)—CONTESTS—PROCEDURE—DEFECTIVE PETITION—FAILURE TO PUBLISH NOTICE.

It is not a good preliminary objection to an election petition under the Controverted Elections Act, Man., that the returning officer had failed to publish the notice required by sec. 21, where the petitioner had not been required by the returning officer to pay the cost of publication, nor had he been notified of the amount required.

[For earlier decisions see 19 D.L.R. 478, 796.]

Statement

HEARING of preliminary objections.

J. E. Adamson and *S. Hart Green*, for petitioners.

A. J. Andrews, K.C., and *F. M. Burbidge*, for respondent.

Mathers, C.J.

MATHERS, C.J.K.B.:—At the conclusion of the argument all the objections were dismissed with the exception of the 25th, which, in part, complains that the petitioners did not deposit with the prothonotary or pay to the returning officer the costs and expenses of publishing the petition and notice of presentation thereof, and that neither the petition nor notice of presentation thereof was published. As a fact no money was deposited by the petitioners with the prothonotary or paid to the returning officer to cover the cost of publishing the notice which he is required to publish by sec. 21 of the Manitoba Controverted Elections Act, nor was any such notice published by him.

MAN.

K. B.

RE KILDONAN AND ST. ANDREWS ELECTION.

Mathers, C.J.

In so far as failure to publish this notice was due to the fault of the returning officer, the petitioners are not responsible. That officer was called, and frankly stated that he did not know of the provision requiring him to publish a notice, and that had he known he would in all probability have published the notice as required.

Rules of Court were made by the Judges in 1886 (8 M.R. 609), under a former Act. I am disposed to think these rules, in so far as they are not inconsistent with the present Act, are continued in force by sec. 33 of the Interpretation Act, R.S.M. 1913, ch. 105, which says that when an Act is repealed and other provisions are substituted, all rules made under the repealed Act shall continue good and valid, so far as they are not inconsistent with the substituted Act, until they are annulled and others made in their stead. It is not necessary to decide the point, because if the local rules are in force the notices required to be published by rule 10 have been so published. I am of opinion, however, that, for the reasons given in *Re Richelieu*, 48 Can. S.C.R. 625, this particular rule is inconsistent with, and therefore impliedly repealed, by sec. 21 of the Act, which requires the returning officer to publish a notice of the petition in a newspaper published in the electoral division, and, if none so published, then in one published in an adjoining division.

Then, are the English Rules of Michaelmas Term, 1868, in force? By sec. 90 of the Act, so far as the Manitoba rules do not extend, the English rules are to be observed where, consistently with the Act, they can be observed. The local rules do not deal with the question of who shall pay the cost of publishing the notice required by sec. 21 of the Act, and neither does the Act itself. It is, to my mind at least, doubtful whether the first part of English rule 12 is not inconsistent with sec. 21 of the Act and is therefore not to be observed in Manitoba. It may be, however, that that rule, in so far as it directs that the cost of such publication shall be paid by the petitioners, is in force.

Assuming that this part of the rule is to be observed here, is the failure to deposit with the prothonotary a sum to cover this expenditure, or to pay such a sum in advance to the returning officer, a fatal preliminary objection? It was held by the Manitoba Full Court, in *Re Lisgar*, 7 Man. L.R. 581, affirmed by the Supreme Court, 20 Can. S.C.R. 1, and re-affirmed in *Re Burrard*, 31 Can.

S.C.R. 459, that failure to leave with the prothonotary at the time of filing the petition a copy thereof for the returning officer, as required by English rule 1, is a ground of preliminary objection and is fatal to the petition.

In the *Lisgar* case the Supreme Court was not unanimous. Strong and Gwynne, JJ., dissented, and Taschereau, J., doubted. From the judgment of Gwynne, J., in the *Burrard* case, I infer that had the Court not felt itself bound by the judgment in the *Lisgar* case it would not have held the objection fatal to the petition.

If the matter were *res integra* I should have thought that such an objection was not a "ground of insufficiency" against the petition or the petitioner, or against any further proceedings thereon, and was therefore not the subject of a preliminary objection at all. While the above decisions are binding and must be followed in all cases covered by them, it is manifest, from the reluctance with which the Supreme Court decided the *Burrard* case, that the rule established by them is not to be extended.

The English rule 1, which requires a copy of the petition to be left with the prothonotary, says nothing about leaving anything else. It does not, nor does any other rule, say that the petitioner shall also deposit with the prothonotary the cost of publishing the notice required by sec. 21. The last paragraph of rule 12 does say that the cost of publication by the returning officer shall be paid by the petitioners. Had it been intended that the petitioners should make a deposit with the prothonotary to cover this expenditure, I have no doubt it would have said so. It does not say so, for the reason probably that until the notice is published the amount to be paid therefor by the petitioners cannot be ascertained. When it is ascertained, the returning officer has a right to claim payment from the petitioners, or it may be that, having ascertained the amount to be paid, he could demand payment before publishing it. Until payment has been demanded and refused the petitioners are not in default.

It is possible that, should the petitioners refuse to pay the cost of publication when properly demanded, further proceedings upon the petition might be stayed upon an application for that purpose until he had done so. I am not, however, at present concerned with the returning officer's remedy to recover payment

MAN.

K. B.

RE KILDONAN AND ST. ANDREWS ELECTION.

Mathers, C.J.

in the event of the petitioner refusing or neglecting to pay him. The statute casts upon him the duty of publishing the notice required by sec. 21. Its language is imperative, and is not conditional upon the petitioner supplying him with funds for that purpose. For his failure to do what the statute says he shall do, the petitioners are not responsible. Neither are they required to either deposit money with the prothonotary or with the returning officer to cover the cost of publication of the notice until that amount has been ascertained by the returning officer and they are notified of it. In my opinion the 25th objection also fails.

There will be an order dismissing all the preliminary objections with costs.

Preliminary objections dismissed.

B. C.

S. C.

DILL v. G. T. P. COAST S. S. CO.

British Columbia Supreme Court, Morrison, J. March 15, 1915.

1. CARRIERS (§ II M—273)—CARRIERS OF PASSENGERS—TICKETS—CONDITIONS AND LIMITATIONS—BAGGAGE.

A condition stated on a passage ticket for transportation upon a boat whereby the transportation company was not to be liable for injury to the passenger or baggage, (*inter alia*) from perils of the sea or defects in the boat fittings, where reasonable means had been used to send the boat to sea in a seaworthy state, will bind the passenger where the latter had ample opportunity to read the ticket and to get notice therefrom and from the posted notices of the limitation of liability if the company did all that was reasonably required to bring the conditions to the attention of prospective passengers.

Statement

ACTION for personal injuries and for loss of luggage.

McCrossan, for plaintiff.

Sir C. H. Tupper, K.C., for defendant.

Morrison, J.

MORRISON, J.:—The plaintiff, a young school teacher, residing at the time at Nasset, on Queen Charlotte Islands, took passage on the defendant's coasting steamer, "Prince Albert," *en route* for Vancouver. Her father purchased her ticket and looked after her luggage. There was some question as to whether her luggage and other articles, which cannot be included as luggage, were, as a fact, put on board from the wharf upon which they were brought for shipment, on her ticket. I find, however, that they were placed on board as claimed.

On the evening of August 18, 1914, the ship was cast ashore,

during rather "dirty" weather. Whilst one of the boats was being lowered, a bolt which penetrated the keel, and to which the after lowering tackle was fastened, slipped, catering the craft at such an angle that the plaintiff was thrown into the sea, and, whilst in the water, she alleges that a boat which was being lowered struck her. Her description of this last alleged incident seems very improbable. She was promptly rescued. She, together with other passengers, spent some hours during that night in an open boat, and, after suffering considerable privation, was landed at Prince Rupert. She had lost her luggage and claims to be suffering from the effects of the exposure experienced on the occasion in question. The point for me to determine is as to the defendant's liability, first for personal injuries which she may have sustained; and, secondly, for loss of her luggage and other articles. The plaintiff had experience in travelling this route on steamers. She handled the tickets issued by the defendants on this occasion, which were given to her father, acting as her agent. The ticket in question is a very common one in appearance and shape, and contains on its face or front the conditions on which the passenger is taken. Conditions 4, 7 and 11 are the ones particularly involved in this case, and read as follows:—

4. That the person using this ticket assumes all risk of loss or injury to person or property caused by or incidental to the dangers of navigation.

7. The company will use all reasonable means to insure the ship being sent to sea in a seaworthy state and well found, but is not otherwise liable for loss of, or injury to the passenger or his baggage, or delay in the voyage, whether arising from the act of God, King, King's enemies, perils of the sea, rivers or navigation, barattry or negligence of the company's servants whether on board the steamer or ashore, defect in the steamer, her machinery, gear or fittings, or from any other cause of whatsoever nature. The passenger shall not be liable in respect of his luggage or personal effects to pay or be entitled to receive any general average contribution.

11. Baggage liability is limited to wearing apparel, not to exceed one hundred dollars ($100) in value for a whole ticket, and fifty dollars ($50) for a half ticket, unless a greater value is declared by the owner and excess charge paid thereon at the time of checking baggage.

If the plaintiff knew of these conditions and took passage on the defendants' ship on that footing, she cannot recover as claimed. The difficulty which arises on this point is as to whether the company did all that was reasonably required of them to bring these conditions to her attention. The evidence is that they had all the usual literature displayed and available at their

B. C.
S. C.
DILL
v.
G.T.P. COAST S.S. Co.
Morrison, J.

office; that Nasset is a very small settlement, in which the company's agent was well known to the plaintiff; that the plaintiff was somewhat accustomed to travel on those passenger boats; that she is a person of intelligence, who in and about taking passage was in no need of hurry. She had ample time to inspect and read her transportation.

I find that the company did all that was reasonably required of them to bring to the plaintiff's notice the conditions on her ticket, and she proceeded on the voyage on the footing of that contract. I find that the ship had been inspected as required by statute and that on this occasion was well equipped, manned and provisioned. I find that the proximate cause of any personal injury to the plaintiff was the slipping of the bolt above referred to, and that that defect in the lifeboat was latent, the existence of which could not reasonably have been detected: 4 Hals., p. 45.

As to her "luggage," it was, I think, practically admitted at the trial that the liability was limited to $100. She had other articles which, according to the authorities, cannot be taken as included in that term: 4 Hals., par. 69; Water Carriage of Goods Act, 10 Edw. VII. ch. 61; Merchants Shipping Act, R.S.C., ch. 113, sec. 964.

I think that, in the circumstances surrounding the plaintiff's mishaps, the officers and crew acted with the best judgment. There will be judgment for the defendants.

Judgment for defendants.

ONT.
S. C.

TORONTO GENERAL TRUSTS CORPORATION v. GORDON, MACKAY & CO.

Ontario Supreme Court, Middleton, J. February 19, 1915.

1. CONTRACTS (§ IIA—128)—AMBIGUITY — MISTAKEN INTERPRETATION — ACTS OF PARTIES—INTENTION.

Where a contract is devoid of any ambiguity, its plain provisions must not be defeated merely because the parties have acted upon a mistaken interpretation of its provisions; but where there is an ambiguity the acts of the parties done under it are admissible in evidence as a clue to their intention.

[*Lewis* v. *Nicholson*, 18 Q.B. 503; *North Eastern R. Co.* v. *Hastings*, [1900] A.C. 260, referred to.]

Statement

ACTION by the executors of Joseph Mickleborough, deceased, to recover the sum of $10,000, in the circumstances mentioned below.

C. J. Holman, K.C., and *J. D. Bissett*, for the plaintiffs.
I. F. Hellmuth, K.C., and *J. H. Fraser*, for the defendants.

ONT.
S. C.
TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & Co.
Middleton, J.

MIDDLETON, J.:—This action is based upon an agreement which, notwithstanding Mr. Hellmuth's eulogy praising it as a model of draftsmanship and clarity, I find exceedingly obscure and difficult of construction.

Joseph Mickleborough, in his lifetime of the city of St. Thomas, owned or controlled all the stock of a mercantile company called "J. Mickleborough Limited." This company had apparently carried on a successful business in that city, and negotiations took place looking to the sale of the entire undertaking to the defendant company, wholesale merchants carrying on business in Toronto. These negotiations eventuated in the agreement in question, which bears date the 16th February, 1912. It was executed after much negotiation and after many drafts had been prepared and revised by the solicitors for the contracting parties.

Mr. Hellmuth tendered evidence of the negotiations antecedent to the making of this contract, to aid in its interpretation. I refused to receive this evidence. Mr. Holman, while resisting any evidence of Mr. Hellmuth, strenuously sought to give in evidence not merely rejected drafts of agreements but conversations prior to the making of the bargain, with a view of shewing me the contract ultimately made. This I also rejected. I admitted evidence as to what was done under the contract, not merely to shew how the parties construed the bargain, but with the view of allowing it to be shewn that in effect a new contract had been made by which the transaction was completed upon a certain footing.

In the first place, it is I think, my duty to ascertain from the document itself exactly what was contracted for between the parties, if this can be extracted from what appears within the four corners of the document itself.

Turning, then, to the document, it recites Mickleborough's control of the stock in the company, his desire to dispose of the company to the defendants, and that the defendants "are willing to purchase the said company on the basis of its having a paid-up capital of $50,000, and assets, after handing

ONT.

S. C.

TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & CO.

Middleton, J.

over the book-debts as mentioned in paragraph 8, and after making payments of $1,000 a month referred to in paragraph 5, of not less than the said amount of $50,000, as ascertained on the basis provided in paragraphs 2 and 3." It is then provided that the assets to be purchased, other than the shares, are to consist of the stock in trade and fixtures only, the fixtures to be valued at $5,000, the stock to be valued at 85 cents on the dollar, according to the stock-sheets. By clause 4, Mickleborough is to pay all the liabilities down to the 1st March, and is to be entitled to all the book-debts, of the company. There is a provision for the adjustment of insurance, telephone charges, etc., and for the granting of a lease by Mickleborough of the store premises, which he owned.

Apart from the recital which I have quoted, the difficulty is created by the provisions for payment. By clause 5 it is provided that the defendants "will pay the said Joseph Mickleborough for the said shares an amount equal to the value of the said goods, wares, merchandise, and fixtures, ascertained as herein provided, as follows: $20,000 by converting 200 of the said shares into first preference shares bearing a dividend . . . $20,000 in cash, and the balance in monthly sums of $1,000 each, with interest on the balances remaining unpaid at 6 per cent. per annum, payable half-yearly."

The stock was taken, the adjustments were made, and the value of the goods and fixtures was ascertained to be $77,561.50. The question at issue is, whether, as apparently contemplated by the recital, the purchaser is to have $50,000 left in the company, to represent its capital, after making the monthly payments, that is to say, whether all that is to be paid is $27,561.50, or whether the plaintiffs were to be entitled to receive in instalments the whole amount, less only the two sums aggregating $40,000 paid in cash and by the transfer of stock, that is, a net sum of $37,561.50.

It seems to me to be idle to contend that there is not some measure at least of conflict between these two clauses. It is quite obvious that if there was to be left $50,000 of net assets after all the $1,000 payments had been made, as stated by the first clause, the latter clause ought to have provided, not for

payment of the entire balance, but of the entire balance less $10,000.

The whole frame of the agreement is awkward: because, no matter what may be the value of the goods and fixtures, the same trouble is bound to arise. If the agreement meant that for the $50,000 of stock $40,000 only was to be paid, it ought to have been possible to say so in simpler language. The agreement is one for which the parties are equally responsible; it is the joint handiwork of their respective solicitors.

Mr. Holman urges that I ought to reject the preamble, and act solely upon the contractual clause. Mr. Hellmuth urges that what took place afterwards indicates that the parties adopted a certain construction, and that I ought to accept and act upon it.

Before entering into a discussion of the legal questions, I think it better to trace the history of the completion of the transaction. Both parties realised that care was required in seeing that difficulty would not arise in the future from the way in which the assets of the company were dealt with. It was proposed to hand over to the shareholders all the book-debts and a very large sum of money, more than half the nominal amount of the capital, and it was feared that, unless this was carefully done, liability might be imposed upon the stockholders, either vendor or purchaser, if the company should at any time become financially involved. A series of resolutions were prepared with a view of carrying out the transaction in a way that should not be open to criticism. These resolutions were prepared by Mr. McMaster and submitted by him to Mr. Glenn, who was acting for Mr. Mickleborough. It does not appear to me to be material to discuss the form which was being adopted. Mr. McMaster prepared these resolutions upon the basis of the figures given; and, although he mentions that the transfer is on the basis of leaving a capital of $50,000, he deducts from the gross amount $40,000 only, leaving the balance $37,000. He, however, proposes to deduct from this a further sum of $10,000 as representing the excess of the liabilities over the book-debts, leaving a net balance of $27,000.

Mr. Glenn responds to this on the 16th April, stating that,

ONT.

S. C.

TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & CO.

Middleton, J.

if "there is any difficulty in making the minutes agree exactly with the agreement, there ought to be an undertaking on the part of your client that the provisions of the agreement shall govern in every respect. . . . It would be better, I think, if there were a short agreement or undertaking that anything in the minutes should not prejudice Mr. Mickleborough's right to receive the principal and interest provided for in the agreement between the parties." This remark of Mr. Glenn is pressed somewhat unduly by Mr. Holman, for it is clear from its context that it is called forth only by some doubt as to whether there is a discrepancy between the minutes and the agreement as to the time from which interest is to run.

Mr. McMaster, in his reply on the 24th April, after referring to some alteration in figures not now material, adds: "I have altered the minutes so as to make it clear as to the date from which the interest is to run, and if that is not absolutely clear—and I think it is—from the minutes themselves, it is governed absolutely by the agreement which has already been signed by the parties, so that I do not think we need have any new agreement about it."

Some further correspondence took place looking to the holding of a meeting at which the draft minutes were to be adopted, which is not material.

On the 30th April, Mr. McMaster wrote a letter pointing out that in the earlier correspondence and documents he had been in error, and that under them Mr. Mickleborough would be getting more than the surplus provided for by the agreement—evidently referring to the surplus of the value of the assets over and above the $50,000. He goes into the matter at some length and clearly; pointing out that all that Mr. Mickleborough is entitled to receive is the $20,000 cash, $20,000 stock, and $27,561.50, the excess of the assets other than the book-debts over the $50,000 capital.

There is no ambiguity in the position then taken; and, if Mr. Mickleborough was to receive $77,561.50, and not $67,561.50, one would have expected some immediate protest from Mr. Glenn. Instead of that, there was nothing in writing. Mr. McMaster states that he had a conversation with Mr. Glenn, and

that Mr. Glenn acknowledged the accuracy of the position taken. Unfortunately Mr. Glenn died before the recent difficulty arose between the parties. Mr. Mickleborough also died, and the question did not arise until long after his death.

There is no reason why I should hesitate to accept, as I do, Mr. McMaster's statement. I think it is amply borne out by all that followed.

The next document produced is a letter from Mr. Glenn, bearing date the 7th May, which contains no reference to Mr. McMaster's letter of the 30th April, but which does refer to the carrying out of the transaction on the basis of Mr. McMaster's amended minutes.

Other correspondence follows, and the resolutions in their amended form, as prepared by Mr. McMaster, were duly passed at a meeting of the company held at Mr. Mickleborough's residence; and the transaction was regarded as completed upon that date.

The purchasers had taken possession of the physical assets at the time contemplated, about the 1st March, and arrangements had been made by which two gentlemen were placed in charge of the business, they each taking $4,800 stock in the company so as to give them a real interest in the business; the stock taking being largely financed by the defendants.

Books of the company kept at St. Thomas were opened, and journal entries were made, by which Mr. Mickleborough had carried to his credit the balance of $27,561.50, and payments of $1,000 and interest were than made to him from time to time.

Singularly enough, although the amount carried to Mr. Mickleborough's credit was $27,561, the young man who acted as secretary-treasurer, and who held $4,800 of stock, computed the interest as payable on the basis of a credit of $37,561. This arose from some understanding or misunderstanding which, he says, he entertained, that this was the true amount of the debt. The payments of principal and interest were entered from time to time in statements sent to Messrs. Gordon Mackay & Co. Limited, but there was nothing in these statements to indicate how the interest had been computed. Balance-sheets were taken off from time to time and sent forward, these in every case shewing the smaller amount of indebtedness.

ONT.

S. C.

TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & CO.

Middleton, J.

Mr. Mickleborough died on the 26th November, 1912; Mr. Glenn died on the 25th August, 1914; and Mr. McIntyre, the vice-president of the company, died in October, 1914. It is not shewn that he knew anything about the facts. Some considerable time after Mr. Glenn's death, the question of the balance due arose between Gordon Mackay & Co. and the executors of Mickleborough; and this action concerns the $10,000 alone.

If as a matter of law I am entitled to look at what was done, I have no hesitation in finding that all that took place shews that it was never intended that any greater sum than $67,561.50 should be paid. Mr. Glenn was a most careful and capable solicitor, and one who would appreciate to the full the position clearly taken by Mr. McMaster; and, if it had not been in accordance with the real intention of the parties, no one would have pointed it out more quickly and more clearly than he.

Chief Justice Tindal, perhaps more than any one else, relied upon action under a document as the best key to its interpretation. For example: "Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties:" *Doe dem. Pearson* v. *Ries* (1832), 8 Bing. 178, at p. 181. "There is no better way of seeing what they intended than seeing what they did, under the instrument in dispute:" *Chapman* v. *Bluck* (1838), 4 Bing. N.C. 187, at p. 193.

Concerning the maxim *contemporanea expositio est optima et fortissima in lege*, to which this principle is closely akin, Lord Coke says: "Now this that hath been said does agree with our books, and therefore it is *benedicta expositio* when our ancient authors and our yeare books, together with constant experience, doth agree" (2 Inst. 181.)

Authority is not wanting to shew that this maxim must not be unduly pressed, and it is clear that, where the contract is devoid of all ambiguity, its plain provisions must not be defeated merely because the parties have acted upon a mistaken interpretation of its provisions. The case cited by Mr. Holman, *Lewis* v. *Nicholson* (1852), 18 Q.B. 503, recognises the rule

and this qualification. Campbell, C.J. (p. 510) says that the contract is free from ambiguity, and then, "That being so, I am clearly of opinion that we cannot look to subsequent letters to aid us in construing the contract." To quote this omitting the introductory words "That being so," is to miss the whole meaning of what was said.

See also *North Eastern R.W. Co.* v. *Hastings*, [1900] A.C. 260, where Lord Halsbury says (p. 263): "No amount of acting by the parties can alter or qualify words which are plain and unambiguous."

But I doubt whether contemporaneous exposition is the true principle here applicable. It seems to me rather that the law would imply the making of a new contract based upon the interpretation claimed. Assume an ambiguous document, while the contract is as yet executory: one party puts forward a certain interpretation, free from all ambiguity; the other may either contest the position taken or may elect to receive the benefit upon an acceptance of that construction. If he so elects, a new contract is in fact made.

Or it may be that the case should be regarded as an application of the doctrine of estoppel. When Mr. Glenn and his client permitted the transaction to be carried out on the basis of Mr. McMaster's letter, without a word of protest, it is not unfair to say that they are precluded from now setting up any other as being the true meaning of the agreement.

The attempt to offset what was done by Mr. McMaster and Mr. Glenn by an inference to be drawn from the computation of interest upon the larger claim, I think, entirely fails. It is not shewn that the defendants knew that the computation was made upon this basis. No doubt, they had the means of ascertaining if an accurate computation had been made by them; but the failure to compute or to notice the mode of computation does not amount to an acquiescence in it. It is more than offset by the balance-sheets, which are all based upon the smaller claim.

This relieves me from considering whether the rule which Mr. Holman invokes, that an unambiguous contract cannot be modified by a mere recital, applies to a document of this kind.

ONT.
S. C.
TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & Co.
Middleton, J.

All artificial rules are, I think, to be invoked only as a last resort. The rule invoked is much on a par with that which has defeated the intention of testators, that the last clause in a will has greater effect than an earlier clause, now commonly referred to as only "a rule of thumb."

For these reasons, the action fails, and must be dismissed with costs.

Action dismissed.

ONT.
S. C.

Re WORTHINGTON.

Ontario Supreme Court, Middleton, J. February 26, 1915.

1. TRUSTS (§ I A—1)—MORTGAGE—CONTINUANCE OF—RELATION BETWEEN MORTGAGOR AND MORTGAGEE — SALE UNDER POWER — MORTGAGEE TRUSTEE FOR SURPLUS.

During the continuance of a mortgage there is not a relationship of trustee and *cestui que trust* between the mortgagor and the mortgagee; but after the exercise of a power of sale the mortgagee is a trustee of the surplus in his hands.

[*Re Kingsland*, 7 P.R. (Ont.) 460, approved; *Western Canada v. Court*, 25 Gr. 151, disapproved; *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642, followed.]

2. MORTGAGE (§ V—64)—MORTGAGOR WILLING TO PAY—MORTGAGEE INTERNED PRISONER OF WAR—MORTGAGEE UNABLE TO SIGN DISCHARGE —PAYMENT INTO COURT—DECLARATION DECLARING LAND FREE OF INCUMBRANCE.

The Trustee Act, R.S.O. 1914, ch. 121, does not enable the Court to make an order vesting land in Ontario in the mortgagor when he is willing to pay off the mortgage and to pay the money into Court, where the mortgagee's signature to a discharge cannot be obtained because of his internment abroad as a prisoner of war; but if the mortgagor has made a contract of sale of the lands free from incumbrance he may apply under the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 21, for an order to pay into Court sufficient money to meet the incumbrance and interest including an allowance for the costs of a future motion for payment out, and may thereupon obtain the Court's order declaring the land to be free from the incumbrance.

[*Re Keeler*, 32 L.J. Ch. 101, disapproved; *Re Underwood*, 3 K. & J. 745, distinguished; see the subsequent Ont. statute of 1915, ch. 21, amending the Mortgages Act, R.S.O. 1914, ch. 112.]

Statement

APPLICATION by A. H. Worthington for an order under the Trustee Act. R.S.O. 1914, ch. 121, vesting in the applicant certain land in Ontario covered by a mortgage made by the applicant to J. T. Armand, upon payment into Court of the mortgage money, and for leave to pay the money into Court.

D. Urquhart, for the applicant.

Middleton, J.

MIDDLETON, J.:—The mortgage bears date the 30th April, 1914. It is not produced, and I do not know whether it

is yet due, according to its terms. Armand, the mortgagee, is a naturalised Canadian, holding a certificate granted the 23rd April, 1894. He left Canada for France on the 15th June, 1914, and while in Alsace was arrested as a spy and is now interned as a prisoner of war at Baden. He was heard from in January; but, owing to his situation, he cannot be communicated with, and it is impossible to obtain his signature to a discharge of the mortgage.

Armand had been resident at Montreal, and on the 10th November, 1914, a family council was held under the laws of the Province of Quebec, and Mr. Alban de Sars de Compte was appointed curator of Armand's property, Armand being an absentee. This appointment was afterwards homologated by the Superior Court of the Province.

These proceedings in the Province of Quebec, it is admitted, are not sufficient to enable the curator to reconvey the Ontario realty upon payment of the mortgage-money.

It is argued that the case falls within the provisions of the Trustee Act, R.S.O. 1914, ch. 121, and that I am therefore able to make an order vesting the land in the mortgagor, upon proper terms to secure the mortgage-money to the mortgagee.

Notwithstanding certain English cases, I am clearly of opinion that the Act does not apply. In the first place, by the interpretation clause (sec. 2(*q*)) it is expressly provided that a "trustee" shall not include one who is merely a mortgagee. In the second place, the scheme of the Act itself differentiates between trustees and mortgagees. By sec. 8, the Court may make a vesting order in the case of an infant mortgagee. By sec. 9, the Court may make a vesting order where the mortgagee is dead, and there is difficulty in ascertaining his heir or devisee in whom the title to the land is vested. None of these sections deal with the case of an absent mortgagee. Most of these provisions would be unnecessary if the trustee sections were intended to apply to a mortgagee.

In English conveyancing practice a deed conveying property in trust for sale and directing payment of a debt out of the proceeds of the sale is by no means uncommon, and such a trust deed is frequently described as a "mortgage." This was the form of

ONT.
S. C.
RE WORTHINGTON
Middleton, J.

conveyance brought before Sir W. Page Wood, V.-C., in *In re Underwood* (1857), 3 K. & J. 745. This was held not to be a mortgage within the corresponding provision of the English Trustee Act, and therefore a vesting order was made under the trustee clauses.

In *In re Keeler's Mortgage* (1863), 32 L.J. Ch. 101, a mortgage, in the ordinary form, containing a power of sale providing that the surplus proceeds after payment of the mortgagee's claim should be held in trust for the mortgagor, came before Kindersley, V.-C. He thought that, no matter what doubt he might have entertained if the matter had been *res integra*, the case was governed by the decision of Wood, V.-C.

With this I cannot agree. The whole point of the earlier decision was that the instrument was a trust deed, and not a mortgage. In the latter case the conveyance was undoubtedly a mortgage, and not a trust deed, and it did not become a trust deed within the statute and lose its character of mortgage simply because there was a power of sale and a trust of the surplus money.

Notwithstanding this, the case has found its way into textbooks, without question, as an authority for the proposition urged by Mr. Urquhart. In our own Courts it was at first held that a mortgagee, even as to the surplus in his hands after exercising the power of sale, was not a trustee within the statute: *Western Canada Loan and Savings Co.* v. *Court* (1877), 25 Gr. 151; but a more liberal construction afterwards prevailed, and in *In re Kingsland* (1879), 7 P.R. 460, Spragge, C., permitted payment into Court by a mortgagee of the surplus money in his hands. This decision has ever since been followed.

The case of *London and County Banking Co.* v. *Goddard*, [1897] 1 Ch. 642, 650, shews clearly the distinction, and the true principle applicable. After referring to the definition found in the Trustee Act, North, J., says: "I have always understood it to refer to the principle that during the continuance of a mortgage there is no relationship of trustee and cestui que trust between mortgagor and mortgagee. It is quite clear that if lands in mortgage are sold by the mortgagee there may be surplus proceeds, of which the mortgagee becomes trustee; or after the

money has been paid off, if the land had not been reconveyed, there might be a trust of it in the mortgagee. In my opinion this definition relates exclusively to an estate conveyed by way of mortgage while that mortgage security continues to exist as such." He then adds that this restrictive definition "is not applicable to property on mortgage where the instrument of charge contains an express trust. If there is the relationship of trustee and cestui que trust established, there is no reason why the parties should not have the full benefit of the enactment."

Upon the affidavits filed it appears that the property in question has been sold upon terms entitling the purchaser to call for a title free from incumbrance. This will enable the vendor to clear the title upon complying with sec. 21 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109. If the mortgage is not yet due allowance will have to be made for future interest. If the mortgage is past due, no such allowance is necessary; but in either case there should be an allowance made for the costs of the motion for payment out.

I gathered that the curator appointed in Quebec is a concurring party to this application. If he is, no further notice need be given. If he is not, notice should be given to him before any order issues under the Conveyancing and Law of Property Act.

I say nothing as to the curator's right to receive the money from Court. It will depend upon the domicile of the mortgagee and upon the law of the Province of Quebec. It may be that, upon its being shewn that the mortgagee was domiciled in that Province, and that, according to the law of the Province, such a curator is entitled to the money, an order may be made; but until a formal application is made it is premature to discuss this question.

Order accordingly.

B. C.

C. A.

GANZINI v. JEWEL-DENERO MINES.

British Columbia Court of Appeal, Irving, Martin, and McPhillips, JJ.A. April 6, 1915.

1. NEGLIGENCE (§ I A—4a)—MINE SIGNALS—STATUTORY CODE—COMPULSORY ADOPTION—DEFECT—BASIS OF ACTION.

Where a statutory code of mine signals is compulsorily adopted, a defect incident to such code cannot be made the basis of a negligence action on the theory that the statutory signalling system should have been supplemented by another such as a speaking tube system.

Statement

APPEAL by plaintiff from the judgment of Clement, J.

M. A. Macdonald, for appellant.

Craig, for respondent.

Irving, J.A.

IRVING, J.A.:—In *Clark* v. *C.P.R.* (1912), 2 D.L.R. 331, 17 B.C.R. 314, this Court held that a jury could not regard as a negligence a standard of duty laid down by Parliament. In the present case the statutory standard was adopted, but miscarried, owing to the fact that it is not absolutely perfect. I think the learned Judge was right in saying there was no evidence of negligence to go to the jury on that point.

It was not suggested that either the hoistman or Morris was negligent, and the charge of lack of system of inspection was expressly abandoned. But Mr. Macdonald insisted, after he had closed his case, that he ought to be allowed to amend so as to shew that the company was negligent by reason of its superintendent hiring green men and putting them to work in important positions, without fully instructing them as to their duties.

As a rule, amendments should be allowed freely, provided the application is *bonâ fide*, and the other side can be compensated for the mistake, but where the application involves a change in the nature of the attack and is made after the evidence for the plaintiff is closed and a motion to dismiss is granted or about to be granted, the discretion of the trial Judge is difficult to review. In the present case I am not prepared to say the learned Judge was wrong.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—I am of the opinion that the learned Judge below took a correct view of the matter. I only add that, so far as the employment of incompetent workmen is concerned, that point, in any event, is not open to the plaintiff in view of what occurred at the trial. As to the suggestion that there was a

defective system of signalling because, though the one in use was that prescribed by rule 31 (9) of the Metalliferous Mines Inspection Act as "the code of mine signals (which) shall be used . . . in every mine where hoisting is employed," yet it should have been supplemented by a speaking tube system, so as to reduce the danger of mistakes to a minimum, all that I have to say is that no authority has been cited in support of it. What the legislature has deemed a sufficient safeguard should not be open to have additions made to it by a jury.

Martin, J.A.

McPHILLIPS, J.A., for reasons given in writing, was of the opinion that the appeal should be allowed.

McPhillips, J.A.

Appeal dismissed.

WILLIE v. DELISLE.

SASK.
S. C.

Saskatchewan Supreme Court, Haultain, C.J., Elwood, Brown, and McKay, JJ. March 20, 1915.

1. SALE (§ III D—75)—PURCHASER UPON A CONDITIONAL SALE CONTRACT—SALE BY WIFE—FAILURE TO REGISTER LIEN NOTES—RIGHTS OF PARTIES.

The buyer of a horse from the wife of a previous purchaser who had obtained it upon a conditional sale contract will, if he buys with the acquiescence of the conditional purchaser be entitled to the like protection because of the failure of the conditional vendor to register his lien notes under the Lien Notes Act, Sask., as a purchaser from the husband who gave the lien notes would have been entitled to, where the purchase from the wife was carried out in good faith and for valuable consideration.

[*Roff* v. *Kreeker*, 8 Man. L.R. 230, referred to.]

ACTION for the recovery of one horse, or its value, $150, alleged to have been wrongfully taken from the plaintiff by the defendants; and also for general damages for such wrongful taking.

Statement

G. A. Cruise, for appellant.

Arthur Frame, for respondents.

The judgment of the Court was delivered by

McKAY, J.:—The defendants, Delisle Bros., took the horse out of the possession of the plaintiff on April 28, 1914, under a lien note made in their favour by one A. R. Mayo, to whom they sold the horse in September, 1912. The lien note in question was not registered, as required by the Act respecting Lien Notes, being ch. 145, R.S.S.

McKay, J.

The plaintiff claims he bought the horse and other chattels

SASK.
S. C.
WILLIE
v.
DELISLE
McKay, J.

for $500 and a farm for $1,700 from Mrs. A. R. Mayo, Mr. A. R. Mayo, the original buyer of the horse in question from Delisle Bros., being present.

The learned trial Judge dismissed the action, because he came to the conclusion that there was no evidence before him to shew how Mrs. Mayo became the owner of the horse, and, further, says that "he," the plaintiff, "did not purchase from Mayo, and he can "get, I think, no better title under sec. 23 of the Sale of Goods Act than the person who sold to him can give." But, on the other hand, he found that the purchase of the horse by plaintiff from Mrs. Mayo was in good faith and that he paid for the articles bought. The evidence shews that the plaintiff purchased the horse in question and other chattels and a farm from Mrs. Mayo on April 22, 1914, and that during the negotiations Mr. Mayo was present and took part in the same, and was also present at the conclusion of the purchase. . . .

If Mrs. Mayo had no right in herself to sell to plaintiff, it seems to me she had such right with the authority and consent of Mr. Mayo, he being present at and a consenting party to the sale, and actually taking part in it. It was, in effect, a purchase from Mr. Mayo himself, and under these circumstances Mrs. Mayo could transfer as good title under sec. 23 of the Sale of Goods Act, ch. 147, R.S.S., as Mr. Mayo himself. True it is that Mrs. Mayo gave a bill of sale in her own name, but the horse in question was taken possession of by the plaintiff the day after his purchase and kept in his possession until taken from him by the defendants, Delisle Bros.

If, then, it was a purchase from Mrs. Mayo, either in her own right or with Mr. Mayo's authority and consent, I think the purchase is good as against the defendants and plaintiff entitled to the protection of the Act respecting Lien Notes.

Under the Act the defendants Delisle Bros. can only set up their right of property in the horse as against a purchaser from the buyer or bailee of the horse, in good faith for valuable consideration, if the note is registered.

The note was not registered, and the learned trial Judge finds that the purchase was made in good faith and the horse paid for, and there is ample evidence to warrant this finding. This, then, to my mind, constitutes the plaintiff a purchaser in good

faith for valuable consideration within the meaning of the Act, and the defendants Delisle Bros. cannot be permitted to set up their rights under the lien note against him. I do not think it is necessary to quote any authority further than to refer to *Roff* v. *Krecker*, 8 Man. L.R. 230, where Taylor, C.J., reviews all the authorities, both in England and Ontario, upon statutes using similar language to ours.

There is no direct evidence of what damages the plaintiff suffered, but, as the horse was taken by defendants, Delisle Bros., while the plaintiff was working him in his seeder during seeding time, and was kept by defendants, Delisle Bros., until taken from them by the sheriff, the evidence not shewing when, the plaintiff must have suffered some damage; I will, therefore, allow $15 damages.

There is nothing in the notice of appeal to shew that the judgment in favour of the defendant Brown is appealed from, although the form of notice would indicate that the appeal is against the whole judgment, except that defendant Brown's name does not appear in the style of cause, neither did he appear on the appeal by counsel. In any event, there is no evidence against him.

For the foregoing reasons I am of the opinion that this appeal should be allowed with costs as against defendants Delisle Bros., and judgment be entered in plaintiff's favour as against them in the Court below for a return of the horse, or its value, $150, and $15 damages, with costs, but judgment below should stand dismissing the plaintiff's action against defendant Brown with costs. No costs of appeal to Brown.

Judgment accordingly.

McARDLE & DAVIDSON v. HOWARD.

ALTA.
S. C.

Alberta Supreme Court. Stuart, J. June 22, 1915.

1. COSTS (§ II—26)—SOLICITOR—SUING OR DEFENDING IN PERSON—COSTS—TAXATION—UNNECESSARY.

A solicitor, suing or defending an action in person, is entitled, if he obtains judgment, to tax his costs in the ordinary way, but is not entitled to tax unnecessary costs, such as instructions to himself and attendances upon himself.

[*London and Scottish Benefit Society* v. *Chorley*, 13 Q.B.D. 872; *King* v. *Moyer*, 9 P.R. (Ont.) 514, referred to.]

APPEAL by the defendant from the taxing officer. Statement

ALTA.

S. C.

McARDLE & DAVIDSON v. HOWARD.

Stuart, J.

I. W. McArdle, for plaintiff.

F. C. Moyer, for defendant.

STUART, J.:—The plaintiffs, a firm of solicitors, sued the defendant under the small debt procedure, in the District Court, for the sum of $38, being the amount of their bill against him. The solicitors sued in person.

The defendant did not dispute the claim, but entered a counterclaim for damages to the amount of $1,000, charging negligence against the plaintiffs. His order was then obtained by the plaintiffs transferring the case to the Supreme Court. The defence to the counterclaim was filed and examination for discovery took place. Shortly before the case was ready for trial, the plaintiffs retained another firm of solicitors, but before the action came on for trial a settlement was arrived at in the following terms:—

> Confirming our conversation over the telephone, we beg to say we will accept your offer, which was made as follows:—we to be allowed our claim as sued on with costs on small debt scale; the counterclaim to be dismissed or withdrawn and the defendant to have the right to bring a separate action at any time within the statutory period, we to receive costs of counterclaim to be taxed under third column of schedule "C" of the Rules of Court as to costs.
>
> (Sgd.) McArdle & Davidson.
>
> This settlement confirmed this 21st day of May, A.D. 1915.
>
> (Sgd.) Taylor, Moffatt & Moyer.

The case was called for trial before Mr. Justice McCarthy, and judgment was directed to be entered, and was entered accordingly in the terms of the settlement above set forth, which was announced to the Court. The taxation of costs was then proceeded with, but the defendant's solicitors objected to any allowance of costs before the change of solicitors, on the ground that, as the plaintiffs had sued and defended in person, they were not entitled to such costs, and that the terms of the settlement and the judgment did not alter this position, because all that was meant by those documents and records was that such costs of the counterclaim should be paid as could properly be taxed, which would cover only the costs of the solicitors retained shortly before the case was called.

I reserved judgment, because I had the impression that the defendant's solicitor was right as to the rule in regard to solicitors suing or defending in person. It appears, however, that it is

well settled that the rule is to the contrary, and that a solicitor suing or defending in person is entitled, if he obtains judgment, to tax his costs in the ordinary way, with certain exceptions. He is not entitled to such costs as the costs of instructions to himself and attendances on himself, which, of course, are unnecessary. The rule is laid down in *London and Scottish Benefit Soc.* v. *Chorley*, 13 Q.B.D. 872, where the Court of Appeal upheld the opinion of a Divisional Court. The reasons for the rule are there stated, and it is explained that the rule does not rest upon any special privilege of a solicitor. I need not here repeat the reasons there given. The case has not been overruled and is accepted in both the Annual Practice and in Holmested and Langton (see p. 1335 of the latter work, 4th ed.); see also *King* v. *Moyer*, 9 P.R. (Ont.) 514. It is unnecessary, therefore, to consider whether, if the rule had been otherwise, the terms of the settlement would, nevertheless, have been binding upon the defendant.

It was contended that the words of r. 16 of the rules as to costs would, in any case, preclude a solicitor suing or defending in person from taxing his costs, but I cannot discover anything in those words which would prevent the application to this case of the reasons pronounced in the case first above cited. The solicitor still pays his clerks and stenographers for doing his work, although, of course, not item by item, but their time is occupied in the work. There must, however, be some additional care and trouble taken by the officer in our Courts beyond that which would fall upon a taxing officer in England, on account of our present system of lumping costs, instead of taking them item by item. The sums allowed in the schedule are not fixed arbitrarily, but are maximum amounts, and the taxing officer is always at liberty, and, indeed, it is his duty, to reduce them if, in his opinion, the sum named should not be allowed. In the present case it seems to me that a deduction should be made from some of the items upon the principle laid down in the case cited. For instance, the first item in the bill, "Defence to counterclaim, $15," should be dealt with by the taxing officer on the assumption that the maximum sum of $15 named in the schedule was intended to include some remuneration for "instructions," and, according to the exception to the rule, nothing should be allowed

ALTA.
S. C.
McARDLE & DAVIDSON v. HOWARD.
Stuart, J.

for instructions. I would, therefore, deduct $5 from this item. A similar deduction should also be made from several other items. In any case $3 should be deducted from the item, "Order transferring from District Court to Supreme Court, $18," and, as the order was an order, of course, could not be opposed and was made necessary by the very terms of the rule. I think a further sum of $2 should be deducted. There is no doubt that the plaintiff is entitled to the costs of this application, because it was rendered necessary by the counterclaim, and it is quite unreasonable to say that the costs of this order should be placed in the costs of the plaintiffs' small debt action.

Then I should deduct $5 from the item, "Order for directions, $30," because, undoubtedly, a portion of the sum of $30 is intended to cover "instructions" which are not taxable. I would, in any case, deduct $5 from the item, "Attending on examination of defendant, $18," for a similar reason. This, of course, is really a counsel fee, and it is doubtful whether under the rule a counsel fee should be allowed at all. It might involve and, no doubt, did involve some work on the part of the solicitors' clerks, so that I think $9 is a sufficient allowance.

I am unable to see any reason for disallowing anything in respect of the attendance of the two partners of the plaintiffs' firm upon their own examinations. The lump sum is, of course, intended to cover certain other trouble, such as ordering and obtaining copies of the evidence. And the attendance of the solicitor is necessary and forced upon him by the other party. I think these items should stand.

The remaining items, as I understand the matter, were either proper even if the solicitor were still defending in person or were for things done after the plaintiffs had retained other solicitors. I see no reason for making any further deductions. I, therefore, would deduct a total of $24 from the amount allowed by the Master, which will reduce the bill to $167.50, at which amount it will be allowed. There will be no costs of the appeal.

Order accordingly.

EARLY v. CANADIAN NORTHERN R. CO.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Newlands and McKay, JJ. March 20, 1915.

1. RAILWAYS (§ II D 6—70) — ACTION FOR HORSES KILLED—DEFENCE—HORSES AT LARGE THROUGH WILFUL ACT OF OWNER—NEGLECT BY RAILWAY COMPANY TO MAINTAIN CATTLE GUARDS.

It is made an absolute ground of defence under sec. 294, sub-sec. 4, of the Railway Act, Can., to an action against the railway for value of stray horses killed on its right of way at a place which was not a crossing that the horses got at large through the wilful act or omission of the owner, such as turning the horses out to run at large without the authority of a municipal by-law, and such statutory defence is not displaced by shewing that the horses must have got upon the railway tracks at a railway crossing where the railway had neglected to maintain cattle guards as required by sec. 254 of the Railway Act (amendment of 1911, ch. 22).

[*Sporle* v. *G.T.P.R. Co.*, 17 D.L.R. 367; *Clayton* v. *C.N.R. Co.*, 17 Man. L.R. 426, 435, applied; *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, 15 Can. Ry. Cas. 329, 23 Man. L.R. 410, distinguished.]

Statement

ACTION for damages for horses killed on railway tracks.

J. N. Fish, K.C., for appellant.

P. H. Gordon, for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—I do not think that the facts of this case come within the provisions of the first three sub-sections of sec. 294 of the Railway Act. Those sub-sections deal exclusively with the case of animals killed or injured at the point of intersection of a highway with a railway. The animals in question in this case were killed on the property of the railway company at a considerable distance from the point of intersection. The case clearly comes within sub-secs. 4 and 5 of sec. 294, cited.

In order to successfully resist the plaintiff's claim the defendant company must establish that the animals which got upon its property and were killed "got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent."

It is admitted by the plaintiff that his horses were running at large from March 11 up to March 18, 1913, the day of the accident. During the earlier part of the year the horses had been kept in an enclosed pasture, but on and after March 11 they were allowed by the plaintiff to run at large, "when," as he says, "the herd law ceased." The plaintiff was called as a witness on behalf of the defendant, and on cross-examination by his own counsel made the following statement: "There was a

SASK.

S. C.

EARLY
v.
CANADIAN
NORTHERN
R. CO.

Haultain, C.J.

by-law of the rural municipality of Wilton permitting animals to run at large . . . after March 11, and I turned them out."

The reference in this and other evidence of a similar nature is undoubtedly to a by-law permitting animals to run at large during a certain portion of the year, which the municipality had the power to make under the Rural Municipality Act. Objection was taken to the evidence given with regard to the existence of a by-law, and in view of that objection I do not think that we can assume that any such by-law was passed.

Under these circumstances, then, was the plaintiff's act of turning the horses out negligence or a wilful act or omission on his part? In my opinion it was a wilful act, because it was done deliberately and intentionally. It might also be called a wilful omission, because the plaintiff deliberately omitted to do what, in the absence of a by-law, he should have done, that is, keep his horses from running at large. See *Murray* v. *C.P.R.*, 7 W.L.R. 50; *Becker* v. *C.P.R.*, 5 W.L.R. 570.

The case of *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, 15 Can. Ry. Cas. 329, 23 Man. L.R. 410, was cited on behalf of the respondent, but in that case there was a by-law permitting the running at large of cattle at all times of the year, and presumably that by-law was properly proved. On the facts of that case I would respectfully agree with the interpretation given to the words "wilful act or omission." But here we have no such by-law proved, and the presumption must be against the right to allow animals to run at large.

But, the respondent says, if I was guilty of negligence or a wilful act or omission, the real, direct and effective cause of the accident was the failure of the defendant company to maintain cattle-guards suitable and sufficient to prevent cattle and other animals from getting on the railway, as required by sec. 254 of the Railway Act.

The evidence shews that the cattle-guards at the point where these horses got on the railway had been removed for the winter, and had not been replaced at the time of the accident, and there is no suggestion that the defendant company had been relieved by the Board of Railway Commissioners from the duty of maintaining these cattle-guards under sub-sec. 4 of sec. 254, as enacted by sec. 9 of ch. 22 of the statutes of 1911.

SASK.

S. C.

EARLY v. CANADIAN NORTHERN R. CO.

Haultain, C.J.

Section 427 provides a penalty for the omission, on the part of a railway company to do anything required by the Act, by the company where no other penalty is specially provided in the Act. Sub-section 2 of that section further enacts that the company, in addition to such penalty, shall be liable to any person injured by any such omission for the full amount of damages sustained thereby. This section, in my opinion, does not apply to the present case. Section 294 of the Railway Act very largely extends the common law liability of a railway company for injuries to animals which get upon the property of the company, and provides a special defence against actions brought in respect of such injuries. In the language of Perdue, J., in *Clayton* v. *C.N.R. Co.*, 17 Man. L.R. 426, at 435, cited with approval in *Sporle* v. *G.T.P.R. Co.*, 17 D.L.R. 367,

> the section provides the whole remedy to which the owner shall be entitled in such a case and the circumstances under which he can recover. . . . The rights and liabilities of the railway company in respect of animals at large are declared by sec. 237 (now 294) and no section of general application contained in the Act should add to or interfere with the specific provisions contained in the section specially framed to deal with it.

The plaintiff cannot be allowed to invoke the general principle of the common law to cure his contributory negligence in the face of a specific enactment making that contributory negligence an absolute defence to his action.

The appeal, therefore, should be allowed with costs.

Newlands, J.

NEWLANDS, J., for reasons given in writing, was also of opinion that the appeal should be allowed.

McKay, J.

MCKAY, J., concurred.

Appeal allowed.

SASK.

S. C.

BELLAMY v. ROBERTSON.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, Elwood, and McKay, JJ. March 20, 1915.

1. BREACH OF PROMISE (§ II—5)—ENGAGEMENT—RELEASE OF THE OTHER PARTY—INTENTION OF RELEASING PARTY TO GIVE UP HER RIGHTS—ONUS OF ESTABLISHING INTENTION.

The releasing of the other party from a contract to marry involves an intention on the part of the releasing party to give up whatever rights of action she may have in reference to the engagement, and the onus of establishing such intention is on the defendant in an action for breach of promise of marriage.

[*Davis* v. *Bomford*, 6 H. & N. 245, distinguished.]

SASK.

S.C.

BELLAMY v. ROBERTSON.

Lamont, J.

ACTION for damages for breach of promise of marriage.

J. N. Fish, K.C., for appellant.

J. F. Bryant, for respondent.

HAULTAIN, C.J., concurred with LAMONT, J.

LAMONT, J.:—There is no question about the contract to marry; that is admitted by the defendant. His defence is that in October, 1913, it was mutually agreed between the plaintiff and himself that the engagement existing between them should be terminated, and that the same was then terminated. The action came on for hearing before my brother Newlands, who held that the engagement had been terminated by mutual consent. From that decision the plaintiff now appeals.

In July, 1913, the defendant wrote to the plaintiff at Saskatoon stating that in his opinion it was inadvisable that they should get married, and setting out a number of reasons therefor. On August 29 he again wrote to her. The tenor of this letter shewed clearly a desire on his part to terminate the engagement, but near the end he used the following words:—

> However, Mabyl, if you think we can get along together and see things in a different way than we see them now, we'll let the bargain stand, but if otherwise, let us call the deal off. It is up to you.

On September 5, the plaintiff replied, explaining certain matters at which the defendant seems to have taken offence. Her attitude throughout this letter is, I think, set forth with reasonable clearness in one of the closing paragraphs, where she says:—

> I have taken you at your word all the way through when you said "My love for you has never changed," and if you loved me as you said then there could be no doubt how we would get along in later days. But if on the other hand you do not care for me then it is a different affair altogether. I do think though that we should have a personal interview on the matter before we make a final decision in order that there may be no mistake because as you say it is a serious thing.

An interview took place about a month later. At that interview the defendant says he left the matter of continuing the engagement to the plaintiff, and that she agreed to its termination. She says she did not agree to it, and further says that the only way it was left to her was by the defendant saying in a vehement manner:—

> I will marry you Mabyl Bellamy, dammit, if it takes every cent I make to keep you, and I will leave you in a house here in Saskatoon and I will go to Regina to live.

In reference to this interview the plaintiff at the trial gave the following evidence:—

Q. Then when you parted had you given him any release from the engagement? A. No. He said "What are you going to do about it?" and I said "I haven't decided." He said "Will you write to me," and I said "Yes." He said "Will you write within two weeks?" I said "Yes." Q. Did you write him? A. I did. Q. How long afterwards was it written? A. It was about 17 days I fancy, a little over two weeks.

The following is her letter, dated October 26:—

You asked me to write to you and I said I would. It has been a mystery to me ever since why I should have made that promise for there is really nothing to say. I would not have you think that is why I have not written sooner. It was because I have not had the time. I have had only one spare evening since you were here and that was because I was so tired and sleepy that I just couldn't keep awake. Rather an unusual thing for me you will think, but it is the best under the circumstances I think. However, I said I would write and here I am and since there seems nothing else to say I will ask as a special favour that you will not return any of the gifts I have given you from time to time, although I know this is perhaps the usual thing to do. I would say I have mislaid your street address, and if you will kindly send me that I will be pleased to send you any or all of your gifts as you wish. I would not risk to send them as I am sending this. Trusting that you will forgive my long delay in writing, and if you should be in the city any time we would be pleased to have you call. For as you say there is no reason why we should not remain friends.

In his judgment the learned trial Judge referred to the case of *Davis* v. *Bomford* (1860), 6 H. & N. 245. That case was also an action for breach of promise of marriage, in which it was proved that, the defendant having written a letter to the plaintiff desiring to terminate the engagement, called at her father's house, and a conversation took place respecting the return of letters. The defendant returned the plaintiff's letters. The plaintiff said: "No, I cannot give up your letters; it would be like giving you up altogether." The plaintiff left her home and went to reside with an aunt, and no correspondence took place between the parties for a period of two years. It was held that there was evidence from which a jury might infer that the plaintiff had exonerated the defendant from his promise before any breach. After referring to this case, the learned trial Judge in his judgment said:—

If mere silence in answer to the defendant's request to terminate the engagement is sufficient to shew its termination, her (the plaintiff's) letter offering to return his presents and asking him to keep hers is equally evidence of its termination.

SASK.

S. C.

BELLAMY v. ROBERTSON.

Lamont, J.

In addition to this ground upon which the trial Judge based his judgment, counsel for the defendant sought to support the judgment on other grounds. He argued that the question of continuing or ending the engagement had been left to the plaintiff. In my opinion, his saying in a vehement manner that he would marry her but that she should live in Saskatoon while he lived in Regina is not leaving the matter to her within the meaning of their contract to marry, as marriage presupposes a living together. Then counsel argued that the evidence warranted the conclusion that the plaintiff had agreed to release the defendant the night of their interview in October. The answer to that is that although the defendant swore to this in his evidence at the trial the learned trial Judge evidently did not accept it, otherwise he would have found accordingly, and would not have found the evidence of her agreement to terminate the engagement in the expressions used in the letter of October 26. In the alternative, counsel stated that when, on the night of the interview, the plaintiff agreed to write to the defendant, it was for the purpose of conveying her decision whether or not she would release him, and that her letter, in view of that fact, must be held to be a release. This contention is negatived by the letter itself. In the opening paragraph the plaintiff says that it is a mystery to her why she promised to write, because there was really nothing to say. This is totally inconsistent with the idea that she was conveying to the defendant in that letter her decision on the important question of whether or not she would release him.

Then does the letter itself contain expressions from which it should be inferred that she was agreeing to the termination of the engagement? With great deference, I cannot see that such an inference should be drawn from the letter. Where the letter at the outset expressly states that she has nothing to say, the subsequent language, in my opinion, must be clear and unequivocal to justify the drawing of a conclusion that she was acquiescing in the termination of the engagement. In the very paragraph in which she asks him not to return her gifts but agrees to return his, she says:—

> However, I said I would write and here I am and since there seems nothing else to say I will ask you as a special favour that you will not return any of the gifts I have given you from time to time, although I know this is perhaps the usual thing to do.

"Usual" under what circumstances? Did she mean it was usual when contracting parties were mutually agreeing to end an engagement, or was it usual when one party refused to carry out the contract? There is nothing in the letter from which one can determine the circumstances under which she considered it usual. In her evidence she stated that she had never released the defendant. She was asked why it should be a mystery to her that she had promised to write to him. Her answer was: "Because I was not going to give a decision and I did not realize why I should say I would write." There is no doubt in my mind that when the defendant asked her to write it was for the purpose of having her convey to him her decision as to whether or not she would agree to the termination of their engagement. Whether or not it was her intention when she promised to write to give her decision in the letter, is immaterial. When she came to write she used language which to my mind completely negatives the giving of any decision. At that time she herself says she was not going to give any decision. As he had refused to marry her and live with her she was acquiescing in his decision, but she was acquiescing because she could not help herself. She was hurt and wounded by the defendant's conduct, and as he did not want to marry her she could not insist on his so doing. Acquiescence in a state of things she could not help, however, is an entirely different thing from abandoning the rights which the law gave her against the defendant when he refused to carry out his contract. The releasing of the defendant from his contract involves an intention on her part to give up whatever rights of action she might have against him in reference to their engagement. That she had any such intention she denies. The onus of establishing such intention is on the defendant. The offer to return his presents and her asking him to return hers is, in my opinion, not conclusive of an intention on her part to give up her legal rights. What sentimental considerations may have been in her mind I do not know, but I do not think anything conclusive can be inferred from these expressions in view of the other portions of her letter. Reference to *Davis* v. *Bomford*, *supra*. In that case two years had elapsed without a communication, and the plaintiff had changed her residence without notifying the defendant. In the present case no change of residence had occurred, and this

SASK.

S. C.

BELLAMY v. ROBERTSON.

Lamont, J.

action was brought a few months after her letter was written. The *Bomford* case is authority for the proposition that

> where neither party has insisted upon the performance of a contract for a long period after it was made, it may be inferred that they intended to abandon it altogether. (7 Hals. 423.)

That principle, however, does not apply here. I am, therefore, of opinion that the defendant has failed to establish that he was discharged from his contract before breach thereof.

The appeal should be allowed with costs, the judgment of the Court below set aside, and judgment entered for the plaintiff for $500 and costs.

Brown, J.

BROWN, J., dissented.

Elwood, J.
McKay, J.

ELWOOD and MCKAY, JJ., concurred with LAMONT, J.

Appeal allowed.

SASK.

S. C.

ONTARIO WIND ENGINE v. BUNN.

Saskatchewan Supreme Court, Newlands, Brown, Elwood and McKay, JJ. March 20, 1915.

1. PRINCIPAL AND AGENT (§ II A—6a)—AGENT—AUTHORITY OF—FALSE STATEMENT BY— LIABILITY OF PRINCIPAL FOR— AGREEMENT FREEING FROM LIABILITY—EFFECT OF.

A sales agent for a machinery manufacturer must be held to have authority to describe a gasoline engine to the prospective purchaser and to tell the latter what it is capable of doing, and if he falsely described it by stating that it would do something which it was not capable of doing, his principals are liable for his fraud, notwithstanding a stipulation in the signed agreement that no agreements, stipulations, conditions or warranties, express or implied, verbal or otherwise, save those mentioned in writing therein, shall be binding on the principals.

[*Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174, distinguished; *Pearson* v. *Dublin Corporation*, [1907] A.C. 351, applied.]

2. DAMAGES (§ III A—40)—PURCHASER OF GASOLINE ENGINE—FRAUD OF AGENT—RIGHT TO RESCIND LOST BY DELAY—RIGHT TO COUNTERCLAIM —MEASURE OF DAMAGES.

Although the buyer of a gasoline engine may have lost his right to rescind by keeping the engine after knowledge of the fraud of the seller's agent in misrepresenting the engine's capacity, he retains his right to counterclaim against the seller suing for the price, in respect of the loss he (the buyer) had sustained by relying upon the agent's statements; the measure of damages is the difference in price between the engine he got and an engine such as was represented.

Statement

ACTION for the price of an engine purchased by defendant from plaintiffs.

R. B. Bennett, K.C., and *R. E. Turnbull*, for appellant.

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

NEWLANDS, J.:—The order upon which the engine in question was sold contains the following agreement and warranties:—

In the event of the alleged failure of the engine to fulfil the warranty herein, within two days after starting the same, or in the event of the purchaser being unable to make the same operate well within the said two days, written notice shall be given to the Ontario Wind Engine and Pump Co., Ltd., at Winnipeg, by registered letter, within two days after such failure, stating wherein it has failed to fulfil the warranty, and the company shall have the right to send a man to test the same, the purchaser furnishing necessary and friendly assistance, together with requisite help, and if found defective in material or workmanship, the company agrees to pay expenses of making such test, but if the failure is caused by the improper management or want of skill in operating such engine, then the purchaser agrees to pay such expenses to the company forthwith. In event of the engine being found defective in material or workmanship, the company may, at their option, repair such engine or replace the same by one which is not defective in materials or workmanship or may return to the purchaser any money and notes which have been paid or given by the purchaser and cancel this order or agreement and re-take the said engine, and in any of such events the said company shall not be responsible to the purchaser for any damage whatsoever. Failure by the purchaser to give the company such written notice within the said two days shall be conclusive evidence that such engine satisfies all warranties and of the due fulfilment of all warranties.

WARRANTY.

The Ontario Wind Engine and Pump Co., Limited, guarantees that each gasoline engine purchased hereunder shall be tested before leaving factory, and shall have developed its full-rated horse-power. They warrant the engine to be well made, of good material, and durable with proper care.

Parts proving defective in workmanship or material will be replaced free of charge (except freight or express charges) for the period of one year, upon the defective parts being returned to the company at Winnipeg, free of charge to the company.

Leaving out of the question the warranty that the engine developed its full-rated horse-power at the factory, the other warranties may be divided into two classes, operation and durability; the agreement in the body of the instrument containing the warranty as to operation and the warranties on the back those as to durability. In both cases good material and workmanship form an important part of the warranty.

As to the first, the defect must be discovered within two days, and notice sent to the company. As this was not done, the provision that such failure is conclusive evidence that the engine fulfils the warranties takes effect.

This latter provision can, however, have no effect upon the warranty as to durability, nor does it make any difference that

SASK.

S. C.

ONTARIO WIND ENGINE v. BUNN.

Newlands, J.

the want of durability is caused by bad workmanship or poor material, as that warranty is not, in my opinion, affected by the two days' trial.

In the first place, you could not tell whether an engine would be durable in two days, and, in the next place, this warranty provides for parts proving defective in workmanship or material being replaced for the period of a year, making this warranty one for at least a year, which is a sufficient time for the purposes of this action. The only question in my mind as to the warranty is whether the provision replacing parts found defective is exclusive of other remedies. This contract does not contain the provision . . . that

> no other remedy than the return of the said machinery in the manner herein provided for shall be had for any breach of warranty or warranties in this purchase.

It does, however, contain a provision in the agreement as to operation that, in the event of the company repairing, replacing or retaking the machine, the company shall not be responsible to the purchaser in any damages whatsoever. This provision is in the body of the contract, and does not, in my opinion, apply to the warranties on the back, and, any way, the engine in question has neither been repaired, replaced nor retaken by the company. I am, therefore, of the opinion that plaintiff's remedy for damages for breach of warranty has not been taken away by the contract.

Questions were submitted to the jury upon the warranty of durability, as to whether the engine was well made, of good material, and durable with proper care, and they answered "No" to both questions, and, as there is evidence upon which these findings could be based, I think they should not be interfered with.

The jury were not asked to find the amount of damages, and the learned Chief Justice referred this question to the Local Registrar with the following instructions:—

> For the purpose of the reference the measure of damages will be the difference between the value of the engine at the time it was delivered and the value it would have had if it had answered to the warranty as found by the jury in their answers to questions Nos. 17 to 22.

These questions refer entirely to the implied warranties and the operation of the engine. As to the implied warranties, the contract expressly stipulates there are none: *Sawyer-Massey Co.*

v. *Ritchie*, 43 Can. S.C.R. 614; and as to the operation, the notice provided for not having been given, the engine is presumed to have fulfilled that warranty.

The Chief Justice was, therefore, wrong in submitting these answers to the Local Registrar upon which to fix the damages, and this question should be again referred to him to ascertain the damages which would be the difference between the value of the engine at the time it was delivered and the value it would have had if it answered to the warranty that it was well made, of good material, and durable with proper care.

The other damages assessed by the Chief Justice are, in my opinion, too remote, the plaintiff's full measure of damages being the difference in value between the engine he got and one that would fulfil the warranties under which it was sold, with the exception of the $120 he paid for ploughing.

I cannot agree with the Chief Justice's decision that the notes taken superseded the contract. They were, in my opinion, taken in fulfilment of the contract, and, therefore, the two must be read together. This brings me to the defendant's defence and counterclaim of fraud and deceit.

The jury found that the plaintiff company's agent Ribble represented to the defendant, before the order was signed, that the engine was capable of pulling six ploughs right along in breaking heavy prairie land at Sedley, Sask., and of pulling eight ploughs right along in ploughing stubble land there; that such representations were made for the purpose of inducing the defendant to sign the order, and that defendant relied upon the truth of the same in signing the order; that said representations were untrue and were made by Ribble recklessly, not caring whether they were true or false.

It was urged by Mr. Bennett that Ribble had no authority to make such representations, and that defendant knew of such restriction of his authority; the contract which he signed providing that the company was not to be bound by any agreements, stipulations, conditions or warranties not expressly contained therein in writing. For this proposition he cited *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174. This case, in my opinion, differs from that case in that Ribble, who was a sales agent of the plaintiff and was selling machinery that he

SASK.

S. C.

ONTARIO WIND ENGINE v. BUNN.

Newlands, J.

could not carry around with him, must have had authority from the plaintiff to describe the engine he was selling. It is part of the description of an engine to tell the proposed purchaser what it will do, and, therefore, if he falsely described it by stating that it would do something that it would not do, he did it in the course of his employment, and his employers are liable for his fraud. [Reference to *S. Pearson* v. *Dublin Corp.*, [1907] A.C. 351, at 353. . . . Benjamin on Sales, p. 472.]

On the whole, I would refer the case to the Local Registrar to ascertain the defendant's damages, with instructions to assess such damages on the difference between the value of the engine defendant got and one that would comply with the warranty that it was well made, of good material, and durable with proper care, and would perform the work the agent said it would do.

I would make the reference in this way because defendant's damages for breach of warranty and on his counterclaim for deceit would otherwise overlap each other; and I would also allow him the $120, as stated by my brother Elwood. Appellant should have costs of appeal.

Brown, J.

BROWN, J., agreed with NEWLANDS, J.

Elwood, J.

ELWOOD, J.:—On or about June 21, 1911, the defendant signed an order requesting the plaintiff to supply him with a 30-h.p. Flour City engine, for which the defendant agreed to settle by giving notes as follows:—Note due December 1, 1911, $1,600; note due December 1, 1912, $1,600. *Inter alia* the said order contained the following. [Conditions and warranty quoted.]

On June 26, 1911, the defendant wrote to the plaintiff complaining of certain misrepresentations made by one Ribble, who was the agent who procured the above order from the defendant. The plaintiff replied to this letter, stating that it did not guarantee the number of ploughs the engine would pull, and subsequently, on July 8, the defendant, after consulting a lawyer, accepted and took delivery of the engine, and executed the agreements in writing—or, as they are sometimes called, lien notes—which are the subject of this action.

It is contended by the defendant and the jury found that prior to the signing of the order there were certain representations made by the said Ribble inducing the contract which were

false, and which were made by Ribble recklessly, not caring whether they were true or false. It was also found by the jury that the engine did not comply with the warranty as to being well-made, of good material, and durable. On these findings the learned trial Judge allowed the defendant certain damages. I am of the opinion that the contract between the parties is contained in the order, and that the agreement sued on was simply given in pursuance of that order and does not constitute any new contract between the parties. So far as the alleged false representations are concerned, the order itself, as will be observed, contained an agreement that

> there are no other warranties, representations or agreements, express or implied, whether statutory or otherwise, except as herein contained. . . . I agree that there are no verbal or other agreements, warranties or conditions, express or implied, of any nature whatsoever, except as expressly embodied in writing in this order.

And the case of *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174, would seem to me to be strong authority for the proposition that the plaintiff is not bound by the alleged representations of Ribble. But, apart from that, the evidence shews that the defendant, before he signed the order, had had it read over to him; after he signed it he read it; and on June 26 he wrote the plaintiff complaining of the misrepresentations. The plaintiff replied, as I have above stated, and subsequently, on July 8, the defendant, after consulting a lawyer, and with notice of the alleged misrepresentations, accepted the engine and took delivery of it. Under these circumstances I am of the opinion that it is not now open to the defendant to complain of the alleged fraudulent representations, and that his defence and counterclaim, so far as the alleged misrepresentations are concerned, must fail.

It was conceded on the argument that if the contract between the parties is contained in the order, then the terms of the order exclude any claim on an implied warranty, and *Sawyer Massey* v. *Ritchie*, 43 Can. S.C.R. 614, is authority for excluding an implied warranty, where the order contains terms such as I have above quoted.

Then, dealing with the warranty contained in the order, it will be noticed that the order contains the following:—

> In the event of the alleged failure of the engine to fulfil the warranty herein within two days after starting the same or in the event of the pur-

SASK.

S. C.

ONTARIO WIND ENGINE v. BUNN.

Elwood, J.

chaser being unable to make the same operate well within the said two days, written notice shall be given to the Ontario Wind Engine and Pump Co., Ltd., at Winnipeg. Failure by the purchaser to give to the company such written notice within the said two days shall be conclusive evidence that such engine satisfies all warranties and of the due fulfilment of all warranties.

It was contended on behalf of the defendant that this clause with regard to notice only referred to what would occur if a failure of warranty occurred within two days after starting the engine, and that where a failure occurred after the two days no notice was required. The order was prepared by the plaintiff on a printed form supplied by it, and it is to be supposed that the intention of the plaintiff was to protect itself as far as possible. In the defendant's letter to the plaintiff of June 26, 1911, he says:—"He (Ribble) stated that warrant was for two weeks' field trial, and I find this is not in the order." This seems to me inconsistent with the contention now made that no notice was required with respect to any failure occurring after the two days. I have come to the conclusion that the intention of the agreement was that all objections to a failure to comply with the warranty therein referred to must be made by notice in writing to the plaintiff, given within two days after such failure, and that the only failure which could be complained of is one occurring within two days after starting the engine.

It was contended, on the authority of *Sawyer Massey* v. *Ritchie*, *ante*, that this clause only referred to the failure to make the machine operate well, or at most did not cover the warranty as to durability. In *Sawyer Massey* v. *Ritchie* the warranty in part was as follows:—

> It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers, after trial, cannot make it satisfy the above warranty, written notice shall within ten days after starting be given both to the company at Winnipeg, etc. . . .

At p. 625 in the report of the above case, Anglin, J., says:—

> The notice is to be given *if the purchasers*, after trial, *cannot make it* (the machinery) satisfy the above warranty. The purchasers had nothing to do with providing good material for the machinery or making it durable; it was not their business to make it satisfy these warranties. It seems clear, therefore, that the provision as to notice can have no application to them.

The clause in the warranty in *Sawyer Massey* v. *Ritchie* is very different from the one at bar. In the one at bar it will be

noticed there are two events provided for: (*a*) failure to fulfil the warranty within two days after starting; and (*b*) the event of the purchaser being unable to make the engine operate well within the said two days. The word *make*, stress upon which was laid by Anglin, J., above, occurs in event (*b*), but not in event (*a*). This seems to me to give the clause a meaning different from that given to the clause in *Sawyer Massey* v. *Ritchie*. It will be noticed also that the clause says "on failure to fulfil the warranty herein." There is only one warranty. The Ontario Wind Engine and Pump Co., Ltd., *guarantees* certain things, but it *warrants* the engine to be well made of good material and durable with proper care. The singular is used throughout the contract in referring to the warranty. It was urged that want of durability cannot be reasonably discovered on a two days' trial. That may be so, but the parties entered into the contract, and it seems to me are bound by it. *Case* v. *Fiegehen*, 19 O.W.R. 718, and *Hinchcliffe* v. *Barwick*, 5 Ex. D. 177, shew how, at any rate, almost equally drastic provisions are construed.

It cannot be said that there was any waiver of notice by the plaintiff, because what the plaintiff did to the engine after delivery can be referred to the agreement of the plaintiff to replace defective material for the period of one year. The defendant did not give the notice required by the contract, and it seems to me, therefore, his claim under the warranty must fail. In my opinion, therefore, the appeal should be allowed, and there should be judgment for the plaintiff for the amount of the plaintiff's claim with costs, and dismissing the counterclaim with costs.

As it may be that the other members of the Court will take a view of the above different from mine, I think it well to express my opinion as to what, if any, damages the defendant is entitled to should it be held by a majority of the Court that the defendant is entitled to succeed on the warranty.

First, the defendant not being entitled to succeed on the alleged fraudulent representations, and the learned Chief Justice having ordered the Local Registrar to assess the damages sustained by reason of those representations, and evidence having been given on such representations in support of such damages, there should, in my opinion, be another reference to assess the damages sustained by reason of the breach of the warranty.

SASK.

S. C.

ONTARIO WIND ENGINE v. BUNN.

Elwood, J.

Second, as to the damages allowed for the 1911 crop. At the time of the purchase of the engine, the defendant had not a separator and had not decided to purchase one; and it was surely never contemplated by the parties at the time of the contract that the failure of the engine to work would result in the defendant's crop remaining out all winter unthreshed. Ordinarily it would be supposed that the defendant would procure another engine or get someone to thresh his crop. The plaintiff had not notice at the time of the sale that it would not be possible to procure another engine, or that the damage claimed would or would likely be sustained. In my opinion, the damages in this respect are too remote, and do not come within the rule laid down in *Hadley* v. *Baxendale*, 23 L.J. Ex. 179. See also *Shepherd* v. *Ross*, 4 D.L.R. 432.

Third, the damage for loss to the 1912 crop is purely speculative. The amount of the damage, if any, would depend upon the kind of grain sown and many other contingencies upon which the success of a crop rests. The results of planting a crop on this land are far too uncertain to allow damages therefor, and they are, therefore, too remote: *Cross* v. *Douglas*, 3 S.L.R. 97, 109. The question of remoteness is for the Judge, and ought never to be left to the jury: *Hammond* v. *Bussey*, 57 L.J.Q.B. 58; Mayne on Damages, 7th ed., p. 48, note (*k*).

Fourth, the sum of $120 paid to Coupal for his engine to do spring ploughing should, in my opinion, be allowed.

The conclusion I have come to, therefore, is that if the defendant is entitled to damages for breach of warranty, he is only entitled to $120 damages, and if the damages are reduced, the plaintiff should have its costs of this appeal.

MCKAY, J., agreed with NEWLANDS, J.

Order accordingly.

McLELLAN v. McISAAC.

N. S.
S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley, and Drysdale, JJ. January 2, 1915.

1. WRIT AND PROCESS (§ I—8)—RENEWAL OF WRIT—ELECTION ACT—R.S. N.S. 1900, CH. 72, SEC. 8.

As the Controverted Municipal Elections Act, R.S.N.S. 1900, ch. 72, sec. 8, provides for service of the petition in the same manner as a writ in a civil case, substituted service may be authorized in like manner, on proof of inability to effect personal service, although the five days allowed for service had not expired, nor had an application been made to extend the time.

[*Peterborough West Election Case* (*Stratton* v. *Burnham*), 41 Can. S.C.R. 410, followed.]

Statement

APPEAL from the judgment of the County Court setting aside the election of the respondent, who was elected as a municipal councillor.

D. McNeil, K.C., and *T. Gallant*, for appellant.

J. L. Ralston, K.C., and *D. McLellan*, for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., concurred with GRAHAM, E.J.

Graham, E.J.

GRAHAM, E.J.:—First it is contended that the constructive service that was made was irregular.

[The Controverted Municipal Elections Act, R.S.N.S. 1900, ch. 72, sec. 8, quoted.]

The Judge within the five days made an order for

service by sending the same in a prepaid registered letter addressed to the said John A. McIsaac at Foot Cape, Inverness County, Nova Scotia, within thirty days after date of presentation of said petition,

upon the following affidavit:—

I Joseph Doucet of Port Hood in the County of Inverness, sheriff of the said county, make oath and say as follows:

1. On Friday the 28th day of November A.D. 1913, between the hours of four and five in the afternoon I visited the home of John A. McIsaac for the purpose of serving him with the paper writing marked "A" and "B" exhibited to me by the judge swearing me to this affidavit and was told by his daughter that he was not at home.

2. On Monday December 1st A.D. 1913, a man whom I appointed for the purpose of serving him with said papers visited his home but could not find the said John A. McIsaac, as I am informed and verily believe.

3. I have reasons to believe that the said John A. McIsaac is evading service of said paper writings, being a copy of petition against his election and return as councillor for District No. 6, Strathlorne, and notices of presentation thereof and of the security.

4. I verily believe that the said John A. McIsaac cannot be served personally.

5. I verily believe that copy of the petition and notices herein mailed

N. S.

S. C.

MCLELLAN v. MCISAAC.

Graham, E.J.

in a prepaid registered letter at Port Hood would be received by the said John A. McIsaac and that leaving a copy of said petition and notices aforesaid at his place of residence would come to his notice.

(Sgd.) JOSEPH D. DOUCET.

Sworn to at Guysborough in the County of Guysborough this 3rd day of December A.D. 1913.

(Sgd.) A. MacGillivray,
Judge of the County Court
of District No. 6.

It was contended that the order for constructive service could only be made after the lapse of five days, and an application for further time then "within the time granted by the Judge," so that full time might be given to afford an opportunity for personal service before resorting to constructive service.

But this is against the opinion of Mr. Justice Idington, in *Stratton* v. *Burnham*, 41 Can. S.C.R. 410, where a similar provision in the Dominion Act was considered.

That opinion binds me, and if that provision of the statute is not imperative of course the service must stand.

[Controverted Municipal Elections Act, R.S.N.S. ch. 72, sec. 55, quoted.]

Corrupt treating is dealt with in sec. 50 of the Act, and is made a "corrupt practice" by reference to it under sec. 54.

There are but four occasions of treating with the actual knowledge and consent of the respondent. They are mentioned in the testimony of Allan D. McLellan, and quoted by the Judge.

(1) Allan D. McLellan says: "John McIsaac treated me before the election. I think he was there when I was treated."

As he says, "I was a supporter of the respondent, an active supporter." One would think that this was not an act of corrupt treating to influence his vote, but might well happen in the ordinary course as between friends.

The second occasion was when Allan D. McLellan, with the respondent, who had asked him to drive him to the other polling place in the district, met on the road, about 4.15 o'clock p.m., one John G. McKay and Daniel McDonnell, whom the former had picked up on the road. The respondent, when starting on the drive, had given Allan D. McLellan a bottle of whisky, and with that McLellan, in his presence, treated McKay and also McDonnell. Daniel McDonnell had already voted. John Beaton says:—

Daniel McDonnell that I referred to, polled his vote at Kenlock or

wherever the poll was held. That is east of the Broad Cove Banks poll. Daniel McDonnell would be leaving the other poll when met.

John G. McKay had not voted, but he says, on cross-examination:—

I was on my way to the poll. I picked up McDonnell on the way. I was not acquainted with him before. I knew his face. I am not a supporter of McIsaac. I was a strong supporter of McLellan. I ran an election in 1911 for councillor for the same district, on behalf of the Liberal party. McIsaac was supposed to run in the Conservative interest. McIsaac and myself were good personal friends. I am a business man. I am sure the drink was not given to me to influence my vote. McIsaac and all his friends knew that I was a supporter of McLellan's. (Objected to by Mr. McMillan.) There was not a word said about my vote at that time. I don't remember if anything was said about anyone else's vote. McIsaac lives near me. About three or four miles away. I do business in Inverness. McIsaac is there nearly every day. He is a milkman. We have met often for years. We have often had friendly drinks together. Sometimes I treated him and sometimes he treated me.

Re-examined by Mr. McMillan:—

By McIsaac's friends I mean his supporters. This happened at about quarter past four. This was my first appearance at the poll. I was not taking an active part that day. All I did that day was to poll my vote.

The third occasion was when Charles McDonald was treated by the respondent. He says:—

I had no drinks at the poll before I voted. I had one after I voted. I got it from John McIsaac, the candidate. There was nobody present when I was treated. I met him outside at the back of the house. It was intoxicating liquor. Nobody else gave me a drink that day. McIsaac never canvassed me at any other time before the election. He called at my house often. I sell milk to him. He may have called at my house on account of the election.

This Allan D. McLellan says he treated the petitioner election day, but it is not said that the respondent knew of it, and of course it was not for the purpose of influencing him. He also says that when he was returning, as I understand, he treated D. A. Campbell and John James Dunbar. The respondent was not with him returning from that poll. He says:—

I treated D. A. Campbell after coming from the poll. . . . Dunbar finished the bottle. . . . It was very late when I got to the other poll. I waited there until the close of the poll. I did not leave poll with the respondent. I went to his house after that.

The fourth occasion was at the respondent's house in the evening, after the election, when several were treated.

All of the other cases of treating proved at the trial in connection with this election were by agents, and not shewn to have

N. S.

S. C.

MCLELLAN v. MCISAAC.

Graham, E.J.

taken place with the knowledge or consent of the respondent. True, Allan D. McLellan says, "he (the respondent) asked me before the election to treat," but we know the extent of McLellan's treating. He was very communicative in his testimony. And that incident is insufficient to connect the respondent with any but McLellan's treating.

The learned trial Judge has mixed up in his finding personal treating with treating by agents. He says:—

> It has also been proved that the respondent was a party to such treating, both by himself and by his agents, and to his knowledge, and that a large number of voters were, some before and some after, as well as some before and after polling their votes, treated with intoxicating liquors with the corrupt intention of influencing their votes.

The expression, "with the corrupt intent of influencing their votes," could only apply to John G. McKay, who had not at the time of the treating polled his vote. Corruptly treating him, from his evidence, which I have quoted shewing he was well known to be an opponent of the respondent, was a very unlikely thing to happen. McLellan, who had treated the opposing candidate, might well treat McKay without having a sinister motive. That, in connection with the treating, is the only finding the Judge has made which is in the way of an appeal, for of course one would hesitate to disturb a Judge's finding in such a matter, and yet the disqualification of a candidate for treating is rather unusual. No one could cite a case of that kind although it had been attempted. As to all of the personal cases of treating mentioned, as well those which took place after the electors had voted as well as before, I think they did not constitute corrupt treating within the cases decided in England or Canada.

In the *Aylesbury Case*, 4 O'M. & H. 59, 63, it has been held that,

> to constitute an offence under this section the act must be done corruptly or with a corrupt purpose. Treating may be innocent. *Primâ facie* it is innocent. But it may be given under such circumstances as to lead the tribunal to conclude that it was not innocent but corrupt.

In the *Norwich Case* (*Birkbeck* v. *Bullard*), 4 O'M. & H. 84, 91, Cave, J., says:—

> The statute does not apply to that form of treating which exists occasionally between social equals where first one treats and then the other—one form of hospitality. Neither does it apply to certain kinds of treating which exist in relation to business matters—cementing a bargain with a little drink. It applies to that sort of treating which exists where the

superior treats his inferior which gives the treater influence over the treatee and secures his good will. Not however to all cases of this kind does the corrupt treating here spoken of apply. It does not apply to return for small services, e.g., to a porter or guard or the treater's own servants, nor where the object is to acquire general good will. It must have reference to some election and be for the purpose of influencing some vote.

In the *St. George's Division Case*, 5 O'M. & H. 100, Pollock, B., said:—

The intention with which the act of treating is done must be a question of fact in each case. Was the intention directly or indirectly to influence voters, or may the act, in the words of Mr. Justice Willes in the *Bodwin case*, 1 O'M. & H. 125, be fairly imputed to the man's generosity or his profusion or his desire to express his good will to those who honestly help his cause without resorting to the illegal means of attracting voters by means of an appeal to their appetites.

In Hardcastle on Elections, 1880, p. 164, it is said:—

If a corrupt intention is not made out and it appears that meat and drink although given somewhat profusely and although given on the nomination or polling day, and so illegally given, was given bona fide and honestly and not in order to gain votes, the election will not be affected thereby. I have found, said Blackburn, J., that the notion has prevailed that for a candidate to give anything in the way of meat or drink was fatal to an election. That is a salutory notion and acts as a protective machinery to the candidate, but I cannot lay down the law to the full extent that that goes.

For the Canadian law I wish to refer to McPherson on Election Law, pp. 466 and 473. I also refer to *Somerville* v. *Laflamme*, 2 Can. S.C.R. 216, at 245. Also to *Hebert* v. *Hanington*, 6 Allen 530, at 536. There Allen, J., said:—

The charges of treating by the respondent are I think not proved. The giving McMonagle a glass of brandy just as he was setting out for a drive of about ten miles on a winter's night I will not hold to be a treating within the act. Neither do I think the entertainment by the respondent of a number of friends and supporters at his own house in the evening of the polling day and declaration day was a violation of law. Treating after the election in order to make it void, must be done corruptly, for in that case unless there is a previous undertaking it obviously cannot be said to have been given in order to procure the election or to influence any person to give his vote.

In respect to the cases of treating by agents there was not, in my opinion, a violation of the common law. This statute does not require the election to be set aside for treating by agents. There is a penalty.

Then there is the case of alleged bribery, holding out an inducement in the shape of the Fenian raid bounty.

The Judge quotes the evidence thus:—

N. S.

S. C.

MCLELLAN v. MCISAAC.

Graham, E.J.

Alexander MacKinnon gives evidence on this branch of the case and says: "I am a voter in District No. 6. I had a vote on the 4th of November last. I know John A. McIsaac, the respondent in this case. I saw him on election day, the 4th of November last. He was to my house. I did not promise whether I would or would not vote for him. On election day at the poll he came out and said that I should vote for the party in order to get the Fenian money. This was for the Tory party. McIsaac belongs to the Tory party. I was told by McIsaac that was the party that would get the money. McIsaac's words were that I ought to vote for him because he was going to get the Fenian money. I made application for the money long before that."

This was a mere party canvass—not a corrupting offer. And the cross-examination shews that this party speech or canvass did not influence him in the slightest. He says:—

I made application for the money long before that. I don't remember the exact date. It was long before there was any talk of McIsaac's running an election. It was last summer. . . . When McIsaac spoke to me about the Fenian money I said that if he was going to get my vote before I left home he would not get it now on account of talking to me in that way. . . . It made me a little angry.

I think that this ought not to be considered as a case of bribery. The appeal should be allowed and the petition dismissed with costs.

Russell, J.

RUSSELL, J.:—The objection to the service of the petition and notice in this case is that the condition precedent to the making of an order for substituted service had not been complied with, such substituted service only being provided for where the petition cannot be served personally within the time granted by the Judge. The objection seems very reasonable and logical. But I think it must be overruled on the authority of the *Peterborough West Election Case*, 41 Can. S.C.R. 410. The same provision substantially as to service applied there as here, and Britton, J., made an order for substituted service without any extension of time having been made for personal service. The learned Chief Justice held, and the majority concurred, that this provision was not exclusive, that the section providing for service in the same manner as a writ in civil cases must have full effect given to it, and that a writ in a civil case may be served substitutionally if on affidavit it is shewn that it cannot be served personally.

In other words, applying the reasoning of the Supreme Court to our own statute, sec. 8, sub-sec. 3, of ch. 72, provides that service of an election petition may be effected as nearly as possible

in the manner in which a writ of summons is served in a civil case, and O. 9, r. 2, provides that if it is made to appear that plaintiff is unable to effect prompt personal service the Court or a Judge may order substituted service. This provision is not to be limited, so rules the Supreme Court of Canada, by the provisions of sec. 8 (2), which would allow substituted service only after an unsuccessful effort to secure personal service within the extended time allowed by the Judge.

It is wholly unimportant and irrelevant to say whether this reasoning convinces the judgment. We are bound by its authority, and I am not sorry that the merely technical objection of the respondent, who seems to have been evading service, is thus overruled.

I should not have found it necessary to examine the authorities as to service if I had not at the argument been convinced that there was a violation of the law by the respondent such as to avoid the election. I was under the impression that the evidence as to this was very clear. I do not allude to the evidence of bribery. There may have been no corrupting suggestion with reference to that. I suspect that there was, but the evidence is not clear enough to remove all doubt as to the precise nature of the argument used. The language is ambiguous, and the evidence is not even clear as to the precise words used.

As to the treating, however, I do not think we ought to reverse the decision of the trial Judge in a case where it is proved that the respondent himself started out in a wagon with his agent and the latter in his presence treated voters and non-voters promiscuously on their way to and from the poll. The trial Judge has found that the motive was corrupt, and I do not feel free to reverse his judgment. I would also have thought, in view of all the evidence, that there was a corrupt motive.

Longley and Drysdale, JJ., concurred with Russell, J.

Longley, J.
Drysdale, J.

Appeal dismissed.

QUE.

S.C.

CODERRE v. CABANA.

Quebec Superior Court, (in review), Tellier, Greenshields and Pelletier, JJ. January 15, 1915.

1. PAYMENT (§ IV—30)—PAYMENT BY THIRD PERSON—PLEA OF—RIGHT TO.

A debtor who is being proceeded against for the recovery of a judgment in the name of a person who has been paid by an undisclosed third party is entitled to establish before the court all the circumstances under which that payment was made as he may have a substantial ground of opposition as to a third party paying the judgment and enforcing same in the name of the judgment creditor for the purpose of harassing the judgment debtor without giving notice of the transfer.

Statement

APPEAL from a judgment of Hutchinson, J., dismissing an opposition to annul a seizure.

Campbell & Gendron, for plaintiffs.

C. C. Cabana, for defendant, opposant.

Greenshields, J.

GREENSHIELDS, J.:—The opposant inscribes in review from a judgment which granted plaintiffs' motion, and dismissed the opposition with costs.

The facts are as follows:—

On April 4, 1908, the plaintiffs obtained a judgment against the defendant for the sum of $271.40, with interest and costs, amounting to $26.60. On March 31, 1913, the judgment being unsatisfied, the plaintiffs lodged a *fiat* for a writ of execution *de bonis*. The execution issued: the seizure was made, and an opposition *a fin d'annuler* was filed by the defendant.

The opposition in effect alleges: that a *saisie-arrêt* after judgment had issued in the same case in the hands of certain *tiers-saisis;* that the defendant had contested the said *saisie arrêt*, denying the existence of the debt; that such contestation was still pending; that, moreover, the debt or judgment, the enforced collection of which is sought by the execution, was long previous to the issue of the execution completely paid in capital, interest and costs; that the costs sought to be recovered were never distraits to the present attorneys, Campbell & Gendron: Wherefore, the opposant concludes, with the usual prayer for the annulment of the seizure. After the service of the opposition, and its return into Court, a motion was made by the plaintiffs for an order to examine the opposant on his opposition, and that upon such examination taking place, the opposition be dismissed as being on its face unfounded, made in bad faith and frivolous.

The order issued for the examination of the opposant, and he

was examined on June 19, 1913. The effect of his examination is, that he never personally paid the judgment, and no one paid the judgment at his request, or in his interest; that he endeavoured some time subsequent to December 5, 1912, to make a settlement with the plaintiffs of the judgment, and he was then and there told that the judgment had been completely satisfied and paid, so far as the plaintiffs were concerned, and this was the extent of the information he could obtain; but he does express the opinion in his evidence, that it was paid by some one who was far from friendly to him, and paid the judgment in order to harass or persecute him. He states that, far from being paid in his interest, or for his benefit, it was paid against his interests. He admits he paid no money himself. He admits he never got a discharge; that he tried to settle with the plaintiffs and they refused any settlement; that he was never called upon by the person who had paid the judgment to settle the same, and had never received any notice of any transfer of the judgment. Upon this examination being completed the judgment was rendered, dismissing the opposition.

It certainly cannot be said that, on the face of the opposition, it is frivolous or made in bad faith. The opposant clearly states that the judgment has been paid in full, or completely satisfied; in other words, that the plaintiffs have no interest whatever in the present proceedings.

It is true that any one may pay the debt of another. Article 1141, C.C., provides that

> Payment may be made by any person, although he be a stranger to the obligation, and the creditor may be put in default by the offer of a stranger to perform the obligation on the part of the debtor without the knowledge of the latter; but it must be for the advantage of the debtor and not merely to change the creditor that the performance of the obligation is so offered.

Certainly the proof would not justify the statement that in this case the payment had been made in any way in conformity with the article, and it can certainly be said that a debtor who is being proceeded against for the recovery of a judgment in the name of a person who has been paid is entitled to establish before the Court all the circumstances under which that payment was made, the amount that was paid, and it may be that when the judgment debtor is in full possession of all these facts, he might have a substantial ground of defence or opposition to an attack made upon him by that third person who was paid.

QUE.

S. C.

CODERRE v. CABANA.

Greenshields, J.

All this could only come up, and properly come up, upon a contestation of the opposition where full proof could be made. If that opposition is contested in the name of the present plaintiffs it is possible that the opposant could, with success, plead the lack of interest of the plaintiffs: he might plead an extinguishment of the obligation *quoad* the third person on many grounds. But it is not necessary for the decision of this case to refer to the many rights the opposant might assert; the whole question is, is he not entitled to a trial of the grounds of his opposition on the merits? He has been refused that right, and I am of opinion that there was error in refusing him that right, and I should reverse the judgment and dismiss the motion made by the plaintiffs to dismiss the opposition, with costs, as well as the costs of this Court.

Judgment reversed.

ONT.

S. C.

REX EX REL. MITCHELL v. McKENZIE.

Ontario Supreme Court, Sutherland, J. February 27, 1915.

1. OFFICERS (§ I C—30)—MUNICIPAL COUNCIL—ELECTION—NOMINATION—ARREARS OF TAXES—INELIGIBLE AS CANDIDATE—MUNICIPAL ACT, R.S.O. 1914, CH. 192, SEC. 53.

The nomination is a part of the election under the Municipal Act, R.S.O. 1914, ch. 192, sec. 53, so as to render ineligible as a candidate for municipal councillor a person who was at the time of nomination in arrears for taxes to the municipality, although such arrears were paid before the date of polling.

[*Rex ex rel. Zimmerman* v. *Steele*, 5 O.L.R. 565; *Kennedy* v. *Dickson*, 7 O.W.N. 769, referred to.]

2. ELECTIONS (§ II D—75)—CANDIDATE—DISQUALIFICATION OF—ILLEGAL ACTS—AGENTS—KNOWLEDGE OF.

In order to disqualify a candidate at a municipal election in respect of unauthorized illegal acts committed by his agents, he must be shewn to have had knowledge of such acts.

Statement

APPEAL by David C. McKenzie, the respondent in a proceeding in the nature of a quo warranto under the Municipal Act, from an order of the Judge of the District Court of the District of Rainy River, voiding the election of the appellant as Mayor of the Town of Fort Frances and declaring him disqualified by reason of corrupt practices at the election.

W. N. Ferguson, K.C., for the appellant.

G. H. Watson, K.C., for the relator.

Sutherland, J.

SUTHERLAND, J.:—At the election for the Town of Fort Frances, held on the 4th day of January, 1915, the two

candidates for the office of mayor were, Louis Christie, who received 134 of the votes cast, and David C. McKenzie, 150 votes; the latter thus having a majority of 18, and on the 5th January being declared by the clerk of the municipality to have been elected. His election was attacked by one Mitchell, an elector, before the Judge of the District Court of the District of Rainy River, who, after hearing evidence, gave judgment on the 5th February, 1915, unseating and disqualifying the said McKenzie. I quote from the written reasons for judgment: "The grounds of objection upon which evidence was tendered are shortly: first, non-payment by the respondent of taxes at the time of election; second, threats or intimidation by the respondent in a speech made just prior to the polling day; third, corrupt acts on the part of agents of the respondent, as well as the voting of those not entitled to vote by reason of their not being British subjects."

From this judgment the respondent McKenzie now appeals.

As to the first ground of objection to the election of the respondent, the facts are that at the close of the hour fixed by statute for nomination, and after the clerk had read out the list of nominees for mayor, namely, McKenzie and Christie, the latter claimed the seat "because of non-payment of taxes by McKenzie." It appears from the evidence to have been the fact that McKenzie was then apparently in arrears for some $200 for taxes for the year 1914, as to which a notice had been sent to him on the 5th October, 1914, the notice being for a larger amount of taxes in the whole, and he having in the meantime paid a portion thereof.

It also appears that, at the time of the nomination, he was on the list of those in default for taxes on the 15th December, 1914. On the day of nomination, but some time after eleven o'clock, McKenzie paid the remaining taxes. After doing so, and within the statutory time prescribed therefor, he subscribed to and filed the statutory declaration required under the Municipal Act, R.S.O. 1914, ch. 192, sec. 69, sub-sec. 4, form 2. The fifth clause of this form is to the following effect: "I am not liable for any arrears of taxes to the corporation of this municipality."

Section 53 of the Act has reference to disqualification: "53.

ONT.

S. C.

REX EX REL. MITCHELL v. MCKENZIE.

Sutherland, J

—(1) The following shall not be eligible to be elected a member of a council or be entitled to sit or vote therein: . . . (*s*) A person who at the time of the election is liable for any arrears of taxes to the corporation of the municipality."

If "the election" means the day of polling, then McKenzie had paid his alleged arrears of taxes before that time and before taking the declaration, and, having subsequently been elected, could, so far as this ground is concerned, take and retain his seat. But it does not mean that. "Election" includes nomination, and consequently the respondent, being in arrears for taxes to the municipality at the time of his nomination, was disqualified as a candidate. As the District Court Judge has very truly said: "To hold that the day of polling is the day of election would enable a candidate to offer himself who was disqualified, and who, if only one, might be declared elected, contrary to the letter and spirit of the Act." See *Regina ex rel. Adamson* v. *Boyd* (1868), 4 P.R. 204, at p. 209; *Rex ex rel. Zimmerman* v. *Steele* (1903), 5 O.L.R. 565, at p. 572; *Kennedy* v. *Dickson* (1915), 7 O.W.N. 769.

I am, therefore, of opinion that the respondent was properly unseated on this ground.

It appears that a company referred to in the judgment as "the power company or the paper company," of which one Backus is the president and managing director, has already had a good deal of litigation with the municipal corporation over its taxes, and a suit or suits is or are still pending in this connection.

It also appears that the company has commenced an action against the corporation under some agreement in writing between them. It also appears from the evidence that the election was being run with two "tickets," one which may be said to be the ticket favoured by the power company, and another opposed to it; McKenzie heading the former, and Christie the latter.

It also appears that McKenzie was associated with the power company to this extent at all events, that he was the physician for its men, each of whom contributed $1 a month for his services.

The evidence discloses that some of the employees of the power company and its solicitor were very active in supporting the candidature of McKenzie and those on that ticket; and, further, that several aliens were induced to vote without any right to do so at the election; and that, in the case of two or three of those who voted, taxes which they had not paid up till then were paid on the day of voting by or at the instance of the power company or its employees.

It also appears that at a public meeting held before the day of nomination, and at which others in addition to the respondent McKenzie were present and making addresses to the electors, McKenzie made use of language which the District Court Judge has found to be such that he was guilty of a corrupt practice within the meaning of sec. 189 of the Municipal Act* and subject to disqualification as therein provided for.

The finding of the Judge upon this point is as follows: "In this case I must find that the facts are that McKenzie, upon the public platform, at the meeting of the electors of Fort Frances held on the 31st December last, called for the purpose of discussing public issues, just prior to the municipal election, stated upon the public platform that he heard that Mr. Backus was going to cut off the lights of Fort Frances, and that he had gone to him and interceded and got him to agree not to cut them off before the election, as it might be considered an election dodge; and that Mr. Backus had stated to him that, if Mr. Christie was elected, the lights of the town would be turned off. And in the finding of these facts, I am taking practically verbatim the evidence of the Reverend Mr. Anderson, called by the respondent." He goes on to add: "In considering this branch of the relator's case it is necessary to consider the general conditions surrounding the election, which I have already set out. We have, at a large meeting of the public ratepayers called in view of the election, a statement made by a candidate that, if his opponent is elected, their lights will be cut off, and one of the ratepayers

*189.—(1) Every person who, directly or indirectly . . . uses or threatens to use force, violence, or restraint, or inflicts or threatens to inflict injury, damage, harm or loss, or in any manner practises intimidation upon or against a voter in order to induce him to vote, or refrain from voting . . . shall be guilty of a corrupt practice and shall be disqualified from voting for two years and shall incur a penalty of $200, and shall also be liable to imprisonment for any term not exceeding one year.

ONT.

S. C.

REX EX REL. MITCHELL v. MCKENZIE.

Sutherland, J.

promptly characterises the statement as a threat. And the candidate as promptly replies that 'it is not a threat, it is a fact'—thus emphasising the threat rather than modifying its effect. Properly to understand the effect of this statement, we must take into account the surrounding circumstances. Here we have a candidate who is a prominent official in the employ of the power company, presumed to have confidential relations with the company, even if he had not stated that the president was his authority for the statement, telling the ratepayers, seventy-five per cent. or over of whom were dependent on this power for their light, that, if his opponent were elected, their lights would be cut off, and inferentially that, if they voted for him, they would still be able to bask in the power company's light. What was the respondent's object in making the statement unless to influence votes and what stronger reason could be given for supporting the speaker?''

The District Court Judge has set forth the facts and his conclusions and the application of the law thereto very fully, as will appear by further reference thereto. There can be little or no doubt, upon the evidence, that the question of the relations between the power company and the municipality was one of the main issues in the municipal election contest. There can be no doubt either that the question whether the ratepayers were wise in continuing to have litigation with the power company, or whether it was not better to endeavour to adjust in an amicable way their differences with it, also was a matter which was being publicly discussed.

While it is most important that nothing in the way of threat or intimidation should be used by a candidate in an election, and the electors subjected to improper influences thereby, it is also important that candidates should have a reasonable amount of freedom to discuss fully and frankly the issues in which all electors are at the time concerned. It is true that some of those present at the meeting at which the language referred to is alleged to have been used by the respondent, seemed to understand him to be threatening the electors with the consequences which might ensue, in case he were not, but his opponent were, elected.

While the version of what the respondent said, as found by the Judge, is supported by evidence which he had a right to be-

lieve, it is to be noticed that the respondent denies that he used language exactly similar in import to what the Judge has found. McKenzie puts it in this way: "I said that I was told that the lights would be turned off on the following Tuesday, but I interceded and asked the company not to shut off the light at least before the election, for it would be interpreted as an election dodge. But, if they persisted in electing a council that were fighting the power company on every technicality that would arise, it was not unlikely the lights would be shut off."

And again: "Q. Now wasn't this what you said? 'This is not a threat' (after the word threat was used), 'but I discussed it with Mr. Backus, and he decided not to cut off the lights on Monday night, but to wait until the following Tuesday?' A. I said 'It is not a threat, I am discussing facts.'

"Q. You had discussed this matter with Mr. Backus? A. Yes.

"Q. Mr. Backus had threatened to cut off the lights? A. Yes.

"Q. If you weren't elected? A. No, sir. If a settlement of the bill for lights was not made, he intended to shut off the lights.

"Q. You thought it was your duty to let the audience know? A. Yes."

The power of disqualification exercisable by a Judge* is one which, as it seems to me, should only be exercised, in a plain case, upon very clearly proved facts. I confess I have had some little difficulty in arriving at the conclusion I have in this matter, and in consequence have some hesitation in coming to a different conclusion from that arrived at by the District Court Judge, who may perhaps, having seen the witnesses, be in a somewhat better position than I am to estimate fully the effect of their evidence. Nevertheless, I have come to the conclusion that the words used by the respondent, in the light of all the facts set out in the evidence, were not such as could properly be

*Section 180 of the Municipal Act: (1) A candidate elected who is found to have been guilty of bribery, or of a corrupt practice, shall forfeit his seat, and shall be ineligible as a candidate at any election for two years thereafter. (2) The Judge . . . shall report to the clerk of the municipality in which the offence was committed the name of every candidate who has been so found guilty. . . .

ONT.
S. C.
REX EX REL. MITCHELL v. MCKENZIE.
Sutherland, J.

determined to be a threat under the section of the Act in question. I am not at all sure that they come under the meaning of the section at all.

The Judge has also found that the employees of the power company were by the evidence proved to have been the agents of the respondent in committing illegal acts in connection with the election. Elsewhere in his judgment he says that "it is inconceivable that the respondent was not aware of these activities on the part of the power company and its employees in his behalf, and he has not been called as a witness to give evidence as to any objection on his part as to their activities."

I have not been able, after a careful perusal of the evidence, to see that any of the alleged illegal acts were brought to the knowledge of the respondent.

On the whole, therefore, I have come to the conclusion that the appeal should be dismissed in so far as the first ground is concerned, and that in consequence the judgment unseating the respondent should stand.

I am of opinion that, in so far as the judgment disqualifies the respondent, it should be set aside.

As success has been divided, I think, in the circumstances, I will make no order as to the costs of this appeal.

Appeal dismissed.

ONT.
S. C.

POUCHER v. WILKINS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 18, 1915.

1. EXECUTION (§ I—10)—KEEPING ALIVE—LIFE OF JUDGMENT—FURTHER RENEWALS—RULE 571, C.R. ONT. 1913—LIMITATIONS ACT, 10 EDW. VII. (ONT.), CH. 34, SEC. 49.

Where execution was issued upon a judgment within six years after the date of the judgment and the execution was kept alive by renewal for more than twenty years, further renewals may be obtained under Rule 571, C.R. Ont., 1913; the Limitations Act, 10 Edw. VII. (Ont.), ch. 34, sec. 49, is no bar to such renewal.

[*Re Woodall* 8 O.L.R. 288; *McDonald* v. *Grundy*, 8 O.L.R. 113; *Price* v. *Wade*, 14 P.R. (Ont.) 351, distinguished.]

Statement

APPEAL by the plaintiff from an order of a Junior Judge of the County Court.

The judgment was recovered on the 7th March, 1891, and the execution was issued within six years after that date, and had

ONT.

S. C.

POUCHER v. WILKINS.

been kept alive by renewal ever since; the last renewal having been made on the 15th October, 1913, and being still in the hands of the Sheriff to whom it was directed for execution.

W. N. Ferguson, K.C., for the appellant.

M. H. Ludwig, K.C., for the defendant, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O. (after stating the facts as above):—The ground upon which the learned Judge proceeded was that, in the absence of payment or acknowledgment, there is no right to issue execution upon a judgment more than twenty years old, and he evidently treated the renewal of an execution that had been issued within that period as the issue of an execution on the day on which it was renewed. Meredith, C.J.O.

Upon the argument before us, counsel for the respondent relied upon sec. 49 of the Limitations Act in force when the execution was renewed (10 Edw. VII. ch. 34) to support the order of the learned Judge, contending that the renewal of the execution was a civil proceeding within the meaning of sec. 2 of that Act; and that sec. 49 was, therefore, to be read as applying to such a proceeding; and, in the absence of part payment or acknowledgment, barring the right to take it after the expiration of twenty years from the date on which the judgment was recovered.

I am of opinion that this contention is not well-founded, and that sec. 49 has no application to anything but an action or a proceeding in the nature of an action.

The provisions of what is now sec. 49 were first enacted by sec. 3 of 7 Wm. IV. ch. 3, and were the same as those of sec. 3 of the Imperial Act 3 & 4 Wm. IV. ch. 42, which provided, among other things, that actions of covenant or debt upon a bond or other specialty should be commenced and sued within twenty years after the cause of such actions arose.

No change, except verbal ones, was made in this enactment in the consolidation of the statutes of Upper Canada in 1859, or in the revisions of the statutes in 1877, 1887, and 1897, except that the words "covenant or debt" were eliminated in the revision of 1887, no doubt because forms of action had been abolished by the Judicature Act. In 1910, with a view to the revision

ONT.
S.C.
POUCHER
v.
WILKINS.
Meredith, C.J.O.

of 1914, the various limitation Acts were consolidated by 10 Edw. VII. ch. 34. In this enactment the interpretation section was introduced, which, so far as is material to the present inquiry, reads as follows (sec. 2 (*a*): "'Action' shall include an information on behalf of the Crown, and any civil proceeding." And a group of sections, beginning with sec. 49, forms Part III., which is headed "Personal Actions."

Does, then, this interpretation section extend the meaning of the word "action," as used in sec. 49, so as to include "any civil proceeding"? In my opinion, it does not.

It is clear that, at all events until the introduction of the interpretation section, the limitation of twenty years in the Revised Statutes of 1887 was applicable only to actions, and it was so treated by the Chancellor in *Chard* v. *Rae* (1889), 18 O.R. 371.

The section is not applicable where it would give to the word "action" "an interpretation . . . inconsistent with the context" (8 Edw. VII. ch. 33, sec. 1, adding sub-sec. (2) to sec. 6 of the Interpretation Act, 7 Edw. VII. ch. 2); and that would be the effect of applying it to sec. 49.

It is plain, I think, that the word "action" is used in sec. 49 in its ordinary sense. As I have said, Part III., of which sec. 49 is the first section, is headed "Personal Actions;" a well-understood term, which clearly does not include such a proceeding as the issue or the renewal of a writ of execution. The word "commenced" is the appropriate word to apply to the bringing of an action, and is inappropriate to the taking of such a proceeding as the issue or the renewal of a writ of execution; and the period from which the twenty years are to be reckoned is that at which the cause of action arose, meaning plainly, I think, the cause of the "action" with which the section is dealing—an action of covenant or debt on a bond or other specialty. "Cause of action" is a well-understood phrase, and comprises "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court:" per Lord Esher, M.R., in *Read* v. *Brown* (1888), 22 Q.B.D. 128, 131; and a "cause of action arises" (within the meaning of the Limitations Act) "at the time when the debt

could first have been recovered by action:" *per* Lindley, L.J., in *Reeves* v. *Butcher*, [1891] 2 Q.B. 509, 511, following *Hemp* v. *Garland* (1843), 4 Q.B. 519.

If the meaning which it is contended should be given to the word "action" were given to it, the result would be that a plaintiff who had issued his writ within the prescribed period could not after that period had expired take any step in the action, which is *reductio ad absurdum*.

For these reasons, I am of opinion that the appellant's right to renew his execution was not barred by sec. 49 at the expiration of twenty years from the recovery of his judgment.

This conclusion is not opposed to what has been decided in any reported case.

In *Caspar* v. *Keachie* (1877), 41 U.C.R. 599, it was held by Wilson, J., that a writ of revivor or suggestion entered upon the roll (*i.e.*, a suggestion that the plaintiff was entitled to have execution on his judgment) was a proceeding within the meaning of sec. 11 of 38 Vict. ch. 16, and that a judgment was, under that section, to be considered as charged upon or payable "out of land," and that "it cannot be revived by writ or suggestion, if the debtor oppose the rule to shew cause, or, if the proceeding be by writ of revivor, if the defendants appear to the writ and plead the defence of the limitation of ten years;" and that learned Judge also held that the objection, not having been raised until after the suggestion had been entered on the roll, came too late.

In *Neil* v. *Almond* (1897), 29 O.R. 63, it was decided by Ferguson, J., that what he held to be the lien on the defendant's land created by the plaintiff's execution was barred after the expiration of ten years from the day on which it had been placed in the hands of the Sheriff to be executed, notwithstanding that during all that time it had been kept alive by renewals, and that advertising the defendant's land for sale under the execution was a proceeding to recover money that was a lien and charged upon and payable out of the land within the meaning of sec. 23 of ch. 111 of the Revised Statutes of 1887.

In *In re Woodall* (1904), 8 O.L.R. 288, it was held by a Divisional Court, affirming a judgment of Street, J., that *Neil* v.

ONT.
S. C.
POUCHER
v.
WILKINS.
Meredith, C.J.O.

Almond was well decided, and that the lien created by the delivery of the writ to the Sheriff for execution became barred upon the expiration of ten years from the day on which it was placed in the Sheriff's hands, notwithstanding that it had been renewed from time to time and kept in force continuously. The head-note to the report states that it was decided that sale proceedings could not be taken under it after the ten years; I do not find anything in the reasons for judgment to support that statement, although that would follow as a result of the decision.

In *McDonald* v. *Grundy* (1904), 8 O.L.R. 113, it was held by Meredith, J., that a proceeding to sell under a mortgage of land was a proceeding within the meaning of sec. 23 of ch. 133, R.S.O. 1897, and that the ten years' limitation prescribed by that section was applicable to the proceeding to sell.

In these cases the question arose on what was sec. 23 of ch. 133, R.S.O. 1897, or its prototype, the language of which differs materially from that employed in sec. 49. What sec. 23 provided was that "no action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent . . . but within ten years . . .;" and none of the reasons which have led me to the conclusion to which I have come has any application to this enactment.

It may be pointed out that, after the decision in *In re Woodall*, the section under consideration in that case was amended by adding to it the words of qualification which it was suggested by the Court (p. 292) were necessary to give to the section the construction unsuccessfully contended for by the plaintiff's counsel in that case (5 Edw. VII. ch. 13, sec. 10).

In the Act of 1910 there was substituted for the qualifying words added to sec. 23 a sub-section to sec. 24, which is the number of the section by which sec. 23 was re-enacted, which reads as follows: "(2) Notwithstanding the provisions of sub-section 1, a lien or charge created by the placing of an execution or other process against lands in the hands of the Sheriff or other officer to whom it is directed shall remain in force so long as such execution or other process remains in the hands of such

Sheriff or other officer for execution and is kept alive by renewal or otherwise."

This change did away with the effect of the decisions to which I have referred, at all events where the execution debtor was possessed of land upon which the execution operated as a lien or charge.

I am also of opinion that the order cannot be supported on the ground that, there having been no payment or acknowledgment in the meantime, it is to be presumed at the expiration of twenty years from the date of its recovery that the appellant's judgment is satisfied.

Before the passing of the Imperial Act 3 & 4 Wm. IV. ch. 42, there was no statutory provision limiting the time within which an action of debt or covenant on a bond or other specialty must be commenced, but the Courts had, by analogy to the Statute of Limitations, established the artificial presumption that where payment of a bond or other specialty was not demanded for twenty years, and there was no proof of payment of interest or any other circumstance to shew that it was still in force, payment or release ought to be presumed: Best on Evidence, 11th ed., p. 390. The lapse of twenty years where no demand had been made during that time was only a circumstance for the jury to found a presumption upon, and was itself no legal bar: *per* Buller, J., in *Oswald* v. *Legh* (1786), 1 T.R. 270, 271.

This presumption was applicable to actions and to proceedings by *scire facias* on judgments, because the judgment debt was a debt by specialty. The Courts in early times were lenient to judgment debtors, and established the rule that, if a judgment creditor did not issue his execution within a year and a day, he had, in the case of a personal action, to bring an action on his judgment, and in the case of a real action he had either to bring an action or to proceed by *scire facias*. This practice was founded on the theory that if an execution was not issued within a year and a day it was to be presumed, until the contrary was shewn, that the judgment was satisfied.

The modes of proceeding with respect to both classes of action were made uniform by the Statute of Westminster 2 (13 Edw. I., stat. 1, ch. 45), which gave a *scire facias* to the plain-

ONT.
S.C.
POUCHER
v.
WILKINS.
Meredith, C.J.O.

tiff in a personal action to revive the judgment where he had omitted to sue execution within the year after the judgment was obtained: Tidd's Practice, 8th ed., pp. 1152, 1153.

Where, however, a *fieri facias* or *capias ad satisfaciendum* was taken out within the year and not executed, a new writ might be sued out at any time afterwards without a *scire facias* if the first writ were returned and filed, and continuances were entered from the time of issuing it.

This practice, so far as it obtained in Ontario, was changed by the Common Law Procedure Act, 1856 (19 Viet. ch. 43); sec. 202 of which provided that: "During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within one year from the recovery of the judgment, execution may issue without a revival thereof."

By sec. 203 provision was made that where it should become necessary to revive a judgment, by reason of lapse of time or of a change by death or otherwise of the parties entitled, or liable to execution, the party alleging himself to be entitled to execution might either sue out a writ of revivor or apply for leave to enter a suggestion on the roll, to the effect that it manifestly appears to the Court that he is entitled to have execution of the judgment, and to issue execution thereupon, and that this leave should be granted by the Court on a rule to shew cause, or by a Judge upon a summons to be served according to the practice, or in such other manner as the Court or Judge should direct; and by sec. 207 it was provided that a writ of revivor to revive a judgment less than ten years old should be allowed without a rule or order; if more than ten years old, not without a rule of Court or Judge's order; and if more than fifteen years old, not without a rule to shew cause.

By sec. 189 it was provided that a writ of execution should remain in force for one year from the teste, and no longer if unexecuted, but that it might be renewed at any time before its execution for one year from the date of renewal, and that the writ when so renewed should have effect and be entitled to priority according to the time of its "original delivery."

By 20 Viet. ch. 57, sec. 10, sec. 202 of the Act of 1856 was

repealed, and it was provided that "during the lives of the parties to a judgment or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a renewal thereof."

In the consolidation in 1859 of the Statutes of Upper Canada this section was recast and made to read as follows: "During the lives of the parties to a judgment, or any of them, execution may be issued at any time within six years from the recovery of the judgment, without a revival thereof by *scire facias*, or by writ of revivor" (C.S.U.C. ch. 22, sec. 301).

In this consolidation, sec. 203 of the Act of 1856 became sec. 302, and sec. 189, with the words "to the Sheriff" added at the end of it, became sec. 249.

By 27 Viet. ch. 13, sec. 2, owing to doubts that had arisen as to whether there could be more than one renewal, sec. 249 of the Act in the Consolidated Statutes was amended by inserting after the word "expiration" the words "and so from time to time during the continuance of the renewed writ."

By Rule 872 of the Consolidated Rules of the 1st September, 1897, which have the force of a statutory enactment, it is provided that a writ of *fieri facias* if executed is to remain in force for three years only from its issue, but may, at any time before its expiration, be renewed by the person issuing it for three years from the date of renewal, and so on from time to time during the continuance of the renewed writ, and that a writ so renewed shall have effect and be entitled to priority according to the time of the original delivery; and by sec. 9 of the Execution Act, 9 Edw. VII. ch. 47, subject to certain qualifications which do not affect the question under consideration, a writ of execution binds the goods and lands against which it is issued from the time of its delivery to the Sheriff for execution.

Under the old practice, "after *fieri facias* or *elegit* if not executed a new *fieri facias* or *elegit* may be sued out several years afterwards without suing a *scire facias*, provided the continuances are entered from the time of the first *fieri facias*:" *Welden* v. *Greg* (1662), 1 Siderfin 59; *Simpson* v. *Heath* (1839), 3 Jur. 1127.

In the latter of these cases there was an interesting discus-

ONT.
S. C.
POUCHER
v.
WILKINS.
Meredith, C.J.O.

sion as to this practice, and numerous old cases were cited and discussed. It appears from the argument of counsel, and from what was said by Baron Parke in delivering the judgment of the Court, that according to this practice there was no limit to the time within which the *fieri facias* or *capias ad satisfaciendum* might be issued; and counsel for the defendant pointed out that under it "a man might arrest another on a writ taken out forty years before, and kept in his pocket during that time, and of which the other could have no possible notice" (p. 1129); to which it was replied by Baron Parke: "In strict practice, there ought to be an award of judgment on the judgment-roll, that would give the defendant notice." Counsel for the defendant argued that this practice was "inconsistent with the spirit of 3 & 4 Wm. IV. ch. 42, sec. 3, which prohibits proceedings in debt, covenant, or *scire facias*, from being instituted after twenty years," and that "it never could have been the intention of the Legislature to allow a party to sue out a writ of executoin, and keep it by him for more than twenty years, and then execute it." During the argument, Baron Parke quoted with approval the following passage from Tidd's Practice, 9th ed., p. 1103: "When a *fi. fa.* or *ca. sa.* is taken out within the year and not executed, a new writ of execution may be sued out at any time afterwards without a *scire facias*, provided the first writ be returned and filed, and continuances entered from the time of issuing it, which continuances may be entered after the issuing of the second writ."

In *Jenkins* v. *Kerby* (1866), 2 U.C.L.J. N.S. 164, it was held by Draper, C.J., that a writ of execution may be sued out at any time within six years from judgment without a writ of revivor, and if during the six years a writ of execution is sued out and returned and filed the same consequences follow as if, under the old practice, a writ had been sued out within a year and a day and returned and filed; that is, such a writ will support a subsequent writ issued after that period without a *scire facias* or revivor.

It seems to me that the same principle as that upon which this practice was founded is applicable under our practice to an execution issued within six years and kept alive by renewals

beyond the period of twenty years; for if under the old practice a new execution might be issued at any time, provided an execution had been issued within the year and returned and filed, and continuances entered from the time of issuing it, an execution issued within six years, which at all times from its issue has been kept in force and in the hands of the Sheriff, should be in at least as good a position as the new execution under the old practice, and the renewal at least as effectual as the issue of the new execution.

It may be pointed out also that in *Du Belloix* v. *Lord Waterpark* (1822), 1 D. & R. 16, 17, which was an action on a promissory note dated the 27th December, 1787, and payable six months after date, Abbott, C.J., was asked by the defendant's counsel to direct the jury that they were bound to presume from analogy to the case of a bond that after twenty years the note had been paid, although there was no proof that the payee had been within the realm; but the Chief Justice refused to give such a direction, and expressed the opinion that "the case of a bond was distinguishable from promissory notes and bills of exchange, which were simple contracts, and were subjected to the provisions of the Statute of Limitations; whereas the rule for presuming payment of a bond after twenty years was founded on common law, there being no statutable provision with respect to obligations of that nature."

If this opinion was well-founded, as there is now such a statutable provision as to specialties as was at that time wanting, the common law rule for presuming payment of a specialty after twenty years would seem to be no longer applicable.

The Chancellor, however, in *Price* v. *Wade*, 14 P.R. 351, treated the presumption as applicable to an application for leave to issue an execution upon a judgment more than twenty years old.

It is unnecessary to express an opinion as to the correctness of this decision, as it has no application to such a case as this. Here no leave to issue execution was necessary; the appellant had issued execution in due time, and its renewal after the expiration of the twenty years was a mere ministerial act on the part of the officer of the Court by whom it was renewed, whose

ONT.
S. C.
POUCHER
v.
WILKINS.
Meredith, C.J.O.

duty it was to sign the memorandum required by Rule 571 of the Rules of 1913, when the appellant produced the execution, while, according to its terms, it was still in force, and requested him to sign it.

Upon the whole, I am of opinion that the appeal should be allowed with costs, and the order appealed from reversed, and that there should be substituted therefor an order dismissing with costs the respondent's motion to set aside the execution.

Appeal allowed.

SASK.
S. C.

SAWYER-MASSEY CO. v. WHITE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood. March 20, 1915.

1. LANDLORD AND TENANT (§ III D 2—105)—EXECUTION CREDITORS—LANDLORD'S PRIORITY OVER—RENT IN ARREAR—ACCELERATION CLAUSE IN LEASE NOT SUFFICIENT.

Under the statute 8 Anne, ch. 14, the rent for which the landlord is granted priority over execution creditors must not only be due, but must be in arrear at the time of the sheriff's seizure; an acceleration clause in the lease whereby the current year's rent should immediately become "due and payable" and the term become forfeited on the lessee's goods on the demised premises being seized or taken in execution, does not give this priority for the accelerated rent as it would not be in arrear under the statute of Anne until the day following the day when it became due.

[*Child* v. *Edwards*, [1909] 2 K.B. 753, referred to.]

Statement

APPEAL from an order of Brown, J.

W. H. B. Spotton, for appellants.

T. S. McMorran, for respondent, Sawyer-Massey Co.

W. A. Beynon, for respondent, Wachter.

Haultain, C.J.

HAULTAIN, C.J., concurred with ELWOOD, J.

Newlands, J.

NEWLANDS, J., concurred with LAMONT, J.

Lamont, J.

LAMONT, J.:—The claimants are the owners of the south half of section 22, township 18, range 25, west of the 2nd meridian, and by a lease bearing date August 20, 1913, they leased the said land to the defendant White for a term of 6 years. The rent reserved was $2,000, payable on October 1 in each year, the first payment to be made on October 1, 1913.

The lease contained the following provision:—

AND ALSO that if the term hereby granted or the lessee's goods and chattels on said lands liable to distress shall be at any time seized or taken

in execution or attachment by any creditor of the said lessee . . . . . then the current year's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void.

The plaintiffs are execution creditors of White. Acting under the plaintiffs' execution, the sheriff, early in September, 1914, seized all the crop, less exemption, grown by White in 1914 upon the leased premises. On September 8 the claimants notified the sheriff that they claimed one year's rent, and that they were entitled to have same paid to them before the removal of any of the crop seized by him. The execution creditors disputed the claim for rent, and the sheriff applied for an interpleader order.

Counsel for the claimants contended that the landlords were entitled to be paid the rents reserved by virtue of the above-mentioned acceleration clause in the lease, and the provision of statute 8 Anne, ch. 14, sec. 1, which said statute in part reads as follows:—

No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this Act.

It was admitted by counsel for the claimants that, in order to succeed, he must establish that the rent was due at the time the sheriff seized. It was not due by effluxion of time until October 1. Did it become due by virtue of the acceleration clause? That clause cites that if the tenant's goods are seized, then the current year's rent shall immediately become due and payable.

It was contended that the effect of this language was that the rent became due the very moment the sheriff seized; that the falling due of the rent and the seizure were concurrent acts. In my opinion effect cannot be given to this contention. Under the clause, the seizure is necessary to the falling due of the rent; until seizure the rent is not due; upon seizure it immediately becomes due. Seizure, therefore, must precede the falling due of the

SASK.

S. C.

SAWYER-MASSEY CO. v. WHITE.

Lamont, J.

rent as cause precedes effect. The statute, however, affords protection in case the rent is due at the time of seizure; *i.e.*, when the sheriff seizes, the rent is already due. To get the benefit of the statute, the falling due of the rent must precede the seizure. In the present case the rent was not due until seizure was made, and is, therefore, in my opinion, not within the protection of the statute. The meaning which, in my opinion, should be given to the word "immediately" in the clause is: "following without lapse of time," or "directly after in sequence of time."

Another objection to the appellant's claim was that the rent, to come within the protection of the statute, must have been not only due but in arrear at the time seizure was made. Where rent becomes due on a day certain, the lessee has the whole of that day in which to pay it; it is not in arrear until after midnight of that day: 18 Hals. 471; *Child* v. *Edwards*, [1909] 2 K.B. 753. If the rent became due at the time of seizure by the sheriff, the tenant would have all that day to pay it, and it would not be in arrear until after midnight on that day. If, therefore, the meaning of the statute is that the rent must be in arrear at the time of the seizure, the acceleration clause in the lease could not have the effect (even if we accept the appellant's contention as to its meaning) of making the rent in arrear at the time of the seizure. That such is the meaning of the statute seems clear, not only from its language where it subsequently refers to the rent as "rent in arrears," but also from the following authorities: Foa on Landlord and Tenant, p. 161; Woodfall's Law of Landlord and Tenant, p. 559; *Wharton* v. *Naylor*, 17 L.J.Q.B. 278; Bullen and Leake's Precedents, 6th ed., at p. 478; *Thomas* v. *Mirehouse*, 19 Q.B.D. 563; *Re MacKenzie*, [1899] 2 Q.B. 566; Clarke's Law of Landlord and Tenant, at 583.

These authorities lead me to the conclusion that the Statute of Anne was passed for the protection of the landlord where the sheriff seized under execution at a time when the landlord's rent was due and he could have distrained therefor. As it appears in this case that no right to distrain for the rent existed at the time of the seizure by the sheriff, the claimants cannot succeed.

The appeal will, therefore, be dismissed with costs.

Elwood, J.

ELWOOD, J.:—I have read the judgment herein of my brother Lamont, but I am of the opinion that the effect of the provision

in the lease was to cause the rent to become due the very moment that the sheriff seized; that in effect the seizure by the sheriff and the falling due of the rent were automatically concurrent.

I am, however, of the opinion that in order to entitle the landlord to the benefit of the statute the rent must have been in arrears at the time of the seizure; and I therefore concur in the judgment of my brother Lamont in holding that the rent not being in arrears at the time of the seizure precludes the landlord from receiving the benefit of the statute.

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

Appeal dismissed.

RANDALL, GEE & MITCHELL v. C.N.R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. April 5, 1915.

1. CARRIERS (§III A—370)—GOODS RECEIVED FOR TRANSPORTATION—GOODS SHIPPED—FREIGHT COLLECTED—DELIVERY MADE—BILL OF LADING—CANNOT DISPUTE.

It is not open to a railway company which has actually received grain for transportation to dispute the bill of lading or shipping bill issued on its regular form merely on the ground that its agent had not by reason of some inside regulations between the company and its servants the power to sign the bill, where the company received and carried the grain, collected the freight and made delivery pursuant to its terms.

[*Erb* v. *G.W.R. Co.*, 5 Can. S.C.R. 179; *Oliver* v. *G.W.R. Co.*, 28 U.C.C.P. 143, distinguished.]

2. ESTOPPEL (§ III C—62)—BILL OF LADING—WEIGHTS OR QUANTITIES—RAILWAY COMPANY — RESPONSIBILITY — APPROXIMATE AMOUNT — "MORE OR LESS."

Where there is nothing in the bill of lading or shipping bill of the railway to limit its responsibility for the weights or quantities entered on the bill the railway company is estopped from denying that approximately the quantity stated with the addition of the words "more or less" had been received for shipment.

3. CARRIERS (§ III C—388*b*) — FLAX — SHIPMENT OF — LOSS IN TRANSIT —RAILWAY COMPANY — NO SATISFACTORY EXPLANATION — NEGLIGENCE—PRESUMPTION OF.

Where the bill of lading called for "eleven hundred bushels more or less" of flax and the evidence proved the delivery of over 900 bushels in a car load lot, the onus is upon the railway company to account for the deficiency on the car arriving at destination with only half the quantity stated in the bill; where no satisfactory explanation of the loss is given by the railway, negligence may be presumed against it.

[*Ferris* v. *C.N.R. Co.*, 15 Man. L.R. 134, referred to.]

Statement

ACTION to recover value of grain lost *in transitu*.

W. H. Curle, for appellant, plaintiff.

O. H. Clark, K.C., for respondent, defendant.

MAN.

C. A.

RANDALL, GEE & MITCHELL v. C.N.R. CO.

Perdue, J.A.

The judgment of the Court was delivered by

PERDUE, J.A.:—The plaintiffs are a company of grain merchants, carrying on business at Winnipeg. On November 29, 1912, they were notified by the Bank of Montreal at Moose Jaw that a car of flax seed, containing 1,100 bushels, more or less, had been consigned to their order by one Baumgart, and that he had drawn upon them for $435, with bill of lading attached, as an advance on the carload. The plaintiffs paid the draft and received the bill of lading, which shewed a shipment of a carload of flax, containing 1,100 bushels, more or less, from Antar, Sask., to Port Arthur, consigned to their order. After the flax had been inspected and its quality ascertained, the plaintiffs made a further advance to Baumgart of $300. When the car reached Port Arthur it was found to contain only some 454 bushels. The plaintiffs have brought this action to recover from the defendants the amount of their loss. The value of the flax was at the time $1.05½ a bushel.

The main defence is that the bill of lading was signed by one Howes, the defendant's station master and agent at South Moose Jaw, and that he had no authority to sign a bill of lading from Antar, the point from which the consignment was made. Antar is a small station about five miles east of South Moose Jaw, and at that time the defendants kept no agent or station master there. They claim that in the case of cars loaded at Antar the bill of lading was, according to their orders, to be signed either by the agent at the next station east or by the conductor of the train that picked up the car. The plaintiffs were, however, quite unaware of this, and had no notice of any want of authority on the part of the agent who signed the document. Howes was authorized to sign bills of lading on the part of the defendants. The fact that his authority to do so was limited to a certain station or district cannot be taken advantage of by the defendants in view of the facts that they received and carried the shipment under the contract made by him on their behalf, and that they, in pursuance of it, delivered the contents of the car to the consignees named in it. It appears to me to be quite clear that the defendants acted on and acknowledged the validity of the document signed by Howes. Even if the defendants had forbidden Howes to sign bills of lading in

respect of cars loaded at Antar, are innocent purchasers to suffer if he should exceed his instructions? In a business as important and extensive as the grain business in this country, it is necessary that the utmost faith may be placed in the validity of bills of lading issued by railway companies. It should not, therefore, be open to a railway company which has actually received grain for carriage to dispute the bill of lading issued in its regular form simply on the ground that its agent had not, by reason of some inside regulations between the company and its servants, power to sign the bill, and to do this although the company received and carried the grain, collected the freight and delivered the grain pursuant to the terms of the document.

The defendants rely on *Erb* v. *Great Western R. Co.*, 5 Can. S.C.R. 179, and *Oliver* v. *Great Western R. Co.*, 28 U.C.C.P. 143. In each of these cases the goods mentioned in the bill of lading had never in fact been delivered to the railway company, and the agent had signed and issued the document fraudulently for his own purpose. It was held in these cases that he had acted outside the scope of his authority and that the company was not bound. The distinction between those cases and the present is obvious.

In *Horseman* v. *Grand Trunk R. Co.*, 31 U.C.Q.B. 535, the shipping bill contained a notice at the top of it that the rates and weights entered on the bill would not be acknowledged. The defendants in that case had in fact delivered all the goods received, but there was a considerable deficiency between the weight mentioned in the shipping bills and that of the goods when delivered. It was held that the company was not, under the form of shipping bill given in the case, estopped by the statement of weight contained in it. In the present case, although the quantity of flax found in the car at Port Arthur was less than half the quantity mentioned in the bill of lading, the defendants have failed to shew that only the lesser quantity was received by them at Antar. The defendants called as a witness one Dunbar, who was employed by Baumgart to load the car. This witness saw the flax that was to go into the car, but was not present when the work was completed by his men. He estimated the quantity at between 900 and 1,000 bushels. He also admitted having signed a statement that the car contained

MAN.

C. A.

RANDALL, GEE & MITCHELL v. C.N.R. CO.

Perdue, J.A.

1,200 bushels of flax. The witness stated that the flax was dirty and frosted, and that, in his judgment, the dockage would be 50 or 60 per cent. His evidence as to quality and condition is clearly wrong, as the flax graded No. 1, N.W.C., and the dockage was only 15 per cent. Dunbar further stated that the car was not in good condition, and that before loading it he put paper and some lumber in the bottom of it. It is a matter of common knowledge that flax seed, being a very small and smooth grain, might escape readily through a very small aperture. Unless the car was in good condition, the leakage might be very large.

I think that the bill of lading given in this case is binding on the defendants, and that they are estopped from denying that there was 1,100 bushels "more or less" in the car when shipped —that is to say, that 1,100 was the nearest round figure in hundreds to designate the number of bushels. On the question of estoppel by the bill of lading, I would refer to *Howard* v. *Tucker*, 1 B. & Ad. 712; *Tindall* v. *Taylor*, 4 El. & Bl. 219, 229; *Compania Naviera* v. *Churchill*, [1906] 1 K.B. 237; *Coventry* v. *Great East R. Co.*, 11 Q.B.D. 776.

Aside altogether from the rights created by the bill of lading, it is shewn by defendants' own witness that they as carriers received between 900 and 1,000 bushels of flax for carriage and delivery at Port Arthur. They delivered only half that quantity. It lies upon them to shew what became of the remainder. The case is very similar to *Ferris* v. *Can. Nor. R. Co.*, 15 Man. L.R. 134. In that case a considerable quantity of grain disappeared between the point of shipment and the place of delivery, the defendants giving no explanation of the loss. The rule *res ipsa loquitur* was applied and negligence was presumed against the defendants.

An objection was raised by the defendants that the document purporting to have been issued by them was not a bill of lading, because it does not say that the grain had been shipped or loaded on a car when the document was given. The document is headed, "Form of Bulk Grain Bill of Lading, approved by the Board of Railway Commissioners for Canada by Order No. 1491 of August 18, 1911." The writing in many places refers to itself as a bill of lading. The fact was that the grain had been loaded on a car of the defendants on their railway before the document was

issued. Whether we call it a bill of lading, or a shipping bill, or a receipt of goods for carriage, the statements contained in it are *primâ facie* binding on defendants, if it was issued by one having authority to do so, or, in any case, if the company ratified it by adopting it and acting upon it.

I think the appeal should be allowed and that judgment should be entered for the plaintiffs for $362.74. The defendants should pay the costs in the County Court and the costs of this appeal.

Appeal allowed.

WESTERN TRUST CO. v. DUNCAN.

Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. March 20, 1915.

1. DEATH (§ II A—6)—ELEVATOR OPERATOR—KILLED IN COURSE OF EMPLOYMENT—RIGHT OF REPRESENTATIVE TO COMPENSATION—BUILDING USED FOR OFFICES AND APARTMENTS—"FACTORY"—DEFINITION OF—CH. 9, 1910-11 (SASK.).

The representative of an elevator operator who was killed in the course of his employment is entitled to recover compensation under the Workmen's Compensation Act, Sask., although the building in which the electric elevator was operated was not used for manufacturing purposes, but for offices and apartments, such building being within the statutory definition given in that Act to the word "factory."

Statement

ACTION under the Workmen's Compensation Act by plaintiff, as administrator of the estate of Joseph Stoddard, deceased.

F. L. Bastedo, for appellant.

G. H. Barr, for respondents.

Newlands, J.

NEWLANDS, J.:—The deceased was killed while operating the elevator in a building owned by the defendants, the lower storey of which was used as stores and the upper storeys as apartments and offices. No manufacturing was carried on in the building. The elevator in question was operated by machinery driven by electric power.

I agree with the learned trial Judge that the deceased was killed in the course of his employment, and the only question which I think requires consideration in this case is the last clause of the trial Judge's judgment, in which he says:—

I further conclude and hold that the portion of the definition upon which the plaintiff relies, and which I have discussed, is to be governed and understood by and in the light of the general purpose and object of the Act, and is therefore to be construed as intending and meaning only industrial buildings, workshops, places or machinery. As neither the

SASK.

S. C.

WESTERN TRUST CO. v. DUNCAN.

Newlands, J.

Willoughby-Duncan Block, nor the place of its elevator, nor the machinery itself, partakes of this character, the Workmen's Compensation Act, as I have interpreted it, is not applicable to the circumstances of this case.

The interpretation clause in the Act in question (Workmen's Compensation Act, ch. 9, 1910-11, Sask.) reads as follows:—

2. "Factory" means a building, workshop or place where machinery driven by steam, water or other mechanical power is used.

The interpretation which the trial Judge has put upon this section is that the word "factory" means an "industrial" building, etc., etc. He adds to the interpretation given in the statute the word industrial. This, in my opinion, is not interpreting the section, but legislating, as it restricts what is the plain meaning of the words. In discussing this phase of the question the learned trial Judge says:—

Put in its most general form the definition would read that any "place where machinery driven by mechanical power is used" is a factory, and therefore within the Act. This, literally, would mean that every shop, school, residence, church, office or other place where an electric fan, electric sweeper, electric clock or other machinery driven by mechanical power, no matter how simple, and no matter to what purpose applied, was used, would be, as to the place of such use at least, a factory, and within the scope and application of the Workmen's Compensation Act. In fact, every place where a wheel is turned by mechanical power would be a factory and within the Act.

That the Legislature was of the same opinion as the trial Judge is shewn by sub-sec. 2 of sec. 14 of the Act, which reads as follows:—

(2) The word "factory" as defined in this Act shall not be held to include any building, workshop, place or mill on a farm used for the purposes of such farm.

The Legislature was evidently of the opinion that, without this exception, a building on a farm in which machinery driven by mechanical power was used would otherwise be within the Act. Such a building would not necessarily come within the construction put upon the word "factory" by the learned trial Judge, and therefore, if his interpretation of the word "factory" was the one intended by the Legislature, that exception would have been unnecessary.

I think we should follow the rule for the construction of statutes which requires us to give to the words their plain and ordinary meaning, which is, that every building in which machinery driven by mechanical power is used is a factory under that Act, and not restrict the meaning to buildings used for industrial purposes only.

SASK.

S. C.

WESTERN TRUST CO. v. DUNCAN.

Newlands, J.

As the evidence in this case shewed that the elevator in question was in the building owned by defendants, that it was run by machinery which was also in the building, and was driven by mechanical power, and that deceased was employed by them to operate the same, and that he was killed in the course of his employment, I think plaintiff is entitled to recover.

I think the amount of compensation fixed by the trial Judge is sufficient, and should be divided in the proportions mentioned. The appeal should be allowed with costs, plaintiffs to have their costs of trial as well.

Appeal allowed.

MARRIOTT v. MARTIN.

B. C.

S. C.

British Columbia Supreme Court, Macdonald, J. February 15, 1915.

1. SOLICITORS (§ II A—20)—RELATION TO CLIENT—NEGLECT OF DUTY—LIABILITY.

The burden of proving negligence is primarily upon the plaintiff suing a solicitor for neglect of duty, but when once established it is for the solicitor to prove that the client was not injured by it.

[*Gould* v. *Blanchard*, 29 N.S.R. 361; *Nocton* v. *Ashburton*, [1914] A.C. 932; *Whiteman* v. *Hawkins*, 4 C.P.D. 13, referred to.]

Statement

ACTION against a solicitor for negligence.

G. H. Dorrell, for plaintiff.

Maclean, K.C., for defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff agreed to buy an undivided one-third interest in 516 acres of land at Quatsino, B.C., and by letter instructed the defendant to act for him. Plaintiff is a retired English solicitor, but, not being familiar with the laws of this province, he thought it advisable to employ a local solicitor. Before the letter referred to had been acted upon, he met defendant in his office at Victoria, and a discussion took place upon the question of the title that could be obtained to the land proposed to be purchased. The parties do not differ to any great extent as to what occurred, except that the plaintiff states that at this consultation the defendant informed him that there was no practical risk to run as to the title, and that it was only a theoretical risk. Defendant denies this portion of the conversation: although plaintiff was firmly convinced as to his recollection in this respect being correct, I am inclined to think he is honestly mistaken. I am led to this conclusion by the fact that plaintiff, when giving

B. C.

S. C.

MARRIOTT v. MARTIN.

Macdonald, J.

instructions as to a second purchase of land, referred to the title to a further interest in the same property as follows: "I presume there is no practical risk so far as title is concerned, is there?" If he had already discussed the matter with his solicitor he would have put the query in a different manner, and likely have referred to the previous conversation. However, I do not think this point material. There is no dispute between the parties as to the remainder of the conversation at the meeting in August. Plaintiff admits that defendant explained to him that he could not get title to the land he was purchasing until the Crown grant issued: that it was within the power of the Crown not to issue a grant at its discretion; the Crown could so act with or without sufficient reason. Defendant informed the plaintiff that it was not unusual for people to deal with land in the way proposed, and that he himself had made similar purchases. Discussion then took place as to the timber, and the defendant was fully aware that the plaintiff was laying stress upon the fact that the timber on the land was valuable, but the matter of rejection on the part of the Crown on account of excess of timber was not discussed. The necessary documents were prepared, and, after examination of the certificates of purchase and a correction in the powers of attorney, defendant saw no reason why the transaction should not be put through and the money paid over in the terms of the agreement. The survey had been made at the time. A cheque for $2,013.17 was issued by the plaintiff in favour of the defendant, and this amount paid over to the vendor. On October 18, 1912, plaintiff agreed to buy another one-third interest in the Quatsino land from one Knight, and instructed the defendant to put through the matter for him, adding in his letter the query as to title. Defendant acknowledged receipt of the letter of instructions on October 21, 1912, and stated to the plaintiff that he would find out if the parties had completed their payments to the Government and whether the powers of attorney were then in good order, adding, there is no practical risk, in my opinion, and the way in which the transaction with Mr. Shone was carried through is the only possible way of buying land where the Crown grant has not yet issued. On November 6, 1912, defendant wrote the plaintiff that the documents appeared to be all in order, so that Shone and Knight might now be paid the amounts due as arranged. The purchase from Knight was thus completed in a similar manner

to the previous purchase from Shone, and on November 8th, 1912, plaintiff paid the agents for Knight and Shone $3,321.17. The total payments made by the plaintiff in respect of these purchases were the said sum of $2,013.17 paid to the defendant, and the sum of $2,667.17 paid to Knight, and the sum of $654 paid directly to Shone—in all amounting to $5,334.34. This amount plaintiff seeks to recover from the defendant, together with interest.

Plaintiff complains that, the matter of timber on the land being brought to the attention of the defendant, he should have warned him as to the danger of completing the purchase before it was determined that the land being sought to be purchased from the Crown was not "timber lands" within the meaning of the Land Act, or, in the alternative, that the defendant was neglectful of his duty in not pointing out the fact that timber could not be sold. It is presumed that the defendant had full knowledge of the statutes dealing with the sale of Crown lands, and the question is whether he was negligent in completing the purchases.

It is contended that defendant is only liable for gross negligence. In *Schoen* v. *Macdonell*, 18 W.L.R. 329, the defendants were held liable, and Mr. Justice Galliher, in his judgment, refers to the neglect of the solicitors to procure certain timber licences, resulting in loss to the plaintiffs, as "a case of gross carelessness" on the part of Jones, one of the partners, and all the defendants were held liable. It is difficult to determine what is gross negligence on the part of a solicitor. [Reference to the following cases: *Whiteman* v. *Hawkins*, 4 C.P.D. (1878), 13, at 19; *Nocton* v. *Ashburton (Lord)*, [1914] A.C. 932, at 956; *Faithfull* v. *Kesteven*, 103 L.T. 56; *Hunter* v. *Caldwell*, 10 Q.B. 69, at 81-2; *Purves* v. *Landell* (1845), 12 Cl. & F. 91, at 98; *Baikie* v. *Chandless*, 3 Camp. 17.]

Plaintiff's pleadings herein do not allege gross negligence, so the plaintiff is driven to contend that the pleadings and evidence shew such statement of facts as to constitute gross negligence, "so that he who runs may read." Plaintiff must, in order to come within the authorities, take the position that it was not merely an error of judgment on the part of his solicitor in failing to consider and advise him as to the danger of the purchase being refused on the ground of the quantity of timber on the land,

B. C.

S. C.

MARRIOTT v. MARTIN.

Macdonald, J.

but that such failure was want of professional care and skill to such an extent as to render the defendant liable for gross negligence. It must be borne in mind that the plaintiff was purchasing property to which he was well aware he could not then obtain title. Presumably, his submission is that while he knew he could not obtain title and was willing to accept the risks attached to his purchase which had been pointed out to him by the defendant, still he would not have accepted the further risk which he alleges should have been disclosed and from which he suffered damage. This involves consideration of the position of the parties at the time and the extent to which a solicitor is required to search and advise, where it is thus common ground between the client and himself that the title is not being passed, and that the obtaining of a complete title eventually is uncertain. No criticism has been offered as to the form of the conveyancing approved of by the defendant. The documents contained covenants for title and other necessary safeguards. Did the defendant then, under the circumstances, give bad advice or fail to give good advice in connection with this purchase, and, if so, did such failure amount to actionable negligence? In the purchase of Crown lands it is provided that they are to be classified by the surveyor, who is to make full and accurate field notes of his survey, which are to be filed in the Department of Lands accompanied by a statutory declaration verifying such notes and shewing the area of timber lands and first-class or second-class lands which are embraced in such survey. The distinction between first and second-class lands is indicated, and then, as to timber lands, sec. 39 of the Land Act provides that

> Timber lands (that is, lands which contain milling timber of the average extent of eight thousand feet to the acre west of the Cascades and five thousand feet to the acre east of the Cascades, to each one hundred and sixty acres) shall not be open for sale.

Defendant admits that he did not search the field notes pertaining to the lands in question. He was not called as a witness on his own behalf at the trial, and, apparently, relied upon his examination for discovery (put in in its entirety by the plaintiff), together with the correspondence, including copies of the departmental files. He did not offer as an excuse for not examining these field notes that sec. 39 had no application. It was, however, argued on his behalf that the pieces of land of which he was

purchasing undivided interests were not "timber lands" within the meaning of this section. Of the three pieces of land applied to be purchased from the Crown, lot 1012 has 347 acres, lot 1013 has 127 acres, and lot 1011 has 44 acres. The submission that the definition given to timber lands in the section could not be applied, as the average extent of timber to the acre is based on "each 160 acres," has no weight when dealing with lot 1012, so that if "due care and skill" means that the field notes should be searched and, if not available, completion of the sale should be delayed until survey was made and the field notes filed with proper classification, then the defendant was negligent in the matter. I do not think, however, that the point as to basis of determining "timber lands" is well taken as to any of the pieces. The Department of Lands would at any rate be justified under the Act in refusing application to purchase where the average extent of milling timber was 8,000 feet to the acre, notwithstanding that the piece of land sought to be purchased was less than 160 acres. Were the application of the section to be otherwise, it would mean that along the irregular shore line of the province applicants might obtain by purchase at the Government price land which was less than 160 acres in area, contrary to the spirit and intention of the legislation. If this section might thus affect the lands in question, then to what extent should the defendant have advised and searched as to the likelihood of it being applied? As to the first purchase from Shone, the surveyor's notes were mailed to the Department of Lands on July 25, 1912, and presumably, were on file in the department until they were returned to the surveyor for correction on August 25, 1912. They were amended and re-filed on September 26, 1912, and consequently, were on file at the time when the defendant wrote the plaintiff on August 20, 1912, stating that he had examined the certificates of purchase and the powers of attorney, and that they were adequate and sufficient with the exception of a change being required in the description of the property giving the lot numbers, "now that the survey has been made." He then added: "I do not see any reason why the transaction should not be put through in the way here provided for, and am giving this letter to Mr. Shone, who states he is going up to Duncans to see you." Whether such notes were on file or not at this time, I think the solicitor should have examined

B. C.
S. C.
MARRIOTT v. MARTIN.
Macdonald, J.

all available documents that would assist in protecting his client, though the field notes, if examined, would not then have indicated any lands classified as "timber lands." It is true the plaintiff had spoken of the valuable timber on the property, but that of itself might not be sufficient to suggest to the defendant the advisability of investigating as to whether the lands were classified as timber lands or not. He might assume that the applicants for purchase were not seeking to obtain land from the Crown which was not open for sale. If a search at that time would have disclosed the fact that a portion of the land was classified as "timber land," then it was his duty not to have sanctioned completion of the purchase until the question of whether the Crown was willing to sell had been determined. It might be contended that the defendant should have made enquiries as to the classification of the lands. It is a matter of opinion, but I do not think there was, under the circumstances as to this piece, the want of care on the part of defendant requisite to create liability. As to the second purchase of a one-third interest in the same land from Knight, this took place at a time when the field notes had been altered and returned to the Department of Lands. If they had been searched they would have shewn that the surveyor acting for the applicants to purchase had, by declarations made on September 24, 1912, stated in his classification of the lands that lot 1011, containing 44 acres, had 20 acres of timber lands and 24 acres of second-class lands, while lot 1012, containing 347 acres, had 200 acres of timber lands and 147 acres of second-class lands, and lot 1013, containing 127 acres, had 90 acres of timber lands and 37 acres of second-class lands. It was thus clearly stated that lands which the surveyor classified as "timber lands" were sought to be purchased from the Crown. This would be in the face of the provision of the statute that such lands were not open for sale. Defendant should, after searching and finding this condition of affairs, have either advised his client to abandon the purchase of a further interest, or, at any rate, to hold the matter in abeyance until the danger of refusal had been removed. It was urged that in any event, aside from the question of negligence, it was not proved that the Minister of Lands had refused to complete the sale on the ground that they were timber lands. It is true that the letter stating that this was the reason for refusal

is only signed by the Deputy Minister of Lands, but I do not think such a defence is now open to the defendant. His actions subsequent to the refusal to purchase and the correspondence have estopped him from setting up such a contention. My opinion is that, in the purchase of the one-third interest from Knight by agreement dated October 13, 1912, the defendant did not exercise due "care and skill" required of him as a solicitor.

Even if the defendant be held liable for negligence, it is contended that there is no evidence to shew that the plaintiff suffered damage on this account. Plaintiff says that money was paid on the strength of the advice or lack of advice given by the defendant. None of the moneys so paid have been recovered, nor has the plaintiff brought any action under the covenants contained in the agreement with Knight. It was argued on his behalf that even if any action had been brought, aside from the question of Knight being financially responsible, a question might arise as to whether a defence was not open, based upon the decisions in *Brownlee* v. *McIntosh* (1913), 15 D.L.R. 871, 48 Can. S.C.R. 588, and *Clark* v. *Swan* (1914), 16 D.L.R. 382, 19 B.C.R. 532. I do not consider it necessary to come to any conclusion on this point, as, in my opinion, the onus of shewing that the moneys could be recovered under the agreement rests upon the defendant. There is evidence to shew that he was prepared to indemnify or protect the plaintiff in any action that might be brought for such a purpose, and I do not think he can now successfully contend that the plaintiff should have pursued any remedy he may possess against Knight before being entitled to call upon the defendant for payment. [Reference to Mayne on Damages, 7th ed., p. 498; *Whiteman* v. *Hawkins, supra; Gould* v. *Blanchard*, 29 N.S.R. 361, at 364.]

There should be judgment for the plaintiff for the amount paid under the Knight agreement—$2,667.17. Plaintiff is entitled to his costs of action.

Judgment for plaintiff.

N. S.

S. C.

GILLINGHAM v. LEWIS.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley and Drysdale, JJ. January 2, 1915.

1. PLEADING (§ III B—305)—NEGLIGENCE—PLEAS AND ANSWERS—INEVITABLE ACCIDENT—PARTICULARS.

In an action of negligence it is open to the defendant on the general issue to prove that the injury was due to inevitable accident without expressly pleading it; consequently the defendant who has pleaded inevitable accident should not be ordered to give preliminary particulars as to the nature of and the circumstances which led to such inevitable accident.

[*Rumbold* v. *London County Council*, 25 Times L.R. 541, referred to.]

2. PLEADING (§ I I—65)—CONTRIBUTORY NEGLIGENCE—PLEA OF—PARTICULARS.

An order for particulars of contributory negligence should not be granted unless the party applying satisfies the Court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him and which he cannot be prepared to meet unless he is told of it beforehand.

[*School Section* v. *Thomas*, 23 N.S.R. 210, and *Toppin* v. *Belfast*, [1909] 2 Irish R. 181, referred to.]

Statement

APPEAL from the order of Russell, J., at Chambers, ordering defendant to give particulars of his defences.

J. L. Ralston, K.C., for appellant.

J. Terrell, for respondent.

Sir Charles Townshend, C.J.

TOWNSHEND, C.J.:—The action is for negligence by which defendant is alleged to have injured plaintiff in driving a motor car on the street in Halifax. The defences referred to are, (1) that the injury was due to inevitable accident, and (2) that it was caused by plaintiff's contributory negligence. In *Spedding* v. *Fitzpatrick*, 38 Ch.D. 410, 413, it is said that

> 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.

In the Annual Practice, 1914, supported by the authorities there cited at p. 522, it is stated the Court will order particulars in all "charges of bad workmanship, want of skill, negligence, and contributory negligence."

The plaintiff in the affidavit used in this application swears:—

> I do not know what happened to the defendant or to me, or of any circumstance which will enable defendant to say that his knocking me over in the manner he did was an inevitable accident. I used all care in crossing the street, and I am wholly unable to say what act or omission on my part in any way contributed to my being knocked down by the said motor car.

[Reference to ch. 53, Acts of 1908.]

This clause throws the whole burden of disproving negligence on the defendant. According to the case of *Toppin* v. *Belfast Corporation*, [1909] 2 Irish R. 181:—

> The order for particulars of contributory negligence should not be granted unless the party applying made out a "special case" for such an order. . . . I think a special case means one in which the party can satisfy the Court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him, and which he cannot be prepared to meet unless he is told of it beforehand.

This seems to be a sound and good rule for our guidance. Can we in this case gather from the pleadings and the affidavits enough to satisfy the Court that this is a "special case" for ordering particulars? After the best consideration, I can find nothing to justify the application having regard to the above rule, and it is not to be forgotten that the plaintiff has less reason here, as under the statute the defendant, to succeed, is compelled to make out a complete case of no negligence on his part, and to prove affirmatively the alleged inevitable accident and contributory negligence of plaintiff.

For these reasons I think the appeal should be allowed with costs.

Graham, E.J.

GRAHAM, E.J.:—This is an appeal from the judgment of a Judge in Chambers ordering particulars to be delivered by the defendant. The action is really not for negligence. The paragraph simply alleges that the plaintiff, on Agricola street, "was knocked down and seriously . . . injured through collision with or otherwise by reason of the presence upon such street of a motor vehicle the property of and operated by the defendant." It does not allege negligence or facts which would constitute negligence. The reason for this pleading is that a drastic statute has rendered the defendant *primâ facie* liable if that condition appears: 1907, ch. 44; 1908, ch. 53, sec. 4. So that the action is really upon that statute.

Then the defendant, after denials, including a denial that the injuries were caused or contributed to by any negligence or any wrongful act of the defendant, proceeds with these paragraphs:—

> 5. The injuries and damages alleged to have been received and suffered by the plaintiff (if any which defendant denies) arose from inevitable accident. 6. There was contributory negligence on the part of the plaintiff.

N. S.

S. C.

GILLINGHAM v. LEWIS.

Graham, E.J.

The learned Judge directs particulars to be given under these paragraphs.

I think this is rather an exceptional case, and if the issues go down to trial in that condition it will take some time to find out what the case is about. The pleadings give no notice. No facts are given worth speaking about. Perhaps the defendant ought to have gone to a Judge. But at any rate the plaintiff did so and he obtained the order complained of.

The following paragraphs appear in the affidavits in support of the application:—

First is the affidavit of the plaintiff's solicitor:—

1. I have for the purposes of this action made all due inquiries with reference to the happening of the occurrence complained of in the statement of claim herein. 2. I cannot ascertain upon what facts the defendant can intend to rely to make out a case of inevitable accident or contributory negligence as alleged in the defence herein. 3. In order that the plaintiff may properly prepare for trial I am of opinion that it is necessary for him to know the nature of the inevitable accident which caused the injuries sustained by the plaintiff as alleged in the said defence and also of the contributory negligence on his part also therein alleged. 4. Unless the plaintiff has such particulars before the trial I am of opinion that he could not safely proceed to trial without having evidence to refute any possible fact that the defendant may attempt to set up either as constituting such inevitable accident or such contributory negligence, and until the plaintiff has some particulars of the nature of the allegations that the defendant intends to make and which he will have to meet I verily believe that it would be practically impossible. 5. Until I obtain the said particulars I have no means of knowing the outline or nature of the case the defendant intends to set up with regard to such inevitable accident or contributory negligence. 6. This application is not made for the purpose of delay or of obtaining the names of the defendant's witnesses, but solely for the purpose of enabling the plaintiff to properly prepare for the trial. 7. On the 15th September, instant, I gave the defendant's solicitor written notice that I required to have the particulars asked for on this motion, but he did not furnish the same or any particulars.

The plaintiff in his affidavit, after stating how he was injured, says:—

3. I do not know what happened to the defendant or to me or of any circumstance which will enable the defendant to say that his knocking me over in the manner he did was an inevitable accident. 4. I used all due care in crossing the said street, and I am wholly unable to say what act or omission on my part in any way contributed to my being knocked down by the said motor car.

I think there has been a sufficient compliance with the requirements of the judgment in the case of *Toppin* v. *Belfast*, [1909] 2 Ir. R. 181, a decision of the Irish Court of Appeal, which, of

course, one would gladly follow in the absence of an English case the other way. This is the headnote:—

> Where in an action for negligence the defendant pleads contributory negligence the Court will not compel him to give full particulars of such plea unless the plaintiff makes out a special case for the granting of particulars.

But in order to make such a decision useful for future guidance, what "a special case" means requires some definition, and that was supplied at p. 183 of the report by Fitzgibbon, L.J. He says:

> I think a special case means one in which the party can satisfy the Court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him and which he cannot be prepared to meet unless he is told of it beforehand.

The reason why, in an ordinary case of negligence, particulars of contributory negligence are seldom ordered, is that the two things are so interwoven that the plaintiff, knowing his own case, is likely to be in possession of the knowledge of the case of the defendant. But in this case, when the burden is cast by statute on the defendant and he practically begins, he is liable with these paragraphs to start anything.

Inevitable accident is a very comprehensive term, and as the machinery of a motor car is somewhat complicated there might be some latent defect unknown to the defendant which caused the injury. I can imagine a great surprise being introduced into the case from that direction. It was contended that inevitable accident was not required to be pleaded; therefore there need not be particulars given when it is pleaded.

I think when it is pleaded that particulars may be ordered when a special case is made out for them. I refer to *Martin* v. *M'Taggart*, [1906] 2 Ir. R. 120. And that part of the judgment was not overruled by the Irish case already mentioned, and was not appealed from in that case.

In this exceptional case contributory negligence is pleaded in the way it would be pleaded in an action in which the facts constituting the case against the defendant are set out. But it should be really an allegation that the accident was caused by the plaintiff's negligence. It is as if in a plaintiff's statement of claim he stated the injury he had received and then alleged that there was negligence on the part of the defendant.

That would not, I think, constitute sufficient notice.

N. S.

S. C.

GILLINGHAM v. LEWIS.

Graham, E.J.

Because the statute in this case makes something sufficient for a plaintiff to allege, I think it does not make an equally vague statement on the part of the defendant sufficient notice.

I think the appeal ought to be dismissed. There must be some discretion in making such an order.

Longley, J.

LONGLEY, J.:—This is an action for injuries received by the plaintiff, and the defence is a denial, etc., and concludes with the pleading that it was the result of inevitable accident, and also that there was contributory negligence on the part of the plaintiff. To the last two pleas of inevitable accident and contributory negligence the plaintiff has demanded further particulars, which was granted by the Judge to whom application was made. The defendant now appeals to this Court against such particulars, and we have to consider the matter fully.

In regard to inevitable accident, such a plea is entirely unnecessary, and the defendant can give all the evidence which such a plea would imply without any such plea. [Reference to *Rumbold* v. *London County Council*, 25 T.L.R. 541.]

. . . . .

In regard to the plea of contributory negligence, every case must be considered on its merits. In no case will particulars be ordered in which they seem needless. In this case they do seem extremely needless. The plaintiff, Gillingham, makes an affidavit containing a statement of the whole affair; the coming of the defendant in his automobile and where he was and how he was injured. It is impossible for the defendant to produce any evidence which the plaintiff is not prepared at once to meet, and it would therefore seem an absurd thing to grant an order for particulars. The *Trustees of School Section* 34 v. *Thomas*, 23 N.S.R. 210, is cited in support of this view.

In my opinion the appeal should be allowed and no particulars granted.

Drysdale, J.

DRYSDALE, J., concurred with LONGLEY, J.

Appeal allowed.

ROGERS v. CITY OF TORONTO.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. January 2, 1915.

1. MUNICIPAL CORPORATIONS (§ II D—140)—CONTRACTS BY—TENDERS—FAIR WAGE CLAUSE—VALIDITY OF—EXTENT OF AUTHORITY.

A municipal council may validly stipulate as a condition under which tenders are called for that the contract awarded to the successful tenderer shall contain a fair wage clause to the effect that all employees of the contractor shall in respect of their work in the execution of the contract receive union wages or the prevailing rate of wages for their work; the authority of the municipality in this regard is not restricted to work to be done under the contract within the territorial limits of the municipality but extends to a contract for the purchase of crushed stone where the work, or the bulk of the work, is to be done outside such limits.

[*Kelly* v. *Winnipeg*, 12 Man. L.R. 87, approved; *Crown Tailoring Co.* v. *Toronto* (1903), 33 O.L.R. 92*n*, not followed.]

Statement

MOTION by the plaintiffs for an interim injunction, turned by consent into a motion for judgment.

I. F. Hellmuth, K.C., and *Eric N. Armour*, for the plaintiffs.

G. R. Geary, K.C., for the Corporation of the City of Toronto, the defendants.

Middleton, J.

MIDDLETON, J.:—The plaintiff Alfred Rogers is a ratepayer of the City of Toronto, and sues on behalf of himself and all other ratepayers to restrain the city corporation from entering into a contract with any person other than the plaintiff company for the purchase of crushed limestone, and for an injunction restraining the corporation from inserting in any contract or tender for contract, a clause commonly designated "the fair wage clause."

By by-law of the City of Toronto, passed in December, 1893, it is provided that every contract thereafter made with the city shall contain a clause providing that the contractor shall pay to all his mechanics, workmen, and labourers, to be employed by him in the execution of the contract, the union or prevailing rate of wages for such work—prevailing at the date of the contract. Thereafter resolutions were passed fixing a minimum wage, originally 18 cents—now 25 cents—per hour, and settling a general form of clause to be inserted in the contract.

In pursuance of this settled policy on the part of the muni-

ONT.
S. C.
ROGERS
v.
CITY OF
TORONTO.
Middleton, J.

cipal council, the form of tender supplied to competing contractors contains the clause indicated. The plaintiff company in sending its tender deleted this clause. Other tenderers submitted tenders in accordance with the requirements of the municipal council; and it is proposed by the council to contract with some one of those whose tenders accord with the view of the council.

It is argued that, because the stone which is to be contracted for will be manufactured by labourers outside of the municipality—there being no limestone quarry within the city—this amounts to a diversion of municipal funds to non-municipal purposes, namely, the increasing of wages of non-resident workers, and that this is an attempt on the part of the municipality to transcend the territorial limits of its jurisdiction; for, if it is attempted to justify the municipal action upon the ground that the clause was inserted to secure the well-being of the workers, the workers to be benefited reside beyond the limits of the municipality, and the general authority conferred upon the municipality is only to pass by-laws for the well-being of its inhabitants.

I think the action is entirely misconceived. The by-law is not the subject of attack, and I know of no principle which enables the Court to prevent a municipality from making any contract with respect to a matter within its jurisdiction which it may see fit to make. Undoubtedly, the purchase of stone for municipal purposes is *intra vires;* and, if the municipal council sees fit in its contract to stipulate that fair wages shall be paid to those who manufacture the stone, there is nothing in this that is *ultra vires* the corporation. The Courts have no right to interfere with municipal action unless the municipality proposes to transcend the limits of the jurisdiction conferred upon it by the Legislature.

At one time the Courts assumed jurisdiction to review municipal legislative action, upon the ground that the action was unreasonable. There never was in Ontario any real foundation for such jurisdiction. The supremacy of the municipal legislative authority within the sphere of its delegated jurisdiction was not at first recognised. It was assumed that the munici-

pality occupied some subordinate position, and that the principles applicable to the determination of the validity of by-laws of companies, or the rules and regulations of boards exercising a delegated authority, could be applied to municipal action. This assumed supervisory and paternal jurisdiction of the Courts, although founded in error, became well established, and was only put an end to by the direct action of the Legislature, which enacted that no municipal by-law should be dealt with by the Courts on the ground of unreasonableness or assumed unreasonableness.

But this jurisdiction so usurped by the Courts over municipal legislative action was never extended to the supervision of contracts and the elimination of terms that might be regarded as unreasonable. The only case that lends colour to the suggestion of such a jurisdiction as this is an unreported decision of my Lord the Chancellor in a judgment in an action of *Crown Tailoring Co.* v. *City of Toronto* (1903), where an injunction was sought and granted restraining the letting of a contract for firemen's clothing, in which it was stipulated that each article must bear the label of the Journeymen Tailors' Union. This decision proceeded upon grounds that possibly justify the plaintiffs' contention, but it is entirely out of accord with the great bulk of the law upon the subject, which, I think, must govern me.

With the wisdom or unwisdom of the council's action I have no concern. If the ratepayers agree with the policy of the municipal council, then all is well. If they disagree, the redress is at the polls, and not through the Courts.

In *Kelly* v. *City of Winnipeg* (1898), 12 Man. R. 87, where a similar clause was attacked, it was held "that the matter in dispute was a question of policy in the government of the city, as to the expediency of which the ratepayers, and not the Court, should pronounce." It is true that in the course of the judgment Mr. Justice Bain pointed out that the Corporation of the City of Winnipeg could not be said to have no interest in the wages paid to the inhabitants of that city; but that is not the gist of the judgment. The real significance of the decision is the statement I have quoted, that this matter is one entirely outside the jurisdiction of the Courts.

ONT.
S. C.
ROGERS
v.
CITY OF
TORONTO.
Middleton, J.

American cases afford no guide. The municipal system there differs widely from our own, and in most of the cases it will be found on examination that the decision in reality turns upon constitutional limitations to which we have no parallel.

People ex rel. Rodgers v. *Coler* (1901), 166 N.Y. 1, cited by Mr. Hellmuth, is a good illustration of the difficulty that arises when any attempt is made to apply American cases to the situation in Ontario. There a statute, and not a contract, was the subject of discussion. The statute was found to be invalid because "some of its most material provisions are in conflict with the constitution."

The action fails, and must be dismissed with costs.

Action dismissed.

ONT.
S. C.

Re FASHION SHOP.

Ontario Supreme Court, Boyd, C. March 9, 1915

1. LANDLORD AND TENANT (§ III D 2—105)—ASSIGNMENT BY TENANT FOR BENEFIT OF CREDITORS—STATUTORY LIEN OF LANDLORD—LIMITATION—ONE YEAR PRECEDING—THREE MONTHS FOLLOWING—R.S.O. 1914, CH. 155, SEC. 38.

Under the Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38, the landlord, in case of an assignment by the tenant for the benefit of creditors, has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of rent due, but limited to the period of one year next preceding and for the three months following the assignment.

[*Lazier* v. *Henderson*, 29 Ont. R. 673; *Tew* v. *Toronto Savings and Loan Co.*, 30 Ont. R. 76, followed.]

2. CORPORATIONS AND COMPANIES (§ VI F 2—357*a*)—WINDING UP—ASSIGNMENT FOR CREDITORS—LIQUIDATOR—PREFERENTIAL LIEN OF LANDLORD—R.S.C. 1906, CH. 144—R.S.O. 1914, CH. 134—R.S.O. 1914, CH. 155, SEC. 38.

On an order being made for the winding up of the company under the Winding-up Act, R.S.C. 1906, ch. 144, after an assignment for creditors made by the company under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, the liquidator takes the assets subject to the preferential lien of the landlord under sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, for rent in arrear whether distrained for or not, upon goods available for distress limited, however, to the rent for the period of one year prior to the assignment and the three months following.

[*Re Clinton Thresher Co.*, 1 O.W.N. 445, applied; *Fuches* v. *Hamilton Tribune Co.*, 10 P.R. (Ont.) 409, distinguished.]

Statement

APPEAL by the liquidator of the company, in process of winding-up under the Winding-up Act, R.S.C. 1906, ch. 144, from the finding of the Master in Ordinary, in the course of the

ONT.

S. C.

RE FASHION SHOP CO.

reference, that the company's landlord was entitled in the distribution of the assets to priority in respect of his claim for rent.

A. C. McMaster, for the appellant.

L. F. Heyd, K.C., for the landlord.

Boyd, C.

BOYD, C.:—"In the case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment:" Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38.

The phrase "the preferential lien of the landlord for rent" means, as construed by decisions binding on me, that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section: *Lazier* v. *Henderson* (1898), 29 O.R. 673, at p. 679; *Tew* v. *Toronto Savings and Loan Co.* (1898), 30 O.R. 76.

This was the condition of the assets in the hands of the voluntary assignee under the debtor's general assignment of the 28th December, 1914, and such was the plight of affairs when the notice was served on the 31st December of a petition to wind up the company. At that date the winding-up proceedings "shall be deemed to commence:" R.S.C. 1906, ch. 144, sec. 5.

After the winding-up order is made (in this case on the 8th January, 1915), every attachment . . . distress or execution put in force against the effects of the company shall be void: sec. 23. And, by sec. 133, all remedies sought for enforcing a privilege, mortgage, lien or right of property upon, in or to any effects in the hands of the liquidator, may be obtained by an order of the Court on summary petition.

Here no distress was needed to create the statutory preferential lien which arose by virtue of the Landlord and Tenant Act upon the execution by the tenant of the assignment for creditors. That preferential lien existed, I think, *quoad* the particular goods which afterwards became vested in the liquidator (who happens to be the same person as the voluntary assignee). The goods became subject to the winding-up order, charged with

ONT.

S. C.

RE FASHION SHOP CO.

Boyd, C.

the preferential lien as to the limited amount of rent; and, if any order of the Court is required to make that lien available, it should be granted *nunc pro tunc*.

Substantially the same state of affairs arose in *Re Clinton Thresher Co.* (1910), 15 O.W.R. 318, 1 O.W.N. 445, under mechanics' liens created before the winding-up, and I held that the efficacy of the lien was not disturbed, as the estate came into the hands of the liquidator subject thereto.

The great distinction between the present case and *Fuches* v. *Hamilton Tribune Co.* (1884), 10 P.R. 409, is, that there the claim was by a landlord who had not distrained before the winding-up proceedings; but here the fact of the voluntary assignment intervened, which operated as a statutory lien in favour of the landlord, despite the absence of a distress.

The Master's report should be affirmed with costs.

Order accordingly.

CAN.

S. C.

GRAND TRUNK R. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

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

1. CARRIERS (§ IV C 4—547)—TOLLS—CARRIAGE OF FREIGHT—SPUR LINE—REBATE.

In sub-sec. 3 of sec. 226 of the Railway Act, Can., the words "tolls charged by the company in respect of the carriage of traffic for the applicant over the spur line" mean the tolls charged for the transportation, on the railway company's line, of goods carried to or from the applicant's premises and not tolls charged for the movement of freight on the spur alone; consequently a railway ordered to build a spur line to an industrial plant under sec. 226 at the expense of the applicant and to move cars over it without additional toll may be directed by the Railway Commission to rebate to the applicant a fixed sum per car from the tolls on business done with the applicant and carried over the spur line until the cost of construction shall have been repaid by the railway.

Statement

APPEAL by way of stated case from the ruling of the Board of Railway Commissioners for Canada in favour of the respondents.

The appeal was heard *ex parte*.

W. C. Chisholm, K.C., for the appellants.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that the Chief Commissioner has put the proper construction upon the section in question (226 of the Railway Act), and that the appeal should be dismissed.

Davies, J.:—The question stated by the Board of Railway Commissioners for our opinion as to the meaning of sub-sec. 3 of sec. 226 of the Railway Act is as follows:—

> Whether the words in sub-section 3 of section 226 of the "Railway Act" "the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line" mean the tolls charged for the transportation on the railway company's line of goods carried to and from the applicant company's premises, or mean the tolls charged for the movement of such goods upon the said spur.

If the language of this sub-section is only capable of one meaning, it would, of course, be our duty so to declare, irrespective of whether the effect would be to defeat the object and purpose of the Act or not. Our duty is to construe legislation, not to enact it. If, however, the language used is not clear, but is ambiguous and capable of two meanings, one of which would obviously carry out the purpose and intent of the Act, while the other would defeat it, I take it that it is our duty to put the construction upon the language which carries out the object and purpose of Parliament.

Section 226 vested in the Board power, upon the application of the owner of any industry or business within six miles of the railway, to order the railway company to construct, maintain and operate a spur or branch from the railway line to the industry or business and to direct the applicant to deposit in some chartered bank such an amount as the Board might determine sufficient to construct and complete the spur, etc., which amount should be paid to the company from time to time as the work progressed.

The third sub-section, now under consideration, provided for the repayment by the company to the applicant of such cost "out of or in proportion to the tolls charged by the company in respect of the carriage of traffic over the spur."

The railway company contends that these tolls are such only as are chargeable for the carriage to and from its main line to the industry or business over the spur and has no relation to the carriage to and from the industry or business to the destination of the traffic. In this view they applied to be allowed, as stated in the case, to impose a charge of $2 a car for the services to be performed by it in taking an empty car from its main line and placing it on the spur on the premises of the applicant and in hauling out to its main line the car when loaded.

CAN.

S. C.

GRAND TRUNK R. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

Davies, J.

The Board properly declined to make such an order. Its effect would obviously be to make the industry or business pay for the construction of the spur, not in the first instance merely as the statute provided, but absolutely, and, instead of encouraging and aiding such spur traffic, would handicap it. The intent of the legislation was to provide for the repayment of the cost of the spur out of the traffic originating or ending on it, and, while the language used is capable of being construed so as to sustain the contention of the railway company, it is ambiguous, and may fairly be construed as the Board has construed it.

I answer the question that the words of sub-sec. 3 of sec. 226 mean the tolls charged for the transportation on the railway company's line of goods carried to or from the applicant company's premises.

Idington, J.

IDINGTON, J. (after setting out the facts and referring to the Act):— . . . The question submitted should be answered that the tolls in question mean the tolls charged for the transportation on the company's line of goods carried to and from the applicant company's premises.

The appeal should be dismissed, but without costs. Respondent filed no factum. Only counsel for appellant appeared, and he, whilst urging all that could be said for appellant, presented the case fairly and properly.

Duff, J.

DUFF, J. (referring to sub-sec. 3 of the Act):—This sub-section cannot be read alone. It must be read with the main provisions of the Act relating to facilities as well as with the provisions on the subject of rates. The judgment of the Chief Commissioner seems to shew that the construction now advanced, if put into practice, must, at least in a large number of cases, result in discriminations opposed to the spirit of the enactments of the Act on both these subjects, one leading general aim of which is the suppression of reasonably avoidable discriminations; in other words, that the reading proposed is not compatible with the objects of these enactments of the Railway Act. . . .

In the present case I agree that we do approach the limits of proper legal interpretation; but I am fully convinced that we are, nevertheless, within those limits, because, first, I am

satisfied that the sub-section is not incapable of the construction indicated; and, secondly, I think the reasons given by the Chief Commissioner justify the conclusion that the construction proposed by the railway company cannot be put into general operation consistently with the full maintenance of the governing principle of non-discrimination embodied in the cognate provisions touching the subject of rates and facilities.

ANGLIN, J. (dissenting), was, for reasons given in writing, of opinion that the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line mean . . . the tolls charged for the movement of such (traffic) upon the said spur.

Appeal dismissed with costs.

ANTISEPTIC BEDDING CO. v. GUROFSKI.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. March 15, 1915.

1. INSURANCE (§ I D—20)—FIRE—AGENT—AGREEMENT WITH CUSTOMER—FOREIGN COMPANIES—OBLIGATION—FAILURE TO PAY PREMIUM—LIABILITY.

An insurance broker who undertakes with his customer to place fire insurance in foreign companies not authorized to transact business in Ontario and who is provided by the customer with the funds with which to pay the premium, is under an obligation to procure binding contracts of insurance and to do all that was necessary on his part to procure them; his failure to pay the premium to one of the foreign companies whereby it was enabled to repudiate liability under the policy delivered will make him liable to the insured for the loss occasioned thereby.

2. INSURANCE (§ III H—158)—AGENT — INTENTION OF PARTIES — AGENT LIABLE TO COMPANIES—PAYMENT TO AGENT—LIABILITY.

Where the intention of all the parties was that the insurance broker through whom policies of fire insurance were issued was that he alone should be liable to the companies for the premiums and that he should look to the insured for the payment of the premiums with the right on default to have cancelled the insurance companies' debit of the same to such broker, and there was payment of such premiums as between the broker and the insured, the charge of the premiums by the companies to such broker operates as an absolute payment, although the money of the insured had not actually reached the companies.

[*London and Lancashire Life Assurance Co.* v. *Fleming*, [1897] A.C. 499, distinguished.]

Statement

APPEAL from the judgment of MIDDLETON, J.

F. Arnoldi, K.C., and *W. A. Proudfoot*, for the appellant company.

C. A. Moss, for the defendant, respondent.

ONT.

S. C.

ANTISEPTIC BEDDING CO. v. GUROFSKI.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 22nd September, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him, sitting without a jury, at Toronto, on the 11th and 12th March and 14th September, 1914.

The action is brought to recover damages for the failure of the respondent, who is an insurance agent and broker, to perform his undertaking to place and obtain good and valid policies of insurance upon the appellant's "stock of merchandise, furniture, machines, tools, implements, etc.," against loss by fire to the extent of $3,600, and it is alleged by the appellant that the policies of insurance which the respondent obtained were, in the case of four of the five companies by which they purported to be issued, never good and valid policies, because the premiums were never paid, and there was no liability under the policies to make good the appellant's loss.

The respondent resists the claim of the appellant, upon the ground that he obtained the required insurance through the Insurance Brokerage and Contracting Company Limited, through whom, as the appellant knew, he had obtained for it other insurances earlier in the year; that in his dealings with the brokerage company he paid to it the premiums on these insurances, and that the premiums were paid to the insuring companies, or that they gave credit for them to the brokerage company or to their agents; that the policies were good and valid policies; and that, having obtained and delivered them to the appellant, "he fulfilled all duties which were cast upon him in connection with the matters complained of in this action."

Agreeing as I do with the findings of fact of the learned trial Judge, except in the case of the North American Mutual Fire Insurance Company, it is proper that I should state why, while agreeing with him in the case of the other companies, I differ from him in the case of that company.

That the respondent was employed by the appellant to effect the insurances and that he was paid the amount of the premiums in respect of the five policies which he obtained, is not open to question, nor is it open to question that the appellant knew

that the insurances could be placed only with companies that were not licensed to do business in Ontario.

The respondent, as I have said, was an insurance agent and broker, and what he did in carrying out his mandate was to employ the Insurance Brokerage and Contracting Company Limited, the finances of which he controlled, and in which he and Charles E. Ring and one Carroll were interested, and of which Ring was the manager, to effect the insurances.

At the time the control of the brokerage company was obtained, Ring was carrying on, under the name of C. E. Ring & Co., the business of an insurance agent and broker, and he testified that he was agent of all the companies with which the insurances were placed, except the Security Mutual Fire Insurance Company. It was, as I understand the evidence, part of the arrangement between the respondent, Ring, and Carroll, that Ring should continue to carry on the business he had been carrying on in the name under which it had been carried on, but whether the profits were to be his, or were to belong to the brokerage company is not shewn.

The respondent, under the arrangement between him, Ring, and Carroll, made cash advances to the brokerage company, and the company was always largely indebted to him for these advances. The company kept what was called a trade account with the respondent, in which he was from time to time credited with the premiums for insurances he had effected which were received by the company, and he was debited with premiums which he had received on insurances he had employed the company to effect for him.

The money which the respondent received from the appellant in payment of the premiums in respect of the policies in question was not paid by the respondent to the brokerage company or to Ring or to the insuring companies; but the respondent credited to the brokerage company, in an account which he kept with it in his books, the amount of the premiums, and the company in its books debited it to the respondent in the trade account which the company kept with him; Ring also debited the brokerage company in his books with the amount of the premiums; and each of the companies, except the Secur-

ONT.

S. C.

ANTISEPTIC BEDDING CO. v. GUROFSKI.

Meredith, C.J.O.

ity Mutual Fire Insurance Company, debited the amount of its premium in its books either to Ring or to C. E. Ring & Co.

Ring was entrusted by the National Protector Insurance Company and by the North American Mutual Fire Insurance Company with blank policies, duly executed by them, which he had authority to fill up and to deliver to persons who applied for insurances with them, subject perhaps in the case of the latter company to the application being accepted by it; and the policies of these companies which are in question were so filled up and delivered by Ring to the brokerage company.

The policy of the Colonial Assurance Company was issued by the company at its head office in Winnipeg, sent to Ring, and by him delivered to the brokerage company.

The policy of the Security Mutual Fire Insurance Company was procured by Ring through brokers in New York, named Woodcock & Co.; W. L. Pettibone & Co., of Newark, N.J., were the agents of the company at that place, and the policy was countersigned by them and delivered to Woodcock & Co., who sent it on to Ring, and it was delivered by Ring to the brokerage company.

None of these companies had any knowledge of the dealings between the respondent and the brokerage company, or between that company and Ring.

In the case of the Security company, the premium was charged by it to Pettibone & Co., and in the case of the three other companies the premiums were charged by them to C. E. Ring & Co. What the course of dealing between Pettibone & Co. and Woodcock & Co. was, does not appear beyond the mere statement of the fact that Woodcock & Co. acted as brokers in procuring the insurance from the Security company.

The course of dealing between Ring and the Colonial company was that he was allowed sixty days after the close of the month in which a policy was written in which to pay the premium; and, according to the testimony of Mr. Dick, the secretary-treasurer and manager of the company, "the matter of the payment of the premiums by the insured is left with the agent," and "he is responsible to the company for these premiums." Mr. Dick also testified that the premium on the policy of his

company, which is in question, was paid by Ring to the company, "but later he said it was not paid to them" (*i.e.*, to C. E. Ring & Co.), "and that whether or not the premium was paid to the agent is a matter which is left between the agent and the assured."

In the case of all the four companies having been told by Ring that the premiums had not been paid to him, the companies assumed to cancel their policies on the ground that the premiums had not been paid to Ring. The only notice of the cancellation proved to have been received by the appellant from the Security company was sent by registered post from Newark on the 10th May, 1912, and was received by the appellant on the 17th of that month. The notice of cancellation of the Colonial policy was given by Ring on the 25th May, 1912, under instructions from the company.

In the case of the National Protector Company, the notice of the cancellation was given on the same day by Ring, purporting to act for the company, but he does not appear to have had any instructions from the company to give it.

The North American company did not give any notice of cancellation; but, after proofs of loss were sent to it, denied liability, on the ground that the premium was never paid to it, and that it was, as the company understood, never paid to the appellant's "brokers, C. E. Ring & Co.," and on the further ground that it was not liable because of the appellant's default in paying an assessment made on the company's policy-holders, which, according to the terms of the policy, rendered it void.

The proper conclusion upon the evidence is, I think, that each of the companies looked to its agent as its debtor for the amount of these premiums, and not to the insured, and that it was only when the premiums had not in fact been paid to the agent that he was entitled to have the amount of them credited to him.

I agree with the finding of my brother Middleton that, as between Ring & Co. and the appellant, the premiums had been paid in all of the four cases; and it follows that the payment by Ring to the companies by which he was charged with the premiums was an absolute payment discharging the appellant

ONT.

S. C.

ANTISEPTIC PEDDING CO. v. GUROFSKI.

Meredith, C.J.O.

from liability to pay them, unless the decided cases require us to hold that the transactions between these companies and Ring & Co. were "*res inter alios*" and cannot be taken advantage of by the appellant.

In the case of the Security company, the premium was never received by Pettibone & Co.; and therefore, when that fact became known to the company, that firm was entitled to be credited with the amount of the premium which been charged to it, and the premium was therefore never paid to the company, and it had the right for that reason to repudiate liability on the policy.

Not only was this the case, but Ring did not pay the premium to Woodcock & Co., nor did Woodcock & Co. pay it to Pettibone & Co.

Except in the case of the Security company policy, it is clear, I think, that no question would ever have arisen as to the non-payment of the premiums but for the intervention of Ring, and it was entirely owing to it that the companies took the position that the premiums were not paid, and assumed on that ground to cancel their policies. The policies had been on foot for several months before Ring intervened, and during that time all parties treated them as valid and subsisting, and it was not for the purpose of protecting the companies that Ring intervened, but he did so for some purpose of his own after he had quarrelled with the respondent.

The strongest case against the appellant's right to recover on the policies is *London and Lancashire Life Assurance Co.* v. *Fleming*, [1897] A.C. 499, but that case is, I think, distinguishable. There the premiums were settled by promissory notes, which were not paid at maturity, and the only authority which the agent who took the notes had to bind the company was to accept the notes on the condition that, if they were not paid at maturity, the policy or official receipt should be null and void. The company did not know that the notes had been taken, but, upon receipt of the applications for the insurances, it debited the agent with the amount of the premiums and the policies which were issued and delivered provided as follows: (1) Policies shall not be in force until the first premium is paid.

ONT.

S. C.

ANTISEPTIC BEDDING CO. v. GUROFSKI.

Meredith, C.J.O.

(10) If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or other obligation be not paid when due, the policy or assurance becomes null and void at and from default. The agent sent his own note for the premiums to the company, and the company acknowledged the receipt of it, and said it would hold the note as requested. The main argument for the plaintiff was, that the notes had been given to the agent for the purpose of his raising, by discounting them, the money required to pay the premiums, and that, he having discounted the notes and received the proceeds of them, the premiums were paid in cash, although the agent had applied the proceeds to his own use. This argument did not prevail, because, in the view of the Judicial Committee, that was not proved. Dealing with the argument of counsel for the plaintiff that the company had accepted the agent's note and accepted him as its debtor, Sir Henry Strong, in stating the opinion of the Judicial Committee, said there were many answers to it, but that it would suffice to refer to two. "In the first place," he said, "how, without an entire disregard of legal principle, could it possibly be held that the appellants must be deemed to have entered into entirely new contracts of assurance of the life of James Fleming, and to have accepted their own agent's note in payment of the premium, when they were in entire ignorance of all that had passed between White" (*i.e.*, the agent) "and Fleming, and were entirely unaware of the relations in which they stood to the assured? This, like the other point relied upon, was clearly a matter to be proved by the respondent; and it is a sufficient answer to say that there is not only not a shadow of proof in its support, but strong evidence the other way. Further the principle upon which . . . *Acey* v. *Fernie*, 7 M. & W. 151, proceeded applies. The dealings between the appellants and their agent were as regards the assured *res inter alios*, and afford no presumption of an intention to treat the agent as acting, not for his true principals, but as the representative of the assured."

What Sir Henry Strong referred to as "strong evidence the other way" was the testimony of the agent, who said: "Where

ONT.

S. C.

ANTISEPTIC BEDDING CO. v. GUROFSKI.

Meredith, C.J.O.

I had given time on premiums, and the cash had not been paid to me, and I had not the cash to pay myself, I gave a note myself as evidence that there was something due them, not as payment of the premium."

I do not understand that what is said with reference to the application of the principle of *Acey* v. *Fernie* means more than that the mere fact of the company having taken the agent's note for the premiums, in the circumstances of that case, afforded no presumption of the nature which Sir Henry Strong mentioned. I do not understand him to mean that the fact that an agent has given credit for a premium, and has treated himself and has been treated by the insurers as their debtor in respect of it, if proved, is not sufficient to warrant the conclusion that the premium has been paid to the insurers and the contract of assurance has become effective. To hold that it is not, would, I venture to think, come as a surprise to insurance agents and the business community; for I also venture to think that in many cases it is the course of dealing of agents to treat the insured as their debtor for the premium, and themselves as the debtors in respect of it to the insurers whom they represent, and that this practice is well known to and recognised and acted on by insurers.

However that may be, the liability of the companies in this case does not depend upon presumptions afforded by the course of dealing between them and their agents. But the facts in evidence warrant the conclusion that it is proved that the intention of all the parties was that Ring, and he alone, should be liable to the companies for the premiums, and that he should look to the insured, or those at whose instance he had placed the insurances, for payment to him of the premiums; subject only to the condition that, if Ring should be unable to obtain payment of the premium, the debit to him should be cancelled.

If this was the true nature of the transactions, and the conclusion having been come to, as I have already stated, that as between the appellant and Ring the premiums had been paid to Ring, they were as between the companies and the appellant also paid.

If this view is right, the notices of cancellation given by the companies, if otherwise sufficient, were insufficient to put an end to their contracts, because there was neither return nor offer to return the unearned premiums that had been paid.

In the case of the Security company, I am unable, for the reasons I have already mentioned, to come to the conclusion that the premium was paid to that company; and I am of opinion that the respondent is liable to the appellant to make good the loss which the appellant has sustained, owing to the respondent not having obtained a binding contract from that company.

It was argued by Mr. Moss that all the respondent was required to do was to "buy insurance" to the required amount, and that, having employed the brokerage company to obtain it, and having received the policies from that company duly executed, and having delivered them to the appellant, his whole duty was performed; but I am not of that opinion. What the respondent undertook to do was to procure binding contracts of insurance, and to do all that was necessary on his part to procure them, which involved the payment of the premiums; and, having failed in that duty, in respect to the insurance with the Security company, he is, in my opinion, liable to the appellant for the loss occasioned thereby.

It may be unfortunate for the appellant that the question of the liability of the companies whose policies are, in my opinion, binding on them, has not been determined as between them and the appellant; for it may be that, if he proceeds against them, a different state of facts may be developed in the actions against them, and the result may be that they will escape liability, because on those facts the conclusion cannot be properly drawn that the premiums were paid to them.

Upon the whole, I am of opinion that the appeal should be allowed, and that there should be substituted for the judgment dismissing the action, judgment for the appellant for the amount for which the Security Mutual Fire Insurance Company would have been liable upon its policy for $1,000, with interest from the date from which interest would have run against the company; the amount of principal and interest to be settled by the Registrar if the parties are unable to agree as to it.

ONT
S. C.
ANTISEPTIC BEDDING CO. v. GUROFSKI.
Maclaren, J.A. Hodgins, J.A. Magee, J.A.

The appellant should have the costs of the action, except as to the issue on which it has failed, and the respondent should have his costs of these issues, and there should be no costs of the appeal to either party.

MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal allowed in part.

ONT.
S. C.

DOWDY v. GENERAL ANIMALS INS. CO.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 10, 1915.

1. INSURANCE (§ III E—75)—POLICY—LANGUAGE OF—CONSTRUCTION—CONTRACT—FALSE STATEMENT—EFFECT.

The language of an insurance policy must be read most strongly against the insurance company whose language it is, therefore, a stipulation in a policy of animal insurance that it shall be void if any circumstances shall not have been truly stated "by the assured" will be read as qualifying the statements contained in the application form to the effect that "any false statement annuls the policy," so that where the assured made full and true disclosure to the agent of everything about which he was asked and signed the application form believing that the agent had correctly filled in his statement he will not be bound by other statements which the agent had filled in fraudulently, and the company will by reason of the limitiaton of the condition to statements "by the assured" be prevented from setting up that the policy was void because of an untrue statement contained in the application inserted therein by the insurance agent without the assured being aware of it.

[*Hastings* v. *Shannon* (1878), 2 Can. S.C.R. 394; *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516, referred to.]

Statement

APPEAL by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiff, upon the findings of a jury, in an action upon a policy issued by the defendants insuring the plaintiff's horse.

The defence was based upon the untruth of the statements in the application for the policy, signed by the plaintiff. The application form was filled up by one Hall, an agent of the defendants; and the defendants alleged that, by the terms of the policy, Hall was adopted by the plaintiff as his agent, and that the plaintiff was bound by what was contained in the application.

George Wilkie, for the appellants.

C. W. Bell, for the plaintiff, respondent.

The judgment of the Court was delivered by

RIDDELL, J.:—The plaintiff had been a teamster in the employ of the Dominion Power Company. He took ill, and after coming out of the hospital expressed a desire to the manager of the company to go into teaming on his own account, as the company's work was too hard for him. The manager, in view of his former services, "practically gave him" a team of horses for $100. One of these, "Duke," took sick, and Hall, a veterinary surgeon, was called in to attend him. After the horse had been cured, Hall, who was the agent of the defendants, the General Animals Insurance Company, urged the plaintiff more than once to insure the animal. After some demur, the plaintiff agreed, and Hall, producing an application, filled it in without asking the plaintiff for information (except in a very few matters). The plaintiff believed that Hall knew his business and that what he was writing was true, and signed, at Hall's request, without knowledge of the falsity of some of the statements.

On the application is printed in plain letters the statement: "Any false statement in this application annuls the policy." The application also contains the following question: "29. Do you accept to be alone responsible for the correctness of the description and other particulars set forth in this application, and if the whole or any portion of the same be written by a canvasser, agent or employee of the company or by any other person whatsoever, do you accept to consider same as your agent writing for and on your behalf?" And Hall, without the plaintiff's knowledge, inserted an answer "Yes."

A policy issued, having on its face the statement that the application "is . . . made a part of this policy and a warranty on the part of the assured;" and condition 1 reads: "This policy shall be void if any fact or circumstance relating to this risk has not been fully and truly stated to this company by the assured."

Certain of the statements were undoubtedly misstatements, but not to the knowledge of the assured.

The horse died, and claim papers were put in containing similar misstatements. The papers had been drawn up from the

ONT.
S. C.
DOWDY
v.
GENERAL ANIMALS INSURANCE CO.
Riddell, J.

policy by a solicitor, and the plaintiff was not aware of the inaccuracies.

The defendants refused to pay; the plaintiff sued, and at the trial before His Honour Judge Snider and a jury, the jury found in favour of the plaintiff, and judgment went for the full amount, $200, and costs. The defendants now appeal.

Notwithstanding the clause in the application apparently making the insurance agent agent for the applicant, the Supreme Court of Canada seem to have decided that the insurer cannot take advantage of this where the applicant is misled by the agent's fraud: *Hastings Mutual Fire Insurance Co.* v. *Shannon*, 2 S.C.R. 394, at p. 408; and, if *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516, is opposed to this view, we should follow our own Court. I think, however, we need not pass upon this point, but can decide the case on another ground.

In the application (as we have seen) it is specifically stated that "any false statement . . . annuls the policy," the application is made a warranty, and it is provided that the policy is to be void if any circumstances shall not have been truly stated *by the assured*. All these provisions are, I think, to be read together, they are all *in pari materiâ*, there is no possible need for or use in the last if it is not to modify the two former. Remembering that the language of a policy must be read most strongly against the insurance company whose language it is, I think the policy is to be void only on the untrue statement of the assured, and not of one who is in fact the agent of the company, but technically perhaps and for a special purpose acting for the assured. If this be not the meaning, the words "by the assured" are wholly unnecessary and useless.

The assured made full and true disclosure of everything about which he was asked, and I do not think the fraud of Hall can be imputed to him; and there was no fraud but only mistake in the proofs of loss.

Appeal dismissed with costs.

Re MAJOR HILL TAXICAB CO. AND CITY OF OTTAWA.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. March 9, 1915.

1. COURTS (§ III B—110)—MUNICIPAL CORPORATIONS—BY-LAWS PASSED BY POLICE COMMISSIONERS — POWER TO QUASH — MUNICIPAL ACT, R.S.O. CH. 192, SEC. 283.

The power of the Court to quash by-laws of municipal corporations conferred by sec. 283 of the Municipal Act, R.S.O. 1914, ch. 192, does not include by-laws passed by Police Commissioners; the latter by-laws are not subject to the procedure of a summary motion to quash.

[*McGill* v. *License Commissioners*, 21 Ont. R. 665; *Winterbottom* v. *Police Commissioners*, 1 O.L.R. 549, cited; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, distinguished.]

Statement

APPEAL from an order of LENNOX, J., refusing to quash a by-law of the Board of Police Commissioners.

W. C. McCarthy, for the appellant company.

F. B. Proctor, for the respondent city corporation.

Falconbridge, C.J.K.B.

At the conclusion of the argument, the judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—We are all of opinion that the objection taken by Mr. Proctor is well-founded. The jurisdiction to quash a municipal by-law is not an inherent one, but is expressly conferred. We cannot assume jurisdiction by inference or otherwise to quash a by-law of Police Commissioners.

Therefore, without passing upon the reasons for judgment given by the learned Judge in the Court below, we dismiss this appeal with costs.

Appeal dismissed.

MERCHANTS BANK OF CANADA v. BURY.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. March 2, 1915.

1. BILLS AND NOTES (§ I A—2)—PROMISSORY NOTE—"VALUE RECEIVED" STRUCK OUT—"ACCOUNT OF LUMBER TO BE SHIPPED" ADDED—SIGNIFICANCE.

An instrument in the form of a promissory note payable to order is none the less a promissory note because of the words "value received" being struck out and the words "account of lumber to be shipped" being inserted in lieu thereof.

[*Siegel* v. *Chicago Trust & Savings Bank*, 23 N.E.R. 417; *First National Bank* v. *Lightner*, 88 Pac. R. 59; *Chase* v. *Kellogg*, 13 N.Y. Supp. 351, referred to.]

Statement

APPEAL from the judgment of a County Court Judge in an action on a promissory note. The facts are as follows.

ONT.

S. C.

MERCHANTS BANK OF CANADA v. BURY.

Statement

Shields Brothers had a sawmill near Alvinston; on the 2nd December, 1913, they owed their bankers, the plaintiffs, $1,700 on their own note then current, and about $800 on overdrawn account. The bank manager asking for security for the overdraft, Shields Brothers, on the 6th December, 1913, drew a bill of exchange on the defendants in favour of the plaintiffs for $800, payable two weeks after date, and gave it to the plaintiffs' manager at Alvinston, who forwarded it for acceptance. The plaintiffs then held a letter of hypothecation from Shields Brothers.

A few days afterwards, the defendants returned the draft, unaccepted, with the note now sued on, made by the defendants, dated the 8th December, 1913, for $800, payable to the order of Shields Brothers, at the Royal Bank, four months after date. In the right-hand lower corner the lithographed words "Value received" had a line drawn through them, and above was written "account of lumber to be shipped." A few days afterwards Shields Brothers endorsed this note to the plaintiffs.

On the 12th January, 1914, Shields Brothers gave the plaintiffs their note for $2,332.50—the amount then due for overdraft being added to the former note for $1,700. This note was renewed from time to time and reduced by Shields Brothers. The last renewal, for $1,771.35, fell due on the 29th November, 1914, and is held overdue by the plaintiffs.

The defendants had dealings with Shields Brothers. On the 8th January, 1913, they gave Shields Brothers an order for maple roller blocks, and subsequently other verbal orders, and Shields Brothers promised to ship to the defendants all the lumber they got out. It appeared that the defendants had made advances to Shields Brothers, to be repaid in lumber, and also accepted drafts drawn on them by Shields Brothers, for which lumber was shipped or was to be shipped.

The defendants' manager stated that the words on the note referred to the maple roller blocks, which had not then been shipped, but which he expected to be shipped by Shields Brothers in the winter of 1913-4. But Shields Brothers did not ship the lumber. On the 14th January, 1914, the plaintiffs advised the defendants that they held the note for $800, and on the 18th February, 1914, the defendants replied that, unless Shields

Brothers shipped them the lumber in accordance with their contract, the note for $800, which they called a conditional note, would not be paid.

The County Court Judge held that the instrument was a promissory note and that the words "account of lumber to be shipped" were merely a statement of the transaction and did not qualify the absolute promise to pay therein set forth.

Statement

W. J. Elliott, for the appellants.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiffs, the respondents.

THE COURT dismissed the appeal with costs, seeing no reason for disagreeing with the opinion of the learned County Court Judge.

Falconbridge on Banking and Bills of Exchange, 2nd ed., pp. 485, 783, was referred to.

Appeal dismissed.

COOK v. DEEKS.

Ontario Supreme Court, Falconbridge, C.J.K.B., Hodgins, J.A., Latchford and Kelly, JJ. March 2, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G—125)—DIRECTORS—MAJORITY OF SHARES—RESOLUTION—FIDUCIARY OBLIGATION TOWARDS MINORITY—FULL DISCLOSURE—CONFIRMATION—MEETING REGULARLY CALLED.

When a majority of the directors of a trading company also hold a majority of the company's shares and a resolution is adopted at a directors' meeting that no new business shall be undertaken, there is no fiduciary obligation towards the minority shareholders which prevents the directors from acting as individuals in their own individual interests in accepting business of the same class as the company had been engaged in, of which there was full disclosure to the minority interests and in regard to which a directors' resolution declining the contract and disclaiming any interest in it was confirmed at a shareholders meeting regularly called.

[*N.W.T. Co. v. Beatty*, 12 A.C. 589, referred to.]

APPEAL from the judgment of MIDDLETON, J., dismissing an action.

Statement

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the appellant.

E. F. B. Johnston, K.C., and *R. McKay*, K.C., for the respondents, the defendants.

The judgment of the Court was delivered by

HODGINS, J.A.:—Resolved into its simplest elements, the ap-

Hodgins, J.A.

ONT.
S. C.
COOK
v.
DEEKS.
Hodgins, J.A.

pellant's complaint against the individual respondents is, that, while concealing from him their intention, they appropriated the Shore Line contract to themselves, absorbed the organization which belonged to the Toronto Construction Company, and used it in carrying out that contract. It is asserted that this contract, in fairness, should have come to the company, as it was within the scope, and indeed within the actual practice, of its business, was negotiated for by those who were charged with the carrying on of the enterprise, and has been completed with the assistance of the employees, who were got together, trained and organized, to perform the work of the company. And, in order more fully to enable this to be done, the individual respondents, it is charged, virtually stopped the operations of the company and decided to abandon further work.

The proposition of law as laid down by the appellant, in view of what happened, is that the directors who were managing the affairs of the company owed to it and to its shareholders a duty co-extensive with their opportunities, *i.e.*, measured by their activities in connection with the company's business, which duty disabled them from taking the contract for their own advantage and from refusing to seek and get it for the company's benefit.

The conclusion drawn from this proposition is, that they are trustees of the contract for the company, and must account for the profits therefrom. In fact the appellant seeks to put the individual respondents, notwithstanding their disclosure and the ratification by the shareholders of their action, in the position which a trustee of a contract held for the benefit of creditors was, in *Bennett* v. *Gaslight and Coke Co. of London* (1882), 48 L.T.R. 156, held to occupy, when he secretly secured the renewal for the benefit of his own firm.

Much of the evidence called by the appellant is devoted to impugning the *bona fides* of the individual respondents in the course taken by them, and that on the respondents' part in justifying themselves. But the legal proposition which I have stated, if established, renders motive unimportant, and should, therefore, be considered first. It cannot be contended that, when the individual respondents took the contract, they did not disclose it. Their reticence only lasted till it was practically secured. But, when it was entered into, the disclosure was ample and full. The

resolutions of the directors, which distinctly decline this contract and disclaim any interest in it, were confirmed by the shareholders at a meeting duly called; and, if this is effective, no further question can arise.

It must be admitted at the outset that there are to be found in the books many expressions of opinion by very eminent Judges which would indicate the source of the idea that underlies the appellant's contention, and, if read literally, give it some apparent support.

For instance, Knight Bruce, V.-C., in *Benson* v. *Heathorn* (1842), 1 Y. & C. Ch. 326, speaking of six directors to whom was entrusted the exclusive management of the affairs of the company, and who received £650 per annum therefor, says: "I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in the engagement, that they should not make any other profit to themselves of that trust or employment, and should not acquire to themselves, while they remained directors, an interest adverse to their duty."

Lord Romilly, in *York and North Midland R.W. Co.* v. *Hudson* (1853), 16 Beav. 485, 491, says: "The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely."

Cotton, L.J., in *In re Cawley & Co.* (1889), 42 Ch. D. 209, at p. 233, says: "In my opinion the proper rule is that a director is so far in a fiduciary position towards the company that he cannot exercise or refuse to exercise the powers vested in him as director against the interests of the company."

In *Allen* v. *Gold Reefs of West Africa Limited*, [1900] 1 Ch. 656, at p. 671, Lindley, M.R., speaking of powers conferred on majorities enabling them to bind minorities, says that they must be exercised, not only in the manner required by law, "but also *bonâ fide* for the benefit of the company as a whole."

The language of Sir Richard Baggallay in *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589, 593, and that of Lord Cranworth in *Aberdeen R.W. Co.* v. *Blakie* (1854), 1 Macq. H.L. Sc. 461, 471, state the rule as it is now generally understood. In the first case it is said that "a director of a company is precluded from dealing, on behalf of the company, with himself,

ONT.
S. C.
COOK
v.
DEEKS.
Hodgins, J.A.

and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect." In the second case it is stated that "a corporate body can act only by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Sir G. M. Giffard, L.J., in *Gilbert's Case* (1870), L.R. 5 Ch. 559, at p. 566, uses more homely language. He says: "If persons having to exercise a fiduciary power choose to place themselves in this position, that their interests pull one way, while their duty is plainly to do something quite different, and for that reason they abstain from exercising that power" (*i.e.*, to make a call) "they must be held to all the same consequences as though that power had been exercised."

I think that perhaps the doctrine is most concisely stated in the head-note to *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189, thus: "A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company. So, if acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company."

All these expressions of opinion, however, relate to actual transactions or dealings with the property of the company, or with its corporate rights or those of the shareholders, and are not intended to lay down mere academic propositions. I have not been able to find any case where they have been applied as comprehending a duty so extensive as is here contended for, nor to a situation in any sense similar to that developed in this case. The trend of decision is rather to restrict the responsibility and increase the discretion of directors, and to free them from the

serious burdens which trustees are still carrying, provided they make proper disclosure to and obtain the consent of the company. See Lindley on Companies, 6th ed., p. 511.

Some limitations to the responsibilities of directors may be mentioned as illustrating this tendency. While they cannot as a rule profit in the course of their agency, yet they may do so with the knowledge and consent of their principal, *i.e.*, the company *Benson* v. *Heathorn* (*ante*); *Parker* v. *McKenna* (1874), L.R. 10 Ch. 96, at p. 124. They are to be regarded as really commercial men managing a trading concern for the benefit of themselves and all the other shareholders, and as such are allowed a discretion: *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450, at pp. 453, 454. The strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent: *In re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141, at pp. 150, 151; they are not trustees for individual shareholders: *Percival* v. *Wright*, [1902] 2 Ch. 421; and they are not bound to take any definite part in the conduct of the company's business, but so far as they do undertake it they must use reasonable care in its despatch: *In re Brazilian Rubber Plantations and Estates Limited*, [1911] 1 Ch. 425, at p. 437

But there is in our legislation (the Companies Act, R.S.O. 1914, ch. 178, sec. 93, 7 Edw. VII. ch. 34, sec. 89), as in England, a definite restriction upon the action of directors which in itself recognises the fact that they may be interested in matters in which neither the company nor other shareholders are concerned, and which goes far to define their position. That restriction is as follows: "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." And the director is bound to 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 at the next meeting after he has acquired such interest. And if he properly discloses "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 this is not all. By statute, "the affairs of the

ONT.
S. C.
COOK
v.
DEEKS.
Hodgins, J A.

company shall be managed by a board of . . . directors" elected by the shareholders, and, with unimportant exceptions, "no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present:" (1907) 7 Edw. VII. ch. 34, secs. 80, 81.

The directors are empowered to pass by-laws to regulate various things, including "the conduct in all other particulars of the affairs of the company," but these by-laws are subject to confirmation or rejection at the next general or annual meeting (sec. 87).

A glance at the extraordinarily comprehensive list of powers of companies under sec. 23 of R.S.O. 1914, ch. 178, will indicate how extensive those affairs may be and what a wide range of activities are open to them. It is well settled in England that the duties of a director are measured by the articles of association; and it must follow that in Ontario their duties are defined by the statute under which the company is incorporated. See *Costa Rica R.W. Co.* v. *Forwood*, [1900] 1 Ch. 756, [1901] 1 Ch. 746, 760; *Imperial Mercantile Credit Association* v. *Coleman* (1871), L.R. 6 Ch. 558, 567.

While these provisions do not, of course, exhaust the subject, they seem to indicate some important qualifications which must be taken into account in dealing with the questions raised in this case. From these statutory provisions it will be seen that a director may be concerned in a matter so that his duty and interest do or may conflict with that of the company or its shareholders. If he fully discloses that interest and does not vote, he is discharged from liability on account of his fiduciary relationship.

It is also clear that the business of a company, so far as it is done by directors as such, must be transacted at a meeting of directors, and that their regulation of the conduct of the affairs of the company, if embodied in by-laws, is subject to the will of the shareholders. In matters to which these statutory provisions do not extend, the company's business is left generally in the hands of the directors as the agents of the company. And the principle underlying the law of joint stock companies in this regard may be well expressed in the reply to the question propounded by Lord Hatherley, then Sir W. Page Wood, V.-C.,

when he asks, regarding the institution of litigation, "Who are the proper judges?" and answers his own question thus: "Parliament clearly intended that in general the company should be the judges of that as of every part of the company's business, supposing the company be put in the position to judge:" *In re London and Mercantile Discount Co.* (1865), L.R. 1 Eq. 277, 283.

Now, if the acceptance or rejection of a contract within the scope and practice of the company's operations is not the business of the company and a question of policy, and comprehended in the expression "the conduct . . . of the affairs of the company," I am unable to imagine anything that may be so described.

Viewed, as I think it should be, in relation to the actual conditions under which directors assume office and to ordinary business considerations, the rule of responsibility is extensive enough. It should not be pushed to such an extent as to render it impossible for business men to assume the position of directors. Collins, L.J., in *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, at p. 465, points out how unwise it would be to lay down a standard of duty which would make it a practical impossibility to manage a commercial undertaking upon ordinary business lines; and some of the other cases I have already cited indicate an agreement with this view.

If, then, the taking or not taking of this contract was a matter within the directors' discretion, the decision in *North-West Transportation Co.* v. *Beatty* (*ante*) seems almost exactly to cover the point at issue. Sir Richard Baggallay, speaking of the transaction impeached in that case as one either entered into by the directors and confirmed by the shareholders or as one entirely emanating from the shareholders, says (12 App. Cas. at p. 596): "In either view of the case, the transaction was one which, if carried out in a regular way, was within the powers of the company: in the former view, any defect arising from the fiduciary relationship of the defendant James Hughes Beatty to the company would be remedied by the resolution of the shareholders, on the 16th of February, and, in the latter, the fact of the defendant being a director would not deprive him of his right to vote, as a shareholder, in support of any resolution which he might deem favourable to his own interest."

ONT.
S. C.
COOK
v.
DEEKS.
Hodgins, J.A.

Having in mind the statement of the position of a director already quoted from that case, it is evident that the decision was given after full consideration of the principle urged as applicable to this transaction. That case was followed with approval in *Burland* v. *Earle*, [1902] A.C. 83, and *Dominion Cotton Mills Co. Limited* v. *Amyot*, [1912] A.C. 546.

These cases also afford an answer to the contention that it must be shewn that the confirmation by the shareholders must be by an independent majority, *i.e.*, disregarding the votes of the shareholders who are directors.

In the *Beatty* case it is said (p. 600): "It is clear upon the authorities that the contract entered into by the directors on the 10th February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means." After indicating that the only unfairness or impropriety which could be suggested was the fact that the defendant Beatty possessed a voting power as a shareholder which enabled him and those who thought with him to adopt the by-law, it is pointed out that the constitution of the company enabled him to acquire this voting power, and that he was entitled to vote on every share held. It is said that "to reject the votes of the defendant upon the question of the adoption of the by-law would be to give effect to the views of the minority, and to disregard those of the majority."

This is applicable in principle to the present case, and it has, upon this point, the further authority of the two cases I have already mentioned.

Can it be said that there was any unfairness or impropriety, other than that set out in the *Beatty* case, which would leave this case outside the scope of that decision?

The general principle, set out in *Normandy* v. *Ind Coope & Co. Limited*, [1908] 1 Ch. 84, at p. 108, is that the Court never interferes with the majority as against the minority except in case of fraud. The sort of fraud or unfair dealing that will call for the interposition of the Court can only be ascertained from

an examination of the principles on which the Courts have proceeded when dealing with this subject.

In *Martin* v. *Gibson*, 15 O.L.R. 623, the Chancellor set aside an allotment at par among the directors of shares worth more, as amounting to a "confiscation of the corporate rights and privileges;" and while Warrington, J., in *Ving* v. *Robertson & Woodcock Limited* (1912), 56 Sol. J. 412, has held that the shareholders have no right to have the shares allotted to them, and that the company can allot to whom it pleases, it is impossible, in face of *Punt* v. *Symons & Co. Limited*, [1903] 2 Ch. 506, to doubt that the Canadian decision is correct. It is supported by the case of *Madden* v. *Dimond* (1906), 12 B.C.R. 80.

The effect of *Menier* v. *Hooper's Telegraph Works*, L.R. 9 Ch. 350, is to render it improper for directors so to deal with the assets or legal rights of the company as to give some of the shareholders advantages therein and to exclude the minority therefrom.

Many other cases illustrate different situations in which this rule has been applied so as to prevent directors acting improperly with regard to the company's assets or the legal rights of the company or its shareholders. But it must not be forgotten that the power to vote at a general meeting is not given to a director as such, but to him as shareholder (*In re Cawley & Co.*, 42 Ch. D. at p. 233); and that the authority of the majority, if used according to the rights conferred by the articles of association or the statute, is legally exercised: *Benson* v. *Heathorn* (*ante*); *Salmon* v. *Quin & Axtens Limited*, [1909] 1 Ch. 311; *Quin & Axtens Limited* v. *Salmon*, [1909] A.C. 442; *Automatic Self-Cleansing Filter Syndicate Co. Limited* v. *Cuninghame*, [1906] 2 Ch. 34; *Goodfellow* v. *Nelson Line* (*Liverpool*) *Limited*, [1912] 2 Ch. 324; and *Molineaux* v. *London Birmingham and Manchester Insurance Co.*, [1902] 2 K.B. 589, 596. And this right is not controlled by the fact that the interests of the shareholder may be adverse to that of the company or of other shareholders: *Pender* v. *Lushington*, 6 Ch. D. 70 (votes of nominee of shareholders to be given in the interests of a rival company); *Greenwell* v. *Porter*, [1902] 1 Ch. 530 (voting by agreement in a particular way). An interesting and instructive case on this point is *Marshall's Valve Gear Co.* v. *Manning Wardle & Co. Limited*, [1909] 1 Ch. 267.

ONT.
S. C.
COOK
v.
DEEKS.
Hodgins, J.A.

It may be noted that by the Ontario Interpretation Act, R.S.O. 1914, ch. 1, sec. 27, it is provided that "in every Act, unless the contrary intention appears, words making any . . . number of persons a corporation or body politic and corporate shall . . . vest in a majority of the members of the corporation the power to bind the others by their acts."

The correctness of the view that the majority here should rule may be tested by considering what would be the result of the appellant's contention if adopted in this case. It would mean that three-fourths of the assets of the company would be employed against the wish of three-fourths of the shareholders. It would also mean that the directors would either have to devote themselves to the execution of the contract during its continuance or else resign and allow the minority to continue the business and employ the joint capital as it wished. It would further require that in order to change the policy of the company the directors must sell or transfer their shares to others, who then could vote free from the directors' disability. Indeed, it is not too much to say that it would completely deprive the company of the advantage conferred on it by the Legislature of regulating its business according to the wish of the majority, and reduce the directors to mere ciphers in the conduct of the company's business, unable to direct and yet driven by necessity to act against their interests and contrary to their own opinion.

That this has not heretofore been the view in which companies and directors have been regarded, either in England or here, is evident from the cases of *MacDougall* v. *Gardiner*, 1 Ch. D. 13, and *Purdom* v. *Ontario Loan and Debenture Co.* (1892), 22 O.R. 597, which follows it. James, L.J., in the first case, says, at p. 22: "There may be a great many wrongs committed in a company . . . there may be a variety of things which a company may well be entitled to complain of. . . . It is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." And Mellish, L.J., at p. 25, states the rule that has become classic: "If something has been done illegally which the majority of the company are entitled to do legally, there can be no use having a litigation about it, the ulti-

mate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

These practical considerations seem to me to indicate that the appellant's position is untenable, and to require the Court to reject the theory that opportunity is the same thing as interest, and that conditions which might ripen into such an interest are equivalent to the accomplished fact.

An examination of the case, however, in the light of the authoritative statements which have determined the extent of fiduciary responsibility, leads, I think, to the same conclusion. According to these statements, there must be in the shareholders or the company an interest which ought to be protected by the directors in the performance of their fiduciary duty. And what is this interest? Has the company or have the shareholders, when they elect directors to manage its affairs, the right to say that in any and every engagement into which those directors personally enter, if it is one which may come within the corporate powers, the company has an interest irrespective altogether of whether it is in fact one that the directors have not undertaken for the benefit of the company? If so, the fiduciary duty of directors will be extended to a degree hitherto unknown. It will entirely paralyse their discretion as directors, and compel them to devote their whole time and attention not merely to what they are willing to undertake and do undertake for the company, but to that into which they may wisely or unwisely prefer not to embark the company's assets.

And it will also render them liable to the company for opportunities which a minority of shareholders contend they have neglected, and their responsibility will depend, not on their own acts, but on the outcome of engagements as to which they have virtually no power of refusal.

If the appellant is right, the interest of a company must be an interest arising by virtue of the expressed objects of the company, and not from any corporate act resulting in an actual engagement pursuant to and within those objects. And this would involve the proposition that the duty of the directors "so to act as best to promote the interests of the corporation whose affairs they are conducting" includes a duty to take for the company any contract or enter into any engagement within the scope of

ONT.
S. C.
COOK
v.
DEEKS.
Hodgins, J.A.

the corporate powers if in fact it is a transaction likely to be beneficial to the company; and who is to decide this point? It must be the directors, or the shareholders as a body, or the Court.

If either the directors or the shareholders can decide, then there is no absolute duty, but merely a duty when properly required of them by the shareholders. If the Court has to decide, how is it to do so except by resorting to the opinion of those who make up the company?

I do not think that the solution of the question is simplified by the ease with which a remedy can be suggested, *i.e.*, by declaring the individual respondents trustees of the contract for the company. If they are trustees of the contract, the trust must have arisen when it was taken by them, and then only by reason of the antecedent conditions, so that it comes to the same thing in the end. The view that directors are trustees limits the trust to the company's money and property (*Great Eastern R.W. Co.* v. *Turner* (1872), L.R. 8 Ch. 149, *per* Lord Selborne, at p. 152), while the same learned Judge confines their agency to transactions which they enter into "on behalf of the company."

It was argued that the resolution to abstain from further business and to sell the assets was a virtual winding-up of the company, and that the appellant was entitled to some remedy therefor, it being a breach of trust or a fraudulent act. But counsel for the appellant could not point out to my satisfaction just what that remedy was. Obviously such action is within the corporate powers. I am unable to assent to the proposition that the winding-up of the company or the determination to cease business can give the minority shareholders a right of action against the directors in the name of the company. The cessation of its business activity without winding-up, thus preventing the shareholders from realising their share of the assets, might, of course, be more disastrous for them than closing it out. But that situation can be put an end to, if it is unfair, by asking the Court for a winding-up order. If that remedy is not sought, then, I think, the minority has only itself to blame if the state of affairs complained of is allowed to continue.

One other grievance was urged. That is the gradual absorption or use of the *personnel* of the organisation of the company by the individual respondents in the course of carrying out the

contract in question. Here, again, unless the respondents induced the employees to break their engagements with the company, which was not argued, I can see no right of action by the appellant against them, apart from the main contention of the appellant.

Both these latter heads of complaint, apart from the sale of the assets, practically disappear if the main ground is made out. For *ex concessis* they were necessary consequences of the effective performance of the contract; and, if the appellant is entitled, in right of the company, to the benefit of its performance, he cannot complain of the use of the company's organisation, or to its desistment from other things.

My conclusion is that to give effect to the appellant's contention would be to extend the fiduciary duty of a director to such an extent that minority control would be the rule, instead of a rare exception only, caused by the fraud or unfair dealing of the majority; and would place directors who disclose their interest and have their action ratified by the shareholders in the same, if not in a worse, position than those who conceal their interest and become liable under the statute.

Nothing that I heard nor that I have read has convinced me that the learned trial Judge took a wrong view of the position, character, or actions of the parties to this action; and, as I think the law fully bears out his conclusions, I would affirm his judgment with costs.

Appeal dismissed.

HANNIGAN v. McLEOD.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Drysdale JJ. January 12, 1915.

1. OFFICERS (§ II B—80)—FAILURE TO QUALIFY—COMPENSATION AND FEES—RIGHT TO RECOVERY.

Fence viewers who have failed to take the oath of qualification explicitly required of them under R.S.N.S. ch. 70, sec. 93, before entering upon their duties cannot recover moneys which would otherwise be coming to them as fence-viewers.

2. OFFICERS (§ II B—80)—COMPENSATION AND FEES—DE FACTO OFFICERS.

An officer cannot recover fees or set up a right of property or right to recover money that accrues to him in virtue of his office, on the ground that he is an officer *de facto* unless he be also an officer *de jure*.

[*People* v. *Hopson*, 1 Denio N.Y. 573, approved; *R.* v. *Gibson*, 29 N.S.R. 88, referred to.]

N. S.

S. C.

HANNIGAN v. MCLEOD.

ACTION by plaintiffs, fence viewers, to recover double the cost of erecting a fence pursuant to the statute, R.S.N.S. 1900, ch. 70.

H. Mellish, K.C., and *D. McLennan*, for appellant.

W. F. O'Connor, K.C., and *T. Gallant*, for respondents.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—It is with great regret I am forced to come to the same conclusion as Graham, E.J., in this matter. The defence on which the defendant succeeds is purely technical, has no merits whatever, and was only set up during the trial of the action. It could not have availed defendant except that the trial Judge allowed him to amend. I should not have allowed an amendment of that kind at all at the trial and have considered how far it would be right to overrule the amendment and exclude the evidence. That, I admit, would be an extreme course perhaps only justifiable where the Judge has erred in principle and not where it is a matter of discretion.

I think still we should consider how far defendant should have the costs of the action or on this appeal. The plaintiffs were public officers in discharge of a very disagreeable duty and will be defeated on a purely technical ground having no relation to the matter in which their duty was performed. The result of allowing costs would be that they will be muleted in heavy costs in a matter in which they have no personal interest.

Graham, E.J.

GRAHAM, E.J.:—The defendant and one David J. Marple respectively owned fields adjoining each other and were each obliged to maintain a proportion of the fencing between them.

The defendant apparently was in default and Marple proceeded under R.S.N.S. ch. 93, sec. 6, and called in a fence viewer. Rather he called in two, and they have joined in this action. They caused the required fence to be built and under sub-sec. 3 of that section they have sued the defendant for "double the expenses of making or repairing such fence," which is to be recovered by the fence viewer.

Among the many objections raised as to the validity of these

proceedings is one which I think is fatal to the action. That is, that the fence viewers were not at any time sworn into office.

By R.S. ch. 70, sec. 111, it is provided:—

> The council shall at the annual meeting appoint the following officers . . . fence viewers.

By sec. 93, it is provided:—

> Every person appointed to any office under this chapter shall, before he enters upon the duties thereof take and subscribe the oath of qualification contained in form J in the second schedule of this chapter.

And in that schedule is the form of oath appropriate to such an office.

The question is whether this action may be maintained by a *de facto* officer. That is whether it is sufficient to the validity of the act of a fence viewer that he was a *de facto* officer when he is in an action brought face to face with the delinquent, and it is not a case where third parties are maintaining the action and relying upon the fact of a determination of or act of a *de facto* official.

The Queen v. *Gibson*, 29 N.S.R. 88; *Riddle* v. *County of Bedford*, 7 Serg. and Rawle 386; *Green* v. *Burke*, 23 Wend. 490; *People* v. *White*, 24 Wend. 526; *United States* v. *Ward*, 2 Gall. 361; *Rowe* v. *Beale*, 15 Pick at 125; *Exon* v. *Starre*, 2 Shower 158.

I think the underlying principle is that a collateral attack on the regularity of a person's official position is not in certain circumstances punishable but when he himself is on the record it is punishable.

That disposes of this case. Here the fence viewer is a party and he is trying to recover double the expenses he has been put to in constructing a fence, part of which will be for himself. Very little was said at the argument about the fact that two fence viewers instead of one had performed the work and were bringing the action. I suppose it was because no one cared to do so. It would be interesting to know whether they were in partnership or not as to the work performed and as to the profits. I do not feel called on to say anything on this point but I hope it will never be attempted again.

The appeal must be allowed and the action dismissed, the costs to be disposed of as suggested by Mr. Justice Drysdale.

N. S.

S. C.

HANNIGAN v. MCLEOD.

Drysdale, J.

RUSSELL, J., concurred with GRAHAM, E.J., and DRYSDALE, J.

DRYSDALE, J.:—It seems that when plaintiffs acted in their official capacity in viewing and building said fence they had not been sworn into office. That is to say, they had omitted or neglected before entering on the duties of their office as fence viewers to take and subscribe the oath of qualification required of them by sec. 93 of ch. 70, R.S., and it is objected here that they cannot maintain the statutory action because of such failure or neglect.

The only answer made to this is that being *de facto* officers they can or ought to recover and it is on this contention that, in my opinion, the action must be decided. It is a matter of regret to me that I am obliged to hold that *de facto* officers cannot succeed in such an action as is before us. The plaintiffs were no doubt honestly endeavouring to carry out what they considered an onerous duty and if possible I would uphold their action. I am obliged, however, to hold that an officer cannot recover fees or set up a right of property or right to recover money that accrues to him in virtue of his office on the ground that he is an officer *de facto* unless he be also an officer *de jure*. It has long been decided that where one attempts to exercise dominion over the person or property of another it becomes him to see that he has an unquestionable title, although it is equally well settled that the acts of an officer *de facto* though his title may be bad are valid so far as such acts concern the public or the rights of third persons who have an interest in the thing done. *The People* v. *Hopson*, 1 Denio N.Y. 573, a leading authority on the subject, collects and reviews the authorities and is, in my view, a correct exposition of the English doctrine on the subject.

Here the plaintiffs are endeavouring to recover moneys expended by them in virtue of their office as fence viewers. They claim to be municipal officers and no doubt they were appointed by the proper authority, but the statute is explicit as to such officers, that before entering upon their duties they shall take and subscribe an oath of qualification. This it appears plaintiffs never did, and it is obvious under the circumstances that

N. S.

S. C.

HANNIGAN v. McLEOD.

Drysdale, J.

the answer to them when they attempt to recover moneys expended or incurred as fence viewers that they never became legal officers. In short, to recover moneys coming to them as fence viewers I think it is well established that they must not only be officers *de facto* but *de jure* as well.

This question was not raised by the pleadings when the case went down to trial, but the learned trial Judge allowed an amendment on the trial that raised the point. He might, I think, have properly in his discretion refused to allow any such technical amendment, but in the exercise of his discretion the pleadings were amended, and of this the parties cannot now complain. I think the point is fatal to recovery herein and that the defendants must succeed.

I would allow the appeal, but on account of the amendment necessary in my view to defendants to enable them to succeed I would apportion the costs.

Appeal allowed.

REX v. GRAHAM.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Simmons, JJ. March 26, 1915.

1. EVIDENCE (§ VIII—671)—TESTIMONY OF ACCUSED IN CIVIL PROCEEDINGS—FAILURE TO CLAIM PRIVILEGE—IRREGULARITY—CANADA EVIDENCE ACT, SEC. 5.

The evidence of the accused upon his examination taken under sec. 52 of the Assignments Act, Alta., following his assignment for the benefit of creditors, is admissible against him on the trial of a criminal charge of obtaining credit on false pretences unless on the examination he has objected to answer upon the ground that the answer would tend to criminate him or upon some other of the grounds referred to in the Canada Evidence Act, R.S.C. ch. 145, sec. 5 or in the Alberta Evidence Act, 1910, Alta., 2nd session, ch. 3, sec. 7, and this although the examination proceedings may have been irregular.

[*R.* v. *Widdop*, L.R. 2 C.C. R. 3, and *R.* v. *Van Meter*, 11 Can. Cr. Cas. 207, 3 Terr. L.R. 416, applied.]

Statement

CROWN case reserved on a conviction for obtaining credit by false pretences.

W. J. Loggia, for defendant appellant.

W. H. O'Dell, for the Crown.

Scott, J.

The judgment of the Court was delivered by

SCOTT, J.:—The accused was convicted by him at Westaskiwin

ALTA.
S. C.
REX
v.
GRAHAM.
Scott, J.

on February 26, 1914, upon the charge that, in incurring a debt or liability for the firm of Graham Brothers, of which he was a member, to the Miller-Morse Hardware Co., he obtained credit for said firm by false pretences.

The following facts are stated:—

The Crown offered in evidence an assignment from the accused and Charles O. Graham trading as Graham Brothers to the Canadian Credit Men's Trust Association, Limited, dated on the 26th of August, 1914, for the benefit of creditors of the assignors and the examination of the accused under oath taken under section 52 of the Assignments Act and certain documents proved thereby. Counsel for the accused objected to the admission in evidence of such assignment and examination and of all proceedings taken under such assignment on the following grounds:—

1. The assignment was not made to an official assignee under sec. 5 of the Assignments Act as enacted by sec. 14 of ch. 4 of the statutes of Alberta for the year 1909 as amended by sub-sec. 2 of sec. 12 of the Statute Law Amendment Act, 1913, (second session); the same is therefore absolutely null and void.

2. The assignment being for the above reason null and void, there was no authority for the holding of the examination.

3. That there was no evidence before the Court that the proper preliminaries were taken as required by sec. 52 of the Assignments Act and amendments to justify the taking of the examination.

4. If the examination was properly taken by the clerk then the evidence given thereunder is in the nature of a confession or admission to one in authority and cannot be admitted unless it has been proved that a warning has been given.

5. The Canada Evidence Act is not applicable to this class of evidence inasmuch as it was not given in a proceeding over which the Parliament of Canada has jurisdiction as set out in the said Act.

6. Questions pertaining to any statement supposed

to have been given by the accused to the Miller-Morse Hardware Co., Limited, should not have been asked or allowed in evidence, under sec. 52 of the Assignment Act.

In support of his objection to the validity of the assignment counsel for the accused put in without objection a certified copy of an order in council dated on the 2nd. day of December, 1914, appointing the Credit Men's Trust Association, Limited, an official assignee under the Assignments Act in the judicial district of Wetaskiwin, and the same is filed as exhibit "2" on the trial of this charge. This is the only evidence before me on this point.

The examination was held on a written request signed by "John J. Corbett, Inspector" and "W. Paul, Inspector," which was filed as exhibit "6" on the trial. There is nothing in the evidence to shew how many inspectors were appointed, and no resolution for the appointment of inspectors was put in. The appointment of John J. Corbett as inspector was proved only by his own evidence, he swearing that he was appointed as such after the assignment at a meeting of creditors held at Winnipeg. No proof of the fact that Paul was actually appointed as inspector was given.

The trial Judge admitted in evidence the assignment and examination and the documents served by the latter and he states that the case for the Crown was made out by the examination, that, without it, he would have been obliged to acquit the accused; and that by it, and by it alone, the Crown proved not only the making by the accused of the statement complained of, but also the fact that the statement was false.

The question submitted by the trial Judge is as follows:—

Was I wrong in admitting in evidence the assignment in question and the examination of the accused taken under it and the exhibits proved by it?

Had the examination of the accused been taken in the manner and under the conditions prescribed by the Assignment Act (Ch. 6 of 1907) and the amendments thereto, both it and

ALTA.

S. C.

REX v. GRAHAM.

Scott, J.

the exhibits therein referred to would in my opinion be admissible in evidence against him.

In *Reg* v. *Scott*, Dearsley & B. Crown Cas. 47, 7 Cox C.C. 164, it was held by the Court of Criminal Appeal, that the examination of the defendant in bankruptcy proceedings against him was admissible against him on a criminal charge, even though the answers were extracted from him under threat of committal and were criminating.

Sec. 7 of the Alberta Evidence Act (Ch. 3 of 1910, 2nd sess.) provides *inter alia*, that a witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him, but that with respect to any such question, if he objects to answer upon that ground and that if but for that section or any act of the Parliament of Canada, he would have been excused from answering it, then, although the witness is by reason of that section or of any such Act, compelled to answer, the answer so given shall not be used against him or receivable in evidence against him in any civil proceedings or in any proceedings under any Act or Ordinance in force in Alberta.

Sec. 5 of the Canada Evidence Act (R.S.C. ch. 145), provides that a witness shall not be excused from answering any question upon the ground referred to, and also provides that, if he objects on that ground to answer any question and that, if but for that Act or any Act of any provincial legislature, he would therefore have been excused from answering, then although he is by reason of that Act or of any such Provincial Act, compelled to answer, the answer so given shall not be used against him in any criminal trial.

Sec. 35 of the last mentioned Act provides that in all proceedings, over which the Parliament of Canada has legislative jurisdiction, the laws of evidence in force in the province, in which such proceedings are taken, shall, subject to the provision of any Act of the Parliament of Canada, apply to such proceedings.

In my view the effect of these provisions, if not the effect of the provisions in the Alberta Evidence Act, alone, is that the evidence of the accused is admissible against him in a criminal

trial unless he objects to answer upon the ground that the answer would tend to criminate him or upon any of the other grounds referred to in those provisions and upon perusing the examination of the accused in this case, I find that he did not object upon any ground whatever to answer any of the questions put to him during the examination. It therefore follows that the whole of the examination, if legally authorized, would be receivable in evidence against him.

Several of the objections taken by counsel for the accused to the admission of the documents referred to raise the question whether the Crown, before tendering them as evidence, was bound to prove that the necessary proceedings were taken in order to compel the accused to attend upon the examination and he sought to prove that the assignment by the accused which was the foundation of the proceedings was void by reason of its not having been made to an official assignee. What he did prove was that the association was appointed an official assignee for the Wetaskiwin district sometime after the date of the assignment and it appears that it was in that district that the accused carried on business at that date. Sec. 5 of the Assignments Act as amended by sec. 12 of ch. 2 of 1913, 2nd sess. provides that every such assignment shall be void unless made to an official assignee, but the Act does not appear to require that the assignment shall be made to the official assignee for the district in which the assignor carries on business and, for anything that appears, the association may have been at the time of the assignment an official assignee for some other district of the province. If the onus of proving that the assignment was void rested upon the accused, he has therefore failed to adduce the necessary proof.

In my view, however, it is unnecessary to decide upon whom rested the onus of proving the regularity of the proceedings leading up to the examination of the accused, as it appears to be well settled that, even if the proceedings were irregular the examination was properly admitted as evidence against the accused.

In *Reg* v. *Widdop* (1872), L.R. 2 C.C.R. 3, the examination of the accused in bankruptcy proceedings against him was

ALTA.
S. C.
REX
v.
GRAHAM.
Scott, J.

tendered in evidence against him. It appears that the summons requiring him to attend for examination was issued by the trustees in bankruptcy before the resolution appointing him had been registered, and that he was not therefore then authorized to act as trustee. It was held by the Court of Crown Cases reserved that notwithstanding this defect in the proceedings and notwithstanding the fact that he was threatened with committal in case he refused to answer, his examination was properly admitted as evidence against him.

Kelly, C.B., says at p. 7:—

> The objection is a technical one: the section upon which it is founded prescribes merely the mode by which the person to be examined is to be brought before the Court and I think it would be equally contrary to legal principles and common sense, if we were to hold that the prisoner, after voluntarily attending and submitting to examination without objection, was at liberty to raise an objection to the validity of the summons afterwards.

The only remaining objection is that questions pertaining to any statement given by the accused to Miller-Morse & Company should not have been asked upon the examination of the accused or allowed to be given in evidence.

Sec. 52 of the Assignments Act, appears to restrict the scope of the examination of the assignor to matters touching his estate and effects, the property and means he has when the earliest of his outstanding debts was incurred, the property and means he still has of discharging his debts, the disposal he has made of his property and the debts due to him.

Although the questions put the accused which are now objected to may not have been authorized by the section, they were not objected to by him at the time of his examination, and I therefore think that the principles laid down in *Rex* v. *Widdop* is applicable also to them. The same principle may be deduced from the judgment of the Court en Banc of the territories in *Rex* v. *Van Meter*, 11 Can. Cr. Cas. 207, 3 Terr. L.R. 416.

In my opinion the question submitted by the trial Judge should be answered in the negative and the conviction confirmed.

Conviction affirmed.

Re WORRELL.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J. March 3, 1915.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—JURISDICTION IN SASK. WITHOUT CONSENT.

The absolute jurisdiction of a police magistrate in Saskatchewan of a city having a population of over 2,500 is retained under Code, secs. 776 and 777 as to the offences specified in Code, sec. 773 (including that of unlawful wounding), and the consent of the accused to summary trial is required by Code secs. 777 and 778, only in such cases in which there is additional jurisdiction under sec. 777.

[*R. v. Hayward*, 6 Can. Cr. Cas. 399, 5 O.L.R. 65, applied.]

Statement

MOTION to quash a conviction of Charles Worrell (applicant), made by William Trant, Esquire, Police Magistrate in and for the City of Regina, for that he the said Worrell on the 25th day of November, 1914, at Regina in the province of Saskatchewan, did unlawfully wound Harry Dodds, contrary to the Criminal Code of Canada. The proceedings had been taken on the information of E. G. Berry, for that said Charles Worrell on the 25th day of November, 1914 at Regina in the said province did unlawfully wound one Harry Dodds, thereby inflicting grevious bodily harm contrary to the Criminal Code of Canada.

H. Y. MacDonald, K.C., for the applicant.

H. E. Sampson, for the Attorney-General's Department.

Haultain, C.J.

HAULTAIN, C.J.:—On the 28th November, 1914, Charles Worrell was summarily convicted by the Police Magistrate for the city of Regina on a charge of unlawfully wounding. Worrell was not asked to consent and did not consent to being tried summarily.

Regina is a city having a population of not less than 2,500 according to the last decennial census taken under the authority of an Act of the Parliament of Canada.

An application is now made to quash the conviction on the following grounds:—

(1) That the said conviction was made without jurisdiction.

(2) That the said conviction was made without the consent of the accused and the Police Magistrate for the city of Regina had no jurisdiction to make the said conviction without such consent.

SASK.

S. C.

RE WORRELL.

Haultain, C.J.

The questions raised necessitate a consideration of part XVI of the Criminal Code and more particularly sections 773, 776, and 777. It is argued on behalf of the applicant that the absolute jurisdiction given to magistrates by 776 is taken away from some of them by sections 777 by virtue of the words "except in cases coming within the provisions of section 777." That means that all magistrates in the province of Saskatchewan except Police Magistrates in cities and incorporated towns having a population of not less than 2,500 have absolute jurisdiction to try without consent persons charged with any of the offences enumerated in section 773.

Section 777 was originally section 785 in the Criminal Code, 1892. The section as it then stood applied exclusively to magistrates in the province of Ontario. The obvious intention of the section was to enlarge and not to restrict the jurisdiction of the magistrates in that province by adding to the offences enumerated in section 783 (now 773) all other offences which could be tried in Ontario at a Court of General Sessions of the Peace.

Under the Criminal Code, 1892, section 784 (2), the jurisdiction of a stipendiary magistrate in Prince Edward Island and of a magistrate in Keewatin was absolute without the consent of the accused.

In 1895 this absolute jurisdiction was extended to all magistrates in Prince Edward Island and British Columbia and to magistrates in Alberta, Saskatchewan, etc.

In 1900, section 785 of the Criminal Code, 1892 was re-enacted with amendments and was made to apply not only to Ontario as at first but to police and stipendiary magistrates in incorporated towns in every other part of Canada. By subsection 3 of the new section 785 it was enacted that "where the magistrate has jurisdiction by virtue of this section only, no person shall be tried summarily without his consent. That provision was evidently intended to make it quite plain that while absolute jurisdiction to try without consent was given by section 784 to magistrates in Prince Edward Island, etc. it was confined to the cases enumerated in section 783 and was not extended to the other cases which were triable at a Court of General Sessions of the Peace.

Section 777 of the Criminal Code of 1906 was practically the same as section 785 of the Code of 1892 as enacted by the amendment of 1900.

By the Criminal Code Amendment Act, 1909, section 777 was amended by substituting the following sub-section for sub-section 2.

"(2) This section shall apply also to District Magistrates and Judges of the sessions in the Province of Quebec and to police and stipendiary magistrates of cities and incorporated towns having a population of not less than 2,500 according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada and to the recorder of any such city or town if he exercises judicial functions and to Judges of the Territorial Court and Police Magistrates of the Yukon Territory."

A new sub-section was also added to 777 as follows:

"(5) The jurisdiction of the magistrate under this section in cities having a population of not less than 25,000 according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada is absolute and does not depend upon the consent of the accused in the case of any person charged with theft or with obtaining property under false pretences or with unlawfully receiving stolen property where the value of the property alleged to have been stolen, obtained, or received does not in the judgment of the magistrate exceed $10.00."

I have referred at length to these various enactments for the purpose of shewing that a consistent and definite policy and intention on the part of parliament to extend rather than to restrict both the general jurisdiction and the absolute jurisdiction of magistrates in the matter of summary trials.

It is not reasonable to suppose that when the general jurisdiction of a special class of magistrates was extended by bringing them within the provisions of section 777 (old section 785) it was intended thereby to take away or restrict any of the powers they already possessed under the other sections of part XVI.

SASK.

S. C.

RE WORRELL.

Haultain, C.J.

I am of opinion therefore that the words "except in cases coming within the provisions of section 777", in section 776 were only intended to restrict the absolute jurisdiction conferred by that section to the cases enumerated in section 773 and provide that the additional jurisdiction given by section 785 (present sec. 777) should only be exercised with the consent of the accused. I am borne out in this opinion by the judgment of Boyd, C., in *The King* v. *Hayward*, 6 Can. Cr. Cas., 399 at page 401. The conviction is therefore confirmed.

Motion dismissed.

SASK.

S. C.

Re WORRELL.

Saskatchewan Supreme Court, Newlands, Lamont, Elwood, and McKay, JJ. March 20, 1915.

1. CRIMINAL LAW (§ II B—19)—SUMMARY TRIAL—JURISDICTION IN SASK. WITHOUT CONSENT.

The absolute jurisdiction of a police magistrate in Saskatchewan, of a city having a population of over 2,500 is retained under Code secs. 776, and 777 as to the offences specified in Code. Sec. 773 (including that of unlawful wounding), and the consent of the accused to summary trial is required by Code secs. 777 and 778, only in those cases in which there is additional jurisdiction under sec. 777.

[*R.* v. *Hayward*, 6 Can. Cr. Cas. 399, 5 O.L.R. 65, applied; *Re Worrell* (No. 1), 21 D.L.R. 519, 24 Can. Cr. Cas. 88, affirmed.]

Statement

APPEAL from the judgment of Haultain, C.J., refusing a certiorari, *Re Worrell* (No. 1), 21 D.L.R. 519, 24 Can. Cr. Cas. 88.

H. Y. McDonald, K.C., for applicant.

H. E. Sampson, for the Crown.

The opinion of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This was an application for a writ of *certiorari* to quash the conviction of Charles Worrell by the police magistrate of the city of Regina on a charge of unlawfully wounding. The accused was tried summarily without his consent having been asked or given. This conviction was confirmed by the Chief Justice, who held that section 777 of the Criminal Code applied to offences other than those specified in 773, and that the words "except in cases coming within the provisions of section 777" in section 776 were intended to confine the absolute jurisdiction conferred by that section to cases enumerated

in section 773, and to provide that the additional jurisdiction given by section 777 should only be exercised with the consent of the accused. For this proposition he cites *R.* v. *Hayward*, 6 Can. Cr. Cas. 399. This case was an application for a habeas corpus before Boyd, C. The accused had been tried before a police magistrate for stealing 80c. from a church box, pleaded guilty and was sentenced to two years in the provincial reformatory. The learned Judge in his judgment discharging the prisoner said:—

> The offence charged was stealing a small sum of money, much less than ten dollars, and so it falls to be dealt with under section 783 of the Code. It was argued that it might be regarded as coming under section 785, and so the sentence of two years' imprisonment be justified. But I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to comprehend summary trial "in certain other cases" than those enumerated specifically in section 783. Where the offence is charged and in reality falls under section 783 (*a*), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months: section 787.

Secs. 783, 785 and 787 are respectively 773, 777 and 780 of the present Code.

This case decides two points. First, that when the accused is summarily tried and convicted of an offence under section 773, there can only be imposed upon him the punishment set out in section 780 and secondly, that section 777 refers to other offences than those mentioned in section 773. The first proposition is supported by *R.* v. *Randolph*, 4 Can. Cr. Cas. 165, 32 Ont. R. 212, where the Court held that stealing from the person a sum less than $10.00 was a different offence from the theft of less than $10.00 provided for by subsection (*a*) of section 773 and therefore the magistrate could impose a greater penalty than was allowed under section 773. This decision inferentially supports the second proposition also, because if section 777 is to be construed as conferring on the magistrate the jurisdiction of the Court of Quarter Sessions in Ontario, then a person convicted of any offence which could be tried by that Court, which

SASK.
S. C.
RE WORRELL.
Newlands, J.

included the offences included in section 773, could be given the punishment which that Court could impose, while if the section is to be construed as Boyd, C. construed it, as conferring on the magistrates therein mentioned only such additional jurisdiction of the Court of Quarter Sessions as was not conferred by section 773, then the punishment for an offence specified in section 773, subsections (*a*) and (*b*) would be confined to the punishment specified in section 780.

Chancellor Boyd based his opinion that section 777 referred to other offences than those specified in 773 upon the marginal note to that section which then read: "summary trial in certain other cases."

Mr. McDonald, in his argument before us, contended that Boyd, C., based his opinion on the marginal note and that the marginal note being no part of the statute the learned Chancellor was wrong in using it to assist in interpreting the statute, and he cited Hardcastle on the Interpretation of Statutes, page 205.

The learned Chancellor's language is hardly open to the construction put upon it by Mr. McDonald. At page 401, he says:—

> I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to comprehend summary trial "in certain other cases than those enumerated specifically in section 783" (773).

This I think means that the marginal note states correctly what in his opinion the section means.

Without discussing that proposition, I may say I have come to the same conclusion as the learned Chancellor from a perusal of the Act itself without the sidenotes. Section 777 confers upon the "magistrate," under which term is included the police magistrate who made the conviction in this case, the jurisdiction to try the accused for the offence for which he was convicted. Section 773, subsection (*c*).

Having therefore the jurisdiction to try that offence, section 777, which confers on him the jurisdiction of the Court of Quarter Sessions in Ontario, cannot be construed as conferring upon him the jurisdiction he already has, but must be intended to extend that jurisdiction to the trial of other offences. Then

SASK.

S. C.

RE WORRELL.

Newlands, J.

if section 776 is to be construed as only giving to a police magistrate in a city the jurisdiction of the Court of Quarter Sessions in Ontario and, as stated in section 777 only with his own consent, then these two sections together would have to be read as taking away the jurisdiction already conferred upon the police magistrate to try certain of the offences set out in 773 summarily and without the consent of the accused. Section 774. To put such a construction upon these sections would be to make sections 773, 774, 776 and 777 inconsistent with one another, the jurisdiction conferred by 773 and 774 being taken away by section 776 and 777, while to put the other construction upon it would be to make them all consistent with each other. I, therefore, prefer that interpretation that gives to a police magistrate in Saskatchewan absolute jurisdiction over the offences specified in 773 and jurisdiction over such other offences as may be tried before the Court of Quarter Sessions in Ontario only with the consent of the accused.

For these reasons I think that the conviction should be confirmed.

Appeal dismissed and conviction affirmed.

CONSOLIDATED INVESTMENTS v. CASWELL.

MAN.

C. A.

Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. February 24, 1915.

1. CORPORATIONS AND COMPANIES (§ VII B—373)—FOREIGN COMPANIES — FAILURE TO REGISTER—VALIDITY OF CONTRACTS.

Under the Companies Act, R.S.M. ch. 35, secs. 118 and 122, contracts entered into by unregistered foreign corporations are not void but the right of action is suspended until the company registers.

[*Bessemer Gas* v. *Mills*, 8 O.L.R. 647; *Semi-Ready* v. *Tew*, 19 O.L.R. 227, applied.]

Statement

ACTION on a promissory note by an unregistered company.

J. P. Foley, K.C., and *N. A. McMillan*, for the plaintiffs, appellants.

J. W. E. Armstrong, for the defendant, respondent.

Richards, J.A.

Perdue, J.A.

RICHARDS, and PERDUE, JJ.A., concurred with CAMERON, J.A.

MAN.

C. A.

CONSOLIDATED INVESTMENTS v. CASWELL.

Cameron, J.A.

CAMERON, J.A.:—This action is brought on a promissory note dated at Neepawa, Man., May 31, 1913, made by the defendant in favour of the plaintiff for $900, payable 6 months after date with interest, at the Bank of B.N.A., Edmonton, Alberta. The defence sets up that the plaintiff company is an "extra provincial" corporation within ch. 35, R.S.M., and thereby required to take out a license before doing business in Manitoba. It is alleged no such license was taken out and that this action is therefore not maintainable. It is further alleged that the plaintiff company is not incorporated in the Province of Alberta.

The action was commenced March 7, 1914. The trial took place September 2, 1914. A certificate from the Deputy Provincial Secretary, dated September 21, 1914, was filed at the trial stating that the plaintiff company had received a license under the Companies Act, January 9, 1914. So that the company was licensed before action, but some months after the making of the note.

At the trial, counsel for the defendant asked for a dismissal of the action on the ground that the plaintiff company having no license at the time of the taking of the note, was unable to maintain this action. This was granted and the action dismissed, the right to bring it again being reserved.

[Secs. 118 and 122 of ch. 35, R.S.M. quoted.]

The question whether the taking by the plaintiff company of the promissory note in question in the circumstances set forth amounts to carrying on any of its business is one that naturally arises. My own impression would be that the mere taking of the promissory note by the company is not carrying on its business or part of its business. There is sound authority for this view in *Securities Dev. Co. of New York* v. *Brethour*, 3 O.W.N. 250, a decision by a Divisional Court composed of Meredith, C.J.C.P., Teetzel, and Middleton, JJ. There the company, incorporated in New York, brought action to recover on agreements, in form like promissory notes, made by the defendant residing at Ottawa. The lots were in New York State. The circumstances were very similar to those in the case here before us. It was held that the dealings in question were not "carrying on business" within the Ontario Act. As the word-

ing of the Ontario Act and our own is identical on this point, this judgment appeals to me as decisive of this case.

As to the other point raised that a contract, made by an unlicensed company, is illegal and void, there is no doubt some authority to be found for that in the cases arising under the wording of the British Columbia statute. See *Northwestern Construction Co.* v. *Young*, 13 B.C.R. 297.

The British Columbia statutes, however, did not contain the proviso in sec. 122. The far-reaching nature of this saving clause is explained in *Semi-Ready, Ltd.* v. *Tew*, 19 O.L.R. 227, by Mr. Justice Riddell, at 235, where a similar clause in the Ontario Act was given effect to. "All difficulty," says Riddell, J., "as to the want of provincial license is removed by the production of such license, obtained since the argument of the appeal. See *per* Street, J., in *Bessemer Gas Engine Co.* v. *Mills*, 8 O.L.R. 647, at 649, ad fin; *per* Britton, J., at p. 650, ad fin. The action may now be maintained."

Mr. Armstrong sought to narrow the construction to be placed on the proviso to section 122. But a perusal of the whole section convinces me, on the contrary, that we are warranted in giving the proviso a liberal construction.

I would allow the appeal. I would not care to deprive the defendant of his right to a trial of the real issues. But, in the circumstances, to secure the right to a new trial the defendant must pay the costs of the trial already had and of this appeal within thirty days after taxation of the same. Otherwise judgment will be entered for the plaintiff company for the amount claimed and costs.

HAGGART, J.A.:—The question here is the interpretation that is to be given to secs. 118 and 122, ch. 35, R.S.M., the Companies Act, which regulates the doing of business within the Province of extra-provincial corporations. In this case the sale was made before the license was issued but the action was not commenced until after the company obtained its license. The trial Judge dismissed the action, and this is an appeal from that judgment. Haggart, J.A.

With all due deference, I differ from the learned trial Judge. I think that under the provisions of the Companies Act contracts entered into by foreign corporations not registered under

MAN.

C. A.

CONSOLIDATED INVESTMENTS v. CASWELL.

Haggart, J.A.

the provisions of the Act are not void, but the right of action is suspended until the company becomes registered. If there were any doubt at all as to the interpretation to be given to these two sections, I think it is removed by the proviso to sec. 122, which is as follows: "Provided, however, that upon the granting or restoration of the license or the removal of any suspension thereof, such action, suit, or other proceeding may, be maintained as if such license had been granted or restored or such suspension had been removed before the institution thereof."

The object of this statute was to control these foreign companies and raise a revenue. It did not make void all the contracts or engagements entered into by them. The right of action is only suspended until the license is issued.

A similar law in Ontario was considered in *Bessemer Gas Engine Co.* v. *Mills*, 8 O.L.R. 647, and *Semi-Ready* v. *Tew*, 19 O.L.R. 227.

It was contended that this one sale or sole transaction was not a carrying on of business within the meaning of the Act; but, for the reasons I have given, it is not necessary to consider that question.

I would allow the plaintiff's appeal.

Appeal allowed.

SASK.

S. C.

WHITE v. DUNNING.

Saskatchewan Supreme Court, Haultain, C.J. January 27, 1915.

1. ARREST (§ I A—2)—CRIMINAL OFFENCE—WITNESSES ON APPLICATION FOR WARRANT—CR. CODE, SEC. 655.

Sec. 655 of the Crim. Code as amended 1909 does not make it essential that witnesses should be produced on an application to a justice for a warrant of arrest, but requires that if any witnesses are produced their evidence must be given upon oath and taken down in writing by the justice.

[To same effect see *Ex p. Archambault*, 16 Can. Cr. Cas. 433, *R.* v. *Mitchell*, 19 Can. Cr. Cas. 113.]

2. INDICTMENT, INFORMATION AND COMPLAINT (§ I—2)—FORM OF INFORMATION BEFORE JUSTICE—STATEMENT OF BELIEF.

If the reasonable or probable grounds for believing that an offence has been committed are anything less than the actual knowledge of an eye-witness the written and sworn information under Cr. Code, 654 should be worded accordingly and the informant not allowed to take a positive oath that the offence was committed.

ACTION for false arrest brought against the prosecutor and the magistrate.

J. F. Frame, K.C., for the plaintiff.

P. E. MacKenzie, K.C., for the defendants.

HAULTAIN, C.J.:—This case so far as it concerns the defendant Brown turns altogether, in my opinion, on the construction of section 655 of the Criminal Code as amended by the Criminal Code Amendment Act 1909, (8-9 Edward VII. ch. 9.).

The facts are as follows: The plaintiff's son, a boy about four years old had been assaulted by a young boy, the son of the defendant Dunning. The plaintiff followed the Dunning boy and caught him and assaulted him somewhat severely by slapping and kicking. The defendant Dunning was informed by some unknown person over the telephone and in the course of his enquiry was informed by one Alderson, an alleged eye-witness of the assault, that the assault was committed by a Mrs. Annie White who lived in a house near by. The boy also told him that he had been beaten by a woman called White.

Dunning then took the boy to the house of the defendant Brown who is a justice of the peace and police magistrate for the city of Saskatoon and laid an information for common assault against "Mrs. Annie White." According to the evidence of both defendants, Dunning explained the circumstances to Brown, told him that he had not seen the assault himself but that he was informed that it was committed by a woman called Mrs. Annie White. The defendant Brown says that Dunning did not ask for the issue of a warrant but that he issued the warrant himself, thinking it to be his duty, particularly owing to the age of the child and the nature of the injury.

A warrant was issued and given to Dunning who handed it to Sergeant Devereux of the Saskatoon police, for execution. The plaintiff was arrested on this warrant and on being charged the next morning before the defendant Brown, as police magistrate, pleaded guilty to the charge of common assault and was fined $10.00 and costs and bound over to keep the peace for twelve months.

It is contended on behalf of the plaintiff "that the warrant

SASK.
S. C.
WHITE
v.
DUNNING.
Haultain, C.J.

of arrest was illegal and void because the justice of the peace did not hear and consider any allegations of any of the complainant's witnesses or of the complainant."

Section 655 as amended does not require witnesses to be produced, but only provides that if any witnesses are produced their evidence must be given upon oath and taken down in writing. The evidence shews that the justice of the peace did hear the allegations of the complainant Dunning and saw the boy who had been assaulted, took into consideration his [illegible] and the nature of the injuries inflicted, and then considered [illegible] to be his duty to issue a warrant. In issuing the warrant under these circumstances he was, in my opinion, exercising the discretion given to him by the section above mentioned, and I do not think that the facts of the case warrant a finding that that discretion was not properly exercised.

The mere fact that in my opinion a summons might have been or would have been sufficient in this case would not be a ground for interference. The facts that would move one man in one direction might quite reasonably move another in another direction. So long as there are some facts upon which the action in question might not unreasonably be taken the discretion exercised should not be questioned.

I should like to make some comment on the form of the information taken in this case. Both defendants testify that at the time the information was taken it was distinctly stated and understood that Dunning had no personal knowledge of the circumstances. Yet he takes and is allowed to take a positive oath that the offence was committed, and Mr. Brown, the police magistrate made the somewhat startling statement that he would always take an information in that form from a "reputable man" although he knew that the informant could only swear to information and belief. This in my opinion is a most reprehensible practice and should not be continued. Section 654 of the Criminal Code provides that "any one who upon reasonable or probable grounds believes that any person has committed an indictable offence may make a complaint or lay an information in writing under oath." If the reasonable or probable grounds for believing that an offence has been committed are anything

less than the actual knowledge of an eye-witness the information should be worded accordingly. At least the same care should be taken in this matter as is taken every day in the preparation of affidavits in civil actions.

In view of the foregoing it will not be necessary for me to consider a number of other questions which have been raised by counsel on both sides in this case.

The action against both defendants is dismissed with costs.

Even if I found against the defendant Brown on the point which has been discussed I should still hold that there was no action against the defendant Dunning. He was not responsible for the issue or execution of a warrant which on the face of it was issued by a justice of the peace having full jurisdiction in the matter.

Action dismissed.

BOLAND v. GRAND TRUNK RY. CO.

Board of Railway Commissioners. January 18, 1915.

1. RAILWAYS (§ II A—14)—SPURS—CONSTRUCTION—RIGHTS-OF-WAY—OWNERSHIP—PUBLIC INTEREST—JURISDICTION—RAILWAY ACT, SEC. 222.

Spur lines constructed under the provisions of sec. 222 do not *ipso facto* become part of the railway of the company from whose line they are built under the provisions of an agreement providing that the railway company furnish the ties, rails and fastenings, which remain their property, and the owner provides the right-of-way. Such a siding cannot be extended to the land of another owner under an order of the Board, but the Board may, in the public interest, authorize the expropriation of the right-of-way upon which the siding is built and its extension to the lands of an adjoining owner requiring railway accommodation.

[*Blackwoods and Manitoba Brewing and Malting Co. v. Canadian Northern Ry. Co. and City of Winnipeg*, 44 S.C.R. 92, 12 Can. Ry. Cas. 45; *Clover Bar Coal Co. v. Humberstone, Grand Trunk Pacific Ry. and Clover Bay Sand & Gravel Cos.*, 45 S.C.R. 346, 13 Can. Ry. Cas. 162, distinguished.]

Statement

APPLICATION to direct the respondent to extend a spur into certain property rented for factory purposes.

A. C. Macdonell, K.C., for the applicant.

W. C. Chisholm, K.C., for the respondent.

M. K. Cowan, K.C., for the Fairbanks-Morse Canadian Co.

The Chief Commissioner

THE CHIEF COMMISSIONER:—This application was heard by the Assistant Chief Commissioner and Commissioner McLean at a sitting of the Board held in Toronto, July 3, 1914.

CAN.

Ry. Com.

BOLAND v. GRAND TRUNK R. CO.

The Chief Commissioner.

My brother Commissioners have asked me to consider the issues raised.

So far as the facts are concerned, the Assistant Chief Commissioner has made an inspection of the property. He has found that the Grand Trunk Railway line with which the siding connects is on the east side of the Fairbanks-Morse property; that the property of Mr. Boland, the applicant, is on the west side of the Fairbanks-Morse property; and that there is no other way of affording the Boland property railway facilities except by extending the existing Fairbanks-Morse siding.

As a result of his inspection he further found that, physically, it was quite feasible to build the siding; and that the Boland property is in an industrial section of Toronto, but is handicapped by the lack of railway facilities, which would be necessary if the applicant's present intention of establishing a coal and wood yard on his property is to be carried out.

I entirely adopt these conclusions arrived at by the Assistant Chief Commissioner, and consider only the question as to whether or not, under the circumstances of this case, the Board should grant Mr. Boland that facility which, under ordinary circumstances, he would be entitled to.

The Fairbanks-Morse siding, which it is now sought to have extended, was authorized by Order of the Board No. 10062. This Order was made on the application of the Grand Trunk Railway Company and the consent of the Fairbanks-Morse Company, as evidenced by an agreement with the railway company dated December 31, 1909. The Order authorized the construction of the siding subject to the terms and conditions contained in the agreement.

The siding constructed is about 1,600 feet in length, 155 feet of which is constructed on the right-of-way of the Grand Trunk and some 1,450 feet on what was at that time at any rate beyond all question the land of the Fairbanks-Morse Company. The siding branches out into three different tracks on the premises of the Fairbanks-Morse Company. It is proposed that the siding now applied for should be connected with the most westerly track at a point some 180 feet from its northerly extension. This westerly track lies 19 or 20 feet east of the easterly boundary line of the Boland property. It is physically perfectly possible

to make the connection; but, in order to do so on the necessary curve, the new construction, commencing at the point indicated, continues on the land of the Fairbanks-Morse Company for a distance of some 75 feet.

The Fairbanks-Morse Company states that the siding belongs to it, and that the Board is without jurisdiction to order any extension of the siding or connection with it; and Mr. Cowan, who appeared for the Fairbanks-Morse Company, relies on the cases of *Blackwoods* v. *Canadian Northern Railway Company*, 44 S.C.R. 92, and *Clover Bar Coal Company* v. *Humberstone*, 45 S.C.R. 346.

These cases are distinguished by Mr. Macdonell, counsel for the applicant, on the ground that the decisions in both these cases dealt with sidings unauthorized by the Board and which did not form part of the railway; while the siding in question, being authorized by the appropriate Order, under sec. 222, became part of the railway.

Counsel further argues that that part of the judgment of Duff, J., in the *Blackwoods* case, where he deals with the question as to whether or not the presumption arose that the requirements of sec. 222 had been observed, proceeding as the learned Judge does on the assumption that the section had not been observed, that the judgment of the Court would have been to the contrary if an Order under the section had been made.

It is necessary that reference should be made to the agreement under which the siding was constructed.

In the agreement the railway is referred to as the company and the Fairbanks-Morse Company as the contractor. Paragraph 3 of the agreement is as follows:—

"The company will provide the rails, switches, frogs, fastenings and signals and all other iron or steel work required for the construction of the said siding, all of which shall remain the property of the company."

Paragraph 5, after providing for a nominal rental of $1 per year on the value of the rails, switches, frogs, etc., to be paid by the contractor, proceeds to deal with this rental as follows:—

"and as an acknowledgment of the company's ownership and control of the said siding, which is hereby understood that the company furnish for the accommodation of the business of the contractor."

CAN.

Ry. Com.

BOLAND v. GRAND TRUNK R. CO.

The Chief Commissioner.

The agreement also provides that the company is to supply the necessary signals, light them, and maintain and repair the siding, while all switches connecting the siding are to be under the sole control of the employees of the company.

The company also reserves the right to alter the position of the siding, if necessary, for its purposes, *i.e.*, the purposes of the railway.

Paragraph 16, dealing with the right of way, is as follows:—

"The contractor will secure to the company the right-of-way over the lands on which any portion of the said siding may be constructed outside of the lands or property of the company, and will save the company harmless from all claims for compensation by the owners of the said lands, and will pay, and hold the company harmless from all taxes of whatever kinds or nature (including those payable in respect of drainage or for local improvements) which shall be assessed or levied by any authority, or for any purpose upon the lands used and occupied by and for the said right-of-way."

The agreement also provides that the contractor is to protect the railway from cattle or other animals escaping thereupon from such portion of the siding as may be outside the railway lands.

The term of the agreement is 5 years, and the agreement is subject to cancellation at any time on three months' notice by the company.

On the expiration of the agreement, paragraph 19 provides that the company shall have the right, without previous notice, to take up all the iron and steel work in the siding belonging to the company, and that the right shall continue until the expiration of three months' notice from the contractor to the company directing the company to take up and remove the rails and other material.

The agreement is on a printed form, which contained paragraphs allowing the company to use the siding as a common carrier without any charge being made by the contractor; also allowing it to receive and deliver freight upon the siding for persons other than the contractor, if that can be done without interfering with the proper handling of the business of the contractor and subject to a payment per car therefor, and a further provision under which the siding may be connected with or crossed

by other sidings or used as an approach to or a continuation of any other siding. All these provisions are struck out.

As a result of the agreement then the siding is not a permanent construction, but is constructed and operated for the business of the "contractor" only, and the necessary right-of-way remains the property of the contractor. As the Order relied on by the applicant as making the siding part of the railway on its face states that it is made "subject to the terms and conditions set forth in said agreement," I am at a loss to see, apart from all other considerations, how such a construction can be given to it. Apart from the Order, the construction of that part of the siding on the lands of the contractor could have been made without approval by the Board.

It is said that any construction made under sec. 222 must be part of the railway. I have no doubt that the branch line sections do contemplate such branch lines being constructed as railway property and becoming part of the general railway undertaking. Section 222 contemplates the work being done by the company on a right-of-way which the company acquires in the same manner as the company's main line right-of-way is acquired; and the other section dealing with the construction of a somewhat different branch line (sec. 226)—a construction that is forced on the railway company—specially provides that, after the railway company has rebated the whole cost to the industry which has supplied the money for the building of the line, including the right-of-way, the branch becomes the absolute property of the railway company.

I am of the opinion that construction made under an Order issued under the provisions of sec. 222 is not *ipso facto* railway property. Whatever the effect of such Order might be as against the railway company, it cannot in any way affect the title of others, and transfer the right-of-way on which the siding may be built from them to the railway. While it well may be that the section contemplates the acquisition of the right-of-way by the railway company, it can only contemplate this being done by agreement with the landowner or after payment of compensation fixed under the appropriate sections of the Act. Nothing of the sort has happened here.

To treat the siding as railway property and grant the application would work an unwarranted interference with the noe-

CAN.

Ry. Com.

BOLAND v. GRAND TRUNK R. CO.

The Chief Commissioner.

tractual rights of the Fairbanks-Morse Company, and take its property (*i.e.*, the right-of-way) without compensation; a result, I am confident, no enabling Order under sec. 222 was ever contemplated to work.

Apart from the effect of an Order under this section, the agreement is not as much in case of the Board's jurisdiction as was the agreement in the *Clover Bar* case, under which agreement the railway company had the right to use the siding for the purpose of affording not only shipping facilities for itself, but for other persons as well, with the express right, if necessary, to extend the siding for such an object; while in this case the similar provisions appearing in the agreement are deliberately struck out.

Under the circumstances of the case and in view of the facts found by the Assistant Chief Commissioner on his inspection, I am, nevertheless, of the view that an enabling Order should go authorizing the Grand Trunk Railway Company to expropriate the right-of-way through the Fairbanks-Morse Company's property and to construct the siding which is asked.

While, on the one hand, no injury should be worked against merchants already having siding accommodation, on the other hand public interest demands that, in cases where sidings can be extended without injury, the interests of others requiring railway accommodation should not be disregarded.

Here the agreement has lapsed. The Fairbanks-Morse Company has no title in the superstructure, which may at any time be removed. The cost to the Grand Trunk of the expropriation of the right-of-way should be covered in a proper charge made by the company in view of the expense to which the railway company is put, and divided between those using the siding on a *pro rata* basis.

It is to be hoped that, in view of the circumstances, no Order authorizing the expropriation need be issued, but that an adjustment will be made between the parties. There is no doubt that arrangements can be made under which the Boland property can be served without injury to the interests of the Fairbanks-Morse Company. It would occur to me that a reasonable solution of the whole question would be for the applicant to pay the Fairbanks-Morse Company for the land required for the extension of the siding, and pay that company a rate per car for the use

of the siding already constructed. If an arrangement is consummated and no expropriation of the siding, as a whole, had, it should also be made on a basis which will recognize the Fairbanks-Morse Company as having the first, and, therefore, a prior —although not exclusive—right, with the result that the siding would be so operated as to give the business of that company precedence. Of course, if expropriation is ultimately adopted, the rights of all industries which may have to use the siding, or any extension of it in the future, would be common.

The Chief Commissioner.

November 10, 1914. THE ASSISTANT CHIEF COMMISSIONER:— The Fairbanks-Morse Canadian Company has a Grand Trunk Railway spur into its property on the south side of Bloor street, Toronto. This spur was authorized by an Order of the Board, No. 10062, dated April 5, 1910. The Order was issued on the application of the Grand Trunk Railway Company, under sec. 222 of the Railway Act. It was made subject to the terms and conditions of an agreement made between the railway company and the Fairbanks-Morse Company, dated December 31, 1909. Paragraph 5 of the agreement is as follows:—

Assist. Chief Commissioner.

"The contractor (Fairbanks Company) shall pay to the (railway) company, beginning on the date when the charge therefor is first made on the books of the company after the completion of the said siding, one dollar per annum on the value of the rails, switches, frogs, fastenings and signals and other iron and steel material of the company in the said siding, and as an acknowledgment of the company's ownership and control of the said siding, which is hereby understood that the company furnishes for the accommodation of the business of the contractor."

The Grand Trunk Railway line with which the spur connects is on the east side of the Fairbanks property. The property of Boland, the applicant, is on the west side of the Fairbanks property. Boland, on behalf of Millar H. Findlay, applies to the Board for a spur off the Fairbanks' spur into his property. There is no other way of supplying the Boland property with a railway spur than to have it run off of the Fairbanks-Morse spur.

Since the hearing, I have visited the Fairbanks-Morse property and examined the location of the spur on the ground. Physically it is quite feasible to build the spur applied for. The Boland property is in an industrial section of Toronto, but is, undoubtedly

CAN.

Ry. Com.

BOLAND v. GRAND TRUNK R. CO.

Assist. Chief Commissioner.

handicapped by the lack of railway facilities. The applicant is desirous of establishing a coal and wood yard on his property.

The railway company do not offer any serious opposition to this application, but the Fairbanks-Morse Company strongly object. I am satisfied of the necessity of the spur applied for in the interests of trade. I am also satisfied that the damage or inconvenience that the Fairbanks Company might suffer if this application is granted could be fairly compensated by the payment of an annual sum during the time that the Boland spur would be subject to be used. The Fairbanks-Morse Company, in opposing the application, contends that its spur is its own private property, and that the Board has not jurisdiction to grant this application. I think the Board has jurisdiction to order the construction of the spur applied for. The Fairbanks-Morse spur is not the private property of the Fairbanks Company, but is part of the Grand Trunk Railway. Being authorized by the Board under sec. 222 of the Railway Act, it was constructed as part of the railway and is subject to the jurisdiction of this Board, and is included in the word "railway" in sec. 226 of the Act. It was acknowledged to be part of the Grand Trunk Railway in paragraph 5 of the agreement between the Fairbanks-Morse Company and the railway company, already quoted. In *Blackwoods* v. *C.N.R.*, 44 Sup. Ct., p. 92, it was decided that a private spur constructed under an agreement, but not authorized by the Board, could not be added to to provide railway facilities for another industry without the spur being expropriated, or the owner thereof compensated, as the Board had no jurisdiction to make such an Order. The present case is not the same as the *Blackwoods* case. In that case it was the Blackwoods private spur that the spur was to be built off. In the present case, it is part of the Grand Trunk Railway, built to serve the Fairbanks-Morse Company, that the applicant desires to use.

Another case which should be considered, but which, like the *Blackwoods* case, does not apply to the present case, is the *Clover Bar Coal Company* v. *Humberstone and the G.T.P. Ry.*, 45 Sup. Ct., p. 346. The spur in that case, like the Blackwoods spur, was private property and not part of the railway, the spur never having been authorised by the Board. There was a clause in the agreement between the industry and the railway company which gave the railway company the right to use the spur for the pur-

pose of affording shipping facilities for themselves and persons other than the owner of the land upon which the spur was built. The Court decided that the Board had no jurisdiction to make an Order extending the spur to serve another industry. Anglin, J., who delivered the judgment of a majority of the Court, said (pp. 352-3):—

"As pointed out in the case of *Blackwoods Limited* v. *the Canadian Northern Railway Company*—more particularly in the judgment of my brother Duff, at pages 96 *et seq.*—the appellants' spur, constructed solely under the authority of their agreement with the Grand Trunk Pacific Railway Company, must be treated as a private siding or branch, not in any sense part of the Grand Trunk Pacific Railway. Its connection with the railway, because lawful without authorization by the Board of Railway Commissioners, raises no presumption that such authorization was obtained. As a private siding the Board, in my opinion, had not jurisdiction to order its extension, unless it first provided in a proper and legal manner for its becoming part of the Grand Trunk Pacific Railway. This it might have done by directing the expropriation by the railway company of the land on which the siding is constructed."

In the present case, as the spur is already part of the railway, it is not necessary that any expropriation proceedings be taken; but there should be compensation to the Fairbanks-Morse Company for the use of the railway through its property.

In order to inconvenience the Fairbanks-Morse Company as little as possible, the railway through its property should not be used to get to or from the Boland spur between the hours of 7 a.m. and 6 p.m.

An Order may go accordingly.

Com. McLean.

January 14, 1915. MR. COMMISSIONER MCLEAN:—The fundamental question involved in the present application is whether the spur is part of the railway. Order 10062 went subject to the terms and conditions of the agreement between the company, that is, the railway, and the contractor, that is, the Fairbanks-Morse Company. Section 5 of the agreement provides that "the contractor shall pay . . . $1 per annum on the value of the rails, switches, frogs, fastenings and signals and other iron and steel materials of the company in the said siding, and as an acknow-

CAN.

Ry. Com.

BOLAND v. GRAND TRUNK R. Co.

Com. McLean.

ledgment of the company's ownership and control of the said siding, which is hereby understood that the company furnish for the accommodation of the business of the contractor." Order 10062 went under sec. 222 of the Railway Act; but, in view of the fact that it went, as above indicated, subject to the terms and conditions set forth in the agreement, it is necessary to see just what the scope of the agreement was.

By sec. 19 of the agreement, it is set out that, on the termination of the agreement, either by lapse of time or otherwise, or if there is any default in any of the covenants or obligations imposed upon the contractor, the railway shall have the right, without previous notice to the contractor, to take up all the "rails, switches, frogs, fastenings and signals, and iron and steel works and all other materials and property belonging to the company in the said siding." The railway did not, under the agreement obtain any right-of-way. The Fairbanks-Morse Company, under the agreement, was to provide the necessary right-of-way. The effect of this is that the property in the physical materials necessary for the construction of the siding remained in the railway. The title to the right-of-way necessary for the siding outside of the company's lands remained in the Fairbanks-Morse Company.

In the ordinary printed siding agreement form used by the railway, sec. 8 provided that the railway was to have the right (1) to use the siding as a common carrier, without charge being made by the contractor; (2) to receive and deliver freight upon the siding for persons other than the contractor, when this can be done without interfering with the proper handling of the business of the contractor, and subject to a payment per car therefor; (3) to connect the siding or cross the same with other sidings and use said siding as an approach to or continuation of any other siding. In the agreement between the railway and the Fairbanks-Morse Company, this section was stricken out.

While there is a reference in sec. 5 to "an acknowledgment of the company's ownership and control of the said siding," I cannot read this as incorporating the siding into the railway system, thereby making it part of the railway. The agreement is for a limited time. If the arrangement is continued thereafter, it would depend on another agreement. That is to say, assuming the force of the agreement is to incorporate the siding

into the railway system, its continuance as a part thereof assumes as a condition precedent the continuing assent of the contractor. Further, under sec. 18 of the agreement, the company may terminate the agreement on three months' notice. It may also, under sec. 19, be terminated by it in case of default on the part of the contractor. On the termination of the agreement and the removal of the rails and materials, what ownership and control remains to the railway? While the siding is in operation under the agreement, it has an easement over the lands of the Fairbanks-Morse Company; this easement terminates when the agreement terminates.

The acknowledgment in sec. 5 as to "ownership and control" must be read along with the words "which is hereby understood that the company furnish for the accommodation of the business of the contractor." If the portion of track in question is part of the railway system, then it cannot be limited to the case of a particular individual. The wording of sec. 5 must be read in the light of the fact that sec. 8 is stricken out. It is evident that it was intended to preclude the siding being used for the business of any person other than the contractor. The words, in sec. 5, "which is hereby understood that the company furnish for the accommodation of the business of the contractor," are, therefore, to be read not as words of description, but of limitation as to the use. That is to say, the company bound itself that this siding should be treated exclusively as a private siding. I am, therefore, unable to see that, on what is before us, the present application is distinguishable from the position laid down by the Supreme Court in its judgment in the *Clover Bar Coal Company's* case.

REX v. STUBBS.

Alberta Supreme Court, Stuart, J. March 26, 1915.

1. GAMING (§ I—6)—PREMIUM SLOT MACHINES—GUM-VENDING SUBORDINATE TO GAMING FEATURE WITH DISCS.

Where there is evidence justifying the magistrate in finding that a slot machine used for vending gum is a mere subterfuge and a pretence and that the real object of the owners of the machine was to get the customer to continue to play the machine in the hope of winning certain discs given gratis with the gum at irregular intervals and which would be taken in lieu of cash for goods at the tobacco store where the slot machine was operated and that the disc feature of the machine was by reason of the possibility of a comparatively large return from the play the incentive for placing money in the slot,

ALTA.

S. C.

REX v. STUBBS.

a conviction under Code sec. 228, may be supported for keeping a common gaming house in maintaining for gain the place to which persons resorted for the purpose of playing at a game of chance.

[But see *contra*, *R.* v. *Langlois*, 23 Can. Cr. Cas. 43, Que.]

Statement

MOTION to quash a conviction made by Mr. Sanders, Police Magistrate of the city of Calgary, whereby he convicted the accused for having on the 19th January, 1915, at Calgary unlawfully kept and maintained a disorderly house, to wit, a common gaming house by keeping and maintaining for gain, certain premises to which persons resorted for the purpose of playing at a game of chance contrary to section 228 of the Code. The accused was fined $20.00 and costs.

Frank Eaton, for defendant.

J. Shaw, for the magistrate.

F. W. Griffiths, for the Attorney-General.

Stuart, J.

STUART, J.:—This is a slot machine case. Briefly stated the facts are these. American five cent pieces commonly called "nickels" are required to be used. A person who desires to use the machine usually changes a twenty-five cent piece at the cigar store where the machine is kept for five American nickels. He does not need to do this, of course, but may come with one or many nickels in his pocket. When he approaches the machine he is informed by a device or notice prominently appearing thereon what he will obtain if he puts one of the nickels in the slot and pulls the necessary levers. If this notice indicates "gum" then after he has operated the machine a stick of gum will be ejected from the bottom of the machine at a rather obscure spot. But as a result of this operation the notice or indicator will again tell him what he will get if he inserts another nickel and again operates the machine. This may be "gum" again and if he repeats the operation it may still shew that only "gum" will be obtained on the third operation. Ultimately, however, a moment will come when the machine will inform him that if he puts in one more nickel and operates the machine once more he will get two, or four, or eight, or sixteen metal discs. If he goes on and puts in a nickel and operates the machine he gets what he has been told by the machine he will get. If this is eight metal discs these are ejected into a receptacle prominently placed. These discs are taken at the cigar store at the

value of five cents a piece, but only in exchange for tobacco or cigars. In all cases, however, a piece of gum is also ejected at the bottom. If the operator does not take the gum before a second operation this second operation reclaims the stick of gum, that is, withdraws it into the machine, so that no gum accumulates at the bottom for the operator.

The situation, therefore, is that for a nickel a man gets what the machine tells him he will get and also gets the knowledge of what he can get for another nickel. The whole contention of the counsel for the accused rested upon the absolute separation of one operation from another. He contended that always before operating the machine a man knows exactly what he is going to get for his nickel.

This is no doubt perfectly true. If the Court trying the case is unable to look at anything but each operation individually and quite apart from any preceding or succeeding operation, there plainly is no possible ground for calling the machine a gaming device. But if by any means it is possible to look at the series of operations as one continued operation, then other considerations may arise. If as a mater of fact on the day on which the offence is alleged to have been committed any person did operate the machine continuously, that is, did in fact put in a nickel, or a check (because checks or discs once obtained from the machine may be used instead of nickels), and pull the levers a number of times in succession and did in fact consider himself as performing one continued operation although it may have consisted of a succession of separate acts, then it seems to me that the Court would be justified in taking a different view of the situation. It is argued that the Court cannot look into a man's mind to see what his purpose and intent was when he deposited one nickel in the slot; that is, that the Court cannot assume that he had any other purpose than to obtain what the machine told him he would obtain if he put the nickel in and pulled the levers. But in my opinion this is erroneous. The Courts necessarily continuously enquire into the purpose and intent of a man in order to give some quality or characteristic to the act, which is done with such purpose or intent. In my opinion it was purely a question of fact for the magistrate to

ALTA.

S. C.

REX v. STUBBS.

Stuart, J.

decide, of course upon reasonable evidence, whether any person or persons did, on the day in question, put a nickel in and operate the machine, not merely in order to get what the machine said he or they would get but also in order to discover whether or not they would for one nickel more get sixteen discs (worth in trade a nickel each) or eight discs, or four, or two, or merely gum again.

In all such cases, except the last, he would clearly and certainly get fifteen or seven, or three, or one disc, without any additional payment because the one nickel he would have to pay would merely reduce to that extent and no more the number of discs, worth, in the cigar store and in payment for cigars, a nickel each, which he would get for no further payment, for nothing more than merely operating the machine to get them. I think there was evidence before the magistrate from which he could reasonably infer that certain persons did in fact on the day in question proceed to operate the machine in a continuous series of operations simply and solely for such a purpose. I think there was evidence from which he could reasonably infer that the operators cared nothing at all for the gum and treated gum as a negligible thing, and that it was expected and intended by the owners of the machine that they would so act and so treat the matter of the gum. There was evidence from which he could reasonably infer that the gum was a mere subterfuge and a pretence, and that the real object of the owners of the machine was to get persons to operate it in the manner which I have described.

There is just one point not referred to except perhaps indirectly upon the argument which perhaps needs consideration. The chief evidence for the prosecution was evidently two detectives who went to the place in question, not as an ordinary player might, but purely to obtain evidence as to how the machine operated. Their real intention was not themselves to gamble, but to discover by experience and for the purpose of giving evidence exactly how the machine operated. What they did looks very like a mere inspection of the machine by officers of the law and if there had been nothing else before the magistrate than evidence of what they alone did it seems to me that

it might with some reason have been argued that their evidence could be of no use in supporting a charge because the very ground upon which I am basing my decision is that there was evidence from which the magistrate could reasonably infer an intention on the part of the players to play the machine as a continuous operation for the sake of the chance of winning while these detectives did not do it for that purpose or with that intention at all, but merely to secure evidence for the Court as to the nature of the machine. But even if there is anything in this point there was also other evidence shewing that other people did exactly the same thing as the officers did and it seems to me that was sufficient.

This being so, I think I must assume that the magistrate did make the inferences of fact, from the evidence to which I have referred, I think also there was evidence from which the magistrate might infer, as he evidently did, that the place was kept for gain to be derived from the operation of the machine in the way I have indicated. I also think there was evidence from which the magistrate might infer, as he evidently did, that the operation of the machine was a game of pure chance. No skill was required at all; and what the operator would get from his series of operations depended solely, as indeed it was admitted, upon a mere chance. This brings the case within section 226(*a*) of the Code which defines a "common gaming house."

One word perhaps I may add. It was argued that a man is never obliged to go on but can always stop when he pleases. But the magistrate was quite entitled to infer that no man would stop, that is, refrain from paying his nickel when he saw that by doing so he could get, for nothing, seventy-five cents worth of dises acceptable as cash at five cents a piece in payment for cigars, or else thirty-five cents in dises, or fifteen cents or five cents, as I have above indicated. If he saw that he would only get a piece of gum for another nickel no doubt he might stop but that would be because he felt he had lost his chance and did not want to take another one.

I think the application must be dismissed with costs, and the conviction affirmed.

Conviction affirmed.

CAN.

Ry. Com.

CITY OF CALGARY v. CANADIAN NORTHERN RY. CO.

Board of Railway Commissioners. January 12, 1915.

1 RAILWAYS (§ II B—18)—HIGHWAY CROSSED BY RAILWAY—AGREEMENT—ABUTTING LAND OWNERS—DAMAGES.

When an order has been made authorizing the crossing of certain streets by a railway, upon condition that the railway company should enter into an agreement to indemnify the city against all claims for damages by abutting land owners, the Board will not, after the execution of such agreement, order the railway company to carry out its terms.

Statement

APPLICATION to direct the respondent to carry out the terms of an agreement respecting street crossings in the applicant city.

The application was heard at Calgary, November 26, 1914.

C. J. Ford, for the applicant.

A. L. Smith, for the respondent.

R. B. Bennett, K.C., for certain land owners.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

Assist. Chief Commissioner.

THE ASSISTANT CHIEF COMMISSIONER:—The City of Calgary asks the Board to decide whether certain land owners whose property is adjacent to certain crossings of the Canadian Northern Railway Company's tracks over highways in the city of Calgary are entitled to damages.

By Order No. 14611, dated August 18, 1911, the Board approved of the crossing of the tracks of the Canadian Northern Railway over Thistle, Pine, Spruce, Poplar, and Hungerford streets, in the city of Calgary. That Order was made subject to the terms and conditions contained in a resolution passed by the Council of the city of Calgary consenting to the crossing of the said streets. The resolution was passed on June 12, 1911. The portion of it with which we are now concerned is clause 6, which is as follows:—

"That the C.N.R. undertake and enter into an agreement with the city to pay any and all property damages and to indemnify the city therefrom."

The plan approved by the Board shews the profile of the crossing of the tracks on each of the highways above mentioned. At Spruce, Poplar and Hungerford streets the grade on the highway to the railway on each side is shewn to be five per cent. On a blue-print of the plan which we have on file the following endorsement is found:—

"Approved subject to conditions as per report, June 10, 1911, Jno. W. Mitchell, Mayor of Calgary; W. D. Spence, Clerk."

The report of June 10 is the report of the Railway Committee of the Municipal Council, and was adopted by the resolution of June 12, 1911, already mentioned.

I have examined the crossings in question, and I find that the railway crosses the highways on an enbankment, and that the grade at the track is considerably higher—say about eight or nine feet—than the original grade of the highways.

In expropriating its right-of-way over the property adjoining the highways the railway has paid consequential damages to some of the land owners for damage to their adjoining property; but there are a number of owners of property on the streets in question who may have suffered damage because of the close proximity of the railway or because of the change in the grade of the street in front of their property who have received no compensation whatever because the railway did not actually take a portion of their property. The question now before us is whether these parties should be compensated, and if so, by whom.

At the time the Board issued its Order of August 18, 1911, approving of the crossings in question, there was nothing before the Board to shew that the interests of any individual would suffer; and, as already pointed out, the city was actually consenting to the Order going.

More than a year after the consent of the city to the crossings in question was given and the Order of the Board was issued, an agreement between the city and the railway company was entered into on October 24, 1912, dealing with the entrance of the railway into the city. Clause 10 of that agreement bears on the matter before us, and is as follows:—

"The company hereby agrees to indemnify and save harmless the city from and against any and all manner of expense, costs, suits, claims and damages of any nature and kind whatsoever, arising out of the location of the company's line along the said route, or the construction of any of the works herein agreed to be constructed, or the closing of any streets herein agreed to be closed, and that it will in all proceedings to determine any damages or other matter, at the request of the city, as far as possible take upon itself the conduct of any suit or other proceedings, and indemnify the city against all costs in connection therewith, and

CAN.

Ry. Com.

CITY OF CALGARY v. CANADIAN NORTHERN R. CO.

Assist. Chief Commissioner.

pay the costs of the city's solicitor or counsel in suits or other proceedings, the conduct of which is not undertaken by the company. Provided, however, that the city shall notify the company of any claim made against the city, and that the company shall have the right to appear and be represented by counsel, and take upon itself the conduct of any such proceedings on notice to the city."

At the sittings in Calgary we were told by counsel for the railway company that no claim had been made or referred by the city to the railway company, and he submitted that if any claim was made it was a matter for the Courts of the province and not this Board to interpret the agreement in question.

At the time the crossings were approved of the Board had power, under sec. 235 of the Railway Act as amended by sec. 6 of ch. 22 of the Statutes of 1911, to require such compensation to adjacent or abutting land owners as the Board deems proper at the crossing of a railway over a highway; but I am not aware of any case similar to the present in which the Board has exercised that power. I, of course, cannot say what might have been done at the time the Order of August 18, 1911, was issued had no agreement between the city and the railway company been entered into and had the question of damage to abutting land owners been brought to our attention.

Now, after the lapse of three years since we approved of the crossings in question, and with the agreement between the railway company and the city before us, I see no justification for this Board interfering. The parties must be left to their rights, whatever they are under the agreement.

Another point which was brought before us was the lack of the railway company to provide approaches of a grade not exceeding five per cent. at the crossings affected. The standard regulations of the Board respecting highway crossings require the grade on approaches not to exceed five per cent., and the Board has no hesitation in saying that if the grade on the approaches are steeper than five per cent. that they should be made to conform with our standard requirements.

An Order may go as to the grade on approaches, but no Order is made on the question of damages.

Com. Goodeve.

MR. COMMISSIONER GOODEVE concurred.

WESTHOLME LUMBER CO. v. ST. JAMES LTD.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving and McPhillips, JJ.A. February 26, 1915.

1. CONTRACTS (§ II D—188)—CONSTRUCTION—BUILDING CONTRACT—ALTERATIONS.

The power reserved in a building contract to make alterations or additions must be reasonably exercised by the owner.

[*Dodd* v. *Churton*, [1897] 1 Q.B. 562, 66 L.J.Q.B. 477, and *McLeod* v. *Wilson*, 2 Terr. L.R. 312, referred to; and see Annotation on building contracts, 1 D.L.R. 9.]

2. CONTRACTS (§ II D—188)—CONSTRUCTION—BUILDING CONTRACT—TIME LIMIT.

Where a building contract renders certain what is intended to be the time limit, the erroneous statement of the time limit in the accompanying specifications has not the effect of altering it.

3. CONTRACTS (§ II D—188)—CONSTRUCTION—BUILDING CONTRACT—EXTRA WORK—VARIANCE.

The addition of an extra storey to a six storey building pursuant to a condition of a building contract and in respect to which addition the cost of the extra work was agreed upon and an extension of time granted by the architect, is not such a variance from the original undertaking as will operate as a waiver by the owner of his right to claim the per diem allowance for the contractor's delay in completion upon the demurrage clause in the contract.

[*Clydebank* v. *Lzquierdo y Castaneda*, [1905] A.C. 6, and *Dodd* v. *Churton*, [1897] 1 Q.B. 562, 66 L.J.Q.B. 477, referred to].

Statement

APPEAL by the plaintiff from a judgment of Clement, J.

A. H. Macneill, K.C., for appellant.

H. B. Robertson, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with IRVING, J.A.

Irving, J.A.

IRVING, J.A.:—The owner having exercised his alleged right to deduct penalties for a delay in the completion of the work, this action was brought to recover the balance due in payment for the work. The plaintiffs' main contentions are (1) that owing to the wording with reference to the time limit in the contract, being inconsistent with those used in the specifications, the condition as to penalties was void; and (2) that in any event, the addition of extras ordered by the architect destroyed the time clause so far as penalties were concerned. As I have reached the conclusion that the discrepancy is of no importance for reasons which I shall give later, I shall on the assumption that the terms in the contract as to the time clauses prevails, deal with the second point.

The plaintiffs by a contract dated January 17, 1912, ex. 1, p.

B. C.
C. A.
WESTHOLME LUMBER CO. v. ST. JAMES LTD.
Irving, J.A.

335, contracted to erect and complete for the defendants a six storey and basement re-enforced concrete hotel building. The defendants were to do the preliminary or general excavation work. The owners reserved the right to make any alterations or additions. The amount to be paid therefor, was to be stated in the orders authorizing such alterations, or additions. In the event of disagreement the amount was to be determined by arbitration. By art. 2, the work was to be done under the direction of architects whose decision as to the construction and meaning of the drawings and specifications should be final. By art. 9, the price was fixed at $74,121, subject to additions and deductions as in the contract provided, to be paid upon certificates of the architect. By art. 6, the re-enforced concrete frame and the roof were to be completed within seventy days after completion of the excavation. The date of completion of the excavation was February 23. The entire work was to be completed within 160 working days after completion of the excavation. This date the architect ultimately fixed as October 15, but it was not completed till the end of December.

Art. 7 was as follows:—

> Art. 7. Should the *contractors be delayed* in the prosecution or completion of the work by the act (this word in my opinion having regard to the owner's power to make additions and alterations would include the giving of orders for such alterations and additions) "neglect or default of the owners, of the architects, or of any other contractor employed by the owners upon the work, or by any damage caused by fire or other casualty for which the contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architects, but no such allowance shall be made unless a claim therefor is presented in writing to the architects within forty-eight hours of the occurrence of such delay.

In the general conditions of the specifications (247) provision was also made for an extension of the time limit, at the architect's discretion, in the event of a delay occurring (*a*) through a general strike of mechanics employed on the works, or (*b*) on account of a prolonged spell of inclement weather. Under art. 7 and these conditions the architect allowed 64 days'

extension for one cause or another on application by the plaintiffs.

Art. 8. The owners agree to provide all labour and material essential to the conduct of the work not included in this contract in such manner as not to delay its progress, and in the event of failure to do so, thereby causing loss to the contractors; agree that they will reimburse the contractors for such loss, and the contractors agree that if they shall delay the progress of the work so as to cause loss for which the owners shall become liable, then they shall reimburse the owners for such loss. Should the owners and contractors fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in art. 12 of this contract.

Art. 3. No alterations shall be made in the work except upon written order of the architects, the amount to be paid by the owners or allowed by the contractors by virtue of such alterations to be stated in said order. Should the owners and contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in art. 12 of this contract.

Arbitration was provided for by art. 12, but the arbitration proceedings proved abortive and the plaintiffs thereupon sued (1) for $18,138.87, the balance they claimed, made up as follows: the $74,121 and $12,304.86 for additional work performed and additional material supplied, and certain other matters, bringing their total claim up to $92,791.51, less credits $74,652.64; and (2) for damages for breach of contract. The defendants admitted that work had been done to the extent of $84,914.41, and paid into Court $8,000, being the balance due after deducting (1) the before-mentioned credits allowed by the plaintiffs, and (2) a further sum of $3,200 which they claimed to deduct as demurrage for 64 days at $50 per day *i.e.*, from October 16 to December 31.

This charge of demurrage was based on the following clauses in the specification:—

The building shall be turned over to the owners, broom clean and complete in every detail, within 160 working days *after the signing of the contract*.

The owners will pay a bonus of $50 per day for each and every day that the building is completed before the expiration of the time limit.

The contractors shall pay a demurrage of $50 per day for each and every day required to complete the building over and above the time limit.

In addition to the contract of January 17, 1912, the plaintiffs were authorized (ex. 7, p. 383) by letter dated January 29, to

B. C.

C. A.

WESTHOLME LUMBER CO. v. ST. JAMES LTD.

Irving, J.A.

complete the excavation which the owners had already commenced, and on May 31, 1912 (p. 393), the plaintiffs were authorized to proceed with the additional work and material required to make the roof of the six storey building into a new (or 7 storey) building according to specifications prepared by the architects (p. 389).

The learned Judge found that according to the architect's certificate, April 18, 1913 (p. 434), the plaintiffs were entitled to $7,907.72, and also by admission in pleadings to a further sum of $71.70, and as the total $7,979.42 was $20.58 less than the amount the defendants had paid into Court, judgment was given on that basis. He declined to allow interest on $7,979.42 from the date of completion to judgment. No appeal was taken from this refusal of interest.

The learned Judge apparently thought the word "demurrage" was to be read as and for liquidated damages, and that as there was an extension of time provided for, to be granted by the architects in the event of extra work being ordered, he allowed the deduction. He fixed the actual completion of the excavation as February 23, and of the building as December 31, and held the days claimed for demurrage were properly charged at 64 days.

The points taken before us in connection with the extra work were (1) the extras had destroyed the time limit, so far as the penalties were concerned, and (2) in any event the plaintiffs had not been allowed enough for extras and had been charged 14 days too much for demurrage, as according to the plaintiffs' case, the excavation was not finished till March 9.

Mr. Macneill contended that although this "demurrage" might be liquidated damages (see on this point *Clydebank Engineering Co.* v. *Izquierdo y Castaneda*, [1905] A.C. 6), the penalty clause must be construed strictly, for the exact contract, citing *Dodd* v. *Churton*, [1897] 1 Q.B. 562, 66 L.J.Q.B. 477, and that as the date of completion of excavation was arbitrarily fixed by the architect, before, as he contended, it had been in fact completed, the plaintiffs were relieved from the penalties for delay. That contention is not supported by the facts. The facts in connection with the basement and its completion are

these: there were three kinds of excavations to be made, (1) the preliminary or general, which was to be done by the owners; (2) sub-basement, which was an extra; and (3) the elevator pit and footings which were in the contract.

The general excavation work was committed to plaintiffs' care on January 29, 1912 (383). On February 20 they (384) undertook to do extra work (No. 2); and asked for 6 days' extension of time on the contract on that account.

The architect told them to go ahead and formally on February 22, 1912, accepted their offer and then informed them that he had granted an extension and that the time fixed for the starting of the contract would now be February 23. The general excavation was then complete (220), but this sub-basement extra work was continued for some time after February 23, and was done by them in conjunction with their other (No. 3) contract work. That this combined sub-basement extra and No. 3 contract was not completed till March 9, is true, but I think there was evidence from which the Judge could reach the conclusion that the general excavation (No. 1) was finished on February 22.

Holme v. *Guppy* (1838), 3 M. & W. 387, was a case where the owner sought to enforce the provision for penalties where a portion of the delay in the completion of the work was due to his default; but as in that case the delay was caused by the owner and there was nothing to shew they had entered into a new contract to perform the work at four and a half months ending at a later date, the parties were at large, and it was held that the contractors should forfeit nothing for the delay. The delay here not being the fault of the defendants, that case can have no application particularly in view of art. 7. The memorandum kept by the plaintiffs' foreman shews that on February 23, they "started the contract at noon to-day." Further, there was no claim made under art. 8 for any delay on the part of the owner in respect of the general excavation. With regard to the contention that the extras destroyed the provisions relating to the time limit, it must be conceded by the defendants that the extras were very heavy, including $6,800 for the additional storey ordered on May 31, 1913, p.

B. C.

C. A.

WESTHOLME LUMBER CO. v. ST. JAMES LTD.

Irving, J.A.

393. At that date, the 160 days were running. The architects thought that this extra could be made a part of the general contract, and by allowing twenty additional days for this work (as well as the additional time required to procure re-enforcing steel) hold the contractors to the condition as to demurrage. For this the architect relied on articles ii, iii, and vii.

Mr. Macneill argues that as the addition to a six storey building of a new storey was quite beyond the intention of the parties to the contract, the architect could not by extending the time prevent the order for this alteration from operating as a waiver by the owner of his right to penalties. By the order of May 31, 1912, authorizing this new work, the architect wrote that this work was to be a part of the general contract and fixed the price and extended the time for completion on that basis. The plaintiffs did not object to the work being added, but sought and obtained a variation in the specifications. I think what was written in this connection satisfied the condition in the specifications that additional cost for extra work, changes, alterations or deductions, shall be agreed on and a written agreement effected (p. 344). The cases are discussed in *Dodd* v. *Churton*, *supra*, and, in my opinion, this contract by virtue of art. 7, falls within the class referred to at p. 524 of Hudson on Building Contracts: (See also *McLeod* v. *Wilson*, 2 Terr. L.R. 312, a decision by Scott, J.).

Then assuming the principle is determined against him Mr. Macneill contends in detail, that allowance was not made for the time in obtaining the steel (p. 243). This complaint rests wholly on the evidence of the architect who says that although they said they would be delayed, no time was asked for under art. 8. It is quite possible that the changes which were made at the plaintiffs' request (exs. 27 and 28) obviated any delay on that account; at any rate no claim was made under art. 8, and I can see no ground for saying that the plaintiffs are now entitled to an allowance. As to the strike of the marble setters, the condition above set out provides for an extension of time through a general strike of the mechanics employed on the works. The strike relied on by the plaintiffs took place at

Tacoma (p. 64), and in any event the giving of an extension was a matter entirely in the discretion of the architect.

The last objection under this head is that after October 15, 1912, the date fixed for completion when the time was already running against the plaintiff for penalties, the architect gave orders for additional extra work. By the conditions in the specifications (p. 343), the owner had reserved the right to make any alterations or additions. No doubt this power ought to be reasonably exercised, but if exercised reasonably the power would be exercisable up to the last minute of the completion of the work: see the opinion of Phillmore, J., in *Sattin* v. *Poole* (1901), 2 Hudson, 314-5; and it was a matter that could be met by a further extension of time. The orders complained of are to be found in exs. 67, 68, and 69, and were given long before the other work was finished.

Taking up the second main contention that the contract was void so far as demurrage was concerned for uncertainty by reason of the inconsistency, between the contract and specifications, as to whether the 160 days for completion, was to count from the completion of the excavation (February 23) or the signing of the contract, Mr. Macneill contended that it was an ambiguity, but an ambiguity, I think, is where one expression is capable of two meanings. There is a repugnancy, as I understand it, where one clear clause contradicts another clause equally clear. In a deed where there is a repugnancy the rule is the first shall prevail, but in a will the second: *Doe d. Leicester* v. *Biggs* (1809), 2 Taunt. 109, 113, cited in Beal, Legal Interpretation, 2nd ed., p. 189.

In my view of the matter it matters not whether this is ambiguity or repugnancy, because the plaintiffs elected to regard the time of the completion of the excavation as the starting point: see p. 384, the architect's letter, pp. 86, 134, 221, and the question fought out at the trial was whether the excavation was completed on the 9th March as the plaintiffs contend, or February 23 as the defendants contend.

If the matter were to be determined on the question whether this is a repugnancy or an ambiguity, I would decide that the repugnancy rule is applicable, but I would determine it on

B. C.

C. A.

WESTHOLME LUMBER CO. v. ST. JAMES LTD.

Irving, J.A.

another ground—the 6th article of the contract fixes the time for completion with particularity; the object of the clause in the specifications is to prescribe the condition of the building when completed, that is "broom clean" and "complete in every detail." The addition of the words which create the discrepancy, *viz.*, "within 160 days after the signing of the contract," are superfluous and may be rejected. The function of the clause would be performed if the sentence ended at the word "detail." The addition of the discrepant words does not set out fully the time limit, because the time limit was not to be 160 working days, but 160 working days plus such allowances of time as should be made by the architect on the contractor's application.

The foundation of common sense upon which the maxim *falsa demonstratio non nocet* with reference to parcels rests will, I think, support my view. Here we have the contract which renders certain what is intended to be the time limit and the erroneous statement in the specifications of that time limit cannot alter it.

The plaintiffs rely on *Ex parte Vince*, [1892] 2 Q.B. 478, 61 L.J.Q.B. 836. The intention in that case of the parties could not be determined, and the agreement was unintelligible, and other cases relating to vague, indefinite and illusory contracts. Those cases have no application when the intention of the parties is clear and definitely expressed.

I would dismiss the appeal.

McPhillips, J.A.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Mr. Justice Clement in a building contract action—the hearing taking place before the learned Judge without a jury and extending over the period of five days. The evidence is at great length, yet the case may be considered and passed upon in appeal without the discussion in detail of any of the evidence—viewing it as I do—that is—that it is essentially a case to be determined upon the facts as adduced at the trial and no questions of law, in my opinion, arise to, in any way, warrant the disturbance of the findings of fact of the learned trial Judge. The action was launched for moneys due and payable by the

defendants to the plaintiffs upon a building contract and $18,-138.87 was claimed—the learned trial Judge found to be due to the plaintiffs the sum of $7,979.42—and it is from this judgment the appeal is taken by the plaintiffs—the main contentions advanced being that extras were not allowed for and that the allowances made for penalties on account of delay in completion of the building as provided in the contract were wrongly allowed and should not have been deducted from the plaintiffs' claim. The learned trial Judge did not arrive at the same conclusion—as was arrived at in *Bush* v. *Whitchaven*, 52 J.P. 392—*i.e.*, that the case was one which owing to the circumstances would not admit of the application of the conditions of the contract—but that the conditions of the contract were applicable—and I cannot see any reasonable ground—upon which to differ with the learned trial Judge. The learned counsel for the appellants in his able argument strenuously maintained that there was such ambiguity in the contract that the penalties for delays could not be allowed—that is that article 6 of the contract provided that the building was to be completed within 160 days after the completion of the excavation—which work was to be done by the owners whilst under the Specifications and General Conditions forming a part of the contract—the building was to be completed in every detail within 160 working days after the signing of the contract. In my opinion, these provisions must be looked upon as being repugnant to each other. Art. 6 is contained in the contract itself and should, in my opinion, prevails; further it is manifest that that was the real intention, the intention being plainly ascertainable from the contents of the deed—how unfair to the contractor it would be—to have the computation commence from the signing of the contract when construction could not be begun until the excavation was carried out and this work was to be done by the owners. [Reference to *Walker* v. *Giles* (1848), 6 C.B. 662; *Seaman's Case* (1611), Godb. 166; *Parkhurst* v. *Smith* (1742), Willes, 327; *Holme* v. *Guppy* (1838), 3 M. & W. 387-390; *Lodder* v. *Slowey*, 73 L.J.P.C. 82, [1904] A.C. 442, 453; *Dodd* v. *Churton*, [1897] 1 Q.B. 562, 66 L.J.Q.B. 477; *Jones* v. *St. John's College, Oxford* (1870), L.R. 6 Q.B. 115, 124, 40 L.J.Q.B. 80;

B. C.
C. A.
WESTHOLME LUMBER CO. v. ST. JAMES LTD.
McPhillips, J.A.

Scott v. *Bell* (1900), 38 S.L.R. 217; Emden's Building Contracts, 4th ed. (1907), at pp. 186, 187; *McLeod* v. *Wilson* (1897), 2 Terr. L.R. 312; *Law* v. *Local Board of Redditch*, [1892] 1 Q.B. 127; *Strickland* v. *Williams*, [1899] 1 Q.B. 382; *Cape of Good Hope Government* v. *Hills* (1906), 22 T.L.R. 589.]

In my opinion, upon the facts of the present case the demurrage of $50 per day can be taken "as a genuine pre-estimate of loss"—and the learned trial Judge properly allowed it.

I think, therefore, that the judgment of the learned trial Judge was right, and that the appeal should be dismissed.

Appeal dismissed.

CAN.
S. C.

BOOTH v. THE KING.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. February, 2, 1915.

1. TIMBER (§ I—1)—LICENSES TO CUT—RENEWAL OF LICENSE—COMPLIANCE WITH REGULATIONS—EFFECT.

The departmental regulation declaring that holders of licenses to cut timber on Indian lands shall be entitled to renewal if they have complied with existing regulations, does not confer a right of perpetual renewal as such would be inconsistent with the limitation of licenses to twelve months under the Indian Act, R.S.C. 1906, ch. 81.

[*Booth* v. *The King*, 10 D.L.R. 371, 14 Can. Exch. 115, affirmed.]

Statement

APPEAL from a judgment of the Exchequer Court of Canada, dismissing the suppliant's petition of right with costs.

Shepley, K.C., and *Lafleur*, K.C., for the appellant.

Chrysler, K.C., for the respondent.

Davies, J.

DAVIES, J.:—I concur with Mr. Justice Anglin.

Idington, J.

IDINGTON, J.:—The appellant obtained in 1891 from the Superintendent of Indian Affairs a license to cut timber on certain Indian lands. This license was granted under the Indian Act, ch. 43, of R.S.C. 1886, sec. 54 of which is as follows:—

54. The Superintendent-General or any officer or agent authorized by him to that effect, may grant licences to cut trees on reserves and ungranted Indian lands, at such rates, and subject to such conditions, regulations and restrictions, as are, from time to time established by the Governor-in-Council and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.

Section 55 provides, amongst other things, as follows:—

No license shall be so granted for a longer period than twelve months from the date thereof.

Section 56 provides that:—

56. Every licence shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described, subject to such regulations as are made: . . .

and proceeds to declare that every license shall vest in the holder thereof the property in all trees of the kind specified

cut within the limits of the licence during the term thereof

and to give a right of action against any trespassers and to recover damages, if any, and

all proceedings pending at the expiration of any licence may be continued to final termination, as if the licence had not expired.

The license in question was in conformity with these provisions and upon a number of conditions expressed therein and further upon condition that the said licensee or his representatives must comply with all regulations that are or may be established by order in council, etc., on pain of forfeiture of the license. There is not a word express or implied therein looking to a renewal thereof, much less expressive of any obligation to renew. In fact from year to year there was indorsed on this license for many years a renewal of said license and each renewal as such accepted by appellant.

It is certainly difficult to understand how, under such a statute and such an instrument there can be claimed a right of another renewal; yet that is what is insisted upon herein, though the term "renewal" used throughout by the department and the regulations to be referred to hereafter, is in argument disclaimed.

It is conceded that the respondent at the expiration of any single year could insist upon raising the amount of stumpage dues to become payable in future. One might suppose that this alone should end all argument. Yet it does not, for the appellant relies upon the fact that amongst the regulations made, which the Governor in Council is alleged to have been acting under the powers in the said statutes to make, are the following:—

CAN.

S. C.

BOOTH v. THE KING.

Idington, J.

Sec. 5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent-General of Indian Affairs.

Sec. 11. All timber licences are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as *de facto* forfeited.

It seems almost too clear for argument that in face of the absolute restriction in the statute limiting the duration of a license to twelve months, that the Governor in Council could make any regulation which would in fact nullify the statute.

And if the said regulation, sec. 5, means what appellant urges, then it exceeds the power given in the statute.

This is not a regulation which by publication as in some cases is provided by statute shall after the lapse of a certain period of time within the next ensuing session of Parliament become law unless revoked by Parliament.

Its publication is simply for the enlightenment of those concerned, including members of Parliament. If *ultra vires* it goes for nothing. Its frame may be misleading, but in no sense can it create any legal right. If it did mislead in fact, and thereby do the appellant any damage, that might form ground for an appeal to the proper consideration of Parliament, but no such case is made here, nor if attempted could the Court, without Parliamentary sanction, entertain such a claim.

It cannot rest on contract, for it is not within the terms of the contract. It cannot rest upon statute, for the regulation is not a statute in itself or to be deemed as having statutory force and so far as exceeding the statutory power is non-operative.

The only regulations pointed to in the contract are of an entirely different character and for an entirely different purpose. Indeed the word "regulation" as used in the statute is of an entirely different meaning and for an entirely different purpose from what is sought herein to be imparted to it.

In short it seems to me that to give any legal effect to this sec. 5 of the regulations in the way the appellant claims would be to give him a license in perpetuity which certainly would be quite inadmissible, even for Parliament to attempt if regard is had to the trust reposed in it by the transactions leading to

Canadian control over the subject-matter of these Indians and their lands so called.

Counsel tried to disclaim this by suggesting that a general regulation could be passed annulling the section. The annulling regulation then could be passed the day before the expiration of any renewal of the license.

It is idle to say that it could not be made so as to apply to the territory over which the license prevails, for the very terms of the sec. 54, looking to such regulations expressly preserves the right to deal with that which shall be adapted to the locality. That is almost exactly what did happen. An order in council was passed dealing with the tract of Indian lands over which the license in whole or chief part prevailed.

Instead of taking the form of a regulation it took the form of an order in council.

If the argument is good it would seem that all that is to be complained of is matter of form, having no substance.

It is not necessary that I should try and give the sec. 5 relied upon either the meaning and purpose counsel for the Crown suggested, or any meaning. But I do not think it would be very difficult to make a reasonable surmise of its purpose which would shew it never necessarily conveyed to the minds of those concerned the idea of its containing either a contractual or statutory obligation upon which they had a right to seek a remedy at law.

I think the appeal should be dismissed with costs.

DUFF, J.:—The license in question in this case was issued on October 5, 1891, under the authority of secs. 54, 55, 56 and 57 of R.S.C., 1886, ch. 43. The legislation is still in force, being now contained in chapter 81, R.S.C., 1906, secs. 73-76. These sections are as follows: [The learned Judge here cited the sections referred to.]

Duff, J.

The appellant alleges that by virtue of certain regulations dated September 15, 1888, and professedly made in pursuance of sec. 54, ch. 43, R.S.C., 1886, now sec. 73, ch. 81, R.S.C., 1906, and which regulations are still in force, he became entitled and is still entitled to have his license annually renewed at the expira-

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

tion of the term thereof on the condition that during each term he should have complied with all the existing regulations affecting his license. This contention is based upon sections 5, 11, and 12 of the regulation. Secs. 5 and 11 are as follows:—

5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent-General of Indian Affairs.

11. All timber licences are to expire on the 30th day of April next after the date thereof, and all renewals are to be applied for before the 1st day of July, following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as forfeited.

The original license granted to the appellant in October, 1891, expired on April 30, 1892. But the Superintendent of Indian Affairs for the time being granted renewals down to the year 1909, the last expiring on April 30, 1909, the grant of the renewal in each case being recorded in a simple memorandum declaring that the license was renewed. At the expiration of the last mentioned license the Government refused to grant any further renewals. Interpreting the regulations in accordance with the natural meaning of the words there could hardly be a serious answer to the appellant's contention in the absence of any dispute touching their legal validity when construed in that sense. The only question in debate, as I understand the controversy between the parties, is whether the regulations so read were beyond the competence of the Governor in Council exercising the powers conferred by section 54, or, to put the question in another way, whether assuming the regulations to have been validly made, we are not constrained by the provisions of the statute from which they derive their force to construe them in a way which necessarily defeats the appellant's claim. This question must be considered under two heads. First, what is the true construction of the Act of 1886, reading it as it stands, without reference to the course of legislation or judicial or administrative interpretation before and since the statute was passed; secondly, if, as I am constrained to hold that the view of the regulations upon which the appellant's claim necessarily rests is incompatible with the statute when effect is given to its language construed apart from the course of legislation and interpretation just referred to, does this course of legislation

and interpretation justify another construction and one which will support the appellant's claim? As to the first point. The enactment of sec. 55, "No license shall be so granted for a longer period than twelve months from the date thereof" appears to me to import a prohibition which disables the Governor in Council when exercising authority conferred by sec. 54 from validly passing any regulations having for their effect, (1) the constituting of a contract for renewal such as that alleged between the Crown and the licensee as one of the incidents of a license granted under sec. 54, or (2) the vesting in a licensee as such of a right whether contractual or not to have a fresh license issued to him on the expiration of the term of the license upon the sole condition that the stipulations of the original license have been fulfilled. It may be assumed that if the word "license" in the enactment of sec. 55 quoted ought to be read as merely descriptive of the instrument there would be no necessary incompatibility between that section and such a regulation. But if it were the instrument as such that was contemplated by that section one would naturally expect to find some other form of expression than the words "shall be so granted" which words seem more appropriate as making provision for the duration of the right than as merely dictating the form of the instrument; and, I think, reading these sections as a whole, that it is the duration of the right which is being provided for. If that is the true construction it would follow that the Governor in Council is powerless to attach to the grant of a license any incident by regulation or otherwise having the effect of entitling the grantee as such to exercise the rights of a licensee for a longer term than a single year.

As to the second point. Regulations in the form in question were, as pointed out by Mr. Justice Osler and Mr. Justice Maclennan in the passages quoted from their judgments in *Smylie* v. *The Queen*, 27 A.R. Ont. 172, promulgated under the Ontario Act of 1868, and these regulations had been in force for more than twenty years when the regulations now in question were framed in professed exercise of authority conferred in terms identical in effect with those of the Act of 1868.

The statute of 1886 was re-enacted in 1906 and if one had to

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

consider the statute and the regulations alone, one would, I think, be driven to the conclusion that there had been an administrative interpretation of the statute in accordance with the view contended for by the appellant, and it would have been necessary then to consider whether there had not been a legislative adoption of that interpretation. I am disposed to think, however, in view of the course of judicial opinion, that this administrative interpretation is not entitled to very much weight. Questions as to the proper effect of these or identical enactments and regulations have many times come before the Courts during the last forty years and have been the subject of many expressions of judicial opinion, and these expressions have been overwhelmingly against the appellant's view; it is unnecessary to specify the decisions, which are referred to in the judgments in *Smylie* v. *The Queen*, 27 A.R. Ont. 172. In these circumstances, we are, I think, compelled to give effect to the statute in accordance with what appears to us to be the proper reading of the language of the sections themselves.

Anglin, J.

ANGLIN, J.:—The facts of this case are sufficiently set forth in the judgment of the learned Judge of the Exchequer Court. By his petition the suppliant prays that he may be declared entitled to the renewal of a timber license held by him over Indian lands, which the Crown refuses to grant, and he asks consequential relief.

The material parts of the relevant sections of R.S.C. 1886, ch. 43, are as follows:—

> 54. The Superintendent-General or any officer or agent authorized by him to that effect may grant licences to cut trees on reserves and ungranted Indian lands . . . subject to such . . . regulations . . . as are from time to time established by the Governor-in-Council. . . .
>
> 55. No licence shall be so granted for a longer period than twelve months from the date thereof. . . .

Secs. 73 and 74 of ch. 81, R.S.C., 1906, are in terms similar to secs. 54 and 55 of the Act of 1886. The original provisions, which these sections reproduce, were consolidated as secs. 1 and 2 of the Public Lands Timber Licenses Act, ch. 23 in the C.S.C., 1859, which were made applicable to Indian lands by 31 Viet. ch. 42, sec. 35.

Pursuant to the provisions of sec. 54 of the Revised Statutes of 1886 the following regulations *inter alia* were duly enacted and promulgated on September 5, 1888:—

5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent of Indian Affairs.

11. All timber licences are to expire on the 30th day of April next after the date thereof and all renewals are to be applied for before the first day of July following the expiration of the last preceding licence, in default whereof the berth or berths may be treated as forfeited.

A number of other provisions in the regulations contain references to the renewal of licenses.

The suppliant, appealing from an adverse judgment of the Exchequer Court, contends that the statute, properly construed, does not prohibit the issue of a renewable license; that the regulations expressly authorize the issue of such licenses and that, having been laid before Parliament, they must be taken to have received its sanction; and that, having paid a large sum of money for his license on the faith of obtaining a right to a renewal under the statute and regulations, he is either contractually or equitably entitled to such renewal as of right.

On the construction of the statute the appellant's contention is, in my opinion, hopeless. The language of sec. 55 is too plain to admit of any doubt. To interpret it as authorizing the issue of a license renewable as of right after the lapse of the year for which it was granted, and so on from year to year, would defeat its obvious intent. There is no real distinction between a perpetual license and a license perpetually renewable. Both are equally obnoxious to a provision which forbids the granting of a license for a longer period than twelve months.

Nor is the appellant's position improved by invoking regulation No. 5. The early history of that regulation is given by Maclennan, J.A., in *Smylie* v. *The Queen*, 27 A.R. Ont. 172, at pp. 183-4, as follows:—

Regulation 5 provides that licence holders who have complied with all existing regulations shall be entitled to have their licences renewed on application, and regulation 11, that all licences shall expire on the 30th of April next after the date thereof, and that renewals are to be applied for and issued before the 1st of July following the expiration, on default whereof the right to renewal shall cease, and the berth shall be treated as forfeited. The original regulations of the 5th of September, 1849, *Canada*

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

Gazette, vol. 8, p. 6999, are expressed differently. Regulation 8 declares that licensees who have complied, etc., will be considered as having a claim to the renewal of their licences in preference to all others on application, etc., failing which the limits are to be considered vacant, etc. A change was made on the 23rd of June, 1866, since which the regulation relating to renewal has continued to be in the form approved of on the 16th of April, 1869.

The learned Judge continues in language which I respectfully adopt:—

> The question is whether these two regulations were intended or can be held to weaken or qualify the clear terms of the statute, and to confer a right not expressed in the licence itself, and I think it impossible so to hold. In the first place it was not so intended. The second clause of the order in council expressly refers to the *requirements of the statute*, as matters which were to govern licences and renewals thereof, as well as the regulations, conditions and restrictions, which were then being ordained. Again by regulation 24, the exact form of the licence is prescribed, and in the form the term is expressed to be from its date to the 30th of April *and no longer;* and there is not a word in it about renewal. I think, therefore, the intention of the regulations is to comply with, and not to qualify, the statute. But if the regulation is not in accordance with the statute, if it assumes to confer a right of renewal, it must give way to the statute, and can confer no right beyond what the statute authorized the Land Commissioner to grant, and that is a licence for a term not exceeding twelve months. The regulations which the Lieutenant-Governor in Council was authorized to establish were in respect of licences which were not to exceed twelve months in duration. So far as they go beyond that they cannot bind the Crown.

That the holder of a license, subject to a regulation identical with that now relied upon, was not entitled to a renewal as of right had been held in a series of Ontario cases. *Contois* v. *Bonfield*, in 1875-6, 25 U.C.C.P. 39, 27 U.C.C.P. 84; *McArthur* v. *Northern and Pacific J.R. Co.*, in 1890, 17 A.R. Ont. 86; *Shairp* v. *Lakefield Lumber Co.*, in 1890-1, 17 A.R. Ont. 322, 19 Can. S.C.R. 657; and *Muskoka Mill and Lumber Co.* v. *McDermott*, in 1894, 21 A.R. Ont. 129.

As put by Moss, J.A., in *Smylie* v. *The Queen*, in 1900, 27 A.R. Ont. 172, at pp. 190-191:—

> It is enough to say that an agreement for a renewal is something which the law has not empowered the Commissioner of Crown Lands or the Department of Crown Lands to enter into. It is not within the statute, which authorizes no more than the giving of a right to cut timber, and even that for a period not longer than twelve months.
>
> The regulations must be construed as not intending to enlarge the rights of persons dealing in respect of timber beyond such as the statute

authorizes, and no greater effect has been attributed to them by the Courts of the province whenever it has become necessary to consider them.

The term "renewal" seems to be applied to licences issued after the first. But in reality this is not an accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the preceding licence. It may or not be couched in the same language and subject to the same conditions, regulations and restrictions, as the former. It is not the continuance of an old or existing right, but the creation of a new original right.

It is probably now quite too late to contend that regulation No. 5 should be given a construction which, assuming its validity, would confer on timber licensees, complying with the regulations, an absolute right to renewal; but, if the 5th regulation should be so construed, it is still more hopeless to contend for its validity in the face of the explicit language of sec. 55 of the statute.

It was conceded at bar that regulation No. 5 might be revoked or altered at any time by the Governor in Council and that the suppliant's rights as licensee would be subject to such revocation or alteration. But it is maintained that, in the absence of such revocation or alteration, the regulation is binding upon the Crown. In so far as it is authorized and subject to proper construction, this is no doubt the case. But the fact that it may be so revoked or altered does not warrant a construction of an existing regulation in conflict with the prohibition of the statute. Nor does it render it valid while it stands unrepealed or unchanged, if only such a construction can be put upon it.

Although the statute requiring regulations passed under the Indian Act to be laid before Parliament appears to have been enacted only in the year 1894 (57 & 58 Vict. (D.), ch. 32, sec. 12), if it may be assumed in favour of the appellant that the regulation in question was duly laid before both Houses of Parliament that would not materially affect his case. Parliament may be taken to have known the construction which the Courts had put upon this regulation and to have allowed it to remain unchallenged in the expectation that that construction would be adhered to. Moreover, although the fact that a regulation which has been laid before Parliament remains in force un-

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

changed is, no doubt, a circumstance entitled to weight as raising a probability of its being valid and in conformity with the intention of Parliament, it does not suffice to render the regulation effectual and unimpeachable, if, on the only construction of which it is susceptible, it contravenes an express statutory provision. On the other hand, it affords a very strong ground for giving to the regulation a construction not obnoxious to the statute.

Nor has the suppliant any such right as he asserts to the favourable consideration of a Court of equity.

His original license in 1891 was expressly limited to the term "from 5th October, 1891, to 30th April, 1892, and no longer." It contained no provision for renewal. Each of the so-called renewals in like manner extends only to the ensuing April 30, and contains no allusion to further renewal. There is no evidence of any contract for renewal, and, if there were, no such contract which its officers might purport to make could bind the Crown in the face of the statutory prohibition. But whether the suppliant bases his claim upon contract or upon the effect of the regulation, he must be assumed to have known the law applicable to the license which he sought and obtained, and to have taken it subject to that law.

There is no evidence before us as to the value of the timber limits in question when the appellant became licensee or of their subsequent appreciation. But it is common knowledge, which we cannot disregard, that this appreciation has been very great of recent years. Whether the sum paid by the suppliant for his license, by way of bonus, premium or otherwise, should be deemed large or small would necessarily depend upon these considerations. Whatever sum he paid to obtain the license was, no doubt, paid in the expectation that it would probably be renewed from year to year, as is ordinarily the case with Crown timber licenses, but always subject to the right of the Crown, in its discretion, to refuse such renewal. Of an adverse exercise of that discretion at any time he took the risk and he cannot be heard to complain. Under such circumstances there can be no ground for curial intervention in his behalf.

A construction of the regulations which would give to licensees who have complied with them an absolute right to renewals not only directly conflicts with the prohibition of the 55th section of the statute, but would also do grave injustice to the bands of Indians for whom the Crown holds the Indian lands in trust.

The appeal, in my opinion, fails, and must be dismissed with costs.

BRODEUR, J.:—The appellant claims that he was entitled to have a renewal of his license to cut timber on Indian lands. Brodeur, J.

The license itself, which embodies the rights and obligations of the department, on one side, and of the licensee on the other, does not contain any such right on the part of the licensee.

He relies on certain regulations passed by the Governor in Council.

It would not be necessary for me to examine if those regulations could bear such a construction, because, then, they would be in violation of the statute, which declares that no licenses should be granted for a longer period than twelve months, and the Governor in Council could not make any regulations that would be in contravention with a statutory enactment so explicit.

It could be stated also that the Indians are the wards of the state and no policy should be adopted that would deprive the Indians of the fruits that their reserves could procure for them. It may be that at one time their lands could be more advantageously exploited as timber lands, but at some other time they should be converted into farm lands in the interest of the Indians. Then it would be a pity that through some previous concessions to timber license holders that beneficial change could not take place.

For those reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

MAN.

C. A.

HILL v. CARTER-HALLS ALDINGER CO.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. January 5, 1915.

1. MASTER AND SERVANT (§ II B—180)—NEGLIGENCE—FELLOW SERVANT—ACTING IN PLACE OF FOREMAN—LIABILITY OF MASTER.

That a fellow workman as the senior and more experienced of those employed in painting a building had assumed in the temporary absence of the foreman to give directions to a fellow employee, will not support an action in negligence under the Employers' Liability Act, R.S.M. 1913, ch. 61, against the employer in respect of such directions where in fact the employees were upon an equal status.

[*Garland* v. *Toronto*, 23 A.R. (Ont.) 238, applied; *Shea* v. *Inglis*, 11 O.L.R. 124, distinguished.]

Statement

APPEAL from verdict of Macdonald, J.

W. H. Curle, for appellant, defendant.

J. F. Davidson, for respondent, plaintiff.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff, a painter in the service of the defendants, was engaged in painting iron braces at some height from the floor in a building part of which the defendants had contracted to paint. There were two painters including the plaintiff, and two painters' helpers; the business of the helpers being to hold the ladders whenever it was necessary for the painters to go upon them to do any part of the work.

One Coulun was acting as workman or helper for the plaintiff, and until a few minutes before the injury complained of, Coulun did hold the ladder upon which the plaintiff worked.

A few minutes before the injury Coulun went away to another part of the work. He says the plaintiff sent him away. The plaintiff denies this. One Calder, the other painter on the work, who was called as a witness for the plaintiff, swore that about five minutes after the accident both Coulun and the plaintiff told him that Coulun, before leaving the plaintiff, had asked him if he needed him any more, and the plaintiff had said, no. This again is denied by the plaintiff.

The foreman in charge of the painting, was one Gates. He was also in charge of painting in several other places so that he did not stay all day at the work, but visited it several times each day. Apparently whenever he visited the work he found the ladders being properly held by the painters' helpers. He gave instructions to the plaintiff and Calder not to go on a ladder when on a plank or floor unless there was a man holding the ladder. Calder, the plaintiff's witness, says "There was a man

supposed to hold the ladder all the time. We got strict orders to have a man hold the ladder all the time." Both he and Gates say that the plaintiff was present when these orders were given. The plaintiff denies having heard these orders.

Shortly before 5 o'clock on the day of the accident the plaintiff and Calder placed a plank from one beam to another and upon this placed a ladder, the upper part of which was against the iron work or wall and the lower part placed astride the plank—that is to say, that the ladder rested with the lowest rung across the plank. The plaintiff went upon this ladder in that condition and without Coulun to help him as already mentioned and while he was working in that position the ladder slipped and he fell and received the injuries for which he now claims damages from his employers.

In the statement of claim as it stood until the trial the injury was claimed to have resulted from obedience by the plaintiff to the order of Gates, the admitted foreman. At the trial it was admitted that Gates had not ordered the plaintiff to go upon the ladder in question, and in fact had not been present when the plaintiff went upon it. The plaintiff then alleged that Calder, a fellow workman, had told him to place the ladder as he did and go upon it to finish the painting.

Calder admits that Gates was foreman, but in his evidence claims that he was temporarily foreman in Gates' absence. He makes no suggestion that Gates, or any one on behalf of the defendants, placed him in this position, but simply asserts the fact. As nearly as I can make out from his rather vague statements of his position he claimed this because he happened to be the senior man, that is an older and more experienced painter than the plaintiff. He says that he was acting as foreman there and that he instructed the plaintiff to put up the plank and stand the ladder on it. He makes this statement in spite of the fact that he admits they had got orders to have a man hold the ladder all the time when a painter was upon it. In some places he speaks of having told the plaintiff to do this work. In others he puts it differently. For instance, in speaking of the work he says: "I asked him if he would do it, and he said yes. I didn't tell him to do it." He repeated that, in effect, in another place in answer to a question from the Judge. Though he pur-

MAN.

C. A.

HILL v. CARTER-HALLS ALDINGER CO.

Richards, J.A.

ports to have had charge he says that as a matter of fact he and the plaintiff were equal on the work. On being asked the following question he gives the following answer:—

"Q. Did he have to obey your orders? A. We always asked one another before we did anything. We had a little conference before we did anything."

There is no evidence to shew that Gates had any knowledge whatever that his orders with regard to holding the ladder were not being carried out.

I am quite unable to see that there was any evidence whatever to justify a finding that Calder was a person in authority. He got 2½c. an hour more wages than the plaintiff, but he distinctly disclaims having got the difference as foreman or because of any authority, and it is apparent that this difference was because of his being a more experienced workman than the plaintiff.

To my mind the case is practically on all fours with *Garland* v. *City of Toronto*, 23 A.R. (Ont.) 238. It is true that in that case the person whose orders it was said the plaintiff was bound to obey admitted that his only reason for thinking that he was in authority was because he was the senior; the oldest man at the work, or the first man at the work, and that he never considered himself a foreman. In the present case Calder purports to say that he did consider himself a foreman, but what Calder considered or did not consider is quite immaterial; the question turns on what his position was. In the *Garland* case it was held that the party claimed was not a person in authority. That case is rather stronger for the plaintiff than the present because there the plaintiff and the person claimed to be in authority were doing the one act; that is, an act that it needed the two of them to do. Here the work was that of each individual only. The plaintiff could have done his work without Calder and Calder could have done his without the plaintiff. They were not properly engaged on the same work, but they were engaged in similar work. Each of them alone could have done the work if given sufficient time.

The case of *Shea* v. *Inglis*, 11 O.L.R. 124, is wholly distinguishable from the present because there the work in which the plaintiff and the person claimed to be in authority were engaged

was such that in order to have the work done at all the plaintiff had to obey the orders of the other person.

I do not think that there was any evidence to go to the jury of an authority existing in Calder, and I do not think that the plaintiff should have been allowed to amend at the trial by striking out the name Gates, leaving the pleading vague enough to cover an allegation that Calder was the person whose authority the plaintiff had to submit to.

With deference, I think there should have been a nonsuit entered in the case. I would allow the appeal with costs and enter a nonsuit in the Court of King's Bench with costs.

Perdue, J.A.

PERDUE, J.A.:—At the opening of the trial of this case a discussion arose as to the form of the action. Counsel for the plaintiff then agreed, as appears by the record, "to proceed under the Workmen's Compensation Act only." It was meant by this that he would confine the case to a claim under what was formerly known as the Workmen's Compensation for Injuries Act, but which is now called the Employers Liability Act, R.S.M. 1913, ch. 61. The defendant was, therefore, not called upon to meet an action at common law. The discussion that took place after the charge had been given to the jury and they had retired shews that the plaintiff rested his case wholly upon the statute.

As the statement of claim was framed in the first instance, and as it appeared on the record entered for trial, the acts of negligence alleged in the erection of the staging and the placing of a ladder thereon to be used by the plaintiff in performing his work, were stated to have been done under the supervision of one Gates, the foreman of the defendant. It was also alleged that the plaintiff worked on the ladder placed in that way by the order and direction of Gates, who had authority over him, and that while so working the ladder fell and the plaintiff sustained the injury. In his evidence the plaintiff stated most positively that Gates was his foreman. He said that Calder, another painter, was working with him on the plank, but in no part of his evidence does he state or suggest that Calder had any superintendence over him or any right to give him directions or that he had to obey Calder's orders in any respect.

Calder, who was called as a witness for the plaintiff, stated that he was senior and was in charge in Gates' absence, but in

MAN.

C. A.

HILL v. CARTER-HALLS ALDINGER CO.

Perdue, J.A.

cross-examination he corrected this and said he was senior workman. He further stated that the plaintiff and he were equals on the work and, in answer to the question, "Did he (the plaintiff) have to obey your orders?" he answered, "We always asked one another before we done anything, we had a little conference before we done anything." Gates says Calder held the same position as the plaintiff and that Calder had no more authority than the plaintiff. Calder further states that he and the plaintiff had strict orders from Gates, the foreman, to have a man hold the ladder all the time, that no man had to be upon a ladder without a man being there to hold it. He also states that a labourer named Coulun was there to hold the ladder for the plaintiff and was always available for that purpose. Calder says further that prior to this accident he never saw a ladder used upon the plank without being held by some one.

At the time the accident occurred no one was holding the ladder, the result being that it slipped and the plaintiff fell and received the injuries complained of. The plaintiff's contention is that Calder told the plaintiff to finish a piece of the work which necessitated his going upon the ladder and that Calder sent Coulun away so that he was not on hand to hold the ladder. Calder, the plaintiff's witness, admits that he asked the plaintiff if he would do the work, but denies sending Coulun away. Calder further says that immediately after the accident both the plaintiff and Coulun said that the plaintiff had told Coulun that he did not need him any more.

After the charge had been given to the jury the plaintiff's counsel applied for leave to amend the statement of claim by striking out the name of Gates and inserting the word "foreman." This application was granted some time after the trial and the amendment was made accordingly.

The questions left to the jury by the trial Judge, with the answers returned, are as follows:—

(1) Q. "Was the accident the result of negligence on the part of the defendant? If your answer is yes, what was the negligence? A. Yes. Accident result of negligence to erect or supply sufficient protection as to platform by defendant. (2) Q. Was the plaintiff himself guilty of negligence and if your answer is yes, what was his negligence? A. No."

The jury assessed the damages at $2,750.

If this had been an action at common law, and tried as such,

the above questions would have been proper. As the questions and answers stand there is no finding of the jury upon the all important point, whether Calder was at the time entrusted by the defendant with superintendence over the plaintiff. The answer to the first question is a finding that the accident was due to the failure of the defendant "to erect or supply sufficient protection as to platform." But the plaintiff did not attempt to shew that the accident occurred by reason of an unprotected or unsafe platform. If he could prove such negligence on the part of the defendant he might have an action at common law without invoking the assistance of the statute, but he did not attempt to make out such a case, but on the contrary, distinctly abandoned it. His complaint came down to this, that Calder was, as he claims, a foreman over him and that Calder told him to do the work by mounting a ladder placed upon the plank or platform and that the labourer who should have been there to hold the ladder had been sent away by Calder. The jury has in fact made no finding upon the main question in dispute, namely, was Calder placed in superintendence over the plaintiff and was the plaintiff bound to conform to Calder's orders or directions? Without an answer to that question in the affirmative the plaintiff is not entitled to succeed in a case founded upon the statute. Even if the question were properly submitted to the jury, is there evidence to support a finding upon it favourable to the plaintiff? The plaintiff stated several times in giving his evidence that Gates was his foreman and never suggested that Calder had any superintendence over him. Calder, who gave his evidence in a most uncertain manner, finally declared that the plaintiff and he were equals on the work and that they consulted each other as to the work. The plaintiff put in no evidence except Calder's to prove that the latter was his foreman. I think there was no evidence upon which a jury could find that Calder was entrusted with superintendence over the plaintiff. A nonsuit should, therefore, be entered with costs.

CAMERON, J.A., dissented. Cameron, J.A.

HAGGART, J.A., concurred with RICHARDS and PERDUE, JJ.A. Haggart, J.A.

Appeal allowed.

ONT.

S. C.

COLE v. COLE.

Ontario Supreme Court, Lennox, J. May 22, 1915.

1. ASSIGNMENTS FOR CREDITORS (§ VIII—66)—CONTESTATION—NOTICE—EFFECT—ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, CH. 134.

The statutory notice given by an assignee for creditors under sec. 7 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, contesting the preference claimed by the creditor for a part of his claim does not create a forfeiture of the security or of the creditor's right to rank upon the estate in the event of non-compliance with the notice of contestation.

Statement.

THE plaintiff, as assignee for the benefit of creditors of one Paisley, brought this action against himself, as assignee for the benefit of creditors of the Carleton Hotel Company, for a declaration of the rights of the Paisley estate as a creditor of the hotel company's estate.

The action was tried without a jury at Ottawa.

R. G. Code, K.C., for the plaintiff.

H. P. Hill, for the defendant.

Lennox, J.

LENNOX, J., said that the defendant had misconceived the meaning of sec. 27. It is a penal provision, must be construed strictly, and is not aimed at the forfeiture of a security, but is intended to secure the speedy determination of the right to rank and vote as a creditor and share in the distribution of assets, and to authorise a contestation of the indebtedness in whole or in part. As inducing a forfeiture the notice had no effect; but it was a fairly clear notice that a substantial part of the plaintiff's alleged rights was in dispute—it amounted to an assertion that the plaintiff must rank as an unsecured creditor for his total claim.

The plaintiff may have a judgment declaring that the defendant's notice is irregular and served without statutory provision therefor, and that it does not create a forfeiture in respect of the plaintiff's rights under the chattel mortgage, without costs to either party.

If the parties agree, the action will be treated as one for the determination of the status of the plaintiff under the chattel mortgage, and the trial will be continued and concluded upon that basis.

If the parties do not agree, the judgment will be as above.

Judgment accordingly.

AULD v. TAYLOR.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. April 6, 1915.

1. PLEADING (§ II H—219)—DEMAND NOTES—DEED ABSOLUTE AS SECURITY—UNCONDITIONAL LEAVE TO DEFEND—ORDER—DEFENDANT'S RIGHTS TRIED IN THE ONE ACTION.

The fact that the lender suing upon demand notes had taken a deed absolute in form as security for the payment of the debt will support an order giving unconditional leave to defend so that defendant's rights in respect of the mortgage may be tried out in the one action where his affidavit sets up a contemporaneous oral agreement that he should have a period of time not yet expired within which to make payment.

[*Jacobs* v. *Booth's Distillery Co.*, 85 L.T. 262, referred to.]

Statement

APPEAL from an order of Hunter, C.J.B.C.

W. Martin Griffin, for appellant.

R. C. Spinks, for respondent.

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A., dissented.

Irving, J.A.

IRVING, J.A.:—The plaintiff in June, 1913, lent the defendant some money—$3,836.07; the time of repayment was not stated, nor was any security given. On December 1, 1913, an interview took place between the plaintiff's agent and the defendant, when the defendant signed the two demand notes sued on for an amount equal to the above sum, and at the same time defendant executed as security for the notes a deed absolute on its face. The defendant says:—

6. That at said meeting it was distinctly agreed and indeed was the consideration for the giving of the security that the defendant was to be allowed up to two years within which to pay these moneys, it being distinctly understood, however, that he was to pay back the moneys as soon as he possibly could.

The particular line he means to adopt as to the mortgage has not yet been declared. The learned Chief Justice dismissed the application for judgment under O. 14, but we have not been favoured with the reasons for his decision. I do not think we should interfere with his order, in view of the fact that there was this mortgage and the defendant's right to apply to the Court in respect thereof.

With a view to prevent multiplicity of actions, I think the plaintiff should be allowed to go to trial where the whole matter can be tried out. I would therefore dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—There is a striking similarity between this case and *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T. 262, 50

B. C.
C. A.
AULD
v.
TAYLOR.
Martin, J.A.

W.R. 49, decided by the House of Lords and lately considered by us in *Canadian Bank of Commerce* v. *Indian River Gravel Co.*, 20 B.C.R. 180. In the case at bar it appears that the defendant had borrowed two sums of money from the plaintiff, and six months afterwards, on December 1, 1913, the defendant agreed to give the plaintiff security for said debt, which security took the shape of an absolute conveyance of certain lands to the plaintiff, and was duly registered, the consideration for such security being that the defendant was to have not less than one year's time to pay said debt, though it was also agreed that he was to pay before that time "if he possibly could." At the time he gave the said security he also gave plaintiff two promissory notes for the said respective sums payable on demand, and the plaintiff has brought this action upon said notes before the minimum time of one year alleged to have been agreed upon has elapsed, the defendant having been unable to pay the notes before that time, though he swears he has "endeavoured in every possible way to get" . . . money to do so. In the *Jacobs* case, as I understand it from the two reports cited, the two defendants had likewise given security, by means of a memorandum of charge, and signed two promissory notes to secure an advance to them and further moneys, and one of them had given an indemnity to the other, Jacobs, who defended the action and set up that he had been told that he incurred no liability by signing said charge and notes, and that he had signed them relying on that representation: the notes apparently were time notes, it not being stated that they were payable on demand. And it is not stated that the representation was made by the payee, and I should gather from the report that it was made by the co-defendant, the indemnifier, who admitted his liability. But assuming it was made by the payee, as in the case at bar, what is the difference in principle between the two cases? In this one the payer says it was agreed that he was to have a year within which to pay the notes; in *Jacobs* case he said it was agreed he was never to pay them at all! An astonishing statement on the face of it: that a man who gets advances of money and gives notes therefor is never to be called upon to pay them. And still more so in face of the fact that to secure himself for signing he took an indemnity from his co-borrower so as to relieve himself of any responsibility, which was a totally unnecessary precaution and wholly inconsistent act if he were told and believed that he

B. C.

C. A.

AULD v. TAYLOR.

Martin, J.A.

incurred no liability by signing. Nevertheless the House of Lords set aside the judgment of the Court of Appeal affirming an order of Mr. Justice Day in Chambers (ordering the money to be paid into Court within seven days, otherwise judgment), and gave the defendant unconditional leave to defend because it was held there was "a triable issue."

In the light of this decision of so high a tribunal I feel quite unable to say that the learned Judge below adopted a wrong course in allowing the defendant herein to defend unconditionally, despite what is to be found in the following cases on the subject of oral agreements varying written contracts: *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487; *Henderson* v. *Arthur*, [1907] 1 K.B. 10, 76 L.J.K.B. 22; and *Hitchings* v. *Northern*, [1914] 3 K.B. 907. It is to be noted that in the second of them Lord Justice Cozens-Hardy contemplates the reception of evidence of the terms of an antecedent parol agreement in an action to rectify a written contract.

Furthermore, in the case at bar the question of the conveyance absolute in form yet in reality only a mortgage will or should come up for determination, and in so doing the length of time for which the security was given will have to be considered, which cannot on the face of the matter be ascertained from the notes which are payable on demand only. It is also, to my mind, very possible that it may turn out, as argued, that these notes may be held to be "only an incident or part of a larger agreement," which is referred to by Chief Justice Cameron, as an exception to the rule, in *Porteous* v. *Muir* (1883), 8 O.R. 127 at 130, cited in the *Canadian Bank of Commerce* case above referred to. I am not, in the words of Lord Justice James in *Jacobs* case, "expressing any opinion whatever upon the merits of the case," but simply giving some reasons why it is desirable that it should be allowed to be tried out in the usual way.

GALLIHER, J.A., dissented.

Galliher, J.A. (dissenting)

McPHILLIPS, J.A.:—Being of the opinion that the learned Chief Justice of British Columbia (Hunter, C.J.) arrived at the right conclusion in this case in making the order dismissing the application for judgment, and also holding the view that if the action is to proceed to trial it is better that there should be no observations which would in any way affect the disposition of the

McPhillips, J.A.

B. C.
C. A.
AULD
v.
TAYLOR.
McPhillips, J.A.

action by the trial Judge, I refrain from adverting to the points of law that were so ably presented by Mr. Griffin, counsel for the appellant; which, however, in my opinion, in no way disturbed the correctness of the order appealed from.

I would therefore dismiss the appeal.

Appeal dismissed.

MAN.
K. B.

SWANSON v. McARTHUR.

Manitoba King's Bench, Galt, J. March 27, 1915.

1. JUDGMENT (§ II A—60)—RES JUDICATA—DOCTRINE OF—SECOND CASE RAISING NEW ISSUE—OPINION OF JUDGES.

The doctrine of *res judicata* applies to bind the parties by the decision of the issues raised in a prior case, but does not bind the parties or the Court trying a second case raising a new issue under the same contract in regard to mere expressions of opinion by the Judges in appeal, on delivering their judgment in the first case, as to the interpretation of a document adduced in evidence where the record in the first case raised no such issue.

[*Pedlar* v. *Road Block Gold Mines*, [1905] 2 Ch. 427, referred to.]

Statement.

ACTION to set aside a judgment of the Court of Appeal *Swanson* v. *McArthur*, 20 D.L.R. 434, against the same defendants.

W. H. Trueman, for plaintiff.

W. C. Hamilton, for McArthur.

D. H. Laird and *E. F. Haffner*, for Eastern Construction Co.

Galt, J.

GALT, J.:—In this action, which was commenced on November 7, 1914, the plaintiff seeks to set aside a judgment rendered by the Court of Appeal in a former action brought by him against the same defendants, which latter action was dismissed as against both defendants. The plaintiff also asks that a certain agreement dated August 4, 1913, which was in question in the former action, be rectified, that judgment be entered for the plaintiff for $17,952.68 with interest from August 4, 1913, and further and other relief.

The plaintiff does not allege any conduct amounting to fraud on the part of either of the defendants, and (apart from appeal) I know of no other ground on which a litigant can attack a judgment of record. So far as the claim for rectification of the agreement is concerned, the plaintiff himself states that the document correctly sets forth the bargain which he intended at the time to make, and neither he nor his counsel could suggest any variation in its wording which would make it any clearer than it already appears to be. The real complaint is as to the construction which

the Court of Appeal has given to it. All the evidence which was given in the former case has been filed in printed form in this case, and a considerable amount of additional evidence was given by the parties at the trial before me. The plaintiff's main contention in this action is that the judgment rendered in the former action does not operate as an estoppel in the present action, owing to the grounds upon which the Judges of the Court of Appeal based their judgment. The defendants, on the other hand, claim that the judgment of the Court of Appeal covers every relief which might have been open to the plaintiff either in the former or the present action.

The former action was commenced on December 14, 1909, and in it the plaintiff sued John D. McArthur and the Eastern Construction Co., Ltd. The statement of claim alleged that, by agreement in writing dated November 3, 1906, made between the plaintiff and the said John D. McArthur, it was agreed that the plaintiff should execute certain construction work in said agreement referred to in the building of the Transcontinental Railway, with such variations in said work as the chief engineer of the Commissioners of said railway might direct. [See 16 D.L.R. 872, 20 D.L.R. 434.]

McArthur had already entered into a contract with the Commissioners of the Transcontinental Railway to build a large portion of their line, and the plaintiff became a sub-contractor under McArthur to perform the "grading" which might be required on about eight miles of the line. Swanson's sub-contract did not include the building of any bridges. At one particular point included in Swanson's territory there was a large gap about 3,000 ft. wide and 25 or 30 ft. deep which the Commissioners originally intended should be spanned by a bridge. Later on they decided to have an embankment built instead of a bridge. It appears by the evidence that in such cases contractors often construct the embankment by running up a temporary trestle bridge strong enough to hold construction cars and engine, and then carry material to the structure and dump it from the track above. Of course it is equally possible to carry the material in waggons on the ground and build up the embankment from below. When the work is done by the former method the job is technically called "trainfill," irrespective of the materials used (*e.g.*, loose

MAN.

K. B.

SWANSON v. MCARTHUR.

Galt, J.

rock, sand, earth, etc.); but when it is performed from below there is nothing to distinguish it from ordinary grading, which consists of loose rock, common excavation and a charge for overhaul, as the work is done by horses and waggons.

In the present instance the engineer of the Commissioners, being anxious to hasten the work as much as possible, and realizing that the gap in question offered much greater difficulty than ordinary grading, agreed with McArthur, in May, 1907, to allow him the price usually paid for "trainfill," namely, 52c. per cubic yard—a price considerably higher than that usually paid for grading. McArthur, shortly after making his original contract with the commissioners, assigned to the Eastern Construction Co., Ltd., all his interest in a portion of the original contract, including that portion which fell within Swanson's sub-contract. There was nothing in McArthur's original contract, nor in Swanson's sub-contract, entitling either of those parties to charge for any train-filling at all. As soon as Swanson learned that the gap in question was to be crossed by an embankment, he claimed that the doing of this work fell within his sub-contract for grading. There was some difficulty between the parties as to Swanson's right to do this work, but in the end he was allowed to perform it, and he did so quite satisfactorily within the time required by the engineers in charge.

Swanson's sub-contract contained the following, amongst other clauses:—

8. Should the variations made by the chief engineer of the commissioners necessitate the performance of a work of a character not set out in the schedules hereto, and should the parties hereto not mutually agree upon the prices to be paid therefor, then the employer (McArthur) shall pay to the contractors (Swanson) for such work a ninety per centum of the amount he shall receive therefor from the commisioners.

During the construction of the embankment, S. R. Poulin acted as district engineer under the chief engineer, and on May 5, 1908, Poulin wrote to the chief engineer in part as follows:—

As to the classification at station 1267 and 1280 at mile 25. There is to be no classification at that point. By looking at the profile you will see that the point is one of those where you have allowed train-filling prices of 52c. for the making of same. The contractors were to put in their steam shovel at that point; they commenced to put a bottom in with cars and build trestles and roadway at a steep grade, to be ready for the steam shovel. They put on a large force day and night, and were going so well that they asked me to put the steam shovel at another point, saying they

would finish this fill in time in the manner they were going, and the two fills would be made at the same time, instead of one. My opinion at the time was that they could not finish the fill that way, and I said I would not return the same at trainfill prices until I felt satisfied they would complete the embankment, on account of the height of the embankment above the borrow pit. I believe now that they will complete it in time if they keep their force at work, and they will eventually be paid trainfill price for that fill. *No overhaul or classification is to be allowed at that point.*

The amount of material utilized in making the embankment was allowed by the engineers at 264,010 cubic yards. McArthur, under his arrangement with the commissioners, was paid 52c. per cubic yard for this, and he in turn has paid the Eastern Construction Co. at the rate of 49½c. for the same job under an agreement to that effect. The plaintiff claims that by changing the classification of the work from "grading" to "trainfill" the engineer and McArthur made a "variation" which entitled the plaintiff to be paid 90 per cent. of whatever McArthur should receive, or, in other words, 46 4-5c. amounting in all to $123,556.68.

In the first action the plaintiff gives particulars of the work performed by him, including the said alleged variation and additional work, amounting in all to $485,659.51. He then gives credit for $420,855.15, leaving a balance due to him of $64,804.36. The plaintiff claimed payment of this sum from the defendant McArthur, and in the alternative judgment against the Eastern Construction Co., Ltd., also an account and further and other relief.

The defendant McArthur pleaded, amongst other things, that after the assignment of a portion of his contract by himself to the Eastern Construction Co., Ltd., the plaintiff was notified of such assignment and assented thereto. The Eastern Construction Co., Ltd., pleaded, amongst other defences, that they were a foreign company and the Court had no jurisdiction over them. During the course of the proceedings an order was made striking out the name of the Eastern Construction Co., Ltd., and the plaintiff was apparently content to leave the record in that shape, but the defendant McArthur appears to have succeeded in having his co-defendants replaced on the record in order that he might have relief over against them if he could shew himself entitled. In August, 1913, negotiations for settlement took place between the parties, and in the result it was agreed that all the items of the plaintiff's claim should be settled by the payment to

MAN.

K. B.

SWANSON v. MCARTHUR.

Galt, J.

him of $39,000, with the single exception of the item above-mentioned of 264,010 cubic yards of trainfill at 46 4-5c., which would amount to $17,952.68.

In order to effectually close out the settlement, and to provide for the trial of the one excepted claim for trainfill, the parties and their solicitors met together on August 4, 1913, and executed the following agreement:—

In the King's Bench.

Between Swan Swanson Plaintiff,

And

John D. McArthur and The Eastern Construction Company, Limited, Defendants.

The parties hereto having settled between themselves all of the issues raised in this action, with the exception of the one issue hereinafter referred to, this memorandum is signed by the parties as evidencing such settlement and the terms thereof, and limiting the issue remaining unsettled and determining the manner in which the same shall be tried and disposed of.

The one issue unsettled is that raised in the pleadings in respect of the item set forth in the particulars embraced in the plaintiff's amended statement of claim under the name of "trainfill," in respect of which it is claimed by the plaintiff that he should be paid at the rate of 46.8c. per cubic yard, while it is contended by the defendants that the plaintiff is entitled to be paid therefor only at the rate of 40c. per cubic yard, it being admitted that the number of cubic yards involved is 264,010, as in the statement of claim set forth.

The parties have agreed to settle all the other issues between them in this action by the payment into the Royal Bank of Canada at Winnipeg, at the request of the plaintiff, of the sum of $39,000, which the plaintiff has agreed to accept in full payment and satisfaction of all sums whatsoever due or owing or to become due or owing to him in any manner, or to which he has any claim whatsoever as against the defendants or either of them, arising under the issues in this action or under or in respect of any work done or material supplied by him in connection with the work done on the line of the Transcontinental Railway referred to in the pleadings, or under the contract or sub-contracts in the pleadings referred to, excepting, however, the plaintiff's claim for an additional 6.8c. per cubic yard in respect of said trainfill, and it is distinctly understood and the fact is, that the payments made to the plaintiff in respect of the said work, including the said sum of $39,000, covers payment for such 264,010 cubic yards of trainfill at the rate of 40c. per cubic yard, which the defendants claim is payment in full therefor. Therefore, it is hereby declared that the only issue remaining between the parties is as to whether or not the plaintiff is entitled to be paid an additional price of 6.8c. per cubic yard in respect of said trainfill over and above the said 40c. per cubic yard which has been paid to him. And it is further agreed that all parties will co-operate in good faith to bring this issue to trial at the earliest date possible before a Judge of the Court of King's Bench in Manitoba, and either party may appeal against the judgment of such Judge to the Court of Appeal for Manitoba, but neither party shall by way of further appeal or otherwise bring or attempt to bring

the issue before any higher or other tribunal, but all parties will accept and abide by the judgment of such Judge of the Court of King's Bench or of the said Court of Appeal in the event of such appeal being made as a final determination of the issue. The Eastern Construction Co., on its part, assents to being a party to the action and to the issue herein defined being tried and disposed of in this action as against the said defendant, the Eastern Construction Co., as herein provided, and both of the defendants are to be at liberty to file such statement of defence to the plaintiff's amended statement of claim as they severally may deem proper. It is agreed on the part of the plaintiff that his said claim is limited to said balance of 6.8c. per cubic yard of said trainfill, making in all $17,952.68, and that no claim is to be made for accrued interest upon said sum. Each party to the action pays his or its own costs of the action down to the present time. The costs from and after this date in connection with the issue remaining unsettled shall be costs in the cause. Dated at Winnipeg this 4th day of August, 1913.

This agreement was signed by each of the parties and by their respective counsel. It will be observed that while the parties expressed themselves to be providing for the trial of only one issue, the agreement itself provides later on that both of the defendants are to be at liberty to file such a statement of defence to the plaintiff's amended statement of claim as they severally may deem proper. The effect of this provision might naturally lead to several issues being tried in place of one. It was, of course, open to the parties by mutual consent to vary the said agreement subsequently if they saw fit. As a matter of fact the plaintiff made no amendment whatever to his statement of claim, nor did the defendant McArthur alter his pleading in any way, but the Eastern Construction Co., Ltd., on October 1, 1913, amended their statement of defence by adding four sub-paragraphs based upon the agreement of August 4, 1913.

The parties went down to trial before Mr. Justice Prendergast on October 7, 1913. Counsel for the plaintiff took the position that the plaintiff looked to McArthur, rather than to the Eastern Construction Co., for relief. The agreement of August 4, 1913, was put in evidence, but no suggestion was made by any of the parties that there was only one issue to be tried. Mr. Justice Prendergast, on March 9, 1914, gave judgment in favour of the plaintiff for $17,952.68, and interest thereon from August 4, 1913, to date of trial, against the defendant John D. McArthur, but he awarded costs as against both defendants. The defendants appealed to the Court of Appeal, and on June 29, 1914, the judgment which had been pronounced by Prendergast, J., was

MAN.

K. B.

SWANSON v. MCARTHUR.

Galt, J.

reversed, and the action dismissed as against both defendants with costs. The plaintiff attempted to appeal from this judgment to the Supreme Court of Canada, but his appeal was quashed by reason of the clause in the agreement of August 4, whereby the parties had agreed to abide by any judgment on the one issue which might be pronounced by the Court of Appeal: 20 D.L.R. 434.

The claims set up in the present action are for the most part entirely different from those which appear in the former action. The only claim asserted in the present action which can be said to relate to the same subject matter as the former is claim (4), that judgment be entered for the plaintiff for $17,952.68, with interest thereon from August 4, 1913.

This is substantially the same claim as was asserted by the plaintiff in the former action, and consequently cannot be relitigated. The plaintiff is not entitled to any of the specific relief he claims. But there is the usual prayer for further and other relief, and the question is whether the plaintiff is entitled to any. The point is beset with difficulties, partly owing to the fact that the evidence in support of any such relief was given in the former action wherein the Court of Appeal directed that the action should be dismissed, and partly because the plaintiff has not seen fit in the present action to specifically claim certain relief, to which, on the evidence, he seems clearly entitled. The plaintiff, at the former trial, relying upon the agreement of August 4, 1913, claimed that the variation in the contract between the commissioners and McArthur whereby the bridge was eliminated and an embankment substituted, to be paid for as trainfill, enured to the plaintiff's benefit and entitled him, under clause 8 of his sub-contract with McArthur, to be paid 90 per cent. of whatever McArthur realized from the Commissioners. It is impossible to ascertain to what extent the judgment of the Court of Appeal in the former action operates as an estoppel in the present case without first ascertaining the grounds upon which the Court of Appeal based its decision.

The only written judgments of the Court were delivered by Howell, C.J.M., and Richards, J.A.

Mr. Trueman argues with much force that the Court of Appeal has construed the word "trainfill," so far as McArthur is concerned, to mean "grading," but with all the attributes of trainfill,

including an additional charge at the rate of 52c. per cubic yard. But the Court has construed the same word, as regards the plaintiff Swanson, to mean grading, with none of the attributes of trainfill.

Howell, C.J.M., says (see 20 D.L.R. 436):—

After the work had progressed upon the line, it was discovered that, at this point on the plaintiff's part of the line, and at three other parts on the line covered by McArthur's contract, but not on the plaintiff's part of the work, there were borrow pits reasonably convenient to the work, from which loose rock and ordinary excavation could be taken to make these embankments; but, as the distance of the haul and the height of the embankments were much greater in these four places than ordinarily, and as McArthur knew that the roadbed where these four fills are situate was originally intended to be done by himself, he thought that the plaintiff did not have a right under his contract to do this work. He, therefore, entered into an arrangement with the Government engineers that he would put steam shovels and engines on each of these fills and rush the work, not putting in trestles and waiting for the rails to be laid before any embankment was constructed, and it was agreed that, between him and the commissioners, this work should be considered as "trainhaul," and paid for at 52 cents per cubic yard. . . . The plaintiff swears that about the time the work was completed an engineer on the works told him the work would be finally passed as "trainfill," but I cannot see how this statement can vary a bargain made between the plaintiff and McArthur.

Richards, J.A., says, at 439:—

After it once became of the class of work the plaintiff was entitled to do, it was not varied in any way. Calling it "trainfill," in the dealings between defendant and the commissioners, did not make it such. It remained "grading," whatever called. It being grading, and done as such, it came within the plaintiff's fixed schedule of prices, and it seems to me that it was no concern of his what the defendant received for it.

It was argued by counsel for the defendants that this Court is bound to accept not only the judgment of the higher tribunal but also any construction which that tribunal placed upon any document adduced in evidence. I do not so understand the law. In *Pedlar* v. *Road Block Gold Mines*, [1905] 2 Ch. 427, Warrington, J., says, at 437:—

In a question of construction, in my view, no Judge is bound by the decision of another Judge. He is obliged to express his view of the meaning of the document which he has to construe, and in expressing that view, in my opinion, he is not bound by the view of somebody else. I remember hearing Sir George Jessel say that he should not regard himself as bound by the decision of a previous Judge on the construction of the identical document and the identical passage of the document which he had to construe.

But, so far as the present action is concerned, it does not seem

MAN.

K. B.

SWANSON v. MCARTHUR.

Galt, J.

to matter what construction the Court of Appeal decided to place upon the document in question, because the parties agreed that the Court's decision upon this particular issue was to be final, and the question would still remain, was there a "variation" of the plaintiff's sub-contract? The reasoning of Mr. Justice Richards on this point seems unanswerable. He says:—

> So that what happened was the exact opposite of what was contemplated by sec. 8. Instead of work that he had contracted to perform being turned into work that he had not, work that he had not contracted to do was turned into work of a class that he had undertaken to perform.

The plaintiff appears to be in the following dilemma: If the work was in fact train filling it was outside his contract, and so far from being directed by the defendants to do it he was directed not to do it, so no "variation" was forced upon him. If, on the other hand, the work was changed from bridging to grading—as the plaintiff contended it was—it came within his contract, and he is only entitled to be paid on the basis of grading. No claim had been made in the former action for payment for grading. The claim was restricted to an additional price of 6.8c. per cubic yard for trainfill. I enquired from counsel for the defendants if his contention was that unless the plaintiff could shew himself entitled to the exact amount of 6.8c. per cubic yard he could not recover any less amount under the issue, and he answered that this was their contention. In my opinion the plaintiff has failed to establish any right to relief in respect of the items specifically claimed in this action. It was admitted by counsel before me that after judgment was reserved in the former case a memorandum was handed in by counsel for the plaintiff to one of the learned Judges of the Court of Appeal pointing out that even if the plaintiff were obliged to place his claim on the footing of grading he was entitled on the evidence to the sum of $2,107.50 on that score alone. No such claim had been alleged by the plaintiff in his statement of claim, and no amendment was asked for or granted in reference to it, and I must assume that for this reason the Court of Appeal gave judgment on the record as it was. It appears from the cross-examination of the witness George F. Rachan, one of the engineers, on p. 43 of the printed case, and is as follows:—

> HIS LORDSHIP: I understand the $124,141 includes an allowance for overhaul? A. Yes; it does include it; 2,556,400 yards at one cent a yard was the overhaul; $107,711.50 would be the figure at the price of 25 cents

for common excavation and 50 cents for loose rock and allowing the same overhaul.

The plaintiff had already been allowed and paid the sum of $105,604, the price of 264,010 cubic yards at 40c. Deducting the latter payment from the amount shewn by George F. Rachan to have been earned by the plaintiff, leaves the sum of $2,107.50 still due. In giving judgment in the Court of Appeal, Howell, C.J.M., goes over the evidence, and comes to the conclusion that the plaintiff was not entitled to claim payment on the footing of trainfill at all, and he concludes his judgment as follows:—

> When McArthur entered into the contract with the plaintiff there was no work for the latter to do at that fill, and, no doubt, he thought he could make what bargain he chose as to these deep fills, but, as the changes came within the schedules of the plaintiff's contract, the latter insisted that he was entitled to do the work under his contract, and it follows he must be paid for as provided for by these schedules.

Richards, J.A., as above quoted, said practically the same.

The attention of the plaintiff and his solicitors was directed so exclusively to the larger claim for trainfill that even in this second action no specific claim is made, alternatively or otherwise, for the smaller amount. If such a claim had been expressed upon the record in the former action the Court of Appeal might have given effect to it, but it was not so expressed. The claim was for the whole amount alleged to be due on the footing of trainfill. The question is whether it can be granted now. During the progress of the trial I pointed out that, according to the views expressed by both the Chief Justice and Richards, J.A., the plaintiff was entitled to be paid the balance due to him on the footing of grading. I have had the benefit of an additional argument by counsel for all parties on this point. Mr. Laird objects to any such relief being granted on three grounds: Firstly, that under his sub-contract the plaintiff was bound to produce a final certificate from the engineer covering the work in question, but he has not done so. Secondly, the figures relied upon by the plaintiff are not conclusive. There is reason to suppose that some of the material charged for as loose rock was really only frozen earth. Thirdly, the plaintiff agreed with the Eastern Construction Co. to do the work for 40c. per cubic yard, and he has received payment on that basis.

With regard to the first objection, there is no doubt that the work has all been done, and that, so far as McArthur, the original

MAN.

K. B.

SWANSON v. MCARTHUR.

Galt, J.

contractor, is concerned, all necessary certificates have been obtained, because the work has all been paid for long ago. The defendants did not suggest any necessity for the production of a final certificate by the plaintiff when they entered into their agreement with him on August 4th, 1913, and under the terms of that agreement paid the plaintiff $39,000. By doing this I consider that the defendants waived any right they may have had to the production of the final certificate by the plaintiff. The second objection is that the figures relied upon by the plaintiff are not conclusive. The nature of the claim for balance due the plaintiff in respect of grading was well known to the defendants, as the point had been raised in the Court of Appeal, and the evidence in regard to it was brought out by counsel for the defendants on cross-examination of the witness Rachan. Moreover, during the examination-in-chief of the plaintiff, set forth at p. 58 of the printed case, the following question is asked:—

> Q. Before this work was classified as trainfill, what classification did it have? A. It had common excavation, loose rock and overhaul. Q. Have you ever worked out what that work would have netted you had it gone at the original classification?
>
> Mr. Laird: The engineers gave figures for that.

The only evidence given by "the engineers" apparently was that given by Mr. Rachan, and counsel for the defendants appeared to be quite satisfied with it. Some evidence was given by the plaintiff to the effect that owing to his belief that the work was to be classed as trainfill he did a considerable amount of work over and above the estimate given by engineer Rachan. My attention was not drawn by counsel for the defendants to any passage in the evidence shewing where frozen earth had been classed by the plaintiff as loose rock. There was a general deduction made by the engineer on the total contract of $150,000, but whether any of this applied to the big fill is not shewn. On the other hand, I am unable to say to what extent, if at all, the plaintiff is entitled to additional charges for work which he performed under the impression that it was to be allowed as trainfill. But, apart from any speculations of this kind, the broad outstanding fact remains that McArthur received payment for this very work, performed by Swanson, at the rate of 52c. per cubic yard without any deduction. Why, therefore, should any deduction be made as against Swanson? The third objection is that the

plaintiff had agreed to do this work for 40c. per cubic yard, and he has been paid that amount. This identical contention was put forward by the defendants in the former action, and was decided against them by the trial Judge. The Court of Appeal did not interfere with this decision. It was expressly left undecided by Howell, C.J.M., and Richards, J.A., says nothing about it. The parties evidently intended to have a written agreement in respect of it, but when McDougal was informed by the engineer that he did not think the work could be classed as trainfill at all (which it subsequently was), the agreement seems to have been abandoned. Coming now to the question as to whether the plaintiff can obtain this relief now:—

The King's Bench Act contains the following provisions:—

Section 25 (j):

(*j*) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and the other express provisions of this Act, the Court and every Judge thereof shall recognize and give effect to all legal claims and demands, and all estate, rights, duties, obligations and liabilities, existing by the common law or created by any statute, in the same manner as the same would have been recognized and given effect to by the Court of Queen's Bench for Manitoba prior to the passing of the Queen's Bench Act, 1895.

(*k*) The Court, in the exercise of the jurisdiction vested in it by this Act, in every cause or matter pending before it, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to it shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

Rule 365 provides that

The Court or a Judge may, at any time, and on such terms as to costs or otherwise as to the Court or Judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings and best calculated to secure the giving of judgment according to the very right and justice of the case.

Now, while it is true that the plaintiff has not specifically claimed the above balance, the evidence shews that he is entitled to it. He has asked for further and other relief. It is a recognized part of our legal procedure that parties are entitled to any reason-

MAN.

K. B.

SWANSON v. MCARTHUR.

Galt, J.

able amount justified by the evidence. I can see no estoppel in the prior judgment of the Court of Appeal to prevent the plaintiff from now asserting this claim. The reasons for judgment above quoted are wholly in the plaintiff's favour on this point. The parties did not restrict themselves at the former trial or in the argument before the Court of Appeal to "the one issue" mentioned in their agreement of August 4, 1913. They tried out several issues. For instance, there was an issue as to which (if either) of the defendants was liable, and this was decided in favour of the Eastern Construction Co. Then, there was an issue raised by McArthur (par. 18 of his defence) that the plaintiff was not entitled in any event to payment until after the expiry of five days from payment by the commissioners to McArthur, which had not occurred. This issue was decided in favour of the plaintiff.

If I were to dismiss the present action on the ground that the plaintiff has not shewn himself entitled to any of the relief specifically claimed, the plaintiff would still be at liberty, so far as I can see, to commence a new action for the balance clearly due to him for grading. The litigation has already been excessive, and should not be prolonged. I therefore give leave to the plaintiff to amend his statement of claim by adding an alternative claim for the balance due to him for grading. As regards the question of costs, neither of the defendants has seen fit to offer to pay the said moneys which are justly due to the plaintiff. On the other hand, the plaintiff has not seen fit to place this claim upon his record. McArthur is directly liable to the plaintiff on his sub-contract. The Eastern Construction Co. have received from McArthur their proportion of the moneys received by him from the commissioners, an amount based upon the allowance for trainfill, and therefore including the smaller amount due to the plaintiff for grading. They might well be held liable for money had and received.

However, the plaintiff has signified his willingness to take judgment against the defendant McArthur alone. Accordingly there will be judgment for the plaintiff against McArthur for $2,107.50, but without costs. The action will be dismissed as against the Eastern Construction Co., Ltd., without costs.

Judgment accordingly.

SCHEUERMAN v. SCHEUERMAN.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. February 19, 1915.

1. HUSBAND AND WIFE (§ II E—83)—PROPERTY RIGHTS—CONVEYANCE OF HUSBAND TO WIFE—SALE BY WIFE TO THIRD PARTY—RIGHTS OF HUSBAND.

Where the purchaser of lands, on completing the contract, had them conveyed to his wife instead of to himself, with the intention thereby to prevent an execution creditor from realizing therefrom, and to hold upon a secret trust for the husband, but the property was exempt to its full value at that time under a homestead exemption law, the intent to defeat creditors not having been accompanied by any illegal act, is not a bar to the husband bringing an action against his wife for the return of the property to him in pursuance of the trust or to declare him entitled to the benefit of the contract of sale made by her to a third person. (*Per* Stuart and Beck, JJ., in a divided court, affirming Scott, J., at the trial.)

[*Meunier* v. *Doray*, 6 Terr. L.R. 194, and *Day* v. *Day*, 17 A.R. (Ont.) 157, applied; and see *Scheuerman* v. *Scheuerman*, 17 D.L.R. 638.

Statement

APPEAL from Scott, J., 17 D.L.R. 638.

O. M. Biggar, K.C., for plaintiff, respondent.

Frank Ford, K.C., for defendant, appellant.

Harvey, C.J.

HARVEY, C.J.:—I think this appeal should be allowed. I agree with the learned Chancellor of Ontario when he said, in giving his reasons for judgment in *Mundell* v. *Tinkis* (1884), 6 O.R. 625, at 627:—

> I have always understood the rule of equity to be as expressed by Esten, V.-C., in *Phelan* v. *Fraser*, 6 Gr. 336, that this Court never assists a person who has placed his property in the name of another in order to defraud his creditor.

And, again, on 629, when referring to the argument that the rule should not apply if the fraudulent intention has not been carried out, he says:—

> If it is meant that the illegal purpose is not carried out unless it is proved that some creditor has actually been defeated or delayed, this is imposing an unsatisfactory test, because the act and conduct of the grantor are not affected by the subsequent course of third parties. So far as he is concerned, the illegal purpose is complete; he has violated the law and should not be allowed to resort to the law for protection.

The learned trial Judge relies on *Taylor* v. *Bowers*, 1 Q.B.D. 291, approving *Symes* v. *Hughes*, L.R. 9 Eq. 476, followed in *Mulligan* v. *Hubbard*, 5 Man. L.R. 225, but, as I pointed out in *Bakewell* v. *MacKenzie* (1905), 1 W.L.R. 68, the authority of *Taylor* v. *Bowers* has been very much weakened, if not entirely destroyed, by *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742.

Rosenberger v. *Thomas* (1852), 3 Gr. Ch. 635, was a case

ALTA.

S. C.

SCHEUERMAN v. SCHEUERMAN

Harvey, C.J.

where the plaintiff, having been sued by a person on what he considered an unjust claim, transferred his property to the defendant, to protect it from the judgment if obtained. The Court, consisting of Blake, C., and Esten, V.-C., and Spragge, V.-C., refused to give any assistance in recovering back the property. The Chancellor (p. 638) quotes with approval the words of Lord Eldon, in *Curtis* v. *Perry*, 6 Ves. 739:—

> The moment the purpose to defeat the policy of the law, by fraudulently concealing that this was his property, is admitted, it is very clear that he ought not to be heard in this Court to say that it is his property.

All the quotations I have given indicate that the intention is the question of importance, but Osler, J., in *Day* v. *Day* (1889), 17 A.R. (Ont.) 157, comes out plainly, and says that, though the intent is proved, yet, unless some creditor has actually been defrauded, the plaintiff is to be permitted to have the Court's assistance. The trial Judge had decided the other way, and no one of the other appeal Judges adopted the views of Osler, J.

If it is on grounds of public policy, as I take it to be, that the Court refuses to assist a person out of the consequences of an illegal or immoral act, I find it difficult to understand why the purpose and intent of the act done, rather than its fortuitous consequences, should not be the matter of chief consideration, and I feel satisfied that the great weight of authority is against the view expressed by Osler, J.

It is contended, however, that in this case the property in question was exempt from seizure, and that, consequently, there was no possibility of creditors being prejudiced, and that, therefore, there could be nothing fraudulent or wrong in the plaintiff putting the property in the defendant's name, even though he did it for the purpose of defeating creditors. I find myself unable to agree with this statement of fact.

The exemption is not an absolute but a conditional one only. The provision of the Ordinance is: "The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate, according to the registered plan of the same, to the extent of $1,500."

Now, it is apparent that occupation by the debtor is a condition of the exemption, and also that the exemption is limited to a value of $1,500, any value in excess of that being available for creditors. The evidence establishes that the debtor ceased

to occupy the house and that its value did become greater than $1,500, because it was sold for $3,500. It is clear, therefore, that, if this property had been in the name of the debtor, instead of being in that of his wife, there would have been something to which execution could attach, and that, therefore, creditors might have been prejudiced by his putting it in his wife's name.

Meunier v. *Doray*, 6 Terr. L.R. 194, was a quite different case. The action was by a creditor of the husband. The property was a country homestead, which was exempt, regardless of its value. It had always been occupied by the debtor and his family. Consequently, at the time the action was brought, the creditor would have had no right of access to the property, even if it had stood in the name of the debtor. The action was tried before me, and I found that value had been given by the wife for the property, but, on appeal, the members of the Court, other than Mr. Justice Scott, who thought the appeal should be dismissed upon that finding, expressed the opinion that, even if that were not so, the creditor had not shewn that he had been injured.

It seems quite settled that a voluntary conveyance made by a person about to enter on a hazardous business may be set aside at the instance of subsequent creditors.

In *Ex parte Russell* (1882), 19 Ch.D. 588, Lord Jessel said:—

> A man is not entitled to go into a hazardous business, and, immediately before doing so, to settle all his property voluntarily, the object being this: "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss." That is the very thing the statute of Elizabeth was meant to prevent.

It appears to me unreasonable that in an action by a person who had conveyed his property under such conditions to protect it from possible creditors, against the person to whom he had conveyed it, the Court should require that its action be determined by the plaintiff's success or failure in business. To act on such a principle would not, in my opinion, be conducive to good morals.

The evidence in this case does not satisfy me that the creditor was not in fact delayed, though it seems that at some time before the trial the claim had been paid, though how or when does not appear. For the reasons I have stated, however, I am of opinion that that is not of importance. He might have been prejudiced,

ALTA.

S. C.

SCHEUERMAN v. SCHEUERMAN

Stuart, J.

and the intention was to defraud him. The plaintiff, I think, cannot be said to have clean hands, and the Court, therefore, should not assist him.

STUART, J.:—In my opinion, this appeal should be dismissed. I cannot find any sufficient ground for interfering with the findings of fact which were made by the learned trial Judge.

The property in question was purchased by the plaintiff, and an agreement of purchase was taken in his own name. It was found by the trial Judge that the money paid for the property belonged to the plaintiff. Then the plaintiff directed the vendor to issue a transfer to his wife, the defendant, which was done. It was admitted by both plaintiff and defendant that the property was put in the wife's name in order to protect it against the plaintiff's creditors, and that there was an express understanding between them upon this point.

The first defence raised is based upon the Statute of Frauds. But it seems to be now settled law that, where property purchased with the money of one person is conveyed to another, the case is within the saving section of the statute, even though there be a clearly spoken verbal agreement that the grantee shall hold in trust for the person paying the money: Lewin on Trusts, 11th ed., p. 54; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196. This distinction has generally been held to be a very serious whittling away of the terms of the statute, but I would venture to suggest that the actual result is, perhaps, to confine the statute to cases where the transaction has absolutely nothing else in it than a *declaration* or *creation* of a trust—that is, where a person *already* an owner, in fee or otherwise, declares or creates a trust; and to exclude from the operation of the statute the case where the agreement is made *before* the person undertaking to be a trustee has acquired any title to the property which he is to hold in trust. That is something more than a mere declaration or creation of a trust.

It was further contended that the plaintiff could not succeed in a Court of equity upon an equitable claim when it was revealed that his act in having the property conveyed to his wife was due to a desire to defeat or delay his creditors.

This argument presents the real difficulty in the case. It was admitted that at the time of the transfer to the wife the

property was the homestead of the plaintiff, being a house and lot or lots in Edmonton, in which the plaintiff and defendant were residing, and which at the time did not exceed $1,500 in value. At the time of the conveyance, therefore, the property was exempt from seizure under the Exemptions Ordinance.

It seems to be very clearly established that a conveyance of property not exigible under any form of execution is not within the statute of Elizabeth, and is not a fraud upon creditors: *Meunier* v. *Doray*, 6 Terr. L.R. 194; May on Fraudulent Conveyances, Am. ed., p. 18; *Sims* v. *Thomas*, 12 A. & E. 536. It is, therefore, the case that the plaintiff never committed any fraudulent act. He could not defraud creditors by parting with property which the creditors could not attack.

But it is said that this makes no difference, because he, at any rate, had the intention of defeating his creditors, and, having had such an intention in his mind when he quite lawfully conveyed property to his wife in trust for himself, he cannot come into a Court of equity and ask to enforce the trust. Upon consideration, I think this argument ought to be rejected. I know of no law which takes notice of a man's mere thought or intention where that thought or intention does not qualify and give some illegal characteristic to some outward act. In the present case the outward act was clearly legal.

It is impossible to apply the rule *in pari delicto, potior est conditio possidentis*, where there has been in fact no *delictum* at all. Nor do I think the Court is justified in amending the time-honoured maxim that he who comes into equity must come with clean hands, so as to make it read that he must come with a clean heart. If a man's hands are clean, then I think the Court is going beyond its functions in inquiring or noticing the condition of his heart. If he has neither done nor attempted anything illegal, we have, I think no right to examine his mind. No case has been cited and, I think, none can be found in which the maxim has been pushed to the extreme to which it is here attempted. The attempt simply amounts to asking the Court to refuse to give a man his rights arising out of a certain transaction merely because he *thought* he was doing something wrong in entering into it, when in fact he was not doing anything wrong. I have no reason to question the soundness of the reasoning of

ALTA.

S. C.

SCHEUERMAN v. SCHEUERMAN

Stuart, J.

Chancellor Boyd in *Mundell* v. *Tinkis*, 6 O.R. 625, but clearly the *act* there in question was fraudulent and illegal. There is a quite obvious distinction between a failure to effectuate the object and purpose of an illegal act and an omission to commit any illegal act at all.

The view I present was, I find, adopted by a very eminent Judge, Mr. Justice Osler, in *Day* v. *Day*, 17 A.R. (Ont.) 157, and was not unfavourably looked upon by the other Judges in that case.

I only need to add that we cannot, I think, take notice of a future possible increase in the value of the property. The character of the plaintiff's act must be decided upon the facts as they existed at the time it was committed. At that time it was a perfectly legal and not a fraudulent act, and I am unable to see how the possible contingency of a future rise in the value of the property over $1,500 can be said to qualify the character of the act in any degree. For these reasons I think the appeal should be dismissed with costs.

BECK, J.:—This is an appeal from the judgment of Scott, J., at the trial without a jury.

The plaintiff is the husband of the defendant. He held, under an agreement for sale to himself, and was living with his wife and family in a dwelling-house in Edmonton of a value not exceeding $1,500. This property was, consequently, exempt from seizure under execution by virtue of the Exemptions Ordinance—*i.e.*, was not exigible for the claims of creditors.

On paying the balance of the purchase money, he requested his vendor to make the transfer to the defendant, and this was done. It is admitted both by the plaintiff and the defendant that the transfer was made to the wife because the plaintiff was indebted to the J. I. Case Threshing Machine Co. for the balance of the price of a threshing machine bought by the plaintiff and his wife's father and brother. He had given a mortgage to the Case Company for the entire purchase price on a farm he then owned—a "second homestead." The Case Company subsequently realized their claim by enforcing the mortgage. At the time the transfer of the Edmonton property was given to the defendant the plaintiff had no other property, except the "equity" in the land mortgaged to the Case Company. The plaintiff says

ALTA

S. C.

SCHEUERMAN v. SCHEUERMAN

Stuart, J.

that at the time of the transfer the defendant expressly promised to reconvey the Edmonton property to him. She denies this.

Assuming that the law is that, as a general rule, a debtor, who conveys land with the intent to defeat, hinder or delay his creditors, cannot have the assistance of the Court for the purpose of recovering the property, even where, in the result, no creditor is in fact ultimately defeated—a proposition with regard to which there are decisions both *pro* and *contra*—I think that the rule, if it exists, does not apply to the present case, inasmuch as the property conveyed to the wife was not exigible for creditors for the reason that it was exempt.

Under these circumstances the act of the plaintiff was a lawful act, not *per se* tainted with immorality or illegality, and I think that, under these circumstances, the intent was immaterial, and cannot attach to or qualify the lawful act so as to make it unlawful. This seems to be the ground of decision in *Meunier* v. *Doray*, 6 Terr. L.R. 194.

The evidence makes it perfectly clear to me that it was not the intention either of the plaintiff or the defendant that the conveyance to the defendant was by way of absolute gift to her, and the trial Judge has so found. If, as a rule, there is a presumption of law or an inference of fact that a conveyance by a husband to a wife is an absolute gift, I think no such presumption or inference is to be drawn under the circumstances of this case, where the husband had no other property whatever, and the property conveyed was the home of himself and his wife and family, and obviously intended to remain their common home. I think that, in the absence of any evidence of the conditions of the conveyance, the proper inference to be drawn would be that the property would continue to be the common home of the family.

In view of what has occurred between the plaintiff and the defendant here, the wife selling the property, receiving $2,000 of the purchase money, leaving a balance of $1,500 unpaid, which is all that can now be made available for the husband, whom she has abandoned, the circumstances seem now to be such as bring about a fairly equitable solution of their rights. I would dismiss the appeal with costs.

WALSH, J., concurred with HARVEY, C.J.

Walsh, J.

Appeal dismissed.

MAN.

K. B.

REX v RABINOVITCH.

Manitoba, King's Bench, Galt, J. February 11, 1915.

1. SECRET COMMISSION (§ I—10)—FALSE STATEMENT IN WRITING—COLLUSIVE FIXING OF PRICE BY EMPLOYEE.

Where by collusion between the seller and the buyer's employee whose duty it was to fix the prices at which the buyer would purchase, such prices were systematically doubled or trebled over the ordinary rates, and these prices were re-stated in the seller's account copied from the buyer's order form, and the employee so dishonestly crediting fictitious prices was receiving cash presents from the seller as a share or bribe for the continuance of the fraud, charges under the Secret Commissions Act, Can. 1909, are sustainable against the seller, not only in respect of the corrupt gifts, but for issuing a statement of account false and erroneous in a material particular intended to mislead, and also in respect of the fraudulent order form as to his privity to the use of same to deceive the buyer.

2. WITNESSES (§ III—58)—CORROBORATIVE TESTIMONY—PRIOR FACT OTHERWISE IRRELEVANT—ADMISSIBILITY.

Facts which tend to render more probable the truth of a witness' testimony on any material point are admissible in corroboration thereof although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated.

[*Wilcox* v. *Godfrey*, 26 L.T.N.S. 481, applied.]

Statement.

SPEEDY trial without a jury of the two defendants jointly on their election, under Cr. Code, sec. 827, against a jury trial. Four offences were charged under the Secret Commissions Act, Can. 1909.

C. P. Fullerton, K.C., for the Crown.

W. H. Hastings, for the prisoners.

Galt, J.

GALT, J.:—The indictment in this case charges Rabinovitch and Clingman jointly with four offences under the Secret Commissions Act, 1909, being 8 & 9 Edw. VII. ch. 33.

[The learned Judge here quoted secs. 3 and 4 of the said Act, and continued:]

The first count of the indictment charges that the accused, about June 16, 1914, at the city of Winnipeg, knowingly gave to George Craig Lockhart or to Hugh S. McCook, both agents of the J. H. Ashdown Hardware Co., Ltd., an account which contained a statement which was false and erroneous in a material particular and was intended to mislead the said company.

The second count charges that on or about June 18, 1914, at Winnipeg aforesaid, the accused were knowingly privy to one Hugh S. McCook, an agent of the J. H. Ashdown Hardware Co., Ltd., knowingly using, with intent to deceive the said company, the principal of said McCook, a receipt or order form, being a

document in respect of which said company was interested, which said receipt or order contained statements which were false and erroneous in a material particular, and which said receipt or order form was, with the knowledge of said McCook, intended to mislead said company.

The third count charges that the accused, in the month of June, 1914, at Winnipeg aforesaid, corruptly gave a gift or consideration to Hugh S. McCook, an agent of the J. H. Ashdown Hardware Co., Ltd., as an inducement or reward or consideration to such agent for shewing favour to them, the said accused, with relation to the affairs or business of said J. H. Ashdown Hardware Co., Ltd., or for having done an act relating to the affairs or business of said company.

The fourth count charges that the accused, on or about July 13, 1914, at Winnipeg aforesaid, knowingly gave to George Craig Lockhart, an agent of the J. H. Ashdown Hardware Co., Ltd., an account in respect of which the said company, the principal of said Lockhart, was interested, which account contained a statement which was false and erroneous in a material particular, and which, to the knowledge of the accused, was intended to mislead the said company.

The system adopted by the parties was as follows: The Ashdown Company had a head packer, named Hugh Smith McCook, who had been in their employ for the last ten years, assisted by several under-packers. Goods for shipment by the company were packed on the third floor of their warehouse. On the first floor the Ashdown Company employed a receiver of goods named Thorne. Whenever the company required boxes they would notify the accused, and when a consignment of boxes arrived Thorne would count them, without specifying the particular kind, and enter them in a book. But Clingman did not require nor receive any receipt. Thorne would then notify McCook, the head packer, who would send down one of his assistants to get the boxes. The assistant would count them and enter the number of them on a slip of paper, take the boxes up in the elevator to McCook, and hand him the slip. It would then be McCook's duty to make out an order in duplicate, setting forth the date and fixing the charges for the consignment, and send the original to the accused, keeping the carbon copy in an order book.

MAN.

K.B.

REX v. RABINOVITCH.

Galt, J.

The accused would render a statement of their account against the Ashdown Company twice a month, usually about the middle and end of the month. This statement would be a reproduction of the figures which had been fixed by McCook in each of the orders aforesaid. The statement rendered in the middle of any month would usually contain the orders given during the last fortnight of the preceding month, and the statement rendered at the end of the month would include the orders for the first half of that month. Such statements would be taken by one of the accused to McCook at the Ashdown warehouse, to be approved and initialled. It would then be handed back, and on presentation at the office a cheque would be made out and delivered for the amount in favour of the Winnipeg Bottle and Metal Exchange.

In or about the month of May, 1914, the Ashdown Company became suspicious that they were paying too much for their boxes. The fixing of the prices for these boxes had been delegated to McCook for years past, and nobody else in the warehouse seemed to have any accurate knowledge as to what the proper prices should be.

The account referred to in the first count of the indictment is dated June 16, 1914. It was made out by Harry Rabinovitch, and consists of items which had previously been entered in various orders given by McCook to Rabinovitch, commencing June 2nd and ending June 15th. A glance at this account indicates at once a very large increase in the prices paid for boxes over the amounts which had previously been charged by Rabinovitch in 1908, and which were shewn, by the evidence of several witnesses, to be the ordinary prices for such goods in Winnipeg ever since that date. A few lots were charged for at the rate of 15 cents apiece, but a large number at prices ranging from 50 cents up to 80 cents. In the result 490 second-hand boxes were received by the Ashdown Company from the accused and were charged for at an average price of 57 cents apiece. Clingman, who had delivered the boxes, took this account, amounting in all to $280, to the Ashdown Company, procured McCook's initialling, and then received a cheque for the amount.

The next account rendered by the accused under the name of the Winnipeg Bottle and Metal Exchange is dated July 13. It covers items running from June 17 to June 30, amounting to $264, and forms the basis of the fourth count of the indictment. This

account also was made out by Rabinovitch. The amounts charged for the various classes of boxes is pretty much the same as appeared in the previous account, that is to say, it varies from 15 cents apiece per box (in very few instances) to 40 cents, 50 cents, 60 cents, and 80 cents, the boxes on the average netting 47½ cents apiece. Of these 556 boxes, 437 are said to have been liquor boxes, the price of which was shewn to be certainly not more than $1.50 per dozen.

Clingman, according to his own story, was absolutely ignorant of everything that took place in connection with these transactions. He says he could not read and did not know the prices that were being charged, and although he was entitled to one-half the profits of the business ever since the partnership commenced, he never made any effort to ascertain what was due to him, but merely drew out a little money from time to time to live upon. He must have had some practical knowledge of figures, for he was the partner who conducted most of the buying up of boxes, etc. He also did most of the delivering of the goods, and he at least occasionally collected payment for the goods. I cannot believe that he was not well aware of the prices his firm was charging the Ashdown Company for the boxes in question. The line of business pursued by his firm included only a few classes of goods, and it is impossible to believe that he did not frequently discuss with his brother-in-law, Rabinovitch, the prices at which they were selling the goods which he, Clingman, had already bought and paid for. In the case of the account dated June 16 (ex. 3), Clingman himself attended with the account, and got the cheque. He would at least know that his firm were collecting a cheque for $280 for boxes delivered between the 1st and 15th of June. He also knew the amount shewn by his firm's account dated July 13, 1914, for $264, as he attended to collect this also.

I am satisfied that if there was any "false or erroneous statement" in either of these accounts Clingman as well as Rabinovitch must be taken to have known it.

The Secret Commissions Act is a reproduction of the Prevention of Corruption Act, 1906, in force in England. I have been unable to find any case decided under either Act which might assist in deciding this case.

The first and fourth counts of the indictment are laid under sec. 3 (*c*) of the Secret Commissions Act, which is aimed at punish-

MAN.

K. B.

REX v. RABINOVITCH.

Galt, J.

ing anyone who knowingly gives to any agent any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal.

The question is, do these accounts, or either of them, contain any false or erroneous statement?

The Oxford New English Dictionary defines the word "false" to mean "erroneous, wrong," "purposely untrue, mendacious."

During the argument of this case I was a good deal impressed with the view that a statement of account by a vendor of goods, embodying merely the same figures as had been fixed by an agent of the purchaser, could not fairly be said to be a false statement, and that for the same reason it would not be erroneous or defective.

In order to properly ascertain to what, if any, extent the accused's accounts were false, in the light of the meaning given to that word by our most authoritative dictionary, it is necessary to revert to the original orders given by McCook which formed the basis of the accused's accounts.

McCook was well aware of the true values of the boxes and the prices which had for years been paid by the Ashdown Company in purchasing them. Upon receipt of any given quantity of boxes —for instance, of 83 boxes on June 4th—it was shewn in evidence that this consignment consisted of 80 liquor boxes and 3 Apollinaris boxes, valued in all at $8.30; but McCook sub-divides these into five different classes of boxes at prices ranging from 15 cents to 80 cents per box, at a total charge of $32.10. Manifestly the statements made in that order as drawn up by McCook were false and erroneous within the meaning to be attributed to those terms, and were intended to deceive his principal.

Rabinovitch possessed the same knowledge as McCook had with regard to the proper values to be paid for the boxes. He must have known perfectly well that the prices were "false and erroneous." He willingly adopted McCook's figures and rendered his account to the J. H. Ashdown Hardware Co., Ltd., embodying these false charges, and sent Clingman to collect the money.

Clingman was well acquainted with the prices of the boxes, for he had paid for them himself. It is true he says he cannot read or write, but he at least knew the number of boxes he had

delivered, and he must have known the proper prices chargeable for them by his firm. He took the bill to McCook for initialling and subsequently obtained a cheque for the amount. I think he must be taken to have known perfectly well that the account contained the above false statements.

Precisely the same reasoning applies to the account dated July 13, 1914, which forms the subject of the fourth count of the indictment.

The charge set forth in the second count of the indictment is that the accused, on or about June 18, 1914, were knowingly privy to McCook, agent of the Ashdown Company, knowingly using, with intent to deceive the Ashdown Company, a receipt or order form No. 46173, which said receipt or order contained statements which were false and erroneous in a material particular, etc.

The order in question relates to a delivery of 191 boxes by the accused to the Ashdown Company. This delivery, as shewn by the evidence of George Craig Lockhart, voucher clerk for the Ashdown Company, consisted of 188 liquor cases and 4 Old Chum cases. The value of the liquor cases at proper prices is calculated to be $19.58, and the 4 Old Chum cases $1.00, making in all $20.58. This consignment was expanded by McCook on the company's order form into seven different classes of boxes, ranging at prices of 15 cents, 40 cents, 45 cents, 50 cents, 60 cents, 65 cents and 80 cents, and the amount to be charged was fixed by McCook at $99.20. Unquestionably this order contained statements which were false and erroneous in material particulars, and was intended to mislead the Ashdown Company.

Rabinovitch, for reasons already given, must be taken to have accepted the order and acted upon it knowingly and with intent to deceive the Ashdown Company.

There was no evidence to connect Clingman with knowledge of the terms of this order. He could not read or write except to a very limited extent, and he would have nothing to do with the preparation of the accounts to be rendered to the Ashdown Company.

The third count of the indictment charges that the accused, in the month of June, 1914, corruptly gave a gift or consideration to Hugh S. McCook, an agent of the J. H. Ashdown Hardware Co., Ltd., as an inducement or reward or consideration to such

MAN.

K. B.

REX v. RABINOVITCH.

Galt, J.

agent for shewing favour to them with relation to the affairs or business of the Ashdown Company.

In order to deal intelligently with this charge a few preliminary observations are necessary. Shortly after July, 1914, McCook was arrested in connection with the transactions in question. He pleaded guilty and was let out of custody on suspended sentence. The particular charge laid against him was not put in evidence at this trial, but McCook was called as a witness for the prosecution, and testified that he had been in the employ of the Ashdown Company for about ten years as head packer. He explained the system adopted in purchasing second-hand boxes as above detailed. He had been purchasing boxes from Rabinovitch for about seven years and from both of the accused since the formation of the Winnipeg Bottle and Metal Exchange. McCook states that about three years ago Rabinovitch was with him in the warehouse, and when going away put a ten dollar bill in McCook's pocket. McCook had been examined as a witness at the preliminary hearing, and stated that Rabinovitch handed him $10 on the occasion in question, but he did not say that Rabinovitch had put it in the witness's pocket. McCook professes that at first he did not know why Rabinovitch gave him this money, and he called him back to ask him about it, but Rabinovitch just told him to keep it, or something of that kind. A few months afterwards McCook says Rabinovitch gave him $20, and from that time on up to the date of McCook's discharge by the company on July 10, 1914, Rabinovitch paid him moneys aggregating about $50 a month. McCook stated in his evidence that Rabinovitch asked him a couple of times "to put more on," in reference to the amounts to be inserted by McCook in his orders which would form the basis of the accounts subsequently to be rendered by the accused to the company.

The particular payment charged in the indictment is said to have been made by the accused to McCook in June, 1914. McCook says that these payments were usually made to him by Rabinovitch on Portage Avenue or at the Queen's Hotel. He says that Rabinovitch paid him $30 or $40 in June, 1914; but that he cannot recall whether it was paid to him on the street or in the Queen's Hotel, nor is he able to fix the date of the payment other than stating that he thinks it was during the latter part of June.

There is no evidence to connect Clingman with any of these alleged payments other than the suggestion that as a partner of Rabinovitch he must have known whatever Rabinovitch was doing in reference to the firm business.

Rabinovitch denies that he ever paid anything to McCook in connection with his dealings. He shews by his evidence that he was away from Winnipeg from June 16 to June 19, and that he went away again on June 25 to the Pacific Coast and was away till July 6. Still, he was in Winnipeg from the 19th to the 25th. He did not deny McCook's statement that he had asked McCook "to put more on" the box account, but this may have been because he was not asked about it by his counsel.

In attempting to decide between the evidence given by these two men, the credibility to be given to McCook is, of course, greatly weakened by the fact that he is a confessed criminal, and has been carrying on a systematic robbery of his employer for some years. Furthermore, his statements in regard to the particular instances of receiving money from Rabinovitch are indefinite. At the police court he stated that the first $10 was simply given to him by Rabinovitch, whereas at this trial he stated that the money was placed in his pocket by Rabinovitch. Then, again, as to the alleged payment in June, 1914, McCook stated at the police court that the amount was $40, whereas at this trial he said $30. On the other hand, one is confronted with the question, what possible motive could McCook have had for overcharging his employer, unless he derived some benefit from it?

There is no doubt whatever that the prices fixed by McCook to be charged by the accused for the boxes delivered to the Ashdown Company were frequently double and treble and quadruple the amounts which the accused were properly entitled to charge. The moneys payable for the boxes did not go through McCook's hands in the shape of cash, but were all paid by cheque delivered at the office to one of the accused. That McCook should have carried on such a system of overcharges without receiving any benefit from the accused is impossible to believe. He was apparently the only employee of the Ashdown Company who had any accurate knowledge of the proper prices to be paid for these boxes, but he took the precaution of keeping his order books locked up in a drawer of his desk, so that nobody else could get

MAN.

K. B.

REX v. RABINOVITCH.

Galt, J.

at them until on one or two occasions in June, Mr. Dykes, the manager of the company, pried open the drawer and discovered the overcharges which were being made. McCook's evidence in this case must be treated, I think, as the evidence of an accomplice in the crime charged, and it should not be accepted without corroboration. But Rabinovitch knew just as well as McCook did that the figures fixed by McCook were gross overcharges, and that Rabinovitch and his partner were receiving the benefit of such overcharges. Rabinovitch himself made out the accounts under which he knew he was charging double and treble the right amounts. If he, as an honest man, considered that the figures were wrong and that gross mistakes were being made month by month in his favour by McCook, surely it would have been his duty to point them out to McCook; but no such thing happened.

I cannot resist the belief that McCook's evidence as to receiving these gifts month by month from Rabinovitch, and in particular receiving $30 or $40 from Rabinovitch in the month of June, 1914, is reasonable in itself. I do not attach much importance to a lack of definiteness in the particulars of time, place or amount, because I think that if such gifts were made frequently the parties would not make a careful note of them even in their own minds.

The question is whether McCook's evidence is sufficiently corroborated. The following facts appear to me to have an important bearing on this question of corroboration:—

Item 1.—The statement of account (ex. 3) rendered by the accused under the name of the Winnipeg Bottle and Metal Exchange is dated June 16, 1914. Amongst the items included in it is one of June 3rd. Upon that date a delivery was made by the accused, which is entered in the book of the receiver for the Ashdown Company as simply "103 empty boxes." It was shewn in evidence that Clingman nearly always made these deliveries, and that he neither required nor received any receipt for the boxes he delivered. When these boxes were sent upstairs to McCook he expanded them as follows:—

28 boxes, at 50 cents,	$14.00	31 boxes, at 60 cents,	$18.60
22 boxes, at 45 cents,	9.90	15 boxes, at 40 cents,	6.00
		7 boxes, at 15 cents,	$1.05

On June 4, another delivery of "83 empty boxes" was expanded by McCook as follows:—

22 boxes, at 60 cents, $13.20 14 boxes, at 50 cents, $7.00
31 boxes, at 15 cents, 4.65 13 boxes, at 45 cents, 5.85
3 boxes, at 80 cents, $2.40

The total number of boxes delivered, as shewn by the statement of June 16, is 490, and the amount charged is $280, or at an average price of 57 cents apiece.

Item 2.—The statement of account rendered by the accused, and dated July 13, was also made up by Rabinovitch. The item dated June 17 is entered in the receiver's book as simply "192 empty boxes." McCook expands this in his order book as follows:—

28 boxes, at 15 cents, $ 4.20 42 boxes, at 60 cents, $25.20
34 boxes, at 80 cents, 27.20 22 boxes, at 65 cents, 14.30
18 boxes, at 50 cents, 9.00 10 boxes, at 45 cents, 4.50
37 boxes, at 40 cents, $14.80

Item 3.—The account dated June 16 was given by Rabinovitch to Clingman, who attended the Ashdown Company and received a cheque for the amount.

Item 4.—As regards the account dated July 13, McCook had been discharged on July 10, so that he could not initial it. By this time the Ashdown Company had decided not to pay any more moneys to the accused until they made further investigation. Consequently, when Rabinovitch rang up Lockhart on July 15, inquiring why the account was not paid, Lockhart requested him to furnish a duplicate of his account, and says that Rabinovitch promised to do so; but he never did so; and the accused have never since made any attempt to collect the money.

Item 5.—The accused have never rendered any account for boxes delivered during the first half of July, although several such deliveries took place.

Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated: *Wilcox* v. *Gotfrey*, 26 L.T.N.S. 481.

In *Green* v. *McLeod*, 23 A.R. (Ont.) 676, the question arose as to whether certain evidence given by an administratrix had been sufficiently corroborated. Osler, J.A., says, at p. 678:—

"In my opinion it has been so corroborated. The language of the Act is very general. 'Other material evidence' is the

MAN.

K. B.

REX v. RABINOVITCH.

Galt, J.

expression, and this may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. . . . And as to the other sum received by her—indeed as to both—the fact of the deceased having survived her receipt of it for some fourteen months and having made no complaint of the defendant's conduct in connection with it, though he had ample opportunity of doing so, tells in her favour with equal force. These are circumstances which are material and which are relevant and which could not have been rejected. I think they amount to material evidence in corroboration of the defendant's evidence within the meaning of the Act."

I am of opinion that the facts set forth in the various items of evidence above mentioned, and the inferences or probabilities fairly deducible therefrom, afford sufficient corroboration of the evidence given by McCook as to the payments received by him from Rabinovitch from time to time, and in particular to the payment of $30 or $40 in June, 1914.

With regard to Clingman, while I have the gravest doubt that he was not well aware of these payments alleged by McCook, I cannot say that the evidence is sufficient to connect him with knowledge of them. He was unable to read or write, and McCook does not in any way connect Clingman with any of the payments. I accordingly give him the benefit of the doubt as regards this third count.

For the above reasons, I find Rabinovitch guilty upon all four counts, and Clingman guilty upon the first and fourth counts but not guilty on the second and third.

Convictions accordingly.

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Ontario Supreme Court, Meredith, C.J.C.P. January 4, 1915.

1. PRINCIPAL AND AGENT (§ III—33)—CUSTOMS BROKER—BILL OF LADING—NEGLIGENCE—DAMAGES—MEASURE OF.

A customs broker who is entrusted by his client with a duplicate bill of lading endorsed in blank to facilitate the passing of customs is liable in damages to the client if, through the negligence of the broker's agent the bill of lading is improperly delivered either to the buyer of the goods or to the railway company at destination if as a result the buyer obtained delivery without paying for the goods which were under consignment to the seller; the damage in such case is the price plus the interest at 5 per cent. from the time of wrongful delivery to the date of entering judgment.

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

2. PLEADING (§ II H—218)—BREACH OF CONTRACT—AGENT'S NEGLIGENCE—ACTION—DEFENCE.

It is no answer to an action by the principal against his agent for breach of contract resulting from the agent's wrongful disposal of a document of title to goods and the resulting delivery of the goods by the carrier before the price had been paid to such principal who was the seller and consignee, for the agent to set up that the property in the goods had not passed to the person who had wrongfully obtained possession.

3. PRINCIPAL AND AGENT (§ III—33)—CUSTOMS BROKER—BILL OF LADING—LENDING TO CARRIER—NEGLIGENCE—DAMAGES.

A customs broker entrusted with an endorsed bill of lading solely for the purpose of clearing the goods through the customs is not justified in lending the bill of lading to the carrier to enable the latter to fix the freight charges and is answerable in damages if the seller who has consigned the goods to himself loses them in consequence of the broker's wrongful or negligent act.

4. CARRIERS (§ III D 2—400)—VALID DELIVERY—ONUS OF PROVING—RAILWAY RECEIVING GOODS FOR LAST PORTION OF TRANSPORTATION.

The onus of proving a valid delivery of the goods under a bill of lading by which they were consigned to the consignors or their assigns is upon the railway company which received the goods for the last portion of the transportation from the preceding carrier.

Statement

ACTION for damages for the loss of a motor car shipped to the plaintiffs at Vancouver, British Columbia.

A. McLean Macdonell, K.C., and *J. W. Bain*, K.C., for the plaintiffs.

J. J. Maclennan, for the defendants.

A. Haydon, for the third parties the Great Northern Railway Company.

No one appeared for the other third parties.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The substantial questions involved in this case are all questions of fact; and questions which, with one exception, are easily answered; the material facts being, with that one exception, easily found: see *Heys* v. *Tindall* (1861), 1 B. & S. 296.

The plaintiffs, admittedly, through the fault of one or more of the parties to this action, have been deprived of their control over the goods in question; and are entitled to recover damages for the loss which that deprivation has caused them.

The goods in question—a motor carriage—made and owned by them, were shipped by them from their factory in England to themselves or their assigns at the city of Vancouver, in British Columbia, Canada: and the usual bill of lading, in two parts,

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Meredith, C.J.C.P.

was obtained by them from the carriers, and sent, with the usual invoices, to their Canadian sales branch or agency at the city of Toronto, in Ontario, Canada.

The bill of lading provided, in the usual form, for the carriage of the goods to the plaintiffs, or their assigns, at Vancouver, the carriers to pay the freight; that is, the through charges were in effect prepaid.

The motor carriage was intended by the plaintiffs to be delivered to one Noel Humphreys, at Vancouver, upon payment by him of the price of it, in accordance with an agreement respecting it made between them: and, again in accordance with the plaintiffs' method of doing business of that kind there, they drew, at sight, upon Humphreys for the price of the carriage, endorsed one part of the bill of lading in blank, attached the bill of exchange to it, and sent the two to their bankers in Vancouver, with instructions to deliver the bill of lading so endorsed to Humphreys, upon payment by him of the amount of the bill of exchange, which was the price of the carriage; all of which was in accord with their usual, as well as with common, mercantile methods: possessed of the bill of lading so endorsed, and having paid the price of the carriage to a bank of the highest standing, Humphreys would, and it was meant that he should, have no trouble in getting delivery to him of it.

But, before any one could rightly obtain possession of the goods, it was necessary that they should be "cleared" at the Customs House, having "come through in bond:" and the work of making all entries and clearing all goods, everywhere in Canada, for the plaintiffs, was entrusted to the defendants: and, for the purpose of making this entry, the invoices, and the other part of the bill of lading, were delivered to the senior partner of the defendants, with a cheque for the amount of money required to pay all charges, and the defendants undertook to do the necessary work in clearing the goods from all Customs demands.

When the plaintiffs first opened their sales branch or agency in Toronto, the senior partner of the defendants, who are Customs brokers, sought and obtained from the defendants all of their Customs House work, and has ever since had, and done, it.

The second part of the bill of lading was given to the defendants with the invoices, because the senior partner of the defendants had told the plaintiffs that it was necessary that it should accompany the papers, that the Customs House officers required its production; and so it was always given with the invoices to the defendants, sometimes endorsed in blank, and sometimes not so endorsed. The fact is that sometimes Customs officers require the production of the bill of lading and sometimes they do not; their purpose being to prevent frauds; to prevent the passing of goods as shipped in England, when in truth they are shipped from some foreign country, and so are liable to a higher duty than if they had come directly from some part of Great Britain, although of British make. So that in dealing with a company as well known as the plaintiffs it might be seldom, if at all, that the bill of lading would be asked for: yet it was not unreasonable for the defendants to ask for and have it so that it might be produced if demanded.

All the papers in regard to this entry, as was also the case with all work done by the defendants for the plaintiffs, were made out and signed and sworn to in Toronto, by the defendants' senior partner, he, or his firm, having a formal power of attorney from the plaintiffs to act as their brokers. When completed, the papers were sent, with the cheque for the amount required to pass the goods, to the defendants' correspondents in Vancouver, the third parties the Turnbulls, who are Customs brokers there, to clear the goods from all Customs charges: and that was done, they apparently retaining the second part of the bill of lading.

So far it is quite plain sailing, but the subsequent facts are in some respects ill-disclosed. That their part of the bill of lading by some means got into the hands of the carriers at Vancouver, the third party railway company, and that Humphreys got from them the goods without having paid a farthing on their price, is very plain: how the bill of lading got into the hands of the railway company, as well as just by what means and how Humphreys so got possession of the goods, is not made plain by the testimony.

In these circumstances, the plaintiffs sue the defendants for the value of the motor carriage: and the defendants, besides con-

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Meredith, C.J.C.P.

testing the claim, make a claim over against the third parties, the Turnbulls and the carriers, the railway company.

The defence set up to the plaintiffs' claim is, that the defendants themselves were not guilty of any error; and that, if the Turnbulls were, the defendants are not answerable for it; that the Turnbulls were not the defendants' agents, but were the plaintiffs': but in both respects I find them to be clearly wrong.

I find the defendants guilty of a gross breach of their contract with the plaintiffs, to perform duly the duty of the plaintiffs' Customs brokers. Such brokers are employed because of their professed knowledge, skill, and care in the performance of such duties as the defendants undertook in this case. To send, without the least need, indeed without the least excuse for it, a bill of lading of goods of the value of several thousands of dollars, to send such a bill endorsed in blank, with a full knowledge of the danger of so doing, a knowledge which every business man must possess, not to mention those who hold themselves out as competent Customs brokers, I find to have been an undoubted act of negligence, standing alone, and one which becomes the more culpable in view of the fact that the broker who is personally answerable knew at the time that the other part of the bill of lading was to be sent with bill of exchange attached, as I have before mentioned, to guard against delivery of the goods until the price had been paid; and also of the fact that in forwarding the papers to the Turnbulls, and in giving them instructions regarding the entry, not a word was said in the way of warning, either regarding the bills at the bank, the means they adopted of preventing delivery before payment, or even calling attention to the fact that the part of the bill of lading sent to them was a dangerous instrument, being endorsed in blank.

It is not a sufficient answer to this charge of negligence to say that the plaintiffs should not have given to the defendants the bill so endorsed. The defendants were not paying the plaintiffs for skilled reasonable care in the performance of the plaintiffs' professional duties: the plaintiffs were paying the defendants for all that. The plaintiffs owed no duty to the defendants to know that an endorsed bill of lading was not necessary for

Customs purposes; the defendants owed that duty to the plaintiffs; and they owed the duty to the plaintiffs also to inform them of the fact and let the danger be removed by them: or else to have removed it themselves by running a pen mark through the endorsement, or otherwise cancelled it. And, after all that, there was the gross neglect to warn the Turnbulls; a neglect which, whatever else may be said against them, gave them some ground for the complaint they make in this respect, in their letter of the 24th June, 1913, to the defendants: see *Rudd Paper Box Co.* v. *Rice* (1912), 3 D.L.R. 253, 3 O.W.N. 534.

Nor is it a sufficient answer to this charge of failure to do that which they were paid for doing and had contracted to do, for the defendants to say that, any way, no harm would have come from their negligence if others had not been negligent too. The person who wrongfully sets the squib going is answerable for all that may reasonably be expected as a possible result; and the person who sends on a loaded, capped, and full-cocked gun, and especially one who is a professed armourer for hire, can hardly escape being answerable for what might reasonably have been anticipated, if he does not take the trouble to put the dangerous weapon at least at "safe."

Upon the other question, I find that the Turnbulls were not brokers of the plaintiffs, but were acting for the defendants, in doing the few purely ministerial acts which the defendants employed them to do. The Turnbulls had no power of attorney, nor any authority to act in any manner as the plaintiffs' brokers: indeed all that they had to do were not only purely ministerial acts, but were acts of that character so restricted that they had no power over the money to be paid as Customs duties; a cheque payable to the Collector of Customs was the means by which payment was made. The Turnbulls had no more power, and did no more, than any porter or messenger might have done. It is no gain to say, "But they were skilled brokers, and so their knowledge might have been useful if any difficulty had arisen," for that contention vanishes when it is again stated that all the papers were prepared by Jackson over his signature and under his oath, taken in Toronto, so that no change could be made, not even to the dotting of an i or the

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Meredith, C.J.C.P.

crossing of a t, without the papers being sent back to Toronto; nor could they supplement them, because Jackson alone had a power of attorney.

But it is urged, for the defendants, that there was an expressed arrangement, between Jackson and the manager of the plaintiffs' branch or agency at Toronto, under which the Turnbulls were to become the plaintiffs' Customs brokers at Vancouver: that contention however fails for two reasons: because it is not proved; and, if it had been, no such arrangement was ever carried into effect; no such appointment was expressly made, nor were the Turnbulls ever employed except by the defendants in their own name to do for them the purely ministerial acts I have mentioned. There was a conversation between the plaintiffs' manager at Toronto and Jackson, in which, among other things said respecting Jackson's appointment and work, it was mentioned that out of Toronto work could not be altogether done in Toronto, that the entry must be made at the port of discharge, and that the plaintiffs could have a broker there to do all the work, or else it could be done in the way in which I have mentioned as it having been done; and in that conversation Jackson mentioned the Turnbulls as competent and trustworthy brokers, and the plaintiffs' manager was satisfied with Jackson's recommendation of them and willing that they should do anything that might be needful in clearing the plaintiffs' goods at Vancouver, as he would have been with anything else in reason that Jackson might have said, upon the subject of Customs House clearances; but, giving the fullest weight to all that was said, it fell far short if any appointment by the plaintiffs of the Turnbulls to act for them, or any authority to Jackson to make any such appointment: and, as I have said, none in fact was ever made. It is not uncommon for one seeking business, and especially the whole business in his line, of a large concern like the plaintiffs', to speak of his facilities and agencies and to commend them, in order to make a good impression by shewing his capabilities for the best kind of performance of the business entrusted to him. There is no suggestion that any such appointment was ever actually made, or the Turnbulls ever communicated with on the subject, or of any kind of acceptance by them of it or of any kind of contract with the plaintiffs, or any direct respon-

sibility to them. In so far as the testimony of Jackson differs from that of any other witness on this subject, I place more reliance on the testimony of the other witnesses; not because, on the part of any of them, there was any kind of attempt, or desire, to mislead justice; but because it was so very evident that Jackson was so oppressed by the danger of losing his case, which would be a very serious thing for him, whilst one far less oppressive to the plaintiffs, that it was difficult for him to say or to think anything that was not favourable to him, quite unconscious, I have no doubt, of having given even an excessive colour to any of his views. So I find this defence not proved; but, if it had been, the defendants would still remain liable because of their own negligence; quite apart from that of the Turnbulls.

In order that the plaintiffs may recover all their loss from the defendants, it is not necessary for the plaintiffs to shew that the defendants' negligence was the cause of a rightful delivery of the goods to a wrong person. The defendants were guilty of a breach of their contract with the plaintiffs, and without that breach of contract there would not have been such misdelivery: it was the one thing to be guarded against, just as if it had been a cheque endorsed in blank, with of course this difference, in favour of justice, in this case: the money mispaid on the cheque could at once be put in the wrongdoer's pocket, and a legal right to it transferred by the wrongdoer, and it would be a long way following it up and recovering it, if it ever could be, if once in the wrongdoer's possession: the motor carriage could not immediately be so dealt with: and it does not lie in the defendants' mouth to say to the plaintiffs: "The carriage is in law still yours; go and get it:" that was the defendants' duty if any one's: and, having failed in that, as well as in their obligation to take reasonable care of the "loaded gun," they must pay the amount of the plaintiffs' actual loss; which is the price that Humphreys was to have paid for the carriage, and, in addition, the loss through being deprived of both carriage and price from the time of the wrongful delivery of it until the entry of judgment in this action; and those damages I fix at the same amount and interest upon the price at five per centum per annum during that time. The judgment clerk can, and is to, add these two amounts together and enter judgment for the plaintiffs against

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Meredith, C.J.C.P.

the defendants and damages in the amount of them in one sum; with costs.

The third parties the Turnbulls are liable to make good to the defendants that sum: they were plainly guilty of a breach of their duty to the defendants, who employed them and paid them for their services. They had no authority from the defendants, or right of any kind, to make any use of the bill of lading, sent by the defendants to them, except in the Customs House, and for the purpose of clearing the goods. They may have a very good "moral" ground of complaint against the defendants for not making the bill of lading "safe" before sending it to them, or at least for not warning them of its dangerous condition: but that does not excuse them from the wrong of making an unauthorised use of it, whether they observed, or ought to have observed, the endorsement in blank, or not. If they gave the bill of lading to Humphreys, it was a flagrant breach of duty; if they only lent it to the railway company, at the company's request, to enable the company to "fix freight charges," they did it at their own risk, and must take the consequences. As I have said, on the first branch of the case, it is also no answer to the defendants' claim to say: no property in the goods has yet passed; you or the plaintiffs can go and get the carriage yet.

And now we reach the misty ground: and have that obstruction to view in the way, chiefly, I have no doubt, because all the testimony on this branch of the case was taken on a commission in British Columbia, and taken apparently with a misty notion only of the purpose for which it should have been taken; with absurd objections, and "refusals to answer under the advice of counsel," interspersed, tamely submitted to. However, after giving the whole evidence the best consideration I could, and naturally relying much upon the indisputable circumstances of the case, my conclusion is: that the railway company have not proved that they delivered the carriage to Humphreys upon the faith of the bill of lading, endorsed in blank—to which I have before frequently referred—produced, and given to them, by him as the lawful holder of it: nor have they shewn any other proper discharge of all their duties as carriers of it for hire.

The onus of proof of a valid delivery of the goods is upon these third parties, the railway company; and, for the purpose of discharging that onus, they rely mainly upon that part of the bill of lading which was entrusted to the brokers by the plaintiffs, supported by the testimony of their witness Burton, who describes himself as the company's "revising clerk" at Vancouver, and his duty as revising the weight and charges on the waybills of freight coming in. His story is, that Humphreys brought the bill of lading to him; and that, after making several inquiries, and getting the undertaking from him, endorsed by his bankers, to pay any charges there might be, if any, on the shipment, and "being firmly convinced that Mr. Humphreys was acting as agent for the Wolsely Tool and Motor Car Company, which he represented to be," he gave the usual instructions for the delivery of the carriage to him, and that it was, accordingly, delivered to him.

To the contrary, Humphreys testified that he did not bring the bill of lading to the railway company: that in fact he really never had it in his possession: that he "did not handle it himself:" that he understood that it was sent from the Turnbulls' office to the office of the railway company by a messenger; that "they said they would send it down by a messenger."

I am unable to place much dependence on the testimony of either of these witnesses, and so seek eagerly for circumstances to support, or the opposite, any material statement made by either of them. Humphreys is so condemned in the transactions that it may perhaps make little difference to him whether the truth is told or not; however it came about, the substantial result is the same—he got, without payment of a farthing, this valuable carriage, to which he had no right except on payment of $3,359: yet one might expect him to wish to put the best face possible upon his act; and not to be over-scrupulous in doing so. Whilst Burton's intent in making the best of it for himself is very evident; and it may be, and probably is, a more substantial interest than Humphreys': and these things happened over a year and a half ago—a year and a half before the time when the evidence was given; and, no doubt, but one of many thousand like transactions that took place in that time. Against his

ONT.

S. C.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Meredith, C.J.C.P.

story, and in favour of Humphreys', is the fact that he —Burton—had in writing asked the Turnbulls for the bill of lading to enable him "to fix" the freight charges: and it is quite plain, from his own testimony, as well as from some indisputable facts, that this fixing of the charges was what had the most prominent part in the witness's thoughts and actions: if they were not made safe, if anything was lost, he would be looked to by the company to make it good. For some reason or other, not made very plain, although the ship-owners were, and the shippers were not, to pay freight, there was some reason why the railway company should make quite sure of all that was coming to them before letting the goods pass out of their possession; and so it is not altogether improbable that the "revising clerk" was penny wise and pound foolish in the face of the present danger of having to pay the penny himself, the danger regarding the pound being much more remote; as I dare say there are many thousands of transactions of the like kind in good faith, and regular, to one where there is an attempt to obtain goods by false pretences. The fact of the railway company's written request seems to me to support, or at all events lend some colour to, Humphreys' testimony as to how the bill of lading came to the company's office. It would be more in accordance with what might be expected that the Turnbulls would refuse to give the bill to him, but would send it to the company in answer to its written request; and would have sent it when and as Humphreys says it was sent, if he had said that the company wanted it, a thing he was very likely to do, not being able to get it himself; and each of the Turnbulls denies giving, or authorising the giving of, the bill to Humphreys.

The testimony of the witness Robertson throws no light upon the subject; his statement, to the witness Burton, that the goods could not be delivered until the company had the bill of lading, was of course made before the bill had come, though after it had been asked for by the company, and affords no assistance in solving the question, by what means did the bill come into the hands of the company?

Upon this branch of the case, the railway company have not proved their defence; indeed, my findings upon it must be: that

the order for the delivery of the goods to Humphreys was made by the witness Burton because he believed him to be the agent of the plaintiffs, and as such entitled to it; and because he had, as he thought, been safeguarded against any personal loss on account of freight charges; and not because Humphreys brought to him the bill of lading—and under it, or upon giving it up, he was lawfully entitled to possession of the goods. Burton was not free from want of reasonable care; he had telephoned to the Turnbulls and to another Customs broker, and had received such answers from them as would have put a reasonably careful man to further inquiry. He knew that he had written to the Turnbulls for the bill of lading; and yet, in the face of all these things, he did not take the pains to find out from them, even by telephone, anything more about Humphreys or any right he might have to the goods. He was quite mistaken also in his notion that the Bank of Ottawa had "endorsed" Humphreys' undertaking as to the freight charges—the bank did nothing but "identify" the signature of Humphreys.

I find, therefore, that the third parties the railway company are liable for a misdelivery of the carriage; and I assess the damages against them at the same amount, made up in the same way, as I have assessed them against the defendants.

There are yet three things that I must refer to, in addition to the subject of costs, before my duty in the trial of this action is finished.

First: it must be made plain that throughout this action, until the present moment, it has been taken for granted by every party that the bill of lading, endorsed in blank as it was, would be a sufficient authority to the carriers for the delivery by them, in good faith, of the goods, to the bearer of it. I have therefore not considered the subject, because, quite apart from any effect the bill might, in any circumstances, have upon the property in the goods, any sort of order or authorisation, for any such delivery, as the parties might have, expressly or tacitly, agreed upon, would be sufficient between them. But I may point out that, under the bill, the goods are to be forwarded, not to the plaintiffs or their order, but to the plaintiffs or their assigns only: and that one of its provisions is in these words: "This bill

ONT.
S. C.
WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & Co.
Meredith, C.J.C.P.

of lading, duly endorsed, to be given up in exchange for delivery order." In the case of *Glyn Mills Currie & Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591, the delivery was to the consignees themselves.

Second: in like manner it has been taken for granted that the third party proceedings are regular and proper, and that, upon the findings I have made, the defendants are entitled to judgment against the railway company, as well as against the other third parties; that they had and have a right to do if they choose; and, seeing that it is a convenient and comprehensive way of settling all the questions that have been discussed, I follow them in it, with this provision, added so as to make my findings apply to and safeguard all interests: that it shall be adjudged that any claim the plaintiffs might make against the railway company for the misdelivery of the goods shall be precluded by the judgment between the parties to the third party proceedings herein, and that the damages recovered in such proceedings shall be paid and applied in satisfaction of the plaintiffs' judgment against the defendants.

Third: throughout this trial, and until this day, I was not aware that the Great Northern Railway Company were parties to this action; my impression was, that the Canadian Northern Railway Company only were. The fact that Vancouver is in Canada, and a centre for all the great Candian transcontinental railways; and owing to the widespread loose fashion, which has invaded the Courts and worn down old-fashioned disdain of it, of calling nearly all companies by a nickname made up of some or all of the initial letters of the words composing the company's name, and pronouncing them in a slurred manner; and the fact that this fashion was followed during this trial, and the true name of the company not once used, and that slurred "G.N.R." and slurred "C.N.R." to ear, and indeed to the eye, are not strikingly unalike, is my excuse, good or bad, for that impression. I had, and have, an infinitesimal interest in the profits and losses of the first named railway company, and so consider myself disqualified from trying the question of that company's liability, unless, with full knowledge of the circumstances, the other parties to that branch of the action consent. If they all do,

judgment may go as I have indicated; otherwise there will be no judgment upon that branch of the case; or, if the defendants so elect, their claim against the railway company will be dismissed without costs, and without prejudice to any other action any of the parties may see fit to bring in respect of such or a like claim, which will perhaps enable them to sue jointly with the plaintiffs and give all parties the benefit of a trial before a tribunal quite free from any partiality by reason of interest; and otherwise conclusive.

There will be no order as to costs of the third party proceedings in any case. All parties have been negligent; negligence and loose methods are common enough; to let those who are guilty of them succeed, or let them off, just as if they had been ever so careful and methodical, would be an improper encouragement in misdoing, which ought rather to be punished.

No judgment is to be entered upon any of my findings until after the lapse of thirty days; so that all parties may have abundant time to consider whether they shall appeal against them; or what other course is likely to be most in their interests.

[April 21, 1915. Appealed to Supreme Court of Ontario by the defendants and the Great Northern Railway Company, third parties. The appeals were dismissed with costs.]

Re BANKERS' TRUST AND BARNSLEY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. February 26, 1915.

1. CORPORATIONS AND COMPANIES (§ VI F—354)—WINDING-UP AND LIQUIDATION—RIGHTS AND PREFERENCES OF CREDITORS—PREFERRED SHAREHOLDERS.

Where there is no acquiescence, delay, or conduct on the part of the alleged contributory to estop him from alleging that at the time when he made his application for preference shares and thenceforth until the liquidation proceedings the company was not in a position to give him preference shares, he is entitled to set up in answer to the liquidator's claim to place him on the list of contributories that he never got what he applied for by reason of irregularities in the issue to him, as preferred shares of certain shares which were in fact common shares by reason of their having been legally made into preferred, when in fact all of the legally constituted preferred shares had already been issued to others.

[*Re Pakenham Pork Packing Co.*, 12 O.L.R. 100, applied; *Re Bankers' Trust and Barnsley*, 19 D.L.R. 590, affirmed.]

Statement

APPEAL from the judgment of Gregory, J., 19 D.L.R. 590.

B. C.

C. A.

RE BANKERS' TRUST AND BARNSLEY.

Maclean, K.C., for appellant, plaintiff.

H. B. Robertson, for respondent, defendant.

MACDONALD, C.J.A.:—I agree with the conclusion arrived at by the learned trial Judge, and therefore would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—The learned trial Judge came to the conclusion that this case came within the principle of *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100. I agree with him.

The effect of the 46th section on the resolution of August 12, 1912, was, in my opinion, to create so many more common shares—the "original issue" in 1909 being all common shares. Mr. Barnsley's application was for preference shares, and, as there were no preference shares to allot to him, there was no meeting of the minds and therefore no contract. Had he searched the memorandum and articles of association as he was bound to do (*Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325, 36 L.J.Ch. 949) he would have learned that the company had power to issue preference shares. He would not have learned from those documents that all the preference shares had been allotted before he made his application. That fact he could only learn by going through the books of the company; but he was not bound to examine them.

The creditors are entitled from the date of the winding-up order to be regarded as being, to the extent of their claims, purchasers for value of the company's rights against its members—but they can have no greater rights than the company has. You cannot fix upon a person any engagement larger or other than that he entered into. Barnsley never knowingly agreed to accept common shares.

The cases cited on behalf of the liquidator are instances of applicants being held liable, on voidable contracts on the ground of acquiescence, because they knew or ought to have known: see *Beck's Case* (1874), L.R. 9 Ch. 392, 43 L.J. Ch. 531; but these cases have no application in deciding a case of mistake and no acquiescence.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—Briefly, in my opinion the combined effect of arts. 5 and 46, as applied to the question before us, is that in default of any "directions" being given under sec. 46 as to the

new shares, the directors can only deal with them as common stock under the "original capital," unless they obtain the sanction of the company by special resolution under sec. 5, which was not done. These facts, it is contended, bring this case within the decision of the Ontario Court of Appeal in the very similar case of *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100, and I am unable to distinguish that case in principle, because it is stated therein, p. 109, that

> The by-law and the subsequent sanction of the shareholders are the essential elements of the power to create the preference stock. The power is not otherwise conferred, nor is it inherent in the directors of the company. It is not a question of mere form, for the form in this instance is matter of substance. In this case there was a complete failure to comply with the provision of the Act as regards the passing of a by-law, the first prerequisite to the creation of preference stock.

It is true that sec. 22 of the Ontario Companies Act, after giving the directors power to create and issue preference stock by by-law, provides that no such by-law shall have any force or effect whatever unless it has been unanimously sanctioned by a vote of the shareholders at a general meeting duly called for that purpose, but, in my opinion, acts of directors which are wholly unauthorized, unless performed in compliance with the articles, stand on no higher a plane than those which are declared by the Act to be ineffective because of non-compliance.

In some respects this is a weaker case than *Pakenham's*, because there, at least, the unanimous consent of a meeting had been obtained to create preference stock of a fully prescribed nature, and though the matter had been irregularly brought before it as it was not a meeting called for the special purpose, yet still there was some justification for the belief of the directors that the company approved their intended course, though the directors failed to observe the Act and pass a by-law and get it sanctioned. But in the case at bar the directors never even attempted to create any preference stock of the new capital or to define its nature or privileges, or to obtain any sanction therefor, but simply presumed to deal with it all as "ten per cent. preferred shares," without any further definition thereof (whatever that uncertain language may be held to mean), though the nature and various privileges of the original preferred shares had been clearly defined by them. It may be, as alluded to in *Pakenham's* case, at pp. 108-9, that the company could not repudiate these shares as against certain

B. C.

C. A.

RE BANKERS' TRUST AND BARNSLEY.

Martin, J. A.

holders, but that is no answer to the objection of Barnsley to being placed on the list of contributories, and on the facts I find no difficulty in saying, as the Court said in that case, p. 109:—

> Here there is no acquiescence, delay, or conduct on (Barnsley's) part to estop him from alleging and shewing that at the time when he made his application, and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied. There was no concluded contract, and he never received or became the holder of shares of the nature and quality specified in the application or any others.

It may be, as suggested, that the Ontario Court of Appeal came to an erroneous conclusion in that case, but I prefer to follow it, leaving it for a higher tribunal to finally determine the question.

For these reasons I think the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I concur in the reasons for judgment of my brother Irving.

Appeal dismissed.

N. B.

S. C.

SWEENEY v. DE GRACE.

New Brunswick Supreme Court, White, J. March 4, 1915.

1. WILLS (§ I E—40)—FOREIGN WILL—PROBATE—VALIDITY.

A will executed in Quebec before a notary and filed with him as a notarial instrument under Quebec law may be proved on the trial of an action in New Brunswick as to real estate there by a copy produced on the evidence taken in Quebec under commission and certified by the commissioner from the original produced by the notary as a witness before him and by evidence of its attestation in conformity with the New Brunswick law; it is not essential that the will should have theretofore been proved in solemn form in New Brunswick.

[Property Act (ch. 152, C.S.N.B.), sec. 58, considered.]

Statement

TRIAL of action of ejectment.

White, J.

WHITE, J.:—The defendants offer no evidence in this case, but rely exclusively on what they claim to be defects in the plaintiff's title. The first link in the plaintiff's chain of title which the defendants claim to be defective is the conveyance by the sheriff of Gloucester County to Antoine Guilbault. As it is quite clear that if this conveyance is not sufficient to convey the property to Guilbault the title would remain in the defendant Eutrope DeGrace, and would, therefore, have passed to the assignee under the deed of assignment made in 1912 under the Act Respecting Assignments and Preferences, sec. 4, and would,

therefore, vest in the plaintiff as the grantee of said assignee, it is not necessary to consider this objection.

It appears that in the deed from Guilbault to Roumilhac only a life interest was transferred by reason of the omission of the word "heirs" as words of limitation of the estate conveyed. It appears, however, that by decree made in this Court in a suit brought by the present plaintiff against Sophie LaRue Guilbault, widow and devisee under the last will of Antoine Guilbault, the said deed made by her late husband to Roumilhac was reformed so as to convey the fee in the property in question. It is objected that as the defendants were not parties to this suit they cannot be affected by that decree, but inasmuch as the effect of the decree is simply to effect such a conveyance from Guilbault to Roumilhac as Guilbault himself could undoubtedly have made had he inserted in his deed proper words of limitation to that end there is nothing, I think, in this objection.

Objections were made to the sufficiency of the proof of the will of Antoine Guilbault under which his widow is made devisee of the property in question. This evidence is, of course, essential in order to shew that the suit for reforming the deed which I have mentioned was brought against the proper party. As the objections to proof of this will are based on grounds like to those to which I will next refer as being made against the proof of the will of Roumilhac I will deal with them in discussing the last mentioned will.

It is objected that the will of Edouard Roumilhac is not sufficiently proved. Proof of this will was made in three different ways. First by copy attached to the commission issued to Aime Marchand of the City of Quebec and returned by him, certified and authenticated pursuant to the instructions accompanying the commission. Secondly, as a notarial act or instrument filed or enregistered in the Province of Quebec, and certified by the notary with whom it was filed to be a true copy of the original, under sec. 49 of ch. 127, C.S.N.B., 1903; and, thirdly, as having been registered in the office of the Registrar of Deeds for Gloucester County under the provisions of sec. 33 of the Registry Act. As I think the will was properly proved in the first of these modes mentioned it is not necessary that I

N. B.

S. C.

SWEENEY v. DE GRACE.

White, J.

should consider or decide whether it is also properly proved in either or both of the other two ways specified.

It appears from the evidence taken before the commissioner that by the law of Quebec the notary, Mr. Sirois, before whom the will was executed is required to keep the will in his custody as part of his notarial records, and for that reason he declined to allow the original will to be attached to the commission or to give up possession of the same. He stated, however, that according to his understanding of the Quebec law the Court of that province would have power to order him to deliver up the original will under certain circumstances. But assuming that a Quebec Court would have power to order the notary to deliver up the will or remove it from the Quebec jurisdiction for purposes of proof in a suit between parties who were neither devisees or next of kin of the testator I would be very slow to infer that the Quebec Court would make such an order in the present instance unless it were shewn that the will could not be proved in this province without its being removed from the jurisdiction of the Quebec Court. Inasmuch as the commissioner could not return the original document with the commission the evidence which he has returned is the best available evidence, and is, I think, equally as good as though the original will has been returned with the commission. It appears from the evidence taken before the commissioner that this will was signed by the testator in the presence of two witnesses, who in his presence and in the presence of each other signed the will as such witnesses. It is not expressly stated that the witnesses signed the will at the request of the testator, but that they did so is, I think, a necessary inference from the evidence. The will, therefore, is executed with all the formalities required by the laws of this province to give it validity, and as the land in question here is in the Province of New Brunswick a will duly executed according to our provincial law is sufficient to effect the transfer of such land provided the terms of the will are sufficient for such purpose.

A deed was placed in evidence by the plaintiff bearing date December 6, 1912, and made by Louis Philippe Sirois, notary, and Leon Ripp, accountant, described as both of the City of

Quebec, executors of the last will and testament of Edouard Roumilhac, late of Quebec, merchant, and by "the said Leon Ripp acting as curator of Mrs. Allen Gillis, of the City of Quebec, widow of the said deceased, Edouard Roumilhac, the said Allen Gillis having been duly interdicted for insanity on October 9, 1912, and the said Leon Ripp being duly authorized hereunto by a judgment of the Hon. Mr. Justice Dorion, dated December 5 instant," the parties of the first part, and Joseph D. Doucet, the assignee of Eutrope DeGrace, of the second part. This deed appears by the certificate of the Registrar of Deeds for Gloucester County to have been registered in his office on December 14, 1912, and purports to convey all the lands and premises in question unto the party of the second part as assignee as aforesaid to the use of his heirs, successors and assigns forever. It is objected, however, that under the Roumilhac will the executors had not power to make such conveyance. The will is in the French language, but the translation made by Mr. Sirois is attached to the commissioner's return, and it is agreed by the parties hereto that such translation is sufficiently accurate for the purposes of this suit. Quoting from such translation the will contains the following:—

> My testamentary executors will have the right (pourront) to sell or otherwise alienate when they think it most advantageous for my estate, my property, moveable and immoveable, at such conditions and prices as they may think fit, to receive the price and give acquittance for same, and pay my debts without having to consult my universal legatees.

It is contended, however, by the defendants that inasmuch as the will gives the usufruct of the deceased's estate to his widow during her life, the executors could only sell subject to her life claim, and that there is no evidence to shew that Leon Ripp was duly appointed her curator, or had power to convey any interest in her property. I have read the entire will carefully, and I think that by its terms, construed according to the laws of this province the executors had power to convey to Sheriff Doucet as assignee all the interest in the lands in question of which Mr. Roumilhac died possessed.

It is claimed by the defendants that in order to enable the defendant or his predecessor in title, Sheriff Doucet, the assignee of Eutrope DeGrace, to establish title to the property in question

N. B.

S. C.

SWEENEY v. DE GRACE

White, J.

under said will it is essential that the will should have been proved in solemn form in this province. I confess this is the first occasion on which I have ever heard that proposition advanced. The section relied upon in support of this contention is sec. 58 of the Property Act (ch. 152, C.S.N.B.), which provides that probate in solemn form shall

> in all suits and proceedings affecting real estate (save proceedings by way of appeal under ch. 118 of these Consolidated Statutes or for the revocation of such probate or administration) be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate.

The object of this legislation is to enable parties interested to have the will proved in solemn form if they so desire, and thereby to obtain a judgment which will be *res judicata* as to all parties claiming under the will, but it does not take away the right which any devisee or person claiming under the will has always had to prove the will in the ordinary way in suits affecting land claimed under the will. By sec. 33 of the Registry Act, to which I have already referred, it is provided that a will may be registered either by a deposit of the original will with an affidavit proving the due execution thereof, or by the production of the original will to the registrar and deposit with him of a copy thereof with an affidavit of one of the witnesses to the will proving the due execution thereof, and an affidavit verifying the copy filed as a true copy of the original, and an affidavit proving the death of the testator. Section 55 of the Registry Act renders a certified copy of such registry *primâ facie* evidence of the registry and of the due execution of the "instrument," which word "instrument" is defined by sec. 2 of said Act as including "will" as well as "probate of will."

In view of this legislation I find it impossible to believe that the legislature in providing machinery by which devisees may have the will under which they claim, proved in solemn form if they so desire, intended thereby to render proof in solemn form obligatory to enable real estate to pass under the will. I think, therefore, that all the objections to the plaintiff's title to which I have referred must fail.

It appears from the evidence that the defendant, Eutrope DeGrace, for at least twenty years has been in possession of the

land in question. A certified copy of the registered deed was put in evidence, made between Alphonse Leclaire as grantor, and the said Eutrope DeGrace is grantee. This deed bears date July 18, 1902, and was registered October 1, 1902, and conveys to the grantee and his heirs the lands in question in this suit. In para. 17 of the statement of claim which is admitted by para. 17 of the statement of defence it is alleged:—

That the said defendant Julie DeGrace is the wife of the said Eutrope DeGrace and lives with him upon the said lands and premises and carries on business there, and claims some right or interest in the said lands and premises. The said defendant Joseph Evasest DeGrace is a son of the said Eutrope DeGrace, and also resides upon the said lands and premises and claims to have some interest or right therein. The said Eutrope DeGrace also still lives upon the said lands and premises, and is in the possession thereof, and claims to own the same or to have some right or interest therein, and the defendants deny the right of the plaintiff.

And perhaps I may add, although to do so is not essential to the observations I am about to make, that it appears from the evidence that by a written contract entered into between the said Edouard Roumilhac and the defendant, Eutrope DeGrace, it was agreed between them that Roumilhac should sell and convey to DeGrace the lands in question in this suit at a price and upon terms contained in said agreement, and that pending the payment of the purchase money DeGrace should be permitted to remain in occupation of the property. When, therefore, Eutrope DeGrace executed to the sheriff in 1912 the deed of assignment which I have mentioned he thereby, by virtue of section four of the Assignment Act, conveyed to said assignee his real and personal estate, rights, property, credits and effects whether vested or contingent, belonging at the time of the assignment to the assignor except such as are by law exempt from seizure or sale under execution.

It is not pretended that Eutrope DeGrace has acquired any right or interest in the property since such assignment, and as the plaintiff by virtue of the deed of the assignee to him, is now clothed with all the title to the lands in question which the assignee acquired under the assignment, I think it quite clear that, so far at least as the defendant Eutrope DeGrace is concerned, the plaintiff might safely have rested his title upon the said deed of assignment and conveyance by the assignee to him.

As to the other defendants it is admitted, as I have already

N. B.

S. C.

SWEENEY v. DE GRACE.

White, J.

said, by the pleadings, that while they occupy the property in dispute and make some undefined claim of title to the same, the possession of the property is in Eutrope DeGrace.

Under these circumstances I think the plaintiff has sufficiently established his title as against them without resorting to or relying upon the chain of title the first link in which is the sheriff's deed, under the execution and sale, to Antoine Guilbault.

One other defence which I have not yet mentioned was set up in the pleadings, that is to say, that the assignee in selling the property to the plaintiff acted fraudulently in that he was at the time of the sale interested with the purchaser in the property purchased. I find as a fact that there was no such fraud, and that when the property was sold, the assignee had no interest with the purchaser in the purchase thereof.

Under the plaintiff's claim that an account may be taken of mesne profits of the said lands and premises and of the value of the occupation thereof by the defendants and that the same may be paid by the defendants to the plaintiff, I heard evidence given upon which to assess such damages. While I do not at all question the testimony given by Sheriff Doucet upon this point, in which he fixes the rental value of the premises in question as not less than $1 a day, I find it difficult to believe in view of all the circumstances, including the price realized by this property at sale, that it would produce through any legitimate user the large rental which the sheriff says it is capable of yielding. I, therefore, fix the damages by way of mesne profits at the amount which I will state in a moment.

I decree as follows: Declare that the plaintiff is the owner of the lands in question, subject, nevertheless, to any right of dower the said defendant Julie DeGrace may have or be entitled to in said lands, and is entitled to possession of the same. Let the defendants within 10 days after service of this decree deliver possession of the lands and premises to the plaintiff. I assess the mesne profits to which the plaintiff is entitled by reason of having been deprived by the defendant of the use, possession and enjoyment of the said property at $600, and I give judgment in favour of the plaintiff against the defendants for said damages accordingly. The defendants must pay the costs of this suit.

Order accordingly.

REX v. AIKENS.

N. S.
S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley, J. February 13, 1915.

1. CERTIORARI (§ II—28)—SUMMARY CONVICTION BAD ON ITS FACE—FILING SUBSTITUTED CONVICTION.

On a motion for a writ of certiorari, where the practice is to hear the merits on the motion for the writ, and if granted to include an order quashing the conviction on the return being made, the Court will not permit the filing of a substituted conviction made up by the justice after notice of the certiorari application to remedy the defect of the first formal conviction in not stating any place at which the offence was committed, where the depositions themselves did not shew where the offence was committed, and consequently did not shew territorial jurisdiction of the magistrate.

[Compare *R.* v. *Oberlander*, 16 Can. Cr. Cas. 244, 15 B.C.R. 134; *R.* v. *Pickard*, 11 D.L.R. 423, 21 Can. Cr. Cas. 250.]

2. SUMMARY CONVICTIONS (§ II—20)—LOCALITY OF OFFENCE NOT SHEWN—TERRITORIAL JURISDICTION.

Where the depositions already taken before the justice do not supply the defect which makes a summary conviction bad on its face, the justice cannot without the parties being before him and having an opportunity of being heard make up a substituted conviction or amend a defective conviction.

[*Chaney* v. *Payne*, 1 Q.B. 712, applied.]

Statement

APPEAL from the judgment of Ritchie, J., allowing a writ of certiorari and quashing a conviction on return, in respect to a case under the Canada Temperance Act.

W. F. O'Connor, K.C., for appellant.

J. B. Kenny, for respondent.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—This is an appeal from the judgment of a Judge allowing a writ of certiorari and quashing a conviction on return in respect to a case under the Canada Temperance Act. The conviction is dated October 8, 1914, and imposed a penalty of $50 with costs, and directed the forfeiture and destruction of some three barrels of ale and beer found on the premises.

The conviction is properly admitted to be bad. I refer to *The Queen* v. *Hurlburt*, 27 N.S.R. 62. There is no time or place stated in respect to which the offence was alleged to have been committed. In fact, the offence is not identified at all. The defendant appears to have been convicted

> "of having unlawfully kept intoxicating liquor for sale contrary to the provisions of part 2 of the Canada Temperance Act, then in force in the said municipality of the District of Guysboro," etc.

N. S.
S. C.
REX
v.
AIKENS.
Graham, E.J.

The prosecutor appeared and shewed cause on the application for the writ, and the learned Judge, under Crown rule 32, did, as he may do "if he shall think fit," namely, made it part of the order for the certiorari that the "conviction shall be quashed on return without further order."

The learned Judge, as well as the Court on appeal, was asked to give effect to the curative sections supposed to be applicable to such a defect: Canada Temperance Act, secs. 146, 147.

It was argued before us that there should have been or now should be an amendment or a refusal to grant the writ because if the conviction was returned to a writ an amendment could be made in it supplying time and place. The difficulty is, that there is no proper proof of the fact which would justify making such an amendment. The depositions do not shew where the offence was committed. It was unusual and, I think, not permitted by the statute to supply facts before the Judge by means of *ex parte* affidavits in an attempt to have an amendment made and the defect cured.

In my opinion, there is nothing to shew that it was an offence within the territorial jurisdiction of the magistrate and there is no evidence to prove such an offence. I refer to *Woodlock* v. *Dickie*, 6 R. & G. 86. I agree with the learned Judge who heard this application that, if there was any discretion about the matter after a man's property has been taken from him in pursuance of a conviction which was invalid at the time, it would be reason for refusing to exercise that discretion in favour of an order that would now *ex post facto* have the effect of making valid an invalid seizure.

Then at the hearing a conviction was produced by counsel alleged to have been received by him from the Justice and made after he had notice of the application for the writ in which time and place were set forth. Of course, although I never saw a case of a substituted conviction produced in that way before, there is in some cases a possibility of returning to a writ of certiorari a good substituted conviction.

But this, I think, a magistrate cannot do; he cannot, without the parties being before him and with an opportunity of being heard, make up a substituted conviction, or amend a defective conviction, without having the evidence on which to do so.

N. S.

S. C.

REX v. AIKENS.

Graham, E.J.

He must have proper materials on which to amend or cure the defect.

In Seager's Magistrates' Manual, p. 141, it is said:—

"An amended conviction may be made out and returned to the Court under certiorari even after a previous formal conviction has been returned to the clerk of the peace provided such new conviction is according to the truth, and is supported by the facts of the case as proved before the justice."

And for that *Chaney* v. *Payne*, 1 Q.B. 712 (Lord Denman, at 722), among other cases, is cited.

The learned counsel for the prosecution contended, in the alternative, that the certiorari should have been refused. But the same reason exists to defeat that contention. The conviction shews a want of jurisdiction on its face.

In my opinion, the appeal should be dismissed and with costs.

Appeal dismissed.

CHALMERS v. CAMPBELL.

MAN.

K. B.

Manitoba King's Bench, Curran, J. February 22, 1915.

1. BROKERS (§ II B—10)—REAL ESTATE BROKERS—COMPENSATION—MODIFICATION OF TERMS BY VENDOR—EFFECT.

The subsequent alteration, by mutual agreement of the vendor and purchaser, of the terms of payment set forth in their agreement of sale of a leasehold interest in lands will not deprive the real estate agent who made the sale under vendor's authority, of his right to remuneration or postpone the date of payment of same.

[*Burchell* v. *Gowrie*, [1910] A.C. 614, referred to.]

Statement.

ACTION for commission on a sale of leasehold.

G. A. Elliott, K.C., and *M. G. Macneill*, for plaintiff.

C. H. Locke, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff sues for a commission alleged to be due him by the defendant upon a sale of the defendant's leasehold interest in the hotel premises in the city of Winnipeg, known as The Mariaggi Hotel, together with the furniture and contents owned by the defendant.

The plaintiff's agency is in virtue of the following document (ex. 1), which the defendant admits he signed:—

To H. A. D. Chalmers, Winnipeg. Winnipeg, December 17, 1913.

Re Mariaggi Hotel.

Dear Sir,—In the event of your making a sale of my interest in the

MAN.

K. B.

CHALMERS v. CAMPBELL.

Curran, J.

above, I will agree to sell at fifty thousand dollars ($50,000) net to me, twenty thousand dollars ($20,000) cash, balance in one and two years, 6% interest. Anything over and above this amount you may retain for your commission. The purchaser to assume payments on two cash registers and half cost of kitchen range total on above articles, $1,150.

(Sgd.) T. B. CAMPBELL.

On receiving the above authority, and in fact on the same day, the plaintiff introduced to the defendant as an intending purchaser of the hotel premises, one Fred Morgan, and a verbal agreement was then made to effect a sale at the sum of $52,500. The parties, plaintiff, defendant and Morgan, then went to the law office of Machray, Sharpe & Dennistoun, where instructions were given to prepare a written agreement to evidence the verbal bargain so made, as the result of which exhibit 8 was prepared by Mr. Sharpe of this firm, who were acting for the defendant, also the purchaser Morgan, and the landlord of the premises. This document was drawn in duplicate and Sharpe says in his evidence that one duplicate was signed by Morgan, the purchaser, and the other by the defendant, and that Morgan got one copy of the document and the defendant the other. The one produced, ex. 8, is signed by the defendant, and is the defendant's copy of this document.

It is to be observed that the terms of payment vary a little from those provided for by ex. 1; namely, as to the date when the last of the deferred payments was to be made. However, the defendant assented to this change and agreed to the terms of sale as set forth in ex. 8. The cash payment of $7,000 referred to was by the agreement acknowledged to have been paid. As a matter of fact this sum was paid over by Morgan to the defendant's solicitors on January 2, 1914, as appears from ex. 11, a copy of the ledger account of the defendant in the books of his solicitors, Machray, Sharpe & Dennistoun. The same account also shews the receipt from or on behalf of Morgan of $6,000 and $9,000 on January 20, 1914, on account of this sale.

The defendant contends that the sale did not go through in accordance with ex. 8, and that a subsequent agreement, ex. 10, was entered into between him and the purchaser Morgan, varying some of the terms of ex. 8, which the purchaser, it is said,

could not carry out. The subsequent payments of $6,000 and $9,000 respectively were in fact made after ex. 10 had been signed by Morgan. Both parties admit that ex. 8 and ex. 10 must be read together, and that ex. 8 is still binding upon the parties, except in so far as its provisions are varied by ex. 10.

The defendant says that the difficulty arose because Morgan could not put up the $15,500 payable on December 22, 1913, under ex. 8 until January 17 or 19, 1914.

It seems that the defendant held from the owner only an agreement for a lease conditional upon his making certain improvements to the building. Part of these improvements had been made at the time of the sale in December, but considerable remained to be done, and the defendant having become financially embarrassed was unable to complete them. He admits that he was responsible to his landlord for the making of these improvements, and I have no doubt that Morgan, notwithstanding the language of ex. 10, was simply carrying out for the defendant what the defendant was then obligated to do in the matter of these improvements.

Ex. 10 is somewhat difficult to comprehend, but the defendant's counsel admits in his argument that the amount of the purchase money was not changed by it but merely the terms of payment. One thing is quite clear that the cash payment was really $22,000, and instead of the defendant getting the whole of this amount himself $6,000 was devoted to completing the building improvements that the defendant was obligated to make, and this sum is tacked on to the deferred payments and is ultimately to be paid by the purchaser instead of being in terms of agreement, ex. 10, treated as part of the cash payment. This arrangement is, I think, purely fictitious. The purchaser in fact put up the money, and it was expended in improvements which the defendant was bound to make. In fact the arrangement was made merely to satisfy the landlord, who would not agree to trust the defendant with the money and so required it to be put in the hands of his solicitors for direct expenditure in the improvements which he had agreed to accept as sufficient to satisfy the conditions upon which the defendant was to become entitled to his lease.

MAN.

K. B.

CHALMERS v. CAMPBELL.

Curran, J.

Such being the case I fail to see how this $6,000 can be treated otherwise, as between the defendant and the plaintiff, than a part of the cash payment stipulated for in the agency agreement with the plaintiff.

The defendant's whole contention now seems to be that the plaintiff's action is premature, because the commission is not yet payable or was not when the action was begun. If this contention is correct, I am at a loss to understand when the commission could be said to have become legally payable. It seems to me it was payable when ex. 8 was executed, and the cash payment made.

However, the defendant's contention appears in full from his examination for discovery, when he was asked the following questions and gave the following answers, which were put in at the trial by the plaintiff:—

92. Q. So that really as far as you are concerned it is not a question of his being entitled to $2,500; he is entitled to that, there is no dispute? A. None whatever. I told him at the time Mr. Morgan was an old client of mine, that I had spoken to him some months ago, even a few weeks, but I had spoken to him so often about the matter that I had abandoned the idea, while I had made a big reduction in the price of the hotel it was only due to Mr. Carol having taken action to put the bailiff in charge of the hotel. 94. Q. The only question between you then is that he is claiming too soon? A. That is all. I am perfectly satisfied he should get his commission. I think he is entitled to it, and he knows I tried to help him put the deal through, and I tried to get him as much as I could. I told him that would be for the amount of the commission before I signed exhibit 1. I said it was more than was coming to him, but I was prepared to help him out, and I also tried to borrow some money on properties he was interested in, approximately $710. 95. Q. Do you remember being in Machray, Sharpe & Dennistoun's office on the 6th of February, 1914, and Mr. Sharpe writing a letter to the manager of the Sterling Bank? A. I do. I have got a copy of it.

(Copy produced by defendant is a copy of the original ex. 2 at the trial).

I may say that this letter was written for the purpose of trying to aid Mr. Chalmers at my request to get a loan of a certain sum of money, I think about a thousand dollars, and which I was willing to go on the back of a note to enable him to get something, and that I would be protected, but that from the commission when it was due.

Now, this letter ex. 2 which Mr. Sharpe wrote on behalf of his firm, addressed to H. W. Bodman, assistant manager of the Sterling Bank, Winnipeg, gives a somewhat lengthy explana-

tion of the whole transaction out of which plaintiff's right to a commission arose, and contains this explicit statement, unqualified in any way. "Mr. Chalmers, under arrangements with Mr. Campbell, is entitled to a commission of $2,500," and goes on to state that "unfortunately, although Mr. Campbell has considerable equity, he is unable to raise sufficient cash to pay this at once," meaning the plaintiff's commission. Now, the defendant admits that he instructed Mr. Sharpe to write this letter, see Q. 101:—

Q. But this proposal of getting some money for Chalmers had been discussed between you? A. Yes. 102. Q. And then you instructed Mr. Sharpe to write a letter as a result of this discussion, to the bank? A. Yes.

The letter was accordingly written and handed to the plaintiff, who took it to the Sterling Bank, but was unable to raise any money on the strength of it.

I take this letter to be a clear admission of the plaintiff's present right to the commission sued for. To view it in any other light, I think, would mean that a fraud was contemplated on the bank, and I do not think for one moment that any such matter was present to the mind of the writer. I am satisfied it was not, and that the letter was written in perfect good faith to assist the plaintiff to raise money at this bank, aided by the defendant's credit, and on the strength of this large sum for commission being then due the plaintiff by the defendant, but which the defendant was then financially unable to pay. I think the defendant so understood the situation and I think Mr. Sharpe also so understood it.

In the face of these facts I confess I am at a loss to understand why the defendant has defended this action. I do not think, as a matter of law, that the subsequent alteration by mutual agreement of the parties of the terms of payment set forth in ex. 8 can deprive the plaintiff of his rights to a commission, or in any way postpone the date of payment of commission then earned.

The defendant says he was not aware of the subsequent agreement, ex. 10, but I do not believe this. Both Sharpe and the defendant expressly state that the plaintiff was fully

MAN.

K. B.

CHALMERS v. CAMPBELL.

Curran, J.

apprised of the changes in the first agreement effected by ex. 10, and I think he was. But this knowledge, in the absence of an agreement, binding upon the plaintiff, to postpone his right to payment of his commission so earned, would not, in my opinion, affect him to his prejudice.

There can be no doubt, upon the admissions of the defendant himself that the plaintiff effected a sale, which was substantially in accordance with the terms of his authority, ex. 1. Such slight departure as there was in regard to the last of the deferred payments was assented to by the defendant and the sale closed upon the basis set forth in ex. 8. I think the plaintiff had then done all that he was obliged to do to entitle him to payment of his commission.

In *Green* v. *Bartlett*, 14 C.B.N.S. 681, Erle, C.J., says:—

> 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.

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*, 1 C.P.D. 505, 510, or "Was an efficient cause of the sale:" *Millar* v. *Radford*, 19 T.L.R. 575. See also *Burchell* v. *Gowrie*, [1910] A.C. 614.

I do not see that there can be any doubt on the question of fact that the plaintiff's acts were in this case an efficient cause of the actual sale, and I hold that he is entitled to succeed. The defendant had loaned the plaintiff some money upon the notes, exs. 6 and 7, amounting to $370, bearing interest at 8 per cent. This money the plaintiff asserted was advanced on account of his commission. I hold to the contrary, and as these notes have not been paid, the defendant is entitled to have the amounts now due upon them off-set against the commission.

The plaintiff at the trial, by leave of the Court, amended his statement of claim by giving credit for the amount of these notes, so that the matter is easily adjusted. At the trial, by leave of the Court, the defendant amended his statement of defence by setting up that the plaintiff had, since the commencement of the action, assigned his cause of action to a third party, one Arthur C. Miller. I allowed the plaintiff to further amend

by adding Miller as a party, which was accordingly done, as it seemed to me not in the interests of justice to force the assignee to bring another action in respect of the subject-matter of this action.

There will be judgment, therefore, in the plaintiff's favour for $2,500, less the amount with interest of the notes, exs. 6 and 7. Upon such amounts being credited on the judgment the plaintiff Chalmers will be entitled to delivery up to him as paid of the said notes. The plaintiff will be entitled to the usual costs, to be taxed, and costs of necessary examinations for discovery.

I do not think this is a case where the statutory limit should be removed, and I deny the plaintiff's request made at the conclusion of the trial that this should be done.

Judgment for plaintiff.

WESTERN CANADA FLOUR MILLS CO. v. CROWN BAKERY.

Saskatchewan Supreme Court, Elwood, J. April 29, 1915.

1. SALE (§ I B—10)—POSTPONEMENT OF TIME OF DELIVERY BY ONE PARTY—CONSENT BY OTHER PARTY—DOES NOT ABROGATE CONTRACT.

A postponement of the time of delivery whether at the instance of the seller or of the buyer of the goods, to which the other party assents, has not the effect of abrogating the contract.

[*Tyers* v. *Rosedale & Ferryhill Iron Co.*, 44 L.J. Ex. 130, referred to.]

Statement

ACTION for the price of flour.

P. M. Anderson, for plaintiff.

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

Elwood, J.

ELWOOD, J.:—This is an action brought by the plaintiff company to recover from the defendant the sum of $744 for flour sold and delivered by the plaintiff to the defendant on or about July 30, 1914.

On October 9, 1912, the defendant wrote to the plaintiff a letter which, *inter alia*, contains the following:—

> Kindly give lowest prices in flour for a year's supply, car lots, f.o.b. cars, Regina.

To which, on the 11th October, 1912, the plaintiff replied, *inter alia*, as follows:—

SASK.

S. C.

WESTERN CANADA FLOUR MILLS CO. v. CROWN BAKERY.

Elwood, J.

Your favour of the 9th inst., requesting us to quote you our lowest price for contract for a year's supply, amounting to 20 or 30 cars.

And, in consequence of their correspondence, on October 15, 1912, a contract was signed by the defendant and the plaintiff's traveller, in which the following appears:—

CONTRACT.

"R.

No. One. Oct. 15th, 1912.

Western Canada Flour Mills Co., Ltd., of Winnipeg, Man., sell to (*Name*) Crown Bakery, (*Of Town*) Regina. (*Prov.*) Sask. and buy at Winnipeg, Man., the following mill stuffs upon the conditions of price and terms as hereinunder:—

Ship to Crown Bakery.

Shipping date—first car Oct. 17th, and a car about every 15 or 20 days.

Terms: Net; Drafts at 30 days from date of shipments.

Freight allowed to f.o.b. Regina.

Number of Packages.	*Style of Package.*	*Brand.*	*Price. Flour per bbl. Feed per ton.*
About	98 cott.	Purity	5.60
800	98 cott.	Medalion	5.30
6,000	98 jute	Lily	4.80
100	98 jute	Graham	4.80

Purity, Medalion, Graham, to be taken on 30 day basis from stock in Regina. Lily to be shipped in car loads of 310 sacks each.

"here quantities are only about amounts required.

This contract is not subject to cancellation or change of price through market fluctuation. Shipment must go forward on date specified unless company is notified of desire for extension of shipping date by buyer three days prior to original shipping date, but it remains optional with the company whether or not the request be granted. Changes in specifications will be subject to regular differentials. This contract subject to confirmation from Winnipeg.

(Sgd.) N. ADDEMS, Buyer.
E. G. MCLEAN, Traveller."

Under this contract, flour of the different kinds specified was shipped from time to time. The defendant, apparently, did not order his full supply from the plaintiff and, by October, 1913, 3,406 sacks of "Lily," 311½ sacks of "Purity," 144 sacks of "Three Star," 80 sacks of "Graham," 21 sacks of "Whole Wheat" and three sacks of "Medalion" had been shipped.

The "Three Star," above mentioned, was substituted for the "Lily" and the "Whole Wheat" for "Graham."

In October, 1913, the plaintiff's traveller saw the defendant

and wanted the defendant to enter into a new contract. According to the evidence of this traveller, he quoted "Lily" at 5c. a sack cheaper than he, defendant, had been paying; he said the defendant said he would not give a new contract but asked if the company intended to ship him the balance in one shipment, and the traveller said that they could do it but would not do it. The defendant says that the traveller came and asked him what about the balance of the flour on contract and said: "You have quite a lot of flour left, what are you going to do?" The defendant said he would use it if he would give him time, and the traveller said: "That is all that we want."

The defendant continued to order flour from time to time, and, by July 30, 1914, there had been shipped, since October 15, 1913, 1,560 sacks of "Lily" and none of the other kinds. On the 28th of August, 1914, the defendant ordered another car of flour and to this the plaintiff, on the 1st of September, 1914, replied as follows:—

Re car of flour which you have requested our Brandon office to ship you, might say that we are not in a position to supply you with "Lily" on a basis of price on the old contract. This contract was outlawed considerable time ago, but, owing to information supplied us by Mr. McLean, we continued to supply you on a basis of $4.80 for "Lily." The very best price we could quote you to-day for "Lily" is $5.90 per barrel, and if you wish the car to come forward on that basis, kindly wire this office, and we will instruct Brandon to ship at once.

And on September 5, the plaintiff wrote the defendant, *inter alia*, as follows:—

Any verbal arrangement you made with Mr. McLean or any other of our representatives, was only intended to cover until such times as there was an advance in the price of flour. If you had wished to make further contracts, you had the opportunity of doing so before the recent advances took place. You certainly could not expect our company to continue to supply you at the old price, in view of the fact that you did not live up to the terms of the old contract.

In the month of December, 1912, the defendant having become behind in his payments, it was arranged between the plaintiff and the defendant that thereafter, when a shipment was made, there would be attached to the bill of lading for that shipment a sight draft for the cars previously delivered. After October 15, 1913, as said above, the cars were ordered as they

SASK.

S. C.

WESTERN CANADA FLOUR MILLS CO. v. CROWN BAKERY.

Elwood, J.

had been previous to that; for instance, on November 5, 1913, the defendant wrote as follows:—

We would be obliged if you will ship us another car of flour as usual,

and on January 27, 1914, the plaintiff wrote the defendant as follows:—

As it is over two months since we received specification for a shipment of mill stock, we are to-day drawing on you at sight to cover the outstanding balance on your account.

In reply to this, on January 28, 1914, the defendant wrote as follows:—

Kindly ship us one car of flour as usual, attaching bill of lading to draft for last car.

and to this, on January 30, the plaintiff replied:—

We are in receipt of your favour of the 28th inst., with requisition for a car of "Lily" flour, to be shipped at once. We are to-day shipping, etc. . . . We have a good stock of old flour on hand which we will keep for you.

In October, 1913, the evidence shews that the defendant could have purchased from other dealers, flour, of a similar quality to that handled by the plaintiff, at a lower figure than that at which he was purchasing from the plaintiff, but that the defendant continued to purchase from the plaintiff because he understood he was liable to do so under his contract of 1912.

I am satisfied from the correspondence, part of which I have quoted above, that the contract of October 15, 1912, was treated by the parties as still in force, and I so find.

It will be noticed that the contract of October 15, states that cars are to be shipped about every 15 or 20 days; this was not done, but at very much longer intervals during the whole contract, and on October 21, 1912, the plaintiff wrote its buyer as follows:—

We note that the first car of "Lily" was to be shipped about October 17th, and a car about every twenty days. We presume that we are not to make any further shipments outside of the car that we shipped on October 17th until we have further advice from Mr. Addems. We take it for granted that he will advise us regarding each car which he wishes to come forward.

In *Tyers et al* v. *The Rosedale and Ferryhill Iron Co. Ltd.*, 42 L.J. Exch. 185, at p. 192, Martin, B., said as follows:—

There is a contract for the sale of goods to be delivered, say in January, or upon a day of January; on a day before the delivery is to take place, the vendor meets the vendee and says, "It is not convenient for me

to deliver the goods in January or upon the day named, and I will be obliged if you will agree that the goods shall be delivered at a later period;" and the vendee assents. Or the vendee goes to the vendor and says, "It is not convenient for me to receive the goods in January or upon the day named, and will you agree that the delivery shall be postponed?" and the vendor assents. The latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the latter day. In my opinion, this contention is not well founded. In the first place, I think it is decided by authority. It is impossible to distinguish the case of the application for postponement coming from the vendors and one coming from the vendee, and the case of *Ogle* v. *Vane*, has decided that where the postponement took place at the request of the vendor he still continues liable upon the contract. This case, in my opinion, concludes the contention.

That judgment was a dissenting one, but it was subsequently approved at 44 L.J. Ex. 130.

It seems to me that the course of dealing and the correspondence between the parties in the case at bar shews that it was agreed between the plaintiff and the defendant that the delivery of the goods was not to be as originally stipulated, but was to be as the defendant should from time to time require, and that, under the contract, he was entitled to delivery of 6,000 sacks of "Lily."

I am quite satisfied that if the war had not broken out and if the price of flour, in consequence thereof, had not advanced very considerably, the plaintiff would never have taken the position that it was not so bound, but would have insisted that the defendant was bound to accept the balance of the 6,000 sacks.

The total number of sacks of "Lily" and "Three Star," which corresponded to "Lily," delivered amounts to 5,110 sacks, leaving a balance of 890 sacks undelivered. The evidence shews that, in consequence of this, the defendant has suffered damage to the extent of at least 50c. a sack, making a total of $445.

Counsel for the defendant waived all claim to damages for failure to deliver the other brands of flour covered by the contract.

The plaintiff had no right to refuse shipment of the car ordered on August 28, 1914, and, under the arrangement of December, 1912, the plaintiff had no right to bring an action for the car shipped on July 30. Therefore, the plaintiff's action,

SASK.

S.C.

WESTERN CANADA FLOUR MILLS CO. v. CROWN BAKERY.

Elwood, J.

in my opinion, was premature, and it is not entitled to the costs of the action.

It was practically conceded in the argument that, if I should come to the conclusion that the plaintiff's action was premature, instead of putting the parties to the expense of a further action I might give judgment for the plaintiff for $744. There will, therefore, be judgment for the plaintiff for $744 without costs.

There will be judgment for the defendant on the counterclaim for $445 and costs of the action and the counterclaim.

One judgment to be set off against the other, and the one in whose favour the balance is to have execution.

Order accordingly.

MAN.

C. A.

Re FORTUNE ESTATE.

Manitoba Court of Appeal, Richards, Perdue, and Haggart, JJ.A. February 25, 1915.

1. EXECUTORS AND ADMINISTRATORS (§ IV C—110)—COMPENSATION—FUTURE SERVICES—INTERIM ORDER—TRUST COMPANIES.

An executor or trustee should not be allowed by an interim order a large sum as compensation for future services; the same rule should be applied even where a duly authorized trust company is the executor.

Statement. APPEAL from an order of a Surrogate Judge granting an interim allowance.

Sir James Aikins, K.C., and *E. Loftus*, for Standard Trusts Co., respondents.

Richards, J.A. RICHARDS, J.A.:—By an order made on the application of the executor company, the learned Judge, whose decision is appealed against by the beneficiaries, has granted to that company $44,000 as an interim allowance, with a proviso that, when the trust is ended, the whole question of remuneration is to be determined without regard to the above order, and has provided that such allowance shall be without prejudice, in any way, to such determination, and that,

> according as the amount of remuneration so finally determined shall exceed or fall short of the amount chargeable and charged to the said estate hereunder, the executors and trustees shall be paid out of the estate, or shall repay to the estate, as the case may be, the difference.

With much deference, I am obliged to dissent from the learned Judge's method of dealing with the matter.

The trust may last for a number of years. Yet he has granted, as an interim allowance, a sum that he apparently thinks will cover future services of the company, and may even chance to exceed the total remuneration that may be earned in all their dealings, past and future, with the estate until, and including, the winding up of the trust.

It is, I submit, wrong in principle to allow to an executor, or trustee, moneys that, as contemplated by this order, are to be earned in the future, or which he may never earn. The fact that, in the present case, the executor and trustee is a strong company, and likely to be a permanent one, makes no difference in the principle involved.

Apart from the above, I am unable to agree with the learned Judge as to the amount to be allowed. The estate is a large one, and the question of the amount involved is necessarily one of the things to be considered in settling the measure of compensation. On the other hand, I cannot but think, after hearing the argument and examining the material before the Court, that, for so large an estate, the difficulties in handling it have been unusually few and small.

The only proper allowance to be made to the executor and trustee at this stage is necessarily an interim one. What should now be allowed is merely a reasonable sum, without, in any way, committing the Court as to the remuneration to be ultimately allowed when the trust ends. Whether, on the final distribution of the estate, such a sum as the learned Judge has fixed may be considered as the total remuneration, need not now be discussed, as what may have to be done in the future is unknown. But at this stage I think that $10,000 is enough to allow as an interim allowance, without going into the question whether that sum has been actually yet earned, the material before the Court being, in my opinion, insufficient to enable us to finally settle that point.

I would allow the appeal, and alter the order appealed from by striking out the words "forty-four thousand dollars ($44,000)," where they occur therein, and by substituting therefor the words "ten thousand dollars ($10,000)."

I would allow the beneficiaries their costs of this appeal, as between solicitor and client, to be paid out of the estate, and allow no costs of the appeal to the executor company.

MAN.

C. A.

RE FORTUNE ESTATE.

Perdue, J.A.

PERDUE, J.A.:—I agree that the amount to be granted to the executors on account of remuneration should be reduced to $10,000. In fixing that sum it should be distinctly understood that this Court expresses no opinion as to the amount that had actually been earned by the executors up to the time the application for interim remuneration was made. The material before the Court was not sufficient to enable it to arrive at a definite conclusion in regard to the full extent of the services that had up to that time been rendered, or the amount that should be allowed in respect of them. The whole question of remuneration will have to be considered and dealt with when the estate shall have been completely administered, and when the Judge dealing with the matter shall have before him the executors' accounts, full particulars as to the value of the assets of the estate, the disposition made of them, the work involved, and all the other facts and circumstances to be taken into account on such an application. The present decision is to be taken as one simply allowing a payment on account without expressing any opinion as to the amount which should be ultimately awarded.

Haggart, J.A.

HAGGART, J.A.:—Under the Manitoba Trustee Act, ch. 200, sec. 52, R.S.M., an application was made to the Judge of the Surrogate Court of the Eastern Judicial District of the Province of Manitoba by the Standard Trusts Co. and the Judge allowed the sum of $44,000 as a fair and reasonable interim allowance for its care, pains, trouble and time expended in and about the administering, arranging and settling the affairs of the estate up to September 30, 1913.

I can understand the desire of the executive of a trust company to shew to the shareholders profitable operations and good financial results. I appreciate the fact that such companies are in a position to do the business of a trustee better than private individuals, that they have in their employ competent officials and experts, that they are perpetual in their existence and they can give to the public good security for the money and property coming into their custody.

I cannot, with all due respect, find, however, any good reason for supporting the order of the Surrogate Court Judge. I think the amount is excessive. If the Courts affirmed such an order

MAN.

C. A.

RE FORTUNE ESTATE.

Haggart, J.A.

then it would be the duty of the Legislature to interfere and regulate the compensation. If the Legislature did not interfere, then testators would give trust companies a wide berth and direct in their wills that their estate should be administered by their friends and relatives as in former days when there were no trust companies.

It is not necessary at this stage to consider whether the compensation should be computed by percentage on the gross valuation or otherwise. That can be determined when the trust has been executed and when it can be better ascertained what care, pains, trouble and time has been expended in and about the trusteeship. In the meantime I think less than one-fourth of the amount allowed by the Surrogate Court Judge, say $10,000, would be a generous sum by way of an interim allowance.

I would allow the appeal and amend the order of the Judge of the Surrogate Court by substituting for $44,000 the sum of $10,000.

Appeal allowed.

B.C. CENTRAL FARMERS INSTITUTES v. C.P.R. CO.

CAN.

Ry. Com.

Board of Railway Commissioners, January 7, 1915.

1. CARRIERS (§ IV A—519)—C.L.—STRAIGHT—MIXED—COMMODITIES—DIFFERENT—TOLL—HIGHEST—WEIGHT—HIGHEST MINIMUM.

The provision in the respondent's tariffs, west of Lake Superior, that different commodities may be consolidated into C.L. lots at C.L. tolls, but when these commodities in such mixture take different ratings if shipped separately in straight C.L. lots, the entire mixed lot is charged the highest C.L. tolls and the highest minimum weight; (rule 2 (e)) follows the practically universal rule in freight classification and will not be disturbed by the Board.

Statement

APPLICATION for the privilege of shipping mixed C.L. lots of flour and feed, sacked and baled hay and straw at C.L. tolls.

The Chief Commissioner.

January 7, 1915. THE CHIEF COMMISSIONER:—This application was heard at Vancouver at a sitting held in October, 1913. The railway company was represented, but as no one appeared for the applicants, no action was taken, and the matter has subsequently been brought up by correspondence.

The applicants alleged that the refusal of the company so to bill mixed carloads of flour, feed and hay, constitutes a hardship to the settlers, many of whom desire to purchase these commodities in wholesale quantities at a time when they could be

CAN.

Ry. Com.

B. C. CENTRAL FARMERS' INSTITUTES v. C.P.R. CO.

The Chief Commissioner.

procured at reasonable prices, and that as they cannot so purchase they are compelled to obtain supplies from retailers at much higher rates.

I am of the opinion that the application must be dismissed.

Less than a carload consignment of hay cannot be looked upon as a movement of commodities in wholesale quantities. Under the present classification, hay moves with a minimum loading of but 20,000 pounds.

The Traffic Department has very carefully looked through the different tariffs and classifications applying in other places, and reports that no tariff or classification permits a carload mixture as asked; and that, on the other hand, under the present classification, hay and straw in carloads moves under the 10th class at a minimum rate of 20,000 pounds per car, while flour and other mill stuffs in carloads take the 8th class at a minimum of 30,000 pounds.

In view of the low minimum applying on hay and the higher minimum as well as the higher rate which applies on flour and other mill stuffs, I am unable to see what advantage would accrue to the applicants at all compatible with the general disarrangement of the classification.

The classification west of Lake Superior provides a number of distinctive headings covering groups of commodities which may be consolidated into carloads at carload rates; but under rule 2 (c), when the various articles in such mixtures take different classification ratings, if shipped separately in straight carloads, the entire mixed carload is charged the highest carload rate, and the highest minimum carload weight. This is practically the universal rule in freight classification.

If the application were granted it would have to be subject to this rule, unless the whole scheme of mixed classification is to be upset, so that the heavier articles, flour, etc., would have to make room for the lighter, hay and straw, without a corresponding reduction in the carload minimum weight, the result being that the rate on a car so mixed would be at the 8th class instead of at the lower 10th class rate, and would be accompanied by a minimum weight charge of 30,000 pounds.

So far I only treat the question as a matter of classification.

The company has, however, a special commodity tariff (C.R.C. No. W.1686), which gives reduced rates on straight or mixed carloads of bagged flour, grain, flaxseed, oatmeal, and mill stuffs, with a minimum loading of 40,000 pounds, and also reduced rates on straight carloads of hay with a minimum weight of 24,000 pounds.

It is hard to say on what ground an extension of the mixing privilege could be ordered which would apply to the special rates under this tariff. As to the minimum per car, the differences in the present instance being 16,000 pounds as against 10,000 pounds, the result is that if hay were consolidated in one car with grain ,the loading would have to amount to 40,000 pounds, or else the shipper is paying for freight that does not move. This of itself alone would prohibit such a movement. While hay and straw are agricultural products just as much as grain and its products; they can hardly be considered as analogous commodities. The grain rate, for example, is accompanied by the special feature of milling and malting privileges in transit.

I am of the opinion that the application must be refused, and that, if granted, it would be largely merely a matter of trouble to the railway companies with but little, if any, advantage to the shippers.

MR. COMMISSIONER MCLEAN concurred. Com. McLean.

Application refused.

REX v. TALLY.

ALTA.
S. C.

Alberta Supreme Court, Beck, J. January 23, 1915.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II E—44)—SUFFICIENCY OF DESCRIPTION OF OFFENCE—COMMON ASSAULT.

An information charging that the accused "threatened" the complainant with an axe, "contrary to sec. 291 of the Criminal Code," is sufficient to charge the offence of common assault for which that section of the Criminal Code provides.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ I—2)—AMENDMENT OF INFORMATION—RE-SWEARING.

It is not essential that an information before a magistrate should be re-sworn after being amended at the hearing, if the amendment merely gives greater particularity or certainty to the charge without changing the charge to an offence of a different kind or alleging it as of a time or place materially different from that first alleged.

ALTA.

S. C.

REX v. TALLY.

3. SUMMARY CONVICTIONS (§ VI—60)—IRREGULARITY IN INFORMATION—WAIVER BY FAILURE TO OBJECT.

An irregularity in not re-swearing an information in a summary conviction matter when materially amended at the hearing is waived by proceeding with the trial without taking the objection.

[*R.* v. *Lewis*, 6 Can. Cr. Cas. 499, approved.]

4. SUMMARY CONVICTIONS (§ VI—60)—DEFECT IN INFORMATION CURED BY DEPOSITIONS.

If the depositions in a summary conviction matter establish such facts as warranted the justice in convicting of the offence indicated by the information, although not stated in the latter in correct form, Code sec. 724 applies to validate the conviction regardless of the defect in the information.

5. SUMMARY CONVICTIONS (§ II—20)—TERRITORIAL JURISDICTION OF MAGISTRATE—INCONVENIENT PLACE OF TRIAL.

Where, as in Alberta, justices of the peace are appointed with territorial jurisdiction extending over the entire province, an objection that the charge was not laid before the nearest justice will not be a ground for quashing the summary conviction unless there has been a gross abuse of authority in compelling the attendance of the accused at a far-distant and inconvenient place of trial, notwithstanding the availability of a justice at a convenient place of trial, under circumstances amounting to a denial of the right of the accused to make his "full answer and defence" (Cr. Code, sec. 715).

[*R.* v. *Farrell*, 15 Can. Cr. Cas. 283, referred to.]

6. JUSTICE OF THE PEACE (§ III—13)—EXCLUSIVE JURISDICTION OF FIRST JUSTICE TAKING COGNIZANCE OF CASE—IMPLIED REQUEST TO SECOND JUSTICE TO ACT.

Under a statutory provision limiting a justice's jurisdiction in any particular case to the first justice having possession and cognizance of the fact but with a proviso that at such justice's request any other justice may at the first justice's request "take part in" the case, a request to the second justice may be implied from the conduct of the justice who received the information, and in view of Cr. Code sec. 1120, such request will be implied and the conviction upheld where both the justice receiving the information and another sat at the hearing, but because of objection raised by the family of the accused to the first justice acting, he voluntarily refrained from trying the case.

[*R.* v. *Cruikshanks*, 16 D.L.R. 536, 23 Can. Cr. Cas. 23, followed; *R.* v. *Ackers* (*No. 3*), 16 Can. Cr. Cas. 222, and *R.* v. *McGregor*, 2 Can. Cr. Cas. 410, referred to.]

7. TRIAL (§ I A—2)—CRIMINAL CASES—TWO PERSONS SEPARATELY CHARGED ON IDENTICAL EVIDENCE—INTERMIXING OF TRIALS.

Where the assaults charged separately against two persons took place as part of one and the same occurrence, and the evidence would have been identical in each case, it is not a ground for quashing the summary conviction in either case that the two cases were tried together, particularly where no exception was taken at the trial.

[*R.* v. *Lapointe*, 4 D.L.R. 210, 20 Can. Cr. Cas. 98, and *R.* v. *Fry*, 19 Cox C.C. 135, 62 J.P. 457, applied.]

8. SUMMARY CONVICTIONS (§ VII B—80)—FORM—DATE OF OFFENCE.

An objection that a summary conviction for common assault assigns no date to the offence is cured under Cr. Code sec. 1124 if the date appears on the depositions.

9. CONTINUANCE AND ADJOURNMENT (§ II—8)—CRIMINAL TRIAL—DISCRETION OF MAGISTRATE.

Unless it appears that the refusal of a magistrate to grant an adjournment of the hearing results in the accused being prevented from making his "full answer and defence" (Cr. Code sec. 715), the magistrate's *bonâ fide* exercise of discretion cannot be reviewed.

[*R.* v. *Irwing*, 14 Can. Cr. Cas. 489, referred to.]

MOTIONS by the respective defendants to quash the summary conviction made against him.

J. M. Macdonald, for defendants.

Popple, for the Crown.

BECK, J.:—These are two motions to quash convictions, the proceedings being—or being taken to have been—certified to the Court in pursuance of the notices of motion given in pursuance of the new rules in that behalf.

A number of objections are taken.

1. "That the informations charge no offence."

The information in one case is a charge that the defendant "did wilfully run into my hay rack and injured the same, and did threaten me with an axe"; in the other: "did threaten me with a pitch fork."

Whether or not these informations disclose an offence in law, I think any defect that may exist cannot affect the validity of the conviction, and this for two reasons: First, both the informations were amended by the addition of the words "contrary to sec. 291 of the C.C." That section reads:—

> "Every one who commits a common assault is guilty of an indictable offence, and liable, if convicted . . . on summary conviction," etc.

This addition, at all events, made the intent and meaning of each charge quite clear as a charge of common assault. The objection is taken that the information was not re-sworn after amendment.

It seems to me that in no case is it necessary to re-swear an information after an amendment, if the amendment is of such a nature only as that it merely gives greater particularity or certainty to the charge and does not amount to the laying of a new charge, *i.e.*, a charge of a different kind of offence or of a similar offence at a time or place materially different from that first alleged.

Even if the accused had a right to insist upon the informations being re-sworn, they waived the irregularity—if such it was—by refraining from taking the objection: *R.* v. *Lewis*, 6 Can. Cr. Cas. 499.

Secondly, sec. 724 of the Code, which forms part of Part XV., "Summary Convictions," says that:—

ALTA.

S. C.

REX v. TALLY.

Beck, J.

"No objection shall be allowed to any information . . . for any alleged defect therein in *substance* or in form or for any variance between such information . . . the evidence," etc.

So that if the evidence, as it appears in the depositions, establishes such facts as justified the justice in convicting of a common assault, and if he did so, the wording of the informations may be disregarded. This, I think, might have been said even if the informations had not been amended, inasmuch as they at least indicate, if not allege, a common assault. With the amendment it seems to me no question can arise.

2. Another objection is that the charges should have been, and were not, laid and heard before the nearest magistrate.

The provincial legislation respecting police magistrates and justices of the peace is ch. 13 of 1906; ch. 5, sec. 9, of 1907; ch. 20, sec. 10, of 1908; ch. 4, sec. 8, of 1909.

Section 2 of ch. 13 of 1906 says that the Lieutenant-Governor in Council may appoint justices of the peace for the province, who shall have jurisdiction as such *throughout the same*.

There is no statutory provision requiring a charge to be laid or dealt with by the nearest justice, nor is there any other law that I am aware of requiring this; though I have no doubt that if it appeared that there was gross abuse of the authority of a magistrate by, for example, compelling the attendance of the accused at a place extraordinarily far from his home and the place where the offence was alleged to have been committed and where all the witnesses resided, while a competent and impartial justice was available near the place of the alleged offence, this Court would have power to intervene and prevent the abuse of the process of the inferior Court on the ground that the defendant was prejudiced in his right to "make his full answer and defence" (sec. 715, Code), and that therefore the magistrate lacked jurisdiction: *Rex* v. *Farrell*, 15 Can. Cr. Cas. 283.

3. The third objection is that the charge was not tried by the justice who took the information, and there is no evidence of a request to the convicting justice to try the case.

Section 9 of ch. 5 of 1907 adds a section to ch. 13 of 1906, as follows:—

"9*a*. Jurisdiction in any particular case shall exclusively attach in the first justice of the peace, or where more than

one justice is required the first justices to the required number duly authorized, who has or have possession and cognizance of the fact. Provided that at the request of any such justice, or at the unanimous request of any such justices where more than one justice is required, any other justice or justices may take part in any case."

The informations were sworn before William Dives, J.P. The cases were tried before and the convictions made by William Macdonald, J.P.

The convictions are in the usual form—the form provided by the Criminal Code, Nos. 31, 32, 33:—

"Be it remembered that on the.....day of....., in the year....., at..... A.B. is convicted before the undersigned....., a justice of the peace for the said" (province).

Neither these forms nor the convictions in the present cases shew the information to have been laid otherwise than before the convicting magistrate. This, however, is shewn by the papers produced before me, namely, the informations; but other papers also produced, namely, recognizances on the part of both accused to keep the peace, bearing the same date as the convictions and alleging the same offences, appear to have been taken at the same place before both Dives and Macdonald as justices of the peace. It would appear, then, that the justice before whom the information was laid was present when the justice, Macdonald, heard the case. Furthermore, in an affidavit filed on behalf of the defendants it is said:—

"I further asked him" (Macdonald) "if he had any request from the justice of the peace who took the information, to try the case, and he said that he had not, and that it was the fault of the mother of the accused, as she objected to them being tried before the justice of the peace who took the information."

I infer from this that owing to objection Justice Dives refrained from trying the case, and thereby inferentially consented and requested Justice Macdonald to try the cases. An implied request is sufficient: *Rex* v. *Cruikshanks*, 16 D.L.R. 536, 23 Can. Cr. Cas. 23.

In *The King* v. *Ackers* (*No. 3*), 16 Can. Cr. Cas. 222, it was held that while the conviction could not be supported, inasmuch

ALTA.
S. C.
REX
v.
TALLY.
Beck, J.

as it did not appear on its face that the convicting magistrates acted at the request of the police magistrate before whom the information was laid, there being a statutory provision to the effect that no other justice should in such case act except in case of the illness or absence or at the request of the police magistrate, yet the defendant should not be discharged (the application was for *habeas corpus*), but the conviction should be remitted to the convicting magistrates for amendment according to the facts. This order was made in pursuance of a provision of the Ontario Liquor License Act, but it seems clear that a similar power exists under sec. 1120 of the Criminal Code. Being of opinion that the convicting magistrate was fully justified in convicting, I would, if I was not satisfied that there was not an implied request, have directed that the convictions be remitted to the convicting magistrate to be amended by inserting in the convictions after the word "province" the words, "acting in this behalf at the request of William Dives, a justice of the peace in and for the said province, before whom the information herein was laid," if this be according to the fact, instructing the convicting magistrate in accordance with the decision of this Court in *Rex* v. *Cruikshanks*, *supra*, that an express request is not essential under the Act, but that a request may be implied from the conduct of the justice who received the information.

But the convictions appearing to be valid on their face, and I myself being satisfied by the extrinsic evidence that there was a sufficient request by implication, I think the objection may be disregarded in view of sec. 1124: *R.* v. *McGregor*, 26 O.R. 115, 2 Can. Cr. Cas. 410; *R.* v. *Perrin*, 16 O.R. 446.

4. The next objection is that the two charges—that is, separate charges of common assault against each of the defendants—were tried together without the consent of the defendants.

The depositions shew that had the cases been tried separately the evidence would have been identical in each case; that, in other words, the assaults, charged separately against each defendant, both took place as part of one and the same occurrence. Under these circumstances no possible injustice could be done to either defendant, and the reasoning in the cases of *R.* v. *Fry*, 19 Cox C.C. 135, 62 J.P. 457, and *The King* v. *Lapointe*, 4 D.L.R. 210, 20 Can. Cr. Cas. 98, leads to what I think is the proper conclusion that the convictions should stand as against this ob-

jection—at all events, as it does not appear that any exception was taken at the hearing to this course being taken.

5. The next objection is that the informations and convictions contain two separate and distinct offences.

This objection is virtually dealt with under the head of the first objection. In any case, it is evident that in each case the charge was treated as one of common assault; and if this offence is improperly or insufficiently set forth in the convictions, the objection on this ground is ineffective by reason of sec. 1124, inasmuch as on a perusal of the depositions I am satisfied that an offence of the nature described in the conviction has been committed.

6. A sixth objection is that evidence was wrongfully admitted by way of a petition.

I do not find that this objection is established as a fact. There is such a petition, but it is attached to the recognizances to keep the peace. I would presume that it was used by the magistrate—and I suppose improperly—in connection with binding the accused over to keep the peace; but there is nothing to shew that it was used as evidence on the charges of assault or that it influenced the magistrate in determining the question in issue on the trial.

7. It is objected that the evidence does not sustain the conviction. Though the evidence for the prosecution is met by an *alibi* in each case, it, if believed by the magistrate, certainly supports a conviction of both defendants for a common assault.

8. It is objected and the fact is that the conviction assigns no date to the offence. This defect, however, can be supplied from the depositions by virtue of sec. 1124, already referred to.

9. It is objected that the information was not re-sworn after amendment. I have already dealt with this when dealing with the first objection.

10. It is alleged that the defendant Ivan Tally asked for an adjournment in order that he might have counsel to represent him.

The fact of the request and the magistrate's explanation appear in an affidavit filed on behalf of the defendant, which states:—

> "I asked him" (the magistrate) "also why he did not grant the request of the accused for an adjournment to get counsel,

ALTA.

S. C.

REX v. TALLY.

Beck, J.

and he said it was impossible, as the witnesses were there from a long distance, and he himself was going away to the country the next day and would be absent some considerable time."

The place of trial was Morinville, some 25 or 30 miles from Edmonton, the nearest point at which counsel could be procured, if there were none at Morinville, where, if there is a practicing barrister or solicitor, there is only one.

Unless it appears that the refusal of a magistrate to grant an adjournment results in the accused being prevented from having a fair trial—from making "his full answer and defence"—the magistrate's *bonâ fide* exercise of discretion cannot be reviewed. Without going so far as to say that in no case, however intricate and serious, would a magistrate's refusal of an adjournment for this purpose induce the inference that the accused had been deprived of a fair trial, I think he could not reasonably be considered to have been prejudiced in such a case as the present: see *R.* v. *Irving*, 14 Can. Cr. Cas. 489.

11. It was said the costs fixed were excessive. I cannot find this substantiated.

The motions should be dismissed with costs.

Motions refused.

SASK.

S. C.

SASK. ELEVATOR CO. v. CAN. CREDIT MEN'S ASSOC.

Saskatchewan Supreme Court, Elwood, J. April 10, 1915.

1. ASSIGNMENTS FOR CREDITORS (§ III B 3—25)—PARTNERSHIP ESTATE — MONEY RECEIVED IN COURSE OF PARTNERSHIP BUSINESS—DEFAULT IN ACCOUNTING—ASSIGNEE DEFENDING ACTION—COSTS.

Where a claim filed against the partnership estate is for money alleged to have been received by one of the partners in the course of the partnership business, but, in respect of which he had defaulted in accounting, the assignee for creditors of the partnership will, if justified in defending the action, be entitled to be paid out of the assets both the claimant's costs of a successful action to establish the claim and his own costs of defence as between solicitor and client.

Statement

ACTION against a partnership estate.

Hugh Phillips and *B. D. Hogarth*, for plaintiff.

H. Y. MacDonald, K.C., for defendant.

Elwood, J.

ELWOOD, J.:—Briefly, the facts in this case shew that a partnership firm consisting of two members, Black and McHugh, carried on business at Thackeray and Cloan, in this province;

that said McHugh, at the times hereinafter mentioned, was the partner who had the sole management and control of the business; that the defendant Black resided in the Province of Ontario, and apparently took no active part in the business. Prior to the plaintiff erecting an elevator at either Cloan or Thackeray, the said McHugh saw an officer of the plaintiff company and stated that his firm, who were general merchants at both places, would like to transact any business that the plaintiff had at Thackeray prior to the erection of the elevator, and after the elevator was erected would like to act as payor for it at those points. A certain amount of business was transacted in the way of purchasing cars of grain, which were apparently bought in the firm name, on commission, and ultimately a payor was appointed at both Thackeray and Cloan. It is contended on behalf of the plaintiff that Black and McHugh were the payor, and on the part of the defendant that McHugh himself was payor. The defendant is the assignee of Black & McHugh. The bond in each year was entered into by McHugh alone; the drafts for the moneys which were paid out were signed by McHugh; the reports were all signed by McHugh; but I am satisfied, and find on the evidence, that McHugh, in paying out this money, was acting solely on behalf of Black & McHugh. Black & McHugh were the only ones who could receive any benefit from handling this money, and the evidence shews that it is a benefit to merchants to handle money for grain companies, because it attracts custom and assists the merchant in the collection of his debts. There was no possible benefit that I can see that would accrue to McHugh alone, and I, therefore, find from the evidence that—as I said above—this work was undertaken by McHugh for and on behalf of his firm, and that it was never intended that McHugh alone should be the person responsible. It was objected, however, that it was beyond the scope of the partnership for McHugh to so act. There is no evidence as to whether or not Black knew anything about the handling of this money. He was only in the vicinity of the stores once or twice, and there is no evidence either one way or the other. The evidence does shew, however, that it is customary for stores throughout the country at points where there are no banks to handle as payors money for elevator companies, and I find on

SASK.

S. C.

SASK. ELEVATOR CO. v. CAN. CREDIT MEN'S ASSOC.

Elwood, J.

the evidence that it is a custom which would properly belong to a country store such as this one was, and, therefore, in my opinion was properly within the scope of the partnership. The evidence shews that after a fire in the store of Black & McHugh an investigation was had, and as a result of that investigation McHugh admitted a shortage which amounts to $8,002.14. There is no evidence that any part of this money was used for the purposes of Black & McHugh, and I am satisfied from the evidence that McHugh set the store on fire, and that he either appropriated to his own use at that time the whole of the $8,002.14, or, as I think more likely, he appropriated the balance of that money which was then on hand, but had previously appropriated to his own use other sums, a part of the $8,002.14, and the fire was set for the purpose of covering up these defalcations. However, it is immaterial in which way this arose; I am of opinion that the partnership is responsible. The result will be that the plaintiff is entitled to judgment entitling it to rank upon the estate of said Black & McHugh so assigned for the benefit of creditors to the defendant herein for the sum of $8,002.14. The plaintiff is entitled to its costs of this action. I am of opinion that the defendant was entitled to defend the action, and, therefore, the defendant will be entitled to be paid the plaintiff's costs of this action and the defendant's costs as between solicitor and client out of the assets of the estate assigned.

Order accordingly.

MAN.

C. A.

WHEELER v. CHAPMAN.

Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. February 25, 1915.

1. PARENT AND CHILD (§ I—1)—RELATIONSHIP—PURCHASE OF AUTOMOBILE —LIABILITY OF PARENT—AGENCY.

A person who sells an automobile to an infant under 21, and takes his agreement and lien notes for the price, has the onus cast upon him of proving the son's agency for the parent if he seeks to make the latter liable, and such is not conclusively shewn by the license having been taken in the parent's name.

Statement

APPEAL from the dismissal of the action at trial.

E. J. McMurray, for plaintiff, appellant.

B. L. Deacon, for defendant, respondent.

The judgment of the Court was delivered by

HAGGART, J.A.:—The negotiations for the purchase of the automobile were commenced with and carried on until the deal was consummated with Claude Chapman, the son, and the agreement to purchase or the lien notes were signed by him alone. It transpires that he was an infant under the age of 21 years. The plaintiff now claims that it was a joint purchase by the son and mother, both defendants, or else a purchase by the son for the mother.

In support of this contention it is urged that the mother and son lived in the same house; that she advanced a portion of the money; that the proposed purchase was discussed by the mother or in her presence; that the plaintiff himself took the car to her house; that she took out the license in her own name, and that her name is mentioned in the receipt as contributing the money for the first payment.

If the mother was the joint purchaser, or the real sole purchaser, I think the plaintiff would have seen that she signed the documents which consummated the deal. The advance to the son of a part of the money is consistent with the position she takes now and the interest she took in the car and the negotiations were quite consistent with the relations of a mother and son living in the same house.

The taking out of the license in the name of the mother is not satisfactorily accounted for to my mind. The reason given is that it was thought an adult should be the licensee. This is the most serious part of the case pointing towards the mother's liability. Under all the circumstances I would hesitate before substituting my view on such a question of fact for that of the trial Judge.

I am not impressed with the merits of the defence. I think it would have been only the proper thing for the family to have paid for the machine. The onus is on the plaintiff as to the agency of the son. I do not think he has satisfied that onus.

The plaintiff claims in tort for damages. There is no evidence of any wrongful destruction of the car and the wreck of the car may have been the result of some inherent defect in the car itself, or inevitable accident. There was no prohibition in

MAN.

C. A.

WHEELER v. CHAPMAN.

Haggart, J.A.

the contract as to using the car for livery purposes and we cannot assume that such a user was tortious. The trial Judge has in substance given credence to the defendants' story. It is with some doubt that I affirm the trial Judge's finding.

I would dismiss the appeal with costs.

Appeal dismissed.

CAN.

S. C.

CREVELING v. CANADIAN BRIDGE CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. March 15, 1915.

1. PLEADING (§ I G—50)—TRIAL JUDGE — DIRECTIONS TO JURY — ISSUES FULLY PRESENTED—EVIDENCE SUPPORTING SAME—APPEAL.

Where the trial Judge during the trial of an action, in his directions to the jury, presents the issues fully to them, and where the evidence supports it, the verdict of the jury should not be disturbed.

2. APPEAL (§ VII J—390)—OBJECTION—MISDIRECTION OF JUDGE—QUESTION NOT RAISED IN LOWER COURTS—RESULT.

Where a party has not used the opportunity at the trial nor in the first court of appeal it is too late, in the absence of special circumstances, to urge misdirection of the Judge upon a subsequent appeal to a higher court.

[*Creveling* v. *Canadian Bridge Co.*, 20 D.L.R. 528, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Creveling* v. *Can. Bridge*, 20 D.L.R. 528, by which the judgment entered at the trial, on a general verdict by the jury in favour of the plaintiff, was set aside and a new trial ordered.

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

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—It appears to me quite obvious, after reading the pleadings and evidence, that both parties to this litigation assumed at the outset that the accident to the plaintiff was mainly attributable to the absence of a guard on the traveller and that little, if any, fault was chargeable to the system under which that traveller was operated. There is no suggestion in plaintiff's evidence on discovery or in his examination in chief at the trial that his injury was caused as the result of a failure on the part of those in charge of the traveller to give the proper signals to notify the workmen of its approach. His whole evidence is directed to prove that the construction of the traveller was defective in that there was no guard on the wheels. He says that when he was coming up from under the

platform of the bridge he saw the traveller stop at a short distance, two or three feet, from the place where he put his hand on the rail to steady himself, and he does not suggest, as he would naturally have done had the thought been present to his mind, that the traveller then moved forward and crushed his hand without giving him warning. His only grievance is that there was nothing in front of the wheels to attract his attention by physical contact with his hand to the danger to which he was exposed. It is only after the engineer, who controlled in part the working of the traveller, had testified to the practice of omitting signals after the momentary stop and the subsequent setting in motion of the traveller without sounding a whistle, and the divided control over the movements of the traveller which moved forward as much under the direction of the man under the lower platform at the spool as of the engineer above came out in the evidence that it occurred, if at all, to counsel to suggest this ground of negligence or defect in the system under which the traveller was operated. I am much impressed by what the Judge said in his charge, in the extract quoted by Mr. Justice Anglin, and no attempt was then made to correct him. But, on the whole record, it appears that there was no proper system of signals such as it was the duty of the employers to provide for the due protection of their employees, and, in the alternative, if there was a proper system originally adopted it was negligently departed from to the knowledge of those in charge of the work. It is apparent on the whole evidence, as the case stood when it went to the jury, that the system of signals was, by reason of the divided control of the traveller, imperfect. All the engineer can say is that his engine did not stop at the time when the plaintiff says it was at a standstill, but under the system under which the traveller was operated the engine may have been revolving and the wheels of the traveller at a standstill if the clutch was off the rope or if the rope was not tight on the drum.

It is, therefore, apparent that there may have been and probably was a misunderstanding between the man at the engine and the man on the platform below, who co-operated in the control of the movements of the traveller, and to this the accident may be attributable. There also seems to have been a complete misunderstanding as to the system adopted for the proper warn-

CAN.

S. C.

CREVELING v. CANADIAN BRIDGE CO.

Sir Charles Fitzpatrick, C.J.

ing of employees of approaching danger. The engineer, over and over again, affirms that the system did not require a signal to be given for what he calls "momentary stops," whereas all the workmen examined agree that each time the traveller started after having been at rest they expected to receive a signal and this undoubtedly seems to be a very reasonable view to take if the system was really intended to be effective.

How, indeed, could a workman, in the circumstances in which the plaintiff was placed, seeing the traveller at a standstill, decide whether it was stopped for a moment or for a lengthened period of time? If to this we add the divided control over the movements of the traveller, the conclusion that the system was defective would appear to be irresistible.

It is now argued, however, that this ground of liability was not properly put to the jury. I certainly am of opinion that it was put in issue by the pleadings. In plaintiff's statement of particulars it is alleged that his personal injuries were sustained by reason of the negligence of the defendants in respect to para. F 1. It is quite true, as forcibly urged by my brother Anglin, that the Judge's charge was not as full or as complete on this ground of liability as it should have been. After full consideration I adopt the view of Mr. Justice Duff as to the duty of counsel and the powers of this Court in such a case as we have now under consideration. We have the whole record before us. The issues may not have been very logically put to the Court, the evidence may not have been skillfully marshalled, and the jury may not have been very clearly or fully directed, but, if on the pleadings and evidence we are satisfied that substantial justice has been done, that both parties have had their day in Court, it is not only our right but our duty to say so and avoid further costly litigation and no less ruinous delay. The old Latin maxim still has its place in our system, "*interest reipublica ut sit finis litium.*"

I would allow the appeal with costs.

Davies, J. (dissenting)

DAVIES, J. (dissenting):—I would allow this appeal, but would direct a new trial alike on the common law claim and the statutory claim under Employers' Liability Act with costs to abide the event.

IDINGTON J.:—The appellant's hand was crushed by a machine, called a traveller, used in bridge building whilst he was necessarily holding on to the rail over which the traveller ran.

He tells what he was doing. Before putting his hand on the rail for support he says:—

Q. Were you giving any directions to the workmen? A. I turned around and saw the traveller was standing still, and I told the bucker up to straighten the needle beam,

. . . . . .

Q. And how long were you up in that position before your hand was cut? A. I should judge about three seconds, probably a little more that that, five or six seconds; long enough to look down and tell him to go ahead and straighten it. Q. Before you put your hand on the rail did you see where the traveller was? A. Yes, sir. Q. Where was it? A. Standing right back of me, about two feet from me, standing still. Q. Standing still? A. Standing still. Q. What was it doing—what was the traveller doing? A. It was standing still.

. . . . . .

Q. Was there any signal given with respect to the—immediately before the ear moved on your hand? A. When I stepped on the chord I could see the traveller standing there; there was no whistle blown when I got up there. Q. How long before that had there been any signal? A. How long before that? Q. Yes? A. I could not say. Q. Then up to the time of your being injured, and whilst you were on the bridge you know of no signal? A. No signal; no whistle blown. Q. No whistle blown. Had a whistle blown what would you have done? A. Got back on the staging.

Another witness corroborates this as follows:—

Q. What attracted your attention when Creveling was injured? A. I heard him holler, and then I came up to see what had happened. Q. Was he injured? A. He was injured. Q. Before he was injured, right at the time he was injured, and before within a reasonable length of time, was there any signal given by the engineer? A. No. Q. Have you any doubt about it at all? A. No.

The man operating the engine alleges he gave two blasts when the traveller started from a point a hundred feet or more to the rear of where appellant and his mate were working, but does not pretend to have given any later.

We have no proof of any rules laid down by the respondent for the protection in this regard of the men who were engaged in the dangerous work in question. All, including appellant, who speak on the subject, say the men depended on the warning of the whistle at the starting of the traveller in motion. If that had been rightly observed appellant admits its protection would

CAN.
S. C.
CREVELING v. CANADIAN BRIDGE CO.
Idington, J.

have sufficed for him though he and others say besides that a guard projecting ahead of the traveller is in common use in many places. No such guard was used by respondent. No statutory provision relative thereto seems to exist except what indirectly bearing thereon exists in the Employers' Liability Act.

The man in charge of the engine indicates that the only system he had observed was to give a blast or two blasts when he started the engine to propel the traveller on its way, and that if through any cause the traveller had to be stopped, neither he nor any one else had any duty imposed by the respondent to take steps to give further warning when starting up again to proceed further forward.

I cannot think that was such an adequate system as would discharge the respondent from its common law liability. A trap seems to have been set instead of an effectively protective system.

There seems to have been an absence of such protective measures as indicated to be necessary by the principle applied in *Smith* v. *Baker*, [1891] A.C. 325, and many other cases since.

Three charges of neglect of that kind were set out in the statement of claim, and a good deal more attention was paid at the trial to the want of a guard than to that involved in the said system or want of system, but that does not, when all were plainly before the Court, help respondent, yet its counsel urges for that reason the verdict should not stand.

A plaintiff is entitled to hold the judgment awarded him as result of a general verdict when there is evidence upon which the jury could properly find such verdict; and that even though the learned trial Judge had overlooked the evidence and its possible application in law and the counsel had been warring about something else, possibly having only a remote relation to the common sense view of the case; always provided, however, that the Judge has not misdirected the jury.

The evidence quoted above was such and I see no misdirection.

If there had been a proper guard then the question might have arisen if that should not be held sufficient in itself.

I think the appeal should be allowed with costs.

DUFF, J.:—In his statement of claim the plaintiff charges negligence as follows:—

3. The said personal injuries, which the plaintiff sustained as aforesaid, were caused by reason of the negligence of the defendant, particulars of which are as follows:—

(*a*) In not having any system, or in the alternative any proper and sufficient system of signals to carry on the work of construction in safety to the plaintiff.

(*d*) In not having guards or other protection on or in front of the wheels of the said traveller.

The jury found a general verdict in favour of the plaintiff on his claim for damages in respect of the respondents' alleged liability at common law. The Court of Appeal set aside this verdict and ordered a new trial for the purpose of assessing damages under the Employers' Liability Act. This judgment of the Court of Appeal was based on the view taken by all the members of the Court that the plaintiff had admitted the existence of a "system" of signals which, if properly carried out, would afford sufficient protection.

With respect, I think the Court of Appeal misapprehended the effect of the evidence. There was evidence no doubt given on behalf of the plaintiff and the plaintiff himself stated in his own testimony in so many words, that there was a "system" of signals which, if carried out, would have been satisfactory. But it is quite obvious that all the witnesses while using the word "system" were speaking of the practice of signalling as they had observed it. From this practice, as they saw it, they naturally enough inferred that it was the duty of the engineer to see that a signal was given by a blast of his whistle whenever (the travelling derrick having stopped) it was about to be set in motion again. But the engineer himself was called as a witness. He was the only witness who was competent to give evidence at first hand of anything which could properly be described as a "system" in any relevant sense, that is to say, of a practice which under his instructions, express or implied, it was obligatory upon him to observe in the execution of the duties of his service. He explicitly denies that there was any such obligatory practice requiring him to give any signal after what he described as "a momentary stop." And he gives evidence which is intended to convey the impression, and may very well have con-

CAN.
S. C.
CREVELING
v.
CANADIAN
BRIDGE
CO.
Duff. J.

vinced the jury that (owing to the manner of construction of the travelling derrick and the fact that the control of the locomotive apparatus was not in the hands of the engineer himself, but in the hands of others who were not within his view while working the apparatus) it was quite possible for the derrick to be brought to a stand still and set in motion very shortly afterwards without any signal being given; and that in the circumstances it was not practicable to provide, and the "system" such as there was, did not in fact provide for the giving of a signal in such cases.

This evidence appears to have been overlooked in the Court below; and having regard to it, it seems impossible to sustain the judgment setting aside the verdict on the ground on which that judgment was placed by the learned Judges who took part in it. Mr. Tilley now argues, however, that the negligence charged in para. 3 (*d*), namely, the absence of a guard, is a charge which cannot be sustained on the evidence. And he contends that as the charge put forward in para. 3 (*d*) was the only charge the plaintiff attempted to establish in his own case in chief and the only ground of negligence submitted to the jury, the action must be dismissed, unless it should be thought just that as an indulgence to the plaintiff there should be a new trial for the purpose of enabling the plaintiff to establish a case reposing on the ground of negligence charged in para. 3 (*a*)—absence of a sufficient system of signals. I think this ingenious analysis quite fails to do justice to the significance of the evidence in its bearing upon the case advanced by the appellant at the trial. The plaintiff offered evidence to shew that the dangers arising from the operation of such machines were commonly avoided by mechanical protection consisting of a guard which (sweeping the rails upon which the derrick moves) automatically gives warning (by physical contact with his person) to any workman exposed to the peril of such mishaps as that from which the appellant suffered. It was not denied by the plaintiff's witnesses, as I have already indicated, that the giving of signals by blasts after all stops, would, if faithfully observed, be a practice affording sufficient protection; but it was contended that the faithful carrying out of any such practice could not be, in the

circumstances, implicitly relied upon and that it ought to be supplemented by the mechanical warning suggested. That was the case put forward by the plaintiff, and it may be that it ought to fail if it rested solely upon the testimony offered on his behalf in his case in chief. But the answers of the engineer to which I have referred, brought out in cross-examination on behalf of the plaintiff, affords evidence to the benefit of which the plaintiff is as much entitled as of the evidence given by his own witnesses called by himself. Those answers afford ample grounds, as I have already pointed out, for a finding by the jury that the so-called "system" or the practice in operation was, for the reasons I have above mentioned, as the plaintiff contended it must be, quite valueless as a protection in such circumstances as those which led to the mishap from which the plaintiff suffered. It was, therefore, open to the jury to find that the failure to provide some such additional safeguard as the mechanical provision suggested constituted in the circumstances a default in performance of the obligation of the defendant company to take reasonable measures for the protection of its employees in a situation which in the absence of such precautions constantly exposed them to the risk of injury; the evidence of the respondents' foreman indeed is quite sufficient to support a finding that a mechanical guard effective for the purpose suggested could be provided without difficulty.

I see no reason whatever to suppose that this issue was not placed before the jury. The evidence upon which the respondents rely and which prevailed with the Court of Appeal as shewing the existence of a satisfactory and sufficient system of warning was brought out by the respondents' counsel in cross-examination of the plaintiff himself deliberately and beyond all doubt with the object of presenting an answer to the complant of insufficient provision for warning. We are asked by the respondents' counsel now to assume that, as bearing upon the issue whether or not sufficient provision was afforded for warning the workmen of the movement of the crane, counsel for the respondents at the trial failed to bring before the jury this evidence obtained from the plaintiff and his witnesses for that very purpose and to ask the jury to consider whether or not the

CAN.
S. C.
CREVELING
v.
CANADIAN
BRIDGE
CO.
Duff, J.

complaint made by the plaintiff of insufficient means of warning was answered by it.

It is incredible that any such course was in fact pursued. It is incredible indeed, in view of the evidence given on the cross-examination by the engineer, that the question of the adequacy of the alleged "system" should not have been put before the jury as one of the elements governing the determination of the question upon which the learned trial Judge specifically asked them to pass, namely, whether in the circumstances the failure to provide a mechanical "guard" constituted in contemplation of law a neglect of the respondents' duty to the appellant. Since there was, as I have said, evidence sufficient to sustain the finding of the jury on the issue just mentioned upon which they admittedly did pass, it is unnecessary to say more upon the points argued by counsel in support of the judgment in the court below.

It is suggested, however, from the Bench, that the proper judgment here was not to restore the judgment of the learned trial Judge, but to direct a new trial. For several reasons, I think such a judgment by this Court would be unjust. But it should be sufficient to observe that the suggestion is not based upon any alleged misdirection or want of direction, calculated to mislead the jury, of which any complaint whatever has been made by the defendant company at any stage of the proceedings. Indeed, it is manifest that at no stage of the proceedings has the defendant company suggested the propriety of a new trial. From the beginning the verdict has been attacked by it on the ground, and only on the ground, that the finding on the issue submitted specifically by the learned trial Judge is not reasonably supported by the evidence. That contention rejected, the whole attack on the verdict—the question of damages and the question of *volens* apart—entirely fails.

That being the case even if the learned trial Judge's charge were open to serious objection, and I think it is not, it is now too late for the defendant company to ask for a new trial in this Court.

In *White* v. *Victoria Lumber and Man. Co.*, [1910] A.C. 606, at p. 612, Lord Shaw of Dunfermline, in delivering the judgment of the Privy Council, said:—

CAN.

S. C.

CREVELING v. CANADIAN BRIDGE CO.

Duff, J.

For in their judgment it is not open to a party who has not used the opportunity at the trial, nor, either in writing or in argument, used the opportunity in the Court of Appeal, to state for the first time at their Lordships' Bar an objection to the verdict of a jury on the ground of misdirection. It is, of course, possible that some highly exceptional case might arise, but in general it may be laid down that neither party to proceedings before the Privy Council should be permitted to start fresh points of objection which have been open to him and have been neglected at opportune and convenient stages of the litigation in the Colonial Courts. It is not in accordance with justice to the parties that, after an appeal has been made to the Privy Council, they should for the first time learn what the true nature of the case to be made against them is.

I think this states the rule by which this Court has been and ought to be guided.

As to the defence of *volens* it appears to me that it would be a hopeless contention that the jury were bound to find in the face of the engineer's evidence that the plaintiff fully understood the danger to which he was exposed by reason of the defects admittedly unknown to the plaintiff in the alleged system of signals. As to damages I do not think any sufficient case has been made out for interfering with the verdict of the jury.

ANGLIN, J. (dissenting), thought the charge was inadequate and that the verdict at common law could not be sustained because of non-direction upon points on which the jury should have been instructed.

Anglin, J. (dissenting)

BRODEUR, J.:—I concur with MR. Justice Duff.

Brodeur, J.

Appeal allowed with costs.

ROLLEFSON BROS. v. OLSON.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Elwood, and Brown, JJ. March 20, 1915.

1. LANDLORD AND TENANT (§ III D—105)—MORTGAGOR—DEFAULT—MORTGAGEE HAVING RIGHT TO ENTER AND MAKE LEASE—LEASE WITH MORTGAGOR—CROP-SHARING—MORTGAGEE HAS PREFERENTIAL CLAIM AS AGAINST EXECUTION CREDITORS.

Where a mortgage of farm land gives to the mortgagee the right on default of payment to enter into possession, to collect the rents and profits and to make a lease of the land at such rent as the mortgagee thinks proper, it is competent for the mortgagee to enter into possession and to make a crop-sharing lease to the mortgagor who thereby waives service of a formal notice under sec. 93 of the Land Titles Act, Sask., and the share of the grain to which the lessor is entitled under such lease is a valid preferential claim for rent under

SASK.

S.C.

ROLLEFSON BROS. v. OLSON.

the Landlord and Tenant Act, 8 Anne, ch. 14, as against execution creditors of the tenant mortgagor.

[*Foster* v. *Moss*, 4 S.L.R. 421, applied; *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, distinguished.]

APPEAL from an order of a District Court Judge.

A. Casey, and *L. L. Dawson*, for appellant.

T. D. Brown, for all execution creditors.

A. L. McLean, for sheriff.

Haultain, C.J.

HAULTAIN, C.J.:—By a mortgage dated October 5, 1909, and duly registered on December 3, 1909, John L. Olson mortgaged the west half of sec. 31, tp. 30, range 6, and the north-east quarter of sec. 36, tp. 30, range 7, both west of the third meridian, to the Mutual Life Assurance Co. of Canada to secure repayment of $4,000 on the terms mentioned therein. This mortgage among other provisions contained the following:—

And for the purpose of better securing the punctual payment of the interest of the said principal sum I do hereby atorn tenant to the said company for the said lands at a yearly rental of the annual interest payable hereunder, to be paid in manner and on the days and times before appointed for the payment of the said interest, and on payment thereof the same shall be taken to be and shall be in satisfaction of the said interest, but nothing in this proviso shall make the company chargeable or accountable as mortgagees in possession.

And further that if I shall make default in payment of any part of the said principal or interest at any day or time hereinbefore limited for the payment thereof it shall and may be lawful for them, and I do hereby grant full power and license to the said company to enter, seize and distrain upon the said lands, or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said interest as shall from time to time be or remain in arrear or unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent.

It is also covenanted between me and the said company that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof, at any of the above appointed times, then the said company shall have the right and power, and I do hereby covenant with the said company for such purpose, and do grant to the said company full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent of the said lands, and to collect the rents and profits thereof and to make any demise or lease of the said lands or any part thereof, for such terms, periods, and at such rent as they shall think proper, and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease.

SASK.

S. C.

ROLLEFSON BROS. v. OLSON.

Haultain, C.J.

On December 1, 1913, Olson was in default in the sums of $228.41 for interest and $400 for principal due under the mortgage. Acting under the power given by the mortgage the company entered into possession of the land on July 27, 1914, and on the same day secured the execution by Olson as tenant of a lease of the land. The term of the lease is for one year "to be computed from January 1, 1914." The lease was not executed by the company.

The rent reserved is

one-half share or portion of the whole crop of the different kinds and qualities which shall be grown upon the demised premises in each year during the said term, such share to be delivered on the day of threshing.

On September 2, 1914, "all the grain" on the land was seized by the sheriff under the several writs of execution in his hands against Olson issued in the several actions mentioned above.

The company thereupon claimed one-half the crop and a further amount sufficient to represent all taxes due in respect of the land for the year 1914. The sheriff interpleaded and as a result of the interpleader proceedings the company's claim was disallowed and barred by the learned District Court Judge who heard the application. The claimant now appeals from that order.

The principal reasons upon which the learned Judge finds against the claimant are that "the transaction so far as the lease is concerned is merely colourable," that it was not "a true, real transaction" and "that its object was to secure by this means possession of part of the crop" and that it is, therefore, invalid against creditors.

There can be no question that the main object of the lease *was* to secure possession of part of the crop. That does not seem to me to in any way impugn the *bona fides* of the transaction. See *Ex p. Voisey*, cited below.

The company unquestionably had the right, on default of payment of principal or interest, to enter into possession of the land, to collect the rents and profits thereof and to make any demise or lease of the land for such terms, periods and at such rent as they should think proper.

They did enter into possession of the land and made a lease of it to Olson. If the lease had been made to anyone else there

SASK.

S.C.

ROLLEFSON BROS. v. OLSON.

Haultain, C.J.

could have been no question as to its validity, and I cannot conceive of any good reason why the lease to Olson was not as valid as one to anybody else. The fact that the lease was not signed by or on behalf of the company does not affect its validity either. *Morton* v. *Woods*, L.R. 4 Q.B. 293; *West* v. *Fritche*, 3 Ex. 216; *Re Threlfall*, 16 Ch. D. 274; *Ex p. Voisey*, 21 Ch. D. 442.

Olson was bound by it because he signed it and, in any event, the lease being only for one year could be made verbally. I cannot, further, attach any significance to the fact that the lease dates back to the beginning of the year or that the provision with regard to summer fallowing does not sound reasonable. It is quite reasonable to suppose that Olson knew what he was undertaking and that at that late date (July 27) he already had all or most of his summer fallowing done. The lease might, with equal force, be attacked because it covenants to bluestone the seed grain for the demised premises in each year of the term. It is also suggested that because the company was entitled to distrain under the attornment clause in the mortgage it was not necessary to take possession and recreate the relationship of landlord and tenant by lease. It does not make any difference whether it was necessary or not, so long as the right to do it existed, as, in my opinion, it undoubtedly did.

The material before us does not shew whether the crop in question was threshed or not at the time the seizure was made. I think, however, that we may reasonably assume that the threshing was done. The affidavit of the sheriff states that on September 2 "all the grain" on the land in question was attached and seized. Under the terms of the lease the rent or share of the crop was to be delivered on the day of threshing and threshing was to be completed on or before September 1. Under the Landlord and Tenant Act, 1709, 8 Anne, ch. 14, the landlord is entitled to payment of all rent due at the time of the seizure before the goods seized under execution are removed.

On the authority of *Foster* v. *Moss*, 4 S.L.R. 421, the company is, in my opinion, entitled to succeed. For this reason it will not be necessary to consider the alternative ground of appeal that the company is entitled to rent under the attornment clause in the mortgage if the lease to Olson is found to be

SASK.

S. C.

ROLLEFSON BROS. v. OLSON.

Haultain, C.J.

bad. If necessary I should venture the opinion that this contention is sound.

It was urged on behalf of the respondent that the company's entry into possession of the mortgaged premises was inoperative and void, because the proceedings were not taken in accordance with the provisions of sub-sec. 2, of sec. 93, of the Land Titles Act (ch. 41, R.S.S.), while the right to take possession and to make leases must be exercised by the mortgagee in accordance with that subsection, i.e., after service and registration of notice.

This objection is met at the very threshold by the fact that the mortgagor acquiesced in the possession and leasing by the mortgagee. In any event this is not an objection which concerns the present case.

This is not the case of a sale as in *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 20 Man. L.R. 533, 45 Can. S.C.R. 618, and the interests of none of the persons to whom notice is required to be given by the above-mentioned enactment are in the least affected by the result.

For the above reasons the appeal should be allowed. The order appealed from is set aside and the company's claim is allowed. The respondents will pay the appellant its costs of the interpleader proceedings and of this appeal.

ELWOOD, J.:—In this matter I have read the judgments of the Chief Justice and my brother Brown. So far as the effect is concerned of *Smith* v. *National Trust Co.*, 1 D.L.R. 698, referred to in both judgments, I do not understand that judgment to hold other than that under the facts of that case the mortgage did not give power to the mortgagee to transfer the land, and in my opinion it did not hold that the parties might not so contract that power to give a transfer might be given the mortgagee.

Elwood, J.

Under the Act, the mortgagee could, without consent and without taking any further proceedings, enter and lease the land immediately after giving the notice. I cannot see how the respondents would be affected by or interested in a notice where nothing was sought to be done other than enter and lease the land. The mortgagor, by executing and accepting the lease, surely waived any right he had to object to the want of notice. The notice is only necessary in case the assistance of the Act is

SASK.

S. C.

ROLLEFSON BROS. v. OLSON.

Elwood, J.

being invoked by the mortgagee. The right to enter and lease as given in such case is a right in addition to other rights. But in a case such as the present one, where the assistance of the Act is not being invoked, where nothing is required to be done in the land titles office, and where the mortgagor consents, no notice is, in my opinion, necessary.

I agree with the conclusions reached by the Chief Justice, and would allow the appeal, with costs.

Brown, J. dissented.

BROWN, J., dissented.

Appeal allowed.

ONT.

S. C.

DICARLLO v. McLEAN.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 23, 1915.

1. SOLICITORS (§ II C—30)—COSTS — SECRET COLLUSIVE SETTLEMENT — AUTHORITY OF COURT—DEFENDANT TO PAY COSTS.

Where the plaintiff and defendant make a settlement of the matter in litigation behind the back of the plaintiff's solicitor and this is done collusively with the object of depriving the plaintiff's solicitor of his costs the court may, on the latter's application, order the defendant to pay such costs in full; and such liability is not limited by the amount of the collusive settlement between the parties.

[*Brunsdon* v. *Allard*, 2 E. & E. 19; *Price* v. *Crouch*, 60 L.J.Q.B. 767; *Muricetta* v. *South American Co.*, 62 L.J.Q.B. 396; *Re Margetson and Jones*, [1897] 2 Ch. 314; *Morgan* v. *Holland*, 7 P.R. (Ont.) 74, referred to.]

Statement

APPEAL by the defendant from an order of Middleton, J.

The judgment appealed from is as follows:—

Middleton, J.

MIDDLETON, J.:—The cases fall into two distinct classes. If a solicitor has a lien upon the proceeds of litigation for his costs, and gives notice of that lien to the opposite party, and after such notice money is paid over to the client, the Court will in general, on motion, compel the party paying to pay the solicitor's costs. As put by Richards, J., in *Brown* v. *Conant* (1856), 2 P.R. 208, 211: "It is like paying a debt that has been assigned after notice. It is the notice which creates the right." In all cases falling within this class, the plaintiff's position as *dominus litus* is fully recognised, and the amount which the plaintiff has agreed to accept limits the defendant's liability.

The other class of cases is where upon the facts it is shewn that the parties have acted collusively. In this case the defendant

renders himself liable to pay the full amount of the solicitor's bill, his liability being in no way limited by the amount paid to the plaintiff.

In order that the solicitor succeed in cases of this class, it is essential that he should establish collusion, in the sense in which that term is used, to the entire satisfaction of the Court. *Brunsdon* v. *Allard* (1859), 2 E. & E. 19, may be taken as a starting-point. There Lord Campbell, C.J., points out that the attorney's right does not prevent the parties to the action from coming to a compromise the result of which is that the attorney loses his lien, "provided that the arrangement is not a mere juggle between the parties, entered into by them in collusion to deprive the attorney of his costs." Wightman, J., states the ground for the equitable interference of the Court as being "a case of collusion thoroughly made out." Erle, J., places the matter thus: "The attorney's right, however, certainly goes to this extent, that, if a conspiracy between the plaintiff and defendant, to defraud the attorney of his costs, is clearly made out, the Court will interfere to prevent it." Crompton, J., says that the Court "will probably restrain the parties from carrying out a collusive arrangement made on purpose to defraud the attorney of either." No collusion having been shewn, the attorney there failed.

In *Price* v. *Crouch* (1891), 60 L.J. N.S. Q.B. 767, the solicitor obtained relief, and the Court, while accepting the principle of *Brunsdon* v. *Allard*, interprets that decision by defining exactly what must be shewn to constitute collusion. Denman, J., says this (p. 769): "The point appears to me to be, what is the meaning of the word 'collusion' in relation to such a case as the present; and the meaning of the word goes no further than to denote an agreement between two parties, with the knowledge that they are doing an unfair thing in depriving a third party of a right he had." And, with reference to what is said by Lord Campbell in the earlier case, he adds: "I do not think . . that Lord Campbell meant to say that, unless there was a 'mere juggle', a juggle in a fraudulent sense, there could be no collusion. The other Judges do not go so far. Mr. Justice Wightman hits the point: 'Was the object of the arrangement to deprive the plaintiff's attorney of his costs?' I conclude from the language both of Mr. Justice Wightman and of Mr. Justice Crompton in that

ONT.

S. C.

DICARLLO v. MCLEAN.

Middleton, J.

case, that we are justified in holding that in the present case the object of the bargain was to defeat the applicant's lien, and so to deprive him of the costs of the work he had done as solicitor to the plaintiff. . . This is enough to establish collusion." Wills, J., points out that the defendant knew that in making the settlement it was the plaintiff's intention to keep the money in his own pocket and defraud his solicitor. "This does not seem to be consistent with the state of mind of a person who thought everything was fair. It is obvious that if the plaintiff's solicitor's costs could be got rid of, better terms could be obtained for the defendant, and the bargain was made with that object. Both the plaintiff and the solicitors for the defendant were well aware that a considerable sum for costs was due, and their conduct shews that they desired to defeat the applicant's claim for them. The defendant's solicitors knew that they could get better terms for their client from the plaintiff if he left his solicitor out in the cold."

The meaning of this word "collusion" is also discussed in reference to an interpleader application in the case of *Murietta* v. *South American, etc., Co.* (1893), 62 L.J.N.S. Q.B. 396, where Wills, J., says: "Colluding may be said to be an equivalent for playing the same game. That is the literal meaning of the word." This is assented to by Charles, J.

In *Dunthorne* v. *Bunbury* (1888), 24 L.R.Ir.6, Lord Ashbourne, C., in determining the defendant's liability, says (p. 9) that he went "to the plaintiff to settle the case in such a way that it would have the effect of depriving the plaintiff's solicitor of his costs. In doing so he knew he was dealing with a client who was no mark for her solicitor's costs. We were pressed . . . with the contention that it was always open to parties to meet and settle. That is true, if it be done *bonâ fide*. . . . In this case the object, or, at all events, one of the objects, of the arrangement was to deprive the plaintiff's solicitor of his costs. . . . He knew . . . perfectly well that the woman he was settling with was a pauper."

In re Margetson and Jones, [1897] 2 Ch. 314, was a case of a similar description. A small sum was paid to a pauper litigant without making any provision for the solicitor's costs; the intention being, as Kekewich, J., put it, "to cheat the solicitors of their costs."

ONT.

S. C.

DICARLLO v. McLEAN.

Middleton, J.

Morgan v. *Holland* (1877), 7.P.R. 74, was also a case of a settlement made with an indigent plaintiff without proper precaution to protect the solicitor's lien. Proudfoot, J., there says (p. 78), with reference to the extent of the defendant's liability: "Nor do I think that the liability of the defendant should be limited to the amount he paid to the plaintiff. The plaintiff never would have accepted the sum given to him, which was less than the attorneys' bill, had he intended to pay the attorneys, and the defendant knew this, and aided the plaintiff in an endeavour to cheat his attorneys."

The case of *The Hope* (1883), 8 P.D. 144, was one in which the principle was accepted, but the solicitors failed because there was no evidence of any intention to defraud them.

This being the principle, and the onus being upon the solicitors, the evidence requires to be carefully scrutinised. The plaintiff was an impecunious Italian labourer; the defendant is a contractor. During the course of his employment the plaintiff was injured, and lost an arm. The action was tried and resulted in a verdict of $1,500 damages for the plaintiff. An appeal was had to a Divisional Court of the Appellate Division, with the result that the judgment for the plaintiff was affirmed. A further appeal was had to the Supreme Court of Canada, when a new trial was ordered because of the assumed misconduct of a juror. The case was then entered for the second trial. Security had been given upon the appeal; a motion had been made for the delivery up of this security. This motion failed, as the bond covered the costs of the first trial and the appeal to the Appellate Division, and these costs as well as the costs of the appeal to the Supreme Court were made to abide the result of the new trial.

The plaintiff was known by the defendant to be in abject poverty. The defendant had seen him begging upon the streets of Toronto. The defendant, through his employees, procured the plaintiff to be taken to Simcoe, and he there settled with him for $400, making no provision for the costs, which he knew would far exceed this sum. The brother of the defendant at once bought for the plaintiff a ticket for transportation to Italy, out of the money paid over, and the plaintiff left for Italy, taking the money with him.

Upon this motion the defendant and his brother have been examined at length, and, with every endeavour to view the

ONT.
S. C.
DICARLLO
v.
MCLEAN.
Middleton, J.

defendant's conduct charitably, I cannot avoid being driven to the conclusion that the settlement was collusive, within the definition given in the cases cited. I do not mean to say that I think that the defendant desired to defraud the plaintiff's solicitors. He knew that the costs were heavy. He desired to end the litigation with the least possible expenditure of money. He knew that the plaintiff could not have paid his solicitors. He knew that the plaintiff, when given this money, would not pay his solicitors. He was ready to assist the plaintiff to leave the country without discharging his obligation. He displayed that reckless disregard for the rights of others which amounts to dishonesty, and he acquiesced in, if he did not suggest, the plaintiff's dishonesty.

There is much in the surrounding incidents of the transaction and in the evidence which calls for comment. The defendant is a most unsatisfactory witness, and his lack of frankness induces suspicion. His brother appears to be far more truthful, but even in the brother's evidence there are unpleasant features. The fact that the settlement took place behind the back of the defendant's own solicitor, that an outside solicitor was brought in to prepare the documents, that the defendant refuses to give the name of the solicitor employed, because he was regarded "as a gentleman, and he said it was not necessary for him to say;" the fact that the defendant denied all knowledge of how this pauper plaintiff travelled from Toronto to Simcoe, when it appeared that he was taken there by the defendant's employee at the defendant's expense; that the defendant, after all that had taken place, suggested that the plaintiff was still available in Ontario; that it was deemed necessary to have no fewer than seven persons witness the signature to the release; that Moretti, the man who was employed to look up the plaintiff and take him to Simcoe, was regarded as entitled to special reward for his services—are all most significant facts.

The order sought will, therefore, be granted with costs.

J. M. Ferguson, for the appellant.

H. H. Dewart, K.C. for the respondents.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, agreeing in the result arrived at and with the reasons given by Middleton, J.

CANADIAN PACIFIC R. CO. v. PARENT.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur JJ. March 15, 1915.

1. CARRIERS (§ III F—439)—DAMAGES—LIVE STOCK—PERSON IN CHARGE—INJURY CAUSING DEATH—NEGLIGENCE—CONTRACT LIMITING LIABILITY OF COMPANY—EFFECT.

A railway company is liable in damages for the death of a person caused by the negligence of the company's employees, notwithstanding that the party killed was in charge of live stock and was being carried on a free pass and had signed a contract releasing the company from all liability, where the party signing could not read or write, and could not have known the nature of the conditions signed, and the company had not done what was reasonably sufficient to give him notice of the conditions.

2. DEATH (§ II A—5)—DEPENDANTS—PERSON KILLED IN ONTARIO—RIGHT OF ACTION IN QUEBEC—ACTION BARRED IN ONTARIO—ACT OF CLASS ACTIONABLE IN ONTARIO.

An action will lie in Quebec by the dependants of a person killed in Ontario, although in Ontario no action would lie, unless the deceased would have had a right of action had he survived; however, where he had barred such action by the contract he had signed; in Quebec, the right of action is not subject to such condition, but the wrongful act must be of a class actionable in Ontario.

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court.

G. G. Stuart, K.C., for the appellants.

R. C. Smith, K.C., and *Savard*, for the respondents.

Sir Charles Fitzpatrick, C.J. dissented.

FITZPATRICK, C.J., dissented.

Davies, J.

DAVIES, J.:—Chalifour's death occurred in the Province of Ontario in a collision between a locomotive of appellants' railway and a car of appellants in which deceased was travelling in charge of cattle belonging to his employers, the shippers of the cattle.

The contract to carry the cattle from Winnipeg, Manitoba, to Montreal, Quebec, was made in the former city, and the accident occurred in the Province of Ontario.

Both Courts below held that the rights of the parties under the contract were to be determined by the law of Quebec, where the carriage of the cattle ended, and that the rights of the widow and children to recover damages for the death of the deceased, caused by the admitted fault of the company was under that law an independent right and could not be barred or destroyed by a contract or covenant made with the company by Chalifour before his death.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. PARENT.

Davies, J.

As establishing such a covenant, the appellant relied upon a contract between itself and the shippers of the cattle, the form of which had the approval of the Board of Railway Commissioners and also upon a condition printed upon the back of what was called a pass, under which the deceased, as one of the men in charge of the cattle, was travelling.

These conditions were signed by one Addshead, who appeared to be the principal man in charge of the cattle, and also by Chalifour, the deceased.

The contentions of the company were, first, that the law of Ontario, where the accident occurred and of Manitoba where the contract was made were the same, and that the rights of the plaintiffs and the company's liabilities were to be determined by that law and not by the law of Quebec; and, secondly, that the conditions of the contract or pass absolved them from all liability for damages arising out of the accident causing Chalifour's death, whether in the words of the condition,

> such accident, injury, damage or loss is caused by the negligence of the company or of its servants or employees or otherwise howsoever.

In other words, the company contended that it had with the sanction of the Railway Board, contracted itself out of any liability whatever, even if caused by gross negligence or otherwise arising out of the carriage of Chalifour as man in charge of the cattle from Winnipeg to Montreal.

In the view I take of the proved facts and the liability of the company under them, it is not necessary that I should express any opinion upon the important question as to whether the law of Quebec or that of Ontario or Manitoba is to be the governing law in this case.

Mr. Smith contended for the respondents that while the Railway Board had sanctioned the form of contract between the shippers of the cattle and the company exempting the latter from liability in respect of the death, injury or damage of the men in charge of the cattle whether caused by negligence or otherwise, it had not expressly sanctioned the form of pass or contract which the company had made or contended it had made with the man himself and that such latter contract was still within the provisions of sec. 340 of the Railway Act prohibiting

contracts impairing carriers' liabilities unless authorized or approved of by the Board.

I am of opinion that the class of contract to be made between the railway company and its shippers approved of by the Board is quite sufficient to cover the pass or contract made with Chalifour, if that is binding, and the omission of the word "death" in this latter contract or pass does not affect its real meaning or limit that meaning.

The question, however, remains to be determined whether any binding contract with conditions as those contended for, was made between Chalifour and the company, and that must be determined upon a consideration of all the facts and circumstances.

Chalifour was a French Canadian who resided with his family in the Province of Quebec. He could neither read nor write French or English, but he could write his name. He was quite an illiterate man and as proved could not even read the newspapers in his own language. He spoke and understood a little English, enough to enable him to understand orders or instructions respecting his duties or employment as a cattle drover or caretaker. He is one of a large class in Quebec well known in Canada.

Before the train started from Winnipeg he and his co-employee, Addshead, signed a paper or rather certain "conditions" on the back of a paper on the front of which, headed in large capitals were the words "Live Stock Transportation Pass."

It was signed in the presence of two employees of the company, one Devillers, who witnessed it and was an interpreter of foreign languages and understood French, and one Anderson, another employee, who did not understand or speak French.

The evidence they gave is somewhat meagre. Anderson says he does not understand French, but stood beside Devillers while he filled in the pass, that there was some conversation between Devillers and Chalifour in French, but he did not understand it. All he seemed to be clear about was that if any questions were asked with respect to the conditions they were explained. Devillers does not remember what the circumstances

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. PARENT.

Davies, J.

were or if he had any conversation with Chalifour or whether he explained the conditions.

It seems quite certain that the live stock contract itself was not shewn to Addshead or Chalifour and that the only paper they saw at all was one on which was printed on the front in large type, "Live Stock Transportation Pass," and on the back "conditions" which they signed. My conclusion is that all they saw was the back of this paper headed "conditions" and that they asked no questions, received no explanations and really did not have any idea what the paper was, except that it had something to do with the cattle which they were in charge of and their carriage, and that they as men in charge had to sign it.

To draw an inference that this illiterate French Canadian, who only spoke or knew enough English to take and carry out orders connected with his work in taking care of cattle and tending them; who could not read in either language nor write anything beyond his own name, knew or could have known the nature of the document he was signing, is something I must decline to do.

Whether he did so know or must be held to have known is more an inference of fact to be drawn from all the circumstances than a presumption of law.

Chalifour's signature under the facts and circumstances proved, if it carries us as far certainly does not carry us any further than his acceptance of the pass if handed to him would have done without his signature. All he knew was that he was one of the men in charge of the cattle to take care of them and tend them to Montreal: if the heading of the pass itself, "Live Stock Transportation Pass," had been read to him it would not have conveyed the slightest idea to his mind, in my humble judgment, that he was agreeing with the company to take all the chances of the trip and that in case he was injured the company were not to be liable to him even for the grossest negligence.

I think the cases clearly establish that there is no rule or presumption of law that a person is necessarily bound by the conditions contained in a document delivered to him as a transportation ticket, and I do not think that the mere signature

itself, under the circumstances and facts proved in this case, changes the law with respect to such rule or presumption: *Henderson* v. *Stevenson*, L.R. 2 H.L. (Sc.) 470; *VanToll* v. *South Eastern R. Co.*, 12 C.B.N.S. 75.

My position is that Chalifour did not know it was a ticket or pass at all he was signing. It was not handed to him, but to Addshead, his co-worker, and, after the accident, was produced by Addshead, who evidently had retained possession of it all along. It does not appear ever to have been in the hands or possession of Chalifour.

In the case of *Parker* v. *South Eastern R. Co.*, 2 C.P.D. 416, Mellish, L.J., after reviewing several of the cases, at 422, says:—

> Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions.

And at 423:—

> I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

The real and proper question seems to be whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition under which they seek to be released from liability.

[Reference to *Watkins* v. *Rymill*, 10 Q.B.D. 178; *Richardson, Spence & Co.* v. *Rowntree*, [1894] A.C. 217; *Marriott* v. *Yeoward Bros.*, [1909] 2 K.B. 987; *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489.]

My conclusion is that Chalifour's signature to the conditions indorsed upon the "Live Stock Transportation Pass" on which the company rely to relieve themselves from liability was obtained under conditions and circumstances which do not per-

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. PARENT.

mit of any inference or presumption of fact that he knew or could have known what he was signing or that they were conditions of his transportation as man in charge of the cattle and that the company did not do what was reasonably sufficient to give him notice and knowledge of those conditions.

I would, therefore, dismiss the appeal.

Idington, J.

IDINGTON, J. (after stating the facts):—By sec. 544 of the Criminal Code, the appellant is prohibited from carrying cattle, under such circumstances as existed in this case, unless in charge of men engaged to see that the cattle are properly cared for. The sec. 340 of the Railway Act prohibiting appellant from limiting its liability is as follows:—

> No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.
>
> 2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

This is substantially the same as sec. 275 of the Railway Act of 1903, under which the Railway Commissioners, in 1904, ordered as follows:—

> That the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorized so to do until this Board shall hereafter otherwise order and determine.

The shipping firm, in whose employment the deceased was, admittedly shipped their said cattle under a form of contract thus approved.

The questions raised herein are thus far the same as raised in the case of *Robinson* v. *The G.T.R. Co.*, 12 D.L.R. 696, 47 Can. S.C.R. 622, where this Court held that the servant of the shipper who had signed a similar form of contract for the shipment of a horse and given the duplicate thereof to said servant, put in charge of the horse there in question, was entitled to damages arising from the negligence of the company. But in this case the matter of contract was carried a step further by the appellant's officers at Winnipeg issuing a pass worded, so far as bearing upon this case, as follows:—

To conductors: Winnipeg, 18th Sept., 1911.

The two men whose signatures are subscribed on back hereof are the only persons entitled to pass in charge of thirteen cars of live stock (here follow the numbers of the cars, etc.).

On the back of this there was printed in smaller type than appears in the case herein, the following:—

CONDITIONS.

Each of us, the undersigned, having charge of live stock mentioned on face hereof, in consideration of the conditions of the Canadian Pacific Railway Company's Live Stock Transportation Contract, agree with the company, while travelling on this pass to assume all risk of accident or damage to person or property, and that the company shall be entirely free from all liability in respect of any damage, injury or loss to any of us or the property of any of us whether such accident, injury, damage or loss is caused by the negligence of the company, or its servants or employees or otherwise howsoever.

Signatures: Witness:
F. ADDSHEAD. H. DEVILLERS.
JOSEPH CHALIFOUR.

Countersigned:
H. W. DICKSON.
Local Freight Agent.

It is contended by appellant this is a contract by virtue of which the respondents are debarred from maintaining this action.

The respondents first deny the right of the company to impose such limitation of liability and next shew by evidence justifying the finding of the learned trial Judge that deceased could read neither English nor French and understood but little English—only enough to understand the orders of his superior relative to his usual duties as a cattle man. . . .

In some of the cases elucidating the law we have to deal with, it is suggested in England a man signing or even accepting a like conditional pass might be presumed to know how to read English. But if we would do justice here in Canada we cannot proceed upon any such hypothesis. Men of the race of the deceased may by nature be as bright and intelligent as any Englishman yet be so handicapped by their want of knowledge of either English or French when it has to be read, that we must be careful to observe that not unusual conditions of things in coming to a conclusion in a matter of this kind.

To my mind the question above all others to be determined

CAN.
S.C.
CANADIAN PACIFIC R. CO. v. PARENT.
Idington, J.

herein is whether or not the appellant has produced evidence, upon which we can safely rely, enabling it to claim that deceased contracted himself and thereby respondents out of all right to complain of the grossest kind of negligence on appellant's part.

No one who has that general knowledge of the world, and this little part of it, and of the class and kind the deceased belonged to, and the usual mode in which such transactions as involved herein are gone about, but must feel loath to hold that deceased knowingly and understanding what he was about intended to contract as appellant contends he did contract. The onus rested on appellant to shew that he did. I cannot hold on the evidence before us that it satisfies me.

And, as to any implication from the service in which deceased was engaged, we are bound for the present at all events by our decision in the *Robinson Case*, 12 D.L.R. 696, 47 Can. S.C.R. 622.

There is, moreover, in this case a feature that has impressed me very much and renders the position of appellant weaker than in the *Robinson Case, supra.*

It is this:—That in that case the entire contract of the shipper, if read, was before the plaintiff and for a time in his possession and it contained the following clause:—

> In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare, to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or privilege less than full fare the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever.

What right had appellant to convert the clear explicit language of this clause

> free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever.

into the dubious sort of terms contained and used in the above quoted conditions? It seems to me it had none. Such contract as it has any right to impose in such a case must fall within the order of the Board or be null. The word "traffic" in said sec.

275 is by the interpretation clause made to cover passengers as well as freight. In the first place there is a great deal to be said for the argument that this limitation was never in law applicable to the case of the servant himself for his loss, but only to the interest of the master in his servant and such right of action as he might have for injury to him and hence never in law intended to extend to the rights of the servant himself.

It is clear, to my mind, the order is capable of such a construction. And unless the order must be construed as covering and enabling such a limitation of liability there is nothing upon which the appellant can rest, unless upon the said conditions being construed as a clear contract on part of deceased whereby his widow and children would be deprived of any right to complain herein. And applying such a test to this ambiguous thing called "conditions" we are face to face with the interpretation put thereupon by Mr. Justice Cross in the Court of Appeal holding it did not cover the case of death resulting from the injury.

That is not my own interpretation of the terms used in the conditions, but clearly they can be so read.

And yet in face of that view held by a careful and able Judge we are asked to impute to the poor deceased—ignorant of the language—a clear understanding that the condition applied to his death and that in such event though caused by the grossest negligence on the part of appellant, his family could have no claim. I cannot think such a result would be either law or justice. I, therefore, need not enter upon the very wide field of international law and other law into which the argument so well and ably invites us.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think this appeal should be dismissed with costs. . . .

The appellant company produces an order of the Board, bearing date October 17, 1904, which is in the following terms:—

IN THE MATTER OF

The application of the Grand Trunk Railway Company, the Canadian Pacific Railway Company, the Canadian Northern Railway, and the Père

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. PARENT.
Duff, J.

Marquette Railway Company, for approval by the Board of Railway Commissioners of their forms of bills of lading and other traffic forms, in compliance with section 275, sub-sections 1 and 2 of the Railway Act.

The above named companies are the only railway companies in Canada which have, up to the present moment, complied with the requirements of section 275; and in respect of these so far received it may be remarked that there is much diversity in the forms of the several railways. The whole subject is of very great importance and will require that much circumspection should be exercised in examining into the contracts and forms which the Board hereafter has to approve; and also into the question of limitation of liability on the part of carriers.

In view of these facts, and that the railways generally have not submitted their forms for approval, the Board does not deem it advisable to make any final or definite order upon the subject at present, but is of opinion that an interim order might properly be made permitting such railways as have made application therefor to continue the use of their present forms until the Board shall otherwise prescribe and order.

IT IS THEREFORE ORDERED

That the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorized so to do until this Board hereafter otherwise order and determine.

And the Board further requires that a select committee be formed of the legal and traffic officers of the several railway companies named, and others who may hereafter submit their applications, to meet the Board at Ottawa, on a date to be hereafter announced, for the discussion of the said forms and contracts, both freight and passenger, at a session of the Board to be called for such purpose.

(Sgd.) ANDREW G. BLAIR.
Chief Commissioner, Board of Railway Commissioners for Canada.

This is the order upon which the appellant company relies as giving force to the two agreements now under consideration.

It appears from the certificate of the secretary of the Board that the only "*form*" having any relevancy to the present case coming within the operation of this order is a form of "Contract for Carriage of Live Stock" which seems to be identical in its terms with that between the appellant company and the shippers above referred to.

The form of contract thus approved is a contract between the railway company and the shipper; and it contains the paragraph, upon which the railway company relies, above set out. No form of notice to the shipper's nominee or form of contract between the railway company and the shipper's nominee is approved in express terms. And after very full consideration I have come to the conclusion that Mr. Smith's contention is

sound and that the order does not imply any approval or authorization of any contract between the railway company and the shipper's nominee or of notice to the shipper's nominee within the meaning of the first sub-section of sec. 340.

I think that is so for these reasons. The order itself shews that it was passed as a temporary provision only pending a fuller examination of important questions touching the approval of contracts and notices affected by sec. 340; and I think that the operation of the order must be confined strictly by the effect of the language used which appears to me to be simply this: that the "*forms*" specified (which were understood to be the forms then in use) were approved for what they were worth. The company is authorized to enter into a contract in the form produced. That is the whole effect of the order.

This interpretation of the order is, no doubt, open to the observation that in view of the decision of this Court in *Robinson* v. *G.T.R. Co.*, 12 D.L.R. 696, 47 Can. S.C.R. 622, the paragraph quoted above, would afford no protection to the railway company in the case of action by nominees. But it is to be observed that the Court of Appeal for Ontario and the Chief Justice of this Court took the view that this same clause was (even in the absence of notice of it to the shipper's nominee) sufficient to preclude action against the company by the nominee, on the ground that the nominee being on the railway by a consent which was expressed in the contract, and only in the contract, was bound by the conditions of that consent. It is quite possible that this was the view of the law upon which the contract was framed. However that may be the order expressly approves the contract with the shipper and nothing else. I see no ground for implying an approval of a contract with the nominee of the shipper or notice to the nominee. The order is a general approval of a large number of forms containing, no doubt, many clauses, and it would be going altogether too far to read it as an approval not only of the "forms" produced, but any other forms which might be necessary to accomplish the object of the companies.

A similar reason compels the conclusion, I think, that there is nothing in the order "determining" the extent to which the

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. PARENT.
Duff, J.

"liability of the company" to the shipper's nominee "may be impaired, restricted or limited" within the meaning of subsec. 2.

This is a complete answer to the appeal. But I think the appeal fails on the ground also that the evidence does not sufficiently shew an assent by Chalifour to the conditions by which he is alleged to have been bound or any notice to him that he was being carried under a contract with his employers absolving the appellant company from responsibility from injuries caused by the negligence of its servants. . . .

The burden of the affirmative of the issue raised by the company's allegation that Chalifour assented to a modification of the *primâ facie* obligation of the company rests, I think, upon the company throughout, unless some presumption of law arises shifting that burden by the fact of the signing alone. . . .

I think it is impossible to affirm that Chalifour's act of signing had either for himself or for the company any significance as affecting their mutual rights unless it can be said that by signing he affirmed that he was sufficiently capable of comprehending the document to understand that there were conditions.

I think this cannot be affirmed. In the first place, it must be remembered that the pass was delivered to Addshead, who was the employee in charge. It is quite evident that it never came into Chalifour's possession. Addshead signed first, Chalifour afterwards. As the original pass shews, the conditions are printed in small type, not likely to attract the attention of a man of Chalifour's class. But, to my mind, the most weighty consideration applying to this point is that Devillers, Chalifour being the utterly ignorant man that he was, according to the evidence of the respondent, must in the short conversation he had with him have had his attention attracted to the fact that it was most unlikely in the first place that Chalifour could read English at all, and in the second place that he would be capable of comprehending even in the most general way the significance of the printing below which his signature was placed.

I conclude that, treating the questions above stated as questions of fact simply, respecting which the onus is on the appel-

lant company, the company has failed to acquit itself of that onus.

It is argued, however, that the presence of Chalifour's name there creates a presumption of law that he understood the contents of the document to which he attached it. I think there is no such presumption of law. In *Re Cooper*, 20 Ch.D. 611, it is said by Sir George Jessel, that when a man signs a deed, "there is a presumption of law that he knows its contents."

But I have just pointed out that there is here no evidence of anything amounting to the execution of a legal instrument or intentional taking part in a juridical act a condition implied in Sir George Jessel's language when reading the context. I repeat that if it had been shewn that Chalifour had placed his name on this document in circumstances which amounted to an affirmation on his part that he was entering into a contract with the railway company respecting the terms on which the company was to carry him, then, in the absence of fraud, or some other special ground of relief his knowledge or his ignorance of the contents of the document would have been quite immaterial. Such principles have no application whatever in the state of the evidence in this case; the evidence does not bring us to the point at which they come into operation. All observations, therefore, in decided cases and in text books as to the effect of signing a document which is understood or represented to contain some disposition of property or to form some part of a business transaction are quite beside the point.

I have seen no case either in the English or American Courts holding that a presumption of knowledge of the contents of a document signed arises in which it did not appear by direct evidence or manifestly from the circumstances of the case that the signer knew, at least in a general way, the nature of the document. Nor have I seen any case which affirms as a broad principle that every person signing a document purporting to be of a character to have legal effect, if operative, is deemed by a *presumption of law* to have a knowledge of its contents. On the contrary it is not so in the case of wills in respect of which the rule is, I think, correctly stated in Taylor on Evidence, par. 160. The testator is presumed to know and approve the con-

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. PARENT.
Duff, J.

tents of a will which he is proved to have signed, but the presumption is not a presumption of law, that is to say, it is not a presumption which acquits the proponent of the will of the burden of the issue resting on him as to the deceased's knowledge and approval of the contents of the document. If it is shewn that the deceased was unable to read or if doubts are cast upon his capacity or if there are suggestions of undue influence in the circumstances, the proponent must remove these. The burden of establishing the affirmative of the issue remains to the end.

I think there is no rule or law that requires us to hold that the attaching of Chalifour's signature in the circumstances disclosed by the evidence had the effect of shifting the burden which rested upon the appellant company of establishing the affirmative of the issue raised by their allegation that Chalifour was received by them as a passenger on the condition that they should be relieved of their *primâ facie* obligation to exercise due care in carrying him.

That the presence of Chalifour's signature is in itself without evidentiary value or is itself of inconsiderable weight, nobody would affirm. But when the circumstances are all considered the force of that fact seems to me to be entirely neutralized.

For these reasons this appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The condition on the pass exempting the railway company from liability, which Chalifour signed, is couched in terms not materially dissimilar to those of a clause in a form of shipping contract approved by the Railway Board. The difference, if any, would tell rather against the company than in its favour. If the clause of the shipping contract bears the construction which the defendants maintain it should receive, the condition upon the pass is, I think, of the class authorized by the approval of the form of shipping contract.

It is perhaps open to question whether the clause in the shipping contract is not susceptible of a construction which would make it inapplicable to the liability of the railway company towards the man in charge of the live stock, and would restrict its operation to exempting the company from liability

towards the shipper for such damages, if any, as might be occasioned to him through injury to his servant. The form authorized is of a contract which purports to be between the shipper and the company. Provision is made for requiring the signatures of the men to be carried in charge of the live stock to be placed on the back of the contract. But these signatures, when so placed, are not preceded by any words purporting to make the signatories parties to the instrument or to bind them by its terms. On the contrary, it is consistent with the form of the document that the signatures are to be obtained merely for purposes of identification.

On the other hand, the clause providing for exemption is scarcely such as we would expect to find it were it only against liability for the possible loss to the master occasioned by injury to his servant that provision was being made. Nor is it likely that this somewhat illusory right of the master was the subject of such careful attention at the hands of the railway company and of the Board of Railway Commissioners.

Chalifour was not asked to place his signature on the shipping contract, which contained a blank for that purpose, but on the pass issued to him and his fellow drover. This circumstance, however, I regard as immaterial, because section 340 does not require that the specific contract or condition under which the traffic is carried should be itself authorized, but only that it should be of a class which has been authorized. As at present advised I would not be prepared to hold against the defendants on this answer to their plea.

On the second ground of reply I also entertain an opinion favourable to them. Such authorities as *Robinson* v. *G.T.R. Co.*, 12 D.L.R. 696, 47 Can. S.C.R. 622; *Richardson* v. *Rowntree*, [1894] A.C. 217; *Parker* v. *South Eastern R. Co.*, 2 C.P.D. 416; and *Henderson* v. *Stevenson*, L.R. 2 H.L. (Sc.) 470, relied upon by counsel for the plaintiff, seem to me to differ widely from the case now before us. In none of them had a contract exempting from, or limiting, liability been signed by the passenger or bailor. Conditions printed more or less obscurely on the tickets or contracts issued by the defendants were relied upon as relieving them from their ordinary liability as carriers or bailees.

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. PARENT.
Anglin, J.

In the *Robinson* and *Richardson* cases the plaintiffs, who were themselves the injured persons, deposed that they had been ignorant of the conditions relied upon and there was no evidence that they were aware of them. Apparently had they been aware that the printing on the tickets which they thought contained conditions relating to the terms of carriage they would have been bound by them, although ignorant of their nature and effect: *Harris* v. *G.W.R. Co.*, 1 Q.B.D. 515. Indeed, they would probably have been so bound, although unaware that the printed matter contained such conditions, if the defendants had done what, under the circumstances apparent to them when they sold the tickets, was reasonably sufficient to bring the conditions to the passengers' notice: *Marriott* v. *Yeoward Bros.*, [1909] 1 K.B. 987, at 993-4. In *Parker's Case*, 2 C.P.D. 416, and in *Henderson's Case*, L.R. 2 H.L. (Sc.) 470, where limitations of liability in respect of loss of luggage deposited at parcel rooms in railway stations were set up in defence, the plaintiffs gave similar evidence of their ignorance of the limiting conditions. In the present case there is no such evidence of ignorance. In each of the cases cited by Mr. Smith admitted or proven ignorance of the conditions relied upon by the defendants negatived actual consent to them by the plaintiff, and the question was whether the defendants had taken such reasonably sufficient steps to bring those conditions to the notice of the plaintiff that the latter was precluded from setting up such ignorance in reply to the defence based upon them. In the present case the question is whether the presumption of his knowledge of the tenor of the conditions on the pass raised by Chalifour's signature to them has been rebutted—whether presumed knowledge has been disproved. There is no evidence in the record that Chalifour was ignorant of the nature of the conditions on the pass and certainly nothing to warrant an inference that he was unaware that the printing upon it, to which he affixed his signature, contained conditions relating to the terms of the contract of carriage. There is no evidence that the defendants' agent had knowledge of his inability to read English or had any reason to suppose that he did not understand the printed matter, which he appears to have signed without any

hesitation upon being asked to do so. Under such circumstances I am not prepared to hold that the agent was not justified in assuming that Chalifour knew what the printed conditions were. He was not bound to inquire into the idiosynerasies of the particular passenger: *Marriott* v. *Yeoward Bros.*, [1909] 1 K.B. 987, at 993. In the absence of evidence of special circumstances which should have been apparent to the agent, indicating that Chalifour, notwithstanding his readiness to sign the condition on the pass, needed explanation of its nature and effect, I know of no ground upon which it should be held that the agent was under an obligation to proffer such explanations.

The production of the pass with the admitted signature of Chalifour upon it raises a presumption of law that he knew and intended to be bound by the conditions which he had subscribed: *Re Cooper*, 20 Ch.D. 611, at 628-9. The facts that he was illiterate—being able merely to sign his name—and that his knowledge of the English language, in which the pass was printed, was imperfect, do not, in my opinion, suffice to rebut this presumption: *McDonald* v. *Hancock Mutual Life Ins. Co.*, 44 N.Y. (Sup.) 818; *Harris* v. *Story*, 2 E. D. Smith (N.Y.) 363, at 367; *Doran* v. *Mullen*, 78 Ill. 342, at 346.

The presumption arising from the signature is not that Chalifour had read the condition—the evidence perhaps sufficiently disproves that—but that he knew what it was—and that the evidence does not disprove. It is quite uncertain that he was not told the contents of the pass when he signed it. But, assuming that the defendants' agent did not then give him this information, that does not suffice to warrant the conclusion that he did not possess it. He may have acquired it from other sources. He had been in the cattle business for two years, and, although this was his first trip to Winnipeg, he had been to Liverpool in charge of cattle and had probably travelled on railways in this country in the same capacity. At all events he was thrown into the company of men whose business it was to make such trips and who were presumably familiar with the conditions of carriage. His companion on the trip in question, who also signed the pass, was English speaking and probably knew its terms. It is not shewn that he did not communicate

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. PARENT.
Anglin, J.

them to Chalifour, as, indeed, he may well have done. There is not a tittle of evidence to indicate that Chalifour was in any way misled or imposed upon, and there is nothing whatever to warrant the assumption—for such it would certainly be—that he signed the condition on the pass without knowing or ascertaining what it was, or under the belief that it was something other than it was in fact. I think it would be quite too dangerous upon such evidence as we have before us to hold that Chalifour was unaware of the nature and effect of the condition on the pass which he signed, and on which he travelled.

Nor would that suffice to relieve him from the provisions of the contract if he was aware that the printed matter which he signed contained conditions relating to the terms on which the pass was issued to him: *Parker* v. *South Eastern R. Co.*, 2 C. P.D. 416; *Harris* v. *Great Western R. Co.*, 1 Q.B.D. 515. His signature imports such knowledge, and it would be a pure assumption that he did not have it. Indeed, the only evidence in the record is that he had a conversation on the subject of the condition with Devillers, who issued the pass.

The witness was not cross-examined in regard to this evidence. It at least indicates that Chalifour's attention was directed to the condition he was asked to sign, if, indeed, he was not explicitly told its nature and contents. I am not prepared to relieve the plaintiff from whatever consequences may ensue upon Chalifour's having taken the pass on which he travelled with knowledge of the condition to which he affixed his signature. The case must, I think, be dealt with on the footing that, had Chalifour survived his injuries, he would not have had a cause of action against the defendants.

But on the third point raised by the plaintiff I think we are bound by the decision in *Machado* v. *Fontes*, [1897] 2 Q.B. 231; see, too, *Carr* v. *Fracis, Times & Co.*, [1902] A.C.176, at p. 182, to hold that the defendants are liable in this action instituted in the Province of Quebec, although no action could have been maintained by her in the Province of Ontario because of the condition subject to which her husband had accepted carriage by the defendants.

I am, however, with respect, of the opinion, that Mr. Justice

Cross has misconceived the ground upon which the liability of the defendants should be placed. He appears to have dealt with the case as if the crucial question were whether, on its proper construction, the contract signed by Chalifour purported to bar any claim that his dependants might have to recover damages sustained by them as a result of his death. That is not the contention of the defendants. Their position is that, in order to succeed, the plaintiff must shew that she has a claim actionable in the Province of Ontario as well as in the Province of Quebec, and that if suing in the Province of Ontario, she would fail, not because her husband had undertaken to contract away her right of action, but because, had his injuries not been fatal, he would have been unable, in view of his contract with the defendants, himself to maintain an action against them for damages, and his having that right is by the Fatal Accidents Act, 1 Geo. V. ch. 33, sec. 3, made a condition of the statutory right of action thereby given to his dependants: *Conrad* v. *The King*, 49 Can. S.C.R. 577. The right of action in the Province of Quebec given in similar circumstances by article 1056 C.C. is not subject to this condition: *Miller* v. *Grand Trunk R. Co.*, [1906] A.C. 187. If, therefore, the wrong upon which the plaintiff founds her action had occurred in Quebec she would have had a claim actionable there. Although the wrong committed in Ontario does not give her a right of action in that province, because, had her husband survived his injuries, he would not have had a right of action against the defendants, the negligent act or omission which caused his death was not "authorized, or innocent, or excusable" in Ontario any more than it would have been in the Province of Quebec had it occurred there. There is, under the circumstances, no civil remedy for that negligence in Ontario, yet even there it entailed responsibility of another character, not, it is true, upon the present defendants, but upon the individual who was guilty of it: Criminal Code, sec. 283. While by no means satisfied that the view expressed by Mr. Westlake in his work on Private International Law (5th ed.), at p. 286, that

> it is probably the better opinion that no such independent action would lie where damages were not granted by the *lex loci delicti commissi*,

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. PARENT.

Anglin, J.

is not more logical; *Evans* v. *Stein & Co.*, [1904] 7 Ct. Sess. Cas. (5 Ser. 65, at 70); Foote's Private International Jurisprudence (4th ed.), 451, 453, 457-8; in deference to the view expressed by the Judicial Committee in *Trimble* v. *Hill*, 5 App. Cas. 342, at 344, I bow to the authority of *Machado* v. *Fontes*, [1897] 3 Q.B. 231, which in principle clearly covers the case at bar. Dicey on Conflict of Laws (2nd ed.), 645. Indeed, if it be distinguishable at all, the distinction makes in the plaintiff's favour. In the *Machado Case*, [1897] 3 Q.B. 231, the alleged wrongful act on which the suit was based was of a class not actionable in Brazil where it occurred. In the case at bar the wrongful act on which the plaintiff bases her claim was of a class actionable in Ontario, where it occurred, but the document executed by her deceased husband affords a defence to the defendants.

I understand that the conditions of the right to maintain an action in the Province of Quebec for a wrong committed outside the jurisdiction do not differ materially from those which obtain in territories where English law prevails: *Dupont* v. *Quebec Steamship Co.*, Q.R. 11 S.C. 188; *Glasgow and London Ins. Co.* v. *C.P.R. Co.*, 34 L.C. Jur. 1; Lafleur on Conflict of Laws, p. 199 *et seq.* But see *Grand Trunk R. Co.* v. *Marleau*, Q.R. 21 K.B. 269.

I would, on this ground, affirm the judgment against the defendants and dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

ALTA.

S. C.

KROM v. KAISER.

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

1. CONTRACTS (§ V C—390)—RESCISSION—ACTION FOR.

The commencement of an action for rescission is a sufficient repudiation of the contract for sale of lands.

[*Reere* v. *Mullen*, 14 D.L.R. 345, followed.]

2. SPECIFIC PERFORMANCE (§ II—40)—DECREE OF—EQUITABLE RIGHT—DISCRETION OF COURT.

The right of the plaintiff to a decree for specific performance is an equitable right and is always a matter for the just discretion of the court.

[*Krom* v. *Kaiser*, 18 D.L.R. 226, reversed.]

ALTA.

S. C.

KROM v. KAISER.

3. LAND TITLES (TORRENS SYSTEM) (§ IV—43)—SPECIFIC PERFORMANCE —REGISTRATION OF TITLE—REASONABLE TIME — REPUDIATION — NOTICE OF—DEFINITE DATE.

Where the vendor has sued for specific performance of an agreement for sale of lands in Alberta where titles are shewn of record under the Land Titles Act and he has had a reasonable time to get in and register a title in himself to the lands in question, it is not necessary that the purchaser thereafter giving notice of rescission because of the vendor's lack of a registered title shall fix in such notice a definite date in advance at which the transfer must be forthcoming or he would repudiate.

[*Halkett* v. *Dudley*, [1907] 1 Ch. 590, distinguished; *Krom* v. *Kaiser*, 18 D.L.R. 226, reversed.]

4. SPECIFIC PERFORMANCE (§ II—40)—RIGHT TO REFERENCE—TITLE ACQUIRED PENDENTE LITE—RESCISSION—PLEADINGS.

A vendor suing for specific performance is not entitled as of right to a reference as to title or to prove his title acquired *pendente lite*; the court may refuse specific performance although title had been got in by the plaintiff before the trial, if he had unreasonably neglected to obtain the title which he had the right to call for after the purchaser had made an offer to complete the sale, and did not in fact have a title to convey until after the purchaser had pleaded the rescission of the agreement.

[*Krom* v. *Kaiser*, 18 D.L.R. 226, reversed.]

Statement

APPEAL from *Krom* v. *Kaiser*, 18 D.L.R. 226.

J. D. Shaw, K.C., for the plaintiff, respondent.

O. E. Culbert, for the defendant, appellant.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the defendant from a decision of Mr. Justice Hyndman, whereby he directed judgment to be entered for the plaintiff, vendor, in an action to recover the final instalment of the purchase money due under an agreement of sale.

The agreement was made on February 17, 1912. The purchase price was $950, payable, $100 in cash, $200 on August 17, 1912, and the balance on February 17, 1913. On March 1, 1913, a new agreement was signed by the parties which recited that $400 on account of principal and all interest to date had been paid and which granted to the purchaser an extension of time until Sept. 1, 1913, for the payment of the balance. On Sept. 1, the defendant paid only $162.

On December 19, 1913, the plaintiff issued his writ claiming from the defendant the sum of $419.05 as the total amount of principal and interest due up to December 15.

The defendant filed a defence and counterclaim, but not

ALTA.
S. C.
KROM
v.
KAISER.
Stuart, J.

until February 24, 1914. By his defence he alleged that at the time of the original agreement, at the time of action brought, and at the date of the defence, the plaintiff was not the registered owner of the lands and was unable to give a clear title to the lands; he further alleged that before the action was brought he had tendered the balance due. By his counterclaim he repeated the allegation of his defence, set forth the amounts he had paid and claimed a rescission of the contract, and a repayment of the moneys paid.

At the trial which took place on October 5, 1914, the plaintiff in his evidence-in-chief proved the agreement of sale, the extension agreement and the default in the payment. He also put in evidence a certificate of the registrar, shewing that on October 1, 1914, that is four days before the trial, the plaintiff was the registered owner of the land in question, free of encumbrances, and then closed his case.

The evidence for the defence shewed that the plaintiff had secured his transfer of the land on April 11, 1914. The defendant also stated, and in this was not contradicted, that about January 20, 1914, that is after the action was begun but before the defence was filed, he went to the plaintiff and offered to pay him saying, "Mr. Krom, I have got the money for you now and I want this transfer," and that plaintiff had said, "All right I will get you this transfer in a day or two," that he had waited a day or two and had gone to see the plaintiff again when plaintiff said he had not got it yet, "and he don't think exactly if he could get it or not," and that "it will be two weeks' time before he could get it or not," and that he did not know if for sure he could get it or not; and that the defendant had better go and see Mr. Shaw (plaintiff's solicitor), and get him to stop the interest on the money. Defendant stated further that he went up to see Mr. Shaw but did not find him in, that plaintiff had talked about wiring to New York and had said that one Lowndes wired to New York for the transfer, that he went again to see Mr. Shaw and did see him and asked for the transfer, saying that he had the money and had to have the transfer, that Shaw told him the transfer would be ready inside of five days, that after five or six days he went round again and

saw Mr. Shaw, and again asked for the transfer. "I told him I had to have it and I wanted it and so Mr. Shaw turned round and said he thought I was joking and did not have the money, and I took and dug down into my pocket and shewed him $420. I said there is a pile of money but I do not know how much there is but Mr. Shaw there is enough to pay Mr. Krom." He said that he told Mr. Shaw that he had to have the transfer and if he did not produce it, "I would see a lawyer and so I did." He stated that this happened in February. His defence was filed on February 24, and it does not appear that either the plaintiff or his solicitor had made any further communication to the defendant prior to that date. The defendant put in evidence an abstract shewing that on Dec. 20, 1913, the day after the writ was issued, the property stood in the name of persons called Oliver and a transfer dated April 11, 1914, from the Olivers to the plaintiff.

In rebuttal, the plaintiff proceeded to produce further evidence as to his right to call for a conveyance and the trial Judge in what I think was a fair exercise of his discretion permitted the evidence to go in. From this it appeared that the plaintiff had bought the property under an agreement of sale from one Melvin on January 27, 1912, that is some three weeks before his sale to the defendant and that he had paid Melvin's agent in full by the end of the year, 1912. This agreement was put in evidence. One Lowndes testified that he had acted for Melvin in the sale to Krom, and then the following questions were addressed to him:—

Q. How did Melvin come to have an interest in that property? A. I sold it to Melvin. Q. On behalf of the registered owners, I take it? A. Yes, sir. Q. Have you got that agreement between the registered owners, the Olivers and Melvin? A. No. Q. Have you searched amongst you papers for it? A. Yes, sir. Q. Have you been able to find it? A. No. Q. And that you say was the agreement of sale. . . .

Mr. Calbert (Interposing): My Lord, I object to any evidence of this kind, secondary evidence of an agreement between Olivers and Melvin.

Mr. Shaw: Q. Do you believe the document is lost Mr. Lowndes, there was an agreement between these parties, I presume? A. Yes, sir. Q. You personally saw an agreement executed between the Olivers and this man Melvin, is that correct, the agreement for sale? A. No, I cannot say that I did. Q. What did you see? A. I saw a contract, but I did not see it

ALTA.

S. C.

KROM v. KAISER.

Stuart, J.

executed. Q. What kind of contract was it, I mean what was in the contract?

Mr. Culbert: I object to any evidence whatever of this document.

Mr. Shaw: Q. Does it affect this particular land?

Mr. Culbert: I object to that.

The Court sustained the objection.

This was all the evidence which tended in any way to shew any right in the plaintiff to demand a title from the Olivers through Melvin, except the fact that the Olivers had in fact on April 11, 1914, conveyed to the plaintiff.

The plaintiff testified that he had spoken to the defendant before the writ was issued about the title to the property and that the defendant had said that he (the plaintiff) should wait until he (the defendant) would get the money from a lawyer to pay for it and that there was an arrangement between them that the plaintiff should wait till the defendant should pay for the property, and then the plaintiff was to get the title for him. He also said that it was arranged that there should not be a transfer from the plaintiff to the defendant, but that a transfer from the previous vendor should be obtained to the defendant directly. This arrangement was denied by the defendant and the trial Judge did not make any finding as to whose statement he believed. In any case it will be observed that the plaintiff had paid his vendor, or at least his agent, in full by the end of 1912, and had yet done nothing apparently to secure title in his own name during the whole of 1913 and before he issued his writ against the defendant on December 19, of that year, although during the most of 1912 and all of 1913 he was under agreement to give title to the defendant.

The learned trial Judge in giving judgment was of opinion that there had not been a tender of the proper amount, and that in any case, even if the tender had been of the full amount, the purchaser should have given the vendor a reasonable time to complete his title. He did not think it was equitable that the defendant should be allowed to take advantage of the plaintiff's delay in acquiring a registered title at a time when he himself was in default, and had therefore asked for and been granted a written extension of time for payment. He referred to *Mayberry* v. *Williams*, 3 S.L.R. 350.

ALTA.

S. C.

KROM v. KAISER.

Stuart, J.

With much respect I am unable to see how that case is applicable here. Long before action brought and before the time for final payment under the contract, the plaintiff there had a good legal title. The case, as I understand it, simply decides that the failure of the vendor to produce an abstract or to tender a transfer before the issue of the writ did not constitute a defence.

In the present case the circumstances are completely different. The essence of the case is that the plaintiff issued the most peremptory sort of demand for payment of the final instalment of the purchase price, that he was then not in a position to make title, that though nothing happened for a month, during which period the plaintiff although suing for his money did not apparently make any effort to obtain title, or, if he did, only unsuccessful ones, that then the defendant offered to comply with the peremptory demand made by the writ and asked the plaintiff to fulfil his part of the obligation, viz., to produce title and convey, that repeated requests and offers were made by the defendant for the transfer and to pay, that these extended over some three weeks, that at some of the interviews doubts were expressed by the plaintiff as to his ability ever to get title, that finally the defendant produced $420 and stated his ability and willingness to pay the amount due which could have been only a dollar or two more at the most, that when he got no satisfaction he spoke of seeing his lawyer and after waiting a time, during which the plaintiff made no further communication or promise, he finally filed his counterclaim asking for rescission and for his money back.

With respect, I think he was entitled to do so. I am unable to see what legal effect the indulgence previously granted by the extension of time can possibly have upon the rights of the parties when the time finally fixed for completion has arrived and the vendor is suing for his money. Surely the fact that his demand for his money took the extreme form of a writ cannot affect the right of the purchaser to say, "Very well, I comply with your demand, I am ready to pay; please give me my title." The defendant plainly indicated his willingness and, if that were necessary, even his ability, to pay by pro-

ALTA.

S. C.

KROM v. KAISER.

Stuart, J.

ducing within a dollar or two of the amount required. When the vendor confessed his present inability to convey, I do not think any further tender was necessary. With regard to the necessity for waiting a reasonable time, I cannot see that that can stand in the defendant's way. He had already waited, what appears to me to have been, in all the circumstances, a reasonable time, and he made no sudden declaration of repudiation. He had, indeed, twice given the plaintiff all the time he had asked. It is, I think, settled that the commencement of an action for rescission is a sufficient repudiation: *Reeve* v. *Mullen*, 14 D.L.R. 345.

It seems to be clear that no evidence was adduced from which it could be inferred that the plaintiff had, either at the time he entered into the contract, or at the time of bringing his action, or indeed, at any time, a right to call upon the registered owner to convey to him. It was shewn he had a contract with Melvin and that he had paid not Melvin but Melvin's agent. Whether Melvin was ever in a position to call upon Olivers to convey was a matter upon which no light was cast at the trial at all. All that appeared was that after defence and counterclaim the Olivers had for some reason or other, we do not know what, conveyed to Krom, the plaintiff. There was nothing to shew that when he brought this action he had a right to compel a conveyance, nothing suggesting that Melvin had paid the Olivers, even if he had an agreement with them.

The respondents suggest that if anything should turn upon his not having shewn a right to call for a transfer when the action was begun he should be allowed by means of a reference to do so now. I am unable to agree with this view. The case went to trial on a single issue, namely, the question of title. There was nothing else to dispute about. The respondent was clearly informed in paragraph three of the defence that the question of the state of the title at the date of the commencement of the action would be raised. The trial was seven months after defence. Yet the plaintiff went to trial and made no preparation to meet the point.

In *Lucas* v. *James*, 7 Hare. 410, Wigram, V.-C., said at 425:—

I do not in the least degree doubt the power of the Court to enter upon the question of title at the hearing of the cause or to make such a question ground for dismissing the bill; but in order that it may be proper so to deal with a cause the defect, or supposed defect in the title should be prominently put forward in the pleadings.

A reference is generally given on the purchaser's application and for his protection: Hals., vol. 27, p. 86.

The remark in *Lucas* v. *James*, shews quite clearly, and, indeed, no precedent ought to be needed, that a trial of the question of title is quite proper at the hearing and without a reference. Particularly should this be the case in this country where titles are simple, and detailed enquiries are seldom, if ever, necessary. An application by the plaintiff for a reference if it had been made at the trial would have been tantamount to an application to postpone the trial, and the request for it on appeal is nothing more than an application for a new trial—that is, a new trial of the only issue raised. The question whether the plaintiff could shew a good title after the pleadings had been closed was, of course, not an issue raised by the pleadings and could not be so raised, because future facts are as a rule not pleaded. I think, therefore, that the request for a reference must be refused and that the only matter with which we can deal is the question whether the plaintiff was entitled to take advantage of the fact that, after pleadings were closed and before the trial he had succeeded in fact in getting in the title somehow.

Now, I think there is no doubt that, in regard to a vendor's action for specific performance there are cases in which it will be sufficient if he can make out a good title at any time up to the hearing: *Haggart* v. *Scott*, 1 Russ. & My. 293, and other cases cited in *Halkett* v. *Dudley*, [1907] 1 Ch. 590. These are cases, however, where the purchaser has either raised no question of title before the hearing, or if he has raised an objection has nevertheless continued to negotiate on the basis of the contract being still on foot, and without any attempt at repudiation. See Dart on Vendors and Purchasers, 7th ed., p. 1066. The rule has also, I think, been applied where the purchaser merely defends on the ground of want of title; but here the defendant did more than defend. He distinctly repudiated the contract

ALTA.

S. C.

KROM v. KAISER.

Stuart, J.

and counterclaimed. In view of the way he was treated I think the defendant was entitled to assume that no title could be given him. Furthermore, as pointed out by Lord Eldon, in *Jenkins v. Hiles*, 6 Ves. 646, 655, regard must be had to the justice due to particular cases. The right of the plaintiff to a decree for specific performance is an equitable right and is always a matter for the just discretion of the Court. The question to be decided here is, whether it is just and equitable to allow a vendor who has covenanted to give good title upon payment, to begin an action for the purchase price and for specific performance, to put the purchaser off again and again when he offers to comply with his demand and to pay the money, and then after the purchaser definitely repudiates by means of a defence and counterclaim to go then and acquire title by some means and at the hearing simply shew that he has done so but fail to shew that he had ever been in a position either at the commencement of the action or at the date of the tender of the money and demand of title, or at the date of the counterclaim repudiating the contract to compel anyone to give him a title.

It may very well be, if the vendor had not brought an action and the purchaser had merely gone and tendered the money, that, in some circumstances, the defendant should have fixed a definite date at a reasonable time in advance, at which the transfer must be forthcoming or otherwise he would repudiate. But each case must depend on its own facts and the rule as to reasonable notice it appears to me cannot be properly applied in the present case.

The statement of claim alleges, as it was necessary to allege, that the plaintiff was ready and willing to do all that was required of him. The purchaser was, it seems to me, entitled to assume that that was true and to offer to comply with the demand. He did so and offered again and again. He gave what was in fact a reasonable time and still there was no transfer forthcoming. Where the vendor has sued and a reasonable time is in fact given, I do not think the rule as to giving a definite notice can in equity be said to be applicable, at least under our law as to titles.

I think it is necessary and proper to point out that any

attempt by this Court to follow and apply too closely English cases on this subject is exceedingly apt to lead to confusion and improper results. The difficulties about title in England arise in connection with the previous chain of title, not out of the mere conveyance itself. All sorts of defects and entanglements there arise, and a purchaser's solicitor is always obliged in order to protect his client to make demands or requisitions and the rule as to a reasonable notice by a purchaser before rescinding being necessary has arisen in connection with the failure to comply with some such requisition. But, under our system, all this trouble is removed. The state of the title is shewn in the registry office. A vendor knows that a purchaser is entitled to a registrable transfer from a registered owner. If a purchaser gets that he is secure and he is secure with no loss. The position approaches closely to the position in connection with the sale and delivery of goods. When a purchaser tenders his money at the time fixed for delivery he generally is entitled to delivery, and is not bound to give a notice of any kind before withdrawing. So with our transfers of land. A time is fixed for completion. A vendor knows that he must then deliver a registrable transfer. If there are encumbrances he knows exactly what is required which is a registrable discharge of them. A vendor can never be in doubt as to what his purchaser's solicitor will accept. There is only one thing that he is bound to accept, or can safely accept.

In such circumstances, I have no hesitation in declaring that the rule as to reasonable notice, cannot in justice be applied strictly in this jurisdiction. I have found no case where the rule was applied on account of mere delay in executing a conveyance. Of course if you once consider a chain of agreements of sale as exactly the same thing as a chain of conveyances in England, where at each link some defect or omission may appear, and attempt to apply the principle of English decisions upon such a chain of conveyances to a mere chain of agreements of sale you will get a plethora of English authorities, as you will also if you treat agreements of sale as exactly like English encumbrances, which they are not.

Equitable rules must be applied according to the conditions

ALTA.
S. C.
KROM
v.
KAISER.
Stuart, J.

and the facts of particular cases. In my opinion, the defendant did here all that by equitable principle properly applicable in this jurisdiction, and to the conditions here and the facts of this case he could be fairly required to do. I think, in the circumstances, he was entitled to withdraw from the contract and to demand his money back without being bound to fix a definite time by any formal notice.

The appeal should be allowed with costs, the judgment below set aside, and the plaintiff's action dismissed with costs and judgment given for the defendant on his counterclaim for the amounts paid by him under his agreement, with interest at 8% since each respective payment, and for costs of the counterclaim.

Appeal allowed.

ONT.
S. C.

BARRETT v. PHILLIPS.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 1, 1915.

1. EVIDENCE (§ IV E—410)—DIVISION COURT—CASE APPEALABLE—JUDGE TAKING EVIDENCE—REQUIREMENTS.

Where a case in a division court is appealable under sec. 125 (*a*) of the Division Courts Act R.S.O. 1914, ch. 63, the judge is to take down the evidence in writing, and where stenographic notes are not taken, the judge should take down the depositions at least as fully as is customary on examinations taken in longhand before a Master; mere notes of such part of the evidence as the judge thought fit to take do not satisfy the requirements of the statute.

[*Smith* v. *Boothman*, 9 D.L.R. 450, 4 O.W.N. 801, followed.]

Statement

APPEAL by the plaintiff from the judgment of the First Division Court in the County of Hastings, pronounced by the Junior Judge of the County Court of that county, dismissing with costs an action brought to recover $151.88 upon an acceptance.

J. P. MacGregor, for the appellant.

Eric N. Armour, for the defendant, respondent.

Riddell, J.

At the conclusion of the argument the judgment of the Court was delivered by RIDDELL, J.:—This case was tried before His Honour Judge Fralick, Junior Judge of the County Court of the County of Hastings: it is one of the class of cases coming under the Division Courts Act, R.S.O. 1914, ch. 63, secs. 62(*d*) and 106, and the judgment is appealable under sec. 125(*a*).

ONT.

S. C.

BARRETT v. PHILLIPS.

Riddell, J.

Upon the appeal, it was stated to us that all the evidence had not been taken down by the learned County Court Judge, and that the appeal could not be decided upon what had been taken down; we found also that it was not practicable to obtain such admissions as, taken along with the notes of the trial Judge, would enable us to dispose of the case.

We, therefore, following two cases* in this Division (when differently constituted) order that there shall be a new trial; costs, both of the former trial and of the appeal, to be costs in the cause.

It is to be hoped that the trial Judge will, on the new trial, obey the express command of the statute, R.S.O. 1914, ch. 63, sec. 106, and "take down the evidence in writing." This is the right of every litigant, and should no more be disregarded than his right to adduce evidence in support of his claim: and this duty of a Judge trying such a case in the Division Court can no more be disregarded than his duty to hear the evidence adduced. It cannot be made too plain that "notes of evidence" are not "the evidence" which the Judge is required to "take down . . . in writing," unless these notes are so full as to shew the substance of what was said. If the Judge has no stenographer, he should take down the narrative at least as fully as is the custom in an examination for discovery, etc., before a Master who takes the examination in longhand.

Order for a new trial.

*One of the cases is *Smith* v. *Boothman* (1913), 9 D.L.R. 450, 4 O.W.N. 801.

TRUSTS AND GUARANTEE CO. v. SMITH.

ONT.

S. C.

Ontario Supreme Court, Riddell, J. February 10, 1915.

1. DISCOVERY AND INSPECTION (§ III—20)—INTESTATE—ESTATE—DISTRIBUTIVE SHARE—BENEFICIARY — ACTION—"IMMEDIATE BENEFIT"—DISCOVERY—EXAMINATION FOR—ONT. C.R. 1913, R. 334.

A person entitled to a distributive share as a beneficiary of the estate of an intestate is not a person for whose "immediate benefit" an action is prosecuted by the administrator to recover from a third party funds alleged to be the property of the estate, and such beneficiary therefore cannot be examined for discovery under Rule 334, Ont. C.R. 1913.

[*Stow* v. *Currie*, 14 O.W.R. 223, followed; *Macdonald* v. *Norwich Union Insurance Co.*, 10 P.R. (Ont.) 462; *Garland* v. *Clarkson*, 9 O.L.R. 281, distinguished.]

ONT.

S. C.

TRUSTS AND GUARANTEE CO. v. SMITH.

Riddell, J.

APPEAL by the plaintiffs from an order of a Local Judge of the Supreme Court, under Rule 334, allowing the defendant to examine one Mary Ann Elizabeth Morton for discovery.

H. S. White, for the plaintiffs.

G. M. Willoughby, for the defendant.

RIDDELL, J.:—This is an action by the plaintiffs as administrators of the estate of William Webb, late of the township of Chatham. The plaintiffs by their statement of claim allege that the defendant, a farmer of the same township, received from Webb, as custodian for him, a cheque for $3,650 and a sum of money amounting to $3,600, in all (after deducting discount on the cheque when cashed) $7,247.45—and that the defendant, after the death of Webb, took possession of a considerable amount of property which Webb owned at the time of his death. They claim judgment for the sum of $7,247.45 and interest and an accounting for the other property, etc. The defendant claims a gift of the $7,247.45, and expresses willingness to account for such property as he admits came to his hands. He also sets up, but apparently claims no relief from, an agreement by Webb to pay for board, etc.—the plaintiffs are willing to pay.

The case being at issue, the defendant made an application before the Local Judge at Chatham for an order under Rule 334, to examine Mary Ann Elizabeth Morton for discovery. He supports the motion by an affidavit of his own wherein he sets out that Mrs. Morton appears by the papers filed by the plaintiffs (I presume in the Surrogate Court) to be a sister of the deceased; "that the defendant . . . would derive material advantage from the examination *vivâ voce* of the said Mary Ann Elizabeth Morton, who, if the plaintiffs were to succeed, would derive material advantage from the plaintiffs' success;" and that the plaintiffs' solicitor refused to produce her for such examination.

On this material the learned Local Judge made an order accordingly—and the plaintiffs appeal.

There are several grounds of objection to this order, but I deal with only those which will now be referred to. The Rule says: "A person for whose immediate benefit an action is pro-

secuted . . . may without order be examined for discovery" —so that an order for such examination is not necessary in a case coming within the Rule.

But the person so made examinable is one for whose immediate benefit the action is prosecuted—here the affidavit says only that Mrs. Morton "would derive material advantage from the plaintiffs' success."

In *Leushner* v. *Linden* (1914), 7 O.W.N. 456, affirmed in the Appellate Division on the 8th February, 1915 (33 O.L.R. 153), attention was called to the necessity of using in an affidavit the language of the Rule. If the defendant had intended to swear that the action was prosecuted for Mrs. Morton's immediate benefit, he should have done so; material advantage may or may not be immediate benefit. If Mrs. Morton were the endorser for the deceased on a note outstanding and unpaid, she would derive material advantage from the plaintiffs' receiving in this action money to pay the note and so relieve her—but no one could say that the benefit was immediate. She seems to have a nephew and some nieces, children of Benjamin Webb, a brother (now deceased) of hers and of the decedent. If they get some money from the success of the plaintiffs in this action, they may give her some or pay for her support—a material advantage, but not an immediate benefit.

It is argued, however, that, even if the affidavit be defective, it is perfected by the affidavit filed in behalf of the plaintiffs in the Surrogate Court on application for the letters of administration. That sets out, in exhibit C, that Mrs. Morton, as sister of the deceased, will be entitled to one-third of the estate.

As to this, *non constat* that she will receive anything—the deceased may have had debts to the amount of all the money received; she may have assigned any claim she might have had, etc., etc.

But I desire to put the judgment upon the broad ground that she is not in any event one for whose immediate benefit the action is prosecuted.

In *Macdonald* v. *Norwich Union Insurance Co.* (1884), 10 P.R. 462, Mr. Justice Rose held, under a similar Rule, that the assignor for the benefit of creditors was examinable in an action

ONT.
S. C.
TRUSTS AND GUARANTEE CO. v. SMITH.
Riddell, J.

by the assignee. In *Garland* v. *Clarkson* (1905), 9 O.L.R. 281, it was said by the Chancellor (p. 282) that this decision was given by Rose, J. "after conference with his colleagues," and the Divisional Court followed the previous decision (Meredith, J., dissenting). It is not open to me to reverse that Divisional Court decision, nor is it necessary to express an opinion as to its correctness. It must, however, be plain that the assignor must derive a benefit from the money obtained in litigation by his assignee, either by payment of his debts (wholly or *pro tanto*) or by receiving the money himself. Either may perhaps be fairly called immediate benefit—the "estate" is immediately benefited, and the "estate" is his.

The case of a beneficiary in intestacy is quite different—the estate is the estate of the deceased: that indeed is immediately benefited, but the next of kin receives no immediate benefit. All the benefit the next of kin receives is received mediately and not immediately. This was the opinion of the Chief Justice of the Exchequer Division in *Stow* v. *Currie* (1909), 14 O.W.R. 223, at p. 224, where he mentioned the case of an action brought by an executor for the benefit of an estate, where it is sought to examine a third person who is to share in the fruits of the action. It is true that he also places in the same category an action by an assignee for the benefit of creditors, but the class of persons he considers as non-examinable under the Rule includes the creditors, but clearly not the assignor. There is no inconsistency between this case and those already cited.

I do not think that Mrs. Morton is one for whose immediate benefit the action is prosecuted: and allow the appeal with costs here and below to the plaintiffs in any event.

Appeal allowed.

QUE.
S. C.

MECHANICAL EQUIPMENT CO. v. BUTLER.

Quebec Superior Court, Tellier, Greenshields, and Pelletier, JJ. March 30, 1915.

1 CONTRACTS (§ V C—390)—CONSTRUCTION OF THREE MACHINES—PART DELIVERY—DEMONSTRATION REQUESTED—CANCELLATION.

Where a contract has been made for the construction of three machines a letter containing the words "I do not wish you to deliver any more as we will have to refuse same until they have been satisfactorily demonstrated as being able to do the work contracted for," is not a cancellation of the contract, but a suspension of delivery until a demonstration is had.

2. CONTRACTS (§ V C—390)—ONE CONTRACT—THREE MACHINES—CANCELLATION—MUST BE OF ENTIRE CONTRACT.

Where one contract has been made for the construction of three machines the purchaser cannot cancel it as to part and retain it as to part, but must either cancel or retain the entire contract.

APPEAL in an action to recover $13,000 for the balance of the price and value of three railway spike machines made under contract.

Statement

Laflamme, Mitchell, Chenevert & Callaghan, for plaintiffs.

Brown, Montgomery & McMichael, for defendant.

DUNLOP, J.:—The pretension of the company defendant is that the contract was cancelled and that, therefore, plaintiff's action should have been an action in indemnity and not an action on a contract. The defence on this point is based on art. 1691 of the C.C., but even if this article applied, where do they find in the evidence that the contract was cancelled? Let us take the first and the last letters.

Dunlop, J.

The first is a letter of June 21, 1911, and does not say that the contract is cancelled. It reads:—

You have delivered to us one Farrow Automatic Railway Spike Machine and from the appearance of it and the history of its working at the Soo, I do not want you to deliver any more, as we will have to refuse the same, until they have been satisfactorily demonstrated as being able to do the work contracted for.

This letter, instead of being a cancellation of the contract, implies that if plaintiff will stand by the contract, they will accept delivery, but they do not wish one of the obligations assumed by the vendor, namely, the delivery, to be had until a certain demonstration is given. In other words, the letter of June 20, simply says: "Suspend delivery under contract still existing until demonstration is had." That is all. Now, let us look at the last letter. The letter of November 12. In this letter, after making complaints, Mr. Butler advises the plaintiff that so soon as the machines are demonstrated, or so soon as a place is indicated where the machines had been demonstrated, he will be glad to pay for the two machines for which defendant refuses to pay.

Therefore, as late as November 12, 1911, Mr. Butler, in his letter, admits that he himself did not construe the letter of June 20, nor the subsequent letters, in the way defendant's attorney

QUE.
S.C.
MECHANICAL EQUIPMENT CO. v. BUTLER.
Dunlop, J.

attempts to construe them. It appears to me, therefore, that the contract, as a matter of fact, was never cancelled. Here is a contract not for one machine, but for three. Assuming that the Steel Co. had the right to cancel its contract, inasmuch as there was one contract and not more than one contract, they had the right to cancel the whole contract; they could not cancel the contract in part, as they now attempt to do. They could not say: "We will stand by the contract for machine No. 1, but we will repudiate the contract for the two other machines."

Mr. Mignault, vol. 7, 417, after discussing the whole matter concludes as follows: "I believe that the article has relation to the cancellation of the entire contract."

I do not think the argument arising from art. 1691 C.C. is applicable to the present case, or that the Steel Co. pretension can be maintained in arguing that they would take one-third and would repudiate two-thirds, because the contract was made for three machines and not for one machine.

It was reasonable to assume that the company plaintiff would not have gone to the expense of building one machine, unless it had orders to build three machines.

There is another condition which is essential to the application of this art. 1691; that is this: You may cancel the contract, if you like, but this being an exception to the general law, which allows a contracting party practically to take the whole of his contract in his own hands, but you are specially restricted to certain conditions. What are those conditions? To indemnify the workman of all his actual expense and labour and paying damages, according to the circumstances of the case.

Appeal dismissed.

MAN.
C. A.

GIBSON v. SNAITH.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. March 19, 1915.

1. COSTS—(§ I—7)—FORECLOSURE—OFFICIAL ASSIGNEE—NOTICE DISCLAIMING INTEREST—DEFENCE—LIABILITY—MAN. ASSIGNMENTS ACT.

In a suit for foreclosure an official assignee for benefit of creditors under the Manitoba Assignments Act, who is made one of the defendants to the action is not liable to be ordered to pay costs either personally or out of the funds of the insolvent estate if before defence he had given notice to the plaintiff that he disclaimed all interest in the land and did not propose to defend unless costs were asked against him, and on refusal of this term made a similar disclaimer in his defence filed.

[*Ford* v. *Chesterfield*, 16 Beav. 520, followed.]

MAN.

C. A.

GIBSON v. SNAITH.

2. APPEAL (§ VIII D—684)—COSTS—DISCRETION OF JUDGE—NO DISCRETION EXERCISED—PROCEEDING ON WRONG PRINCIPLE—APPELLATE COURT—JURISDICTION—KING'S BENCH ACT, MAN.

Notwithstanding sec. 47 of King's Bench Act, Man., which declares that no order as to costs only which by law are left to the discretion of the court judge shall be subject to appeal except by leave, the Appellate Court may review a judge's decision on a question of costs which were left to his discretion where he had proceeded on an erroneous principle or had not exercised a judicial discretion.

[*Young* v. *Thomas*, [1892] 2 Ch. 134; *Civil Service Co.* v. *General Steam Nav. Co.*, [1903] 2 K.B. 756, applied.]

3. STATUTES (§ II A—95)—COSTS—DISCRETION AS TO—KING'S BENCH ACT MAN., SEC 952—ORIGINAL RULE 934—POWER CONFERRED.

No further power is conferred upon the judge by rule 952 of the King's Bench Act, Man., in regard to the disposition of the costs than was previously conferred by rule 934 which was the original rule conferring discretion as to costs and was taken from Order 65, rule 1 of the English Judicature Act; rule 952 is to be construed along with rule 934 and not as repealing or being substituted for the latter.

[*Shillinglaw* v. *Whillier*, 19 Man. L.R. 149, distinguished; *Matheson* v. *Kelly*, 18 D.L.R. 228, 24 Man. L.R. 695, referred to.]

Statement

APPEAL from a judgment in an action on an agreement for sale.

W. A. T. Sweatman, for defendant, Newton, appellant.

Chalmers, for respondent, plaintiff.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—The plaintiff, in October, 1906, agreed to sell to the defendant Snaith a half section of land for the sum of $3,840, only $200 of which was paid at the time of sale, the balance being payable by the delivery to the plaintiff of one-third of the crop of wheat grown on the premises during a certain number of years, after the expiry of which a mortgage was to be given by Snaith securing the balance then owing. The agreement was in writing under seal, and contained, amongst other provisions, a clause enabling the plaintiff, in case of default by the defendant, to cancel the agreement without compensation for the moneys paid. Shortly after the agreement was made, Snaith mortgaged the land to the defendants, McLellan & English, who were a firm of merchants, and the mortgage was registered against the land. In August, 1907, a judgment against Snaith was obtained by the defendant McDougall, and a certificate of judgment was registered in the proper Land Titles Office so as to bind the interest of Snaith in the land. In January, 1913, McLellan & English made an assignment of their estate and effects to the defendant Newton, who is an official assignee, for the benefit of their creditors. The statement of claim alleges that in 1908 Snaith abandoned the

MAN.

C. A.

GIBSON v. SNAITH.

Perdue, J.A.

agreement for sale and the plaintiff leased the land to him, and that afterwards, in July, 1909, Snaith executed a quit claim releasing to the plaintiff all his interest in the land.

The statement of claim is filed to obtain a declaration that Snaith had abandoned the contract and that none of the defendants have any right, title or interest in the land, or, in the alternative, for the foreclosure of the rights of the defendants. The plaintiff also claimed [illegible] of the action. When the statement of claim was served on Newton, his solicitors wrote to the plaintiff's solicitors stating that he disclaimed all interest in the land and did not propose to defend unless costs were asked against him, and that if the plaintiff's solicitors would write stating that if Newton did not defend no relief would be asked against him except foreclosure, and, in that event, they would not file a defence. To this letter the plaintiff's solicitors replied that if Newton did not file a defence the question of costs would be decided by the Judge, and that if the Judge considered that the McLellan & English estate should pay costs they would ask these costs against the estate. A disclaimer was then filed on behalf of Newton in which he disclaimed any interest in the land and submitted to the relief claimed except costs. Prior to the filing of the statement of claim the plaintiff had caused an estoppel notice to be issued from the Land Titles Office and served on Newton, who then wrote to the plaintiff's solicitors enquiring as to the circumstances. The solicitors replied and explained the matter. No further letter was written by or on behalf of Newton until after the suit was commenced.

At the hearing, the learned trial Judge gave judgment declaring that Snaith had abandoned the contract, and that the defendants had no right, title or interest in the lands. He also ordered that Newton should, out of the estate of McLellan & English, pay the plaintiff's costs "up to the filing of the defence by the defendant Newton."

Newton was brought into the matter and made a party wholly by reason of the assignment of McLellan & English made to him in his official capacity for the benefit of their creditors. There was nothing to shew that he ever asserted any right to the land in any capacity. When served he filed a disclaimer, not a defence, which was as full and complete as the plaintiff could desire. In this state of the facts the plaintiff should not have asked costs

against him or the estate he represented, and I would say, with great respect, that the Judge should not have ordered him to pay costs. The action was brought for the purpose of clearing the plaintiff's title. It was analogous to an action of foreclosure: *Lysaght* v. *Edwards*, 2 Ch.D. 499; *Tytler* v. *Genung*, 16 D.L.R. 581, 24 Man. L.R. 148, 157. The rights of a defendant in a foreclosure action who disclaims any interest in the subject matter were clearly stated by Sir John Romilly, M.R., in *Ford* v. *Chesterfield*, 16 Beav. 520, as follows:—

First:—In a suit for foreclosure or redemption of mortgages where a defendant disclaims, in such manner as to shew that he never had and never claimed an interest, at or after the filing of the bill, then he is entitled to his costs.

Secondly:—If a defendant having an interest shews that he disclaimed or offered to disclaim before the institution of the suit, there also he is entitled to his costs.

Thirdly:—That where a defendant having an interest allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, in that case he is not entitled to his costs.

The rules above laid down have, so far as I can find, been adopted and followed ever since: see Godefroi on Trusts, 3rd ed., p. 28, and authorities cited. From these it is clear that the utmost that could be done to Newton would be to deprive him of his costs. There is no authority that I can find which would, in the circumstances of this case, justify the trial Judge in ordering him to pay costs to the plaintiff either personally or out of the funds of the estate he held in trust.

By sec. 47 of the King's Bench Act, no order made by the Court or any Judge as to costs only which by law are left to the discretion of the Court shall be subject to any appeal except by leave of the Court or Judge making such order. In this case no such leave had been obtained. The above provision was adopted from the English Judicature Act, 1873, sec. 49. The decisions under that section shew that the Court of Appeal will, without leave being given to appeal, allow a review of a Judge's decision on a question of costs which were left to his discretion, where he had proceeded on an erroneous principle: *per* Lindley, L.J., in *Young* v. *Thomas*, [1892] 2 Ch. 134, 136-137; see also *Re Rio Grande, &c., Co.*, 5 Ch.D. 282; *Re Raynes Park Golf Club*, [1899] 1 Q.B. 961; *Re John Tweddle & Co.*, [1910] 2 K.B. 697; An. Practice, 1915, p. 1249; *McCausland* v. *Quebec Fire Ins. Co.*,

MAN.
C. A.
GIBSON
v.
SMITH.
Perdue, J.A.

25 O.R. 330; or where the Judge had not exercised a judicial discretion, or had not before him materials upon which he could exercise a discretion in regard to costs: *Civil Service Co.* v. *General Steam Nav. Co.*, [1903] 2 K.B. 756, 765; *Edmund* v. *Martell*, 24 T.L.R. 25; An. Prac. 1915, p. 1213. I think, with great respect, that the order against Newton to pay costs was not a proper exercise of judicial discretion, and that there were not materials before the learned Judge upon which he could exercise a discretion as to costs.

There remains the question as to the meaning of the present r. 952. That rule was first enacted as sec. 3 of 7 & 8 Edw. VII., ch. 12. The section declared that, in all actions, suits and proceedings in either of said Courts (King's Bench or Court of Appeal), the awarding of costs and the apportionment of same between the parties of the same or adverse sides, shall, subject to this Act, be in the absolute discretion of the Court or Judge, and the Court or Judge shall have jurisdiction to order the payment of costs personally by any solicitor, etc. The words "subject to this Act" might naturally be taken to mean, subject to any other provision in the Act of which sec. 3 formed a part, and which would have the effect of controlling or limiting the effect of that section. On the other hand, as the Act was intended to amend the King's Bench Act, the words in question may have been intended to refer to the latter Act. But, in the present revision of the statutes, the section appears as r. 952 of the King's Bench Act, R.S.M. 1913, ch. 46. By sec. 2 of the Act respecting the Revised Statutes of Manitoba, 1913, 4 Geo. V., ch. 1, the Acts set out in schedule A to the Act are repealed to the extent shewn in the schedule. The schedule shews that ch. 12 of 7 & 8 Edw. VII. is wholly repealed, and that all of the former King's Bench Act is repealed except r. 173, which does not affect this question.

By sec. 6 of the Act respecting the R.S.M. 1913, the new revision shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the laws as contained in the Acts so repealed and for which the revision is substituted. By sec. 8 of the same Act it is provided that if upon any point the provisions of the Revised Statutes of Manitoba, 1913, are not in effect the same as those of the repealed Acts for which they are substituted, then, as to all transactions, matters and things subsequent to the time when the R.S.M. 1913

take effect, the provisions contained in them shall prevail, but as to transactions, etc., anterior to that time, the provisions of the repealed Acts shall prevail. The effect of this is that after the R.S.M. 1913 came into force, the words "subject to this Act" appearing in r. 952 must be taken as meaning subject to other provisions of the King's Bench Act.

Now r. 934, which is found under the same sub-heading in the King's Bench Act, is the original rule conferring discretion as to costs, and was taken from O. 65, r. 1, of the English Judicature Act. It provides that the costs of and incident to all proceedings in the Court shall be in the discretion of the Court, but that nothing contained in the rule should deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules in Courts of equity. Certain other exceptions as to the Judge's discretion are also stated in the rule. We must, it appears to me, now construe r. 952 along with r. 934, and not as repealing, or being substituted for, r. 934. Considering the question of discretion as to costs, we find that r. 934 conferred discretion subject to certain exceptions, and that r. 952 conferred absolute discretion, subject to the other provisions of the Act. In both rules the discretion is qualified. It may well be questioned whether there is any difference between the *discretion* conferred by the one and the *absolute discretion* conferred by the other. If discretion be given which is wholly uncontrolled, then it is an absolute discretion although the word "absolute" is not used. On the other hand, if the discretion bestowed is termed an absolute discretion, but it is in fact subject to something which controls or limits it, then it is, in fact, a limited and not an absolute discretion. It appears to me that, in so far as the present case and the circumstances surrounding it are concerned, there is no further power conferred upon the Judge by r. 952, in regard to his disposition of the costs, than was previously conferred by r. 934. The discretion to be exercised under either of these rules is a judicial discretion It is a wide discretion, but there must be materials before the Judge upon which he could exercise a discretion. In *Civil Service Co.* v. *General Steam Nav. Co.*, [1903] 2 K.B. 756, Lord Halsbury said, in giving judgment in the Court of Appeal:—

No doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think it is not, within the

MAN.
C. A.
GIBSON
v.
SNAITH.
Perdue, J. A.

power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned Judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Bigham, J., and in the judgment of this Court they are right; and it practically comes to this—that the learned Judge has deprived the persons sued of what, *primâ facie*, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned Judge as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the Judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the Judge to treat as grounds for the exercise of his discretion.

With this the other members of the Court agreed.

In *Edmund* v. *Martell*, 24 T.L.R. 25, a case decided in the Court of Appeal in 1907, it was held that where the Judge at the trial of an action without a jury deprives a successful party of costs without having really exercised his judicial discretion at all in the matter, as, for instance, where there are no materials before him upon which he can exercise his discretion, an appeal will lie to the Court of Appeal without leave. The defendant in that case, who was a lessee of a dwelling house, had converted part of it into a shop. The Judge, although deciding in the defendant's favour, deprived her of costs, because, in his opinion, the defendant should first have approached the landlord upon the matter. This was held not to have been an exercise of judicial discretion.

I would also refer to *McCarthy* v. *Capital and Counties Bank*, [1911] 2 K.B. 1088; *Granville* v. *Firth*, 72 L.J.K.B. 152; and *King* v. *Gillard*, [1905] 2 Ch. 7. In the last-mentioned case a successful defendant had been deprived of his costs on the ground that he had been guilty of a misrepresentation to the public, but not connected with the issue between himself and the plaintiffs. It was held that an appeal lay to the Court of Appeal and that no material existed for the exercise of the discretion of the Judge under O. 65, r. 1, corresponding to our r. 934.

Levy v. *Johnson*, 29 T.L.R. 507, is a decision of a single Judge. The defence was the Gaming Act, and costs were refused to a successful defendant. The case is directly contrary to the decision of the Court of Appeal in *Granville* v. *Firth*, *supra*, to which the attention of the Judge apparently was not called.

The English authorities are clear that there must be material before the Judge to justify him in departing from the usual principle of awarding costs and exercising a discretion in withholding them from a successful litigant. Much more would it be necessary that there should be material before him to enable him to award costs against an encumbrancer who, in what is in effect a foreclosure suit, promptly disclaims all interest in the land and submits to the relief sought. In the present case, Newton, by receiving a general assignment in his capacity of official assignee, found himself to be the holder of a mortgage on the plaintiff's land. He was guilty of no action to which the slightest exception could be taken. When made a party defendant, as having some interest in the land, he promptly disclaimed, submitted to the relief claimed, and only asked not to be charged with costs. There was nothing which took place before or after the institution of the suit which could possibly justify the imposition of costs upon him.

I might mention that the case of *Shillinglaw* v. *Whillier*, 19 Man. L.R. 149, was decided before the late revision of the statutes, and while 7 & 8 Edw. VII., ch. 12, was in force. The decision in that case does not give any assistance in interpreting the meaning of r. 952, as the King's Bench Act now stands. In *Matheson* v. *Kelly*, 18 D.L.R. 228, 24 Man. L.R. 695, the point that arises in this case was referred to but not decided.

For these reasons, I think the appeal should be allowed and the judgment varied by striking out the clause ordering Newton to pay the plaintiff's costs up to the filing of his defence. The plaintiff must pay the costs of this appeal.

Appeal allowed in part.

RIPLEY v. VELLIE et al.

Saskatchewan Supreme Court, Lamont, J. May 6, 1915.

1. BILLS AND NOTES—(§ III A—56)—SURETY—SIGNING CONDITIONALLY—KNOWLEDGE OF CONDITION BY PARTY DISCOUNTING—CONDITION NOT FULFILLED—RELEASE OF SURETY.

Where a person signs a note as surety on condition that it is not to be used until a co-surety has signed it, any person who, having knowledge of that condition discounts the note without first obtaining the signature of the co-surety holds it freed from any liability on the part of the surety who did sign it and such surety is released.

[*Ellesmere Brewing Co.* v. *Cooper*, [1896] 1 Q.B. 75, referred to.]

ACTION on a promissory note. Statement

SASK.

S. C.

RIPLEY v. VELLIE.

Lamont, J.

Archer, for plaintiff.

A. E. Vrooman, for defendant.

LAMONT, J.:—The note was for $3,000, and was signed by all the defendants. The defendant Vellie entered no defence. The main defence of the other defendants is: That they signed the note merely for the accommodation of Vellie, and on condition that one MacKenzie, of Regina, should join as co-maker with them of the note. That the plaintiff, knowing this, discounted the note, although MacKenzie had not signed it.

The facts as disclosed by the evidence are: That Vellie was the owner of a brickyard, on which MacKenzie had a first mortgage. MacKenzie, or his firm, was handling a large quantity of the bricks made by Vellie. Vellie got into financial difficulties, and his men, not being paid, were on the point of quitting work, which would necessitate the shutting down of the brickyard. Vellie applied for help to the defendants and to MacKenzie. A note was signed by Vellie and the other defendants in this action in favour of MacKenzie's firm, who endorsed it. Vellie took the note to the plaintiff to get him to discount it. The plaintiff took the note to his solicitor, Archer, who advised against taking it. The plaintiff then notified Vellie he would not take the note, but intimated, if a note were signed in his own favour, he would discount it upon certain terms. Vellie called upon the other defendants and asked them to sign a new note in favour of the plaintiff. They asked Vellie if MacKenzie would sign; Vellie told them that MacKenzie would sign it. To one of them, at least, he said he was sending the note that evening up to Regina for MacKenzie's signature. On the understanding that MacKenzie was to join with them as maker of the note, the defendants signed it. No consideration of any kind was given to the defendants Taylor, Heinrich and Hanna; that they were signing the note for the accommodation of Vellie the plaintiff knew. So far as the evidence shews, Vellie did not send the note to Regina for MacKenzie's signature, nor did MacKenzie sign it.

Vellie took the note to the plaintiff. The plaintiff agreed to discount it upon certain terms; one of the terms was that MacKenzie would release his first mortgage on the brickyard and Vellie would give the plaintiff a first security thereon. Vellie agreed. The plaintiff took the note to his solicitor, Archer, and

gave instructions to have the necessary papers drawn, so as to give the plaintiff a first mortgage on the brickyard.

While these papers were being prepared, the defendants Taylor, Heinrich and Hanna happened to meet, and one of them asked if MacKenzie had signed the note. No one knew; so Taylor suggested that the other two go to Archer's office, where they knew the note to be, and find out. Heinrich and Hanna went. Archer told them that MacKenzie had not signed it. They told Archer that, if MacKenzie's name was not on the note, their names were of no use and would have to come off. Both these defendants say that Archer then said that if MacKenzie did not sign the note, it would not be used. Archer, although acting as counsel for the plaintiff, took off his gown and went into the witness-box to give evidence on behalf of his client.

The practice of counsel going into the witness-box to support by his oath the case which he is conducting is one which cannot be too strongly condemned.

In giving his evidence, Archer admitted that Heinrich and Hanna had come to his office and had inquired if MacKenzie had signed the note, and, on learning that he had not, that they had asked him not to turn the note over until MacKenzie had signed it, but that he had replied that they would have to see Vellie or his agent about that. He further says he did not agree not to have the transaction go through unless MacKenzie signed.

The defendants say that, from the time they were in Archer's office, they never heard of the note until December, some five months later, after it had matured. When Archer got the securities on the brickyard in shape, he received from the plaintiff a note for $1,047; the plaintiff's receipt for a debt for some $1,100, which Vellie owed him, also receipt for a liquor bill of Vellie's of some $300. The plaintiff retained a discount of $300, which Vellie had agreed to allow him.

The first question is: Did Archer know that the defendants had signed the note on condition that MacKenzie should join as maker? Heinrich and Hanna say that, not only did he know, but that he expressly agreed not to use it unless MacKenzie signed it. Archer denies agreeing to this, but did not deny that he knew that the defendants signed it conditionally upon MacKenzie's joining. Their request not to turn the note over until

SASK.

S. C.

RIPLEY v. VELLIE.

Lamont, J.

MacKenzie signed would naturally lead Archer to ask why. I must, therefore, find that Archer did know, at the time Heinrich and Hanna were in his office, that the defendants signed the note upon the condition that MacKenzie would also sign it.

At that time the note had not been discounted; certain steps had been taken to get a first security on the brickyard, but no money had been paid over. On these facts, can the plaintiff succeed?

The position of a joint maker of a promissory note, who signs merely for the accommodation of his co-maker, is indistinguishable in principle from the case of a surety under any other document: *Hough* v. *Kennedy*, 3 A.L.R. 114.

The defendants, therefore, although joint makers of the note with Vellie, were only sureties for him. They are in the position of a surety who joins on condition that someone else will also join as joint surety. The law is clear that, where the agreement for the signature of the co-surety is made with the creditor, and he does not obtain such signature, the surety who did sign is not liable.

In *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755, Sir Robert Collier, in giving the judgment of the Privy Council, at 764, said:—

> In *Bonser* v. *Cox*, 4 Bev. 379, where the defendant agreed to become a surety for Richard Cox in a joint and several bond to be executed by Richard Cox and himself and the execution of the bond by Richard Cox was not obtained, Lord Langdale observes: "The surety has a right to say: The arrangement was that Richard Cox, as well as myself, should be held bound by the bond to the creditor. That arrangement never was carried into effect," and the decision would obviously have been the same if Richard Cox had executed the bond and had been afterwards released.

In 15 Hals., p. 489, the learned author says:—

> Any condition precedent to the surety's liability must be fulfilled before recourse can be had to him. Where, as frequently happens, it is a condition precedent that a guarantee shall be executed by certain named persons as co-sureties, it is the duty of the creditor to see that it is executed by the proper parties.

See also *Scandinavian-Amer. National Bank* v. *Kneeland*, 12 D.L.R. 202 (Reversed 16 D.L.R. 565); *Ontario Bank* v. *Gibson*, 3 Man. L.R. 406.

Does the same principle apply where the agreement to obtain the co-surety's signature was not made with the creditor, but with the principal debtor? I am of the opinion that it does,

if knowledge of the agreement was brought home to the creditor before he made any advances on account of the contract of suretyship.

In *Ellesmere Brewing Co.* v. *Cooper*, [1896] 1 Q.B. 75, four persons executed a bond as sureties for a principal debtor. By the terms of the bond the liability of two of them was limited to £50 each, and that of the other two to £25. After the other three had executed the bond, one of the two whose liability was expressed to be £50, added after his signature the words, "£25 only," thus limiting his liability to £25. The creditor took the bond, knowing this had been done, and without making any objection. It was held by the Court of Appeal that all the sureties were released.

I am, therefore, of opinion that, where a person signs a note as surety on condition that it is not to be used until a co-surety has signed it, any person who, having knowledge of that condition, discounts the note without first obtaining the signature of the co-surety, holds it freed from any liability on part of the surety who did sign it and such surety is released.

In the case at bar, Archer, the plaintiff's solicitor, had knowledge of the fact that the defendants signed only upon condition that MacKenzie would also sign. Notice to him was notice to the plaintiff.

In Hals.' Laws of England, vol. 1, at p. 215, the author lays down the law as follows:—

> Where an agent in the course of any transaction in which he is employed on his principal's behalf, receives notice or acquires knowledge of any fact material to such transaction, under such circumstances that it is his duty to communicate it to the principal, the principal is taken to have received notice of it from the agent at the time when he should have received it, if the agent had performed his duty with due diligence.

The knowledge of the condition upon which the defendants signed *was* material, and should have been communicated to the plaintiff. It is, therefore, immaterial whether or not Archer agreed to hold the note until MacKenzie signed it, his knowledge of the condition upon which the defendants signed it was notice to the plaintiff. Under all the circumstances of the case, it is difficult to see how the plaintiff could have escaped actual knowledge of it himself; this, however, as I hold, is not necessary. The defendants signed conditionally; knowledge on the part of his agent must be imputed to the plaintiff, and his subsequent

SASK.

S. C.

RIPLEY v. VELLIE.

Lamont, J.

discounting of the note, without seeing to it that the condition was fulfilled, discharges the sureties.

As against Vellie, the plaintiff is entitled to judgment. There will, therefore, be judgment for the plaintiff against Vellie, with costs, of a default judgment.

As against the defendants Taylor, Heinrich and Hanna, the action will be dismissed with costs.

Judgment accordingly.

B. C.

C. A.

REX v. MAY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 9, 1915.

1. WITNESSES (§ III—57)—CROWN DISCREDITING ITS OWN WITNESS ON CRIMINAL TRIAL—ADVERSE WITNESS—CANADA EVIDENCE ACT, SEC. 9.

It is ground for ordering a new trial that evidence of a statement made by a Crown witness to the police and taken down in writing on their inquiry into the crime was improperly admitted for the Crown on the witness' failure to identify at the trial as belonging to the accused certain clothing which in his statement to the police he had identified as such, when there had been no finding by the trial Judge, under sec. 9 of the Canada Evidence Act, that the witness was adverse, and that such statement was read by the Crown counsel to the jury and referred to by the trial Judge as being in evidence, although the latter, in his charge, advised the jury not to base a finding on the statement so admitted.

[*Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, and *Ibrahim* v. *The King*, [1914] A.C. 616, 63 L.J.P.C. 185, applied; *Greenough* v. *Eccles*, 5 C.B.N.S. 786; *R.* v. *William Smith* (1909), 2 Cr. App. R. 86 and 106; *Price* v. *Manning*, 42 Ch.D. 372, 58 L.J. Ch. 649; *R.* v. *Mulvihill*, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, 19 B.C.R. 197; *Rice* v. *Howard*, 16 Q.B.D. 681, 55 L.J.Q.B. 311, referred to.]

2. TRIAL (§ I H—35)—CRIMINAL CASE—COMMENT ON FAILURE OF ACCUSED TO REBUT TESTIMONY—CANADA EVIDENCE ACT.

A direction to the jury on a criminal trial that the accused had failed to account for a particular occurrence, as to which, by reason of the testimony adduced against him, the onus was cast upon him to answer, is not a comment upon the failure of the accused to testify, and does not contravene sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145.

[*R.* v. *Aho*, 8 Can. Cr. Cas. 453, 11 B.C.R. 114, applied.]

Statement

CROWN case reserved by Clement, J., in a murder case.

D. S. Tait, for appellant (prisoner).

Maclean, K.C., for the Crown.

Macdonald, C.J.A.

MACDONALD, C.J.:—The questions submitted are as follows:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?

(2) Does my charge to the jury contain any comment on the failure of the accused to testify on his own behalf upon his trial?

The second question should be answered in the negative.

Turning to the record of the proceedings to which the learned Judge has referred us, and upon which the answer to the first question must depend, it will be found that the learned Judge was applied to by Crown counsel for permission to examine the witness Joseph May as an adverse witness under sec. 9 of the Canada Evidence Act, though called on behalf of the Crown. The learned Judge thought that, although there was nothing to lead him to say that the witness had proved adverse, yet in order to decide that question he might receive the evidence of a previous statement alleged to be at variance with an answer the witness had just given in the box.

The propriety of that course appears to me to depend upon the strict legal construction to be placed on the section in question, which is in derogation of the common law. As I read the section, it is made a condition precedent to the admission in evidence of a previous contradictory statement by the witness that he should, in the opinion of the Court, have proved adverse. Coleridge, C.J., in *Rice* v. *Howard* (1886), 16 Q.B.D. 681, 55 L.J.Q.B. 311, refused to look at an affidavit which was alleged to contain a statement by the witness in that case at variance with his then testimony for the purpose of deciding the question of the witness's hostility. On appeal to the Queen's Bench Division, the judgment below was sustained on other grounds, and while the Court declined to express a final opinion upon the question now before us for decision, Grove, J., with whom Stevens, J., concurred, nevertheless said:—

> "With regard to the first point, as to the rejection of evidence in not looking at the affidavit in order to ascertain if the witness were hostile, the great difficulty seems to be that in order to satisfy the Judge of the witness's hostility counsel would have to put in the very evidence which he wanted to prove his right to use. Upon this point I entertain considerable doubt. It has not been decided whether, when a witness does not appear to be hostile, the Judge can look into other matters to shew that he is hostile."

Several other cases were referred to during the argument, but in none of them was the precise point now under consideration decided.

B. C.
C. A.
REX
v.
MAY.
Macdonald, C.J.A.

It cannot, I think, be doubted that the question of the witness's hostility is one to be decided in the presiding Judge's discretion. If he has exercised that discretion, we cannot, sitting as a Court of Criminal Appeal, review his finding. Here the learned Judge has made it plain that he did not, and as he thought could not, from anything which was at the time before him, decide whether the witness had proved adverse or not. In other words, he made it plain that he had not exercised the discretion vested in him, but determined to admit the alleged contradictory statement before coming to an opinion as to whether the witness had proved adverse or not.

If my view be correct, he admitted a writing which, but for the statute, would be inadmissible, and which under the statute would only be admissible when he had come to the conclusion that the witness had proved adverse. I think, therefore, that the first question must be answered in the affirmative.

I then come to consider the application to the circumstances of this case of sec. 1019 of the Code. It was contended by counsel for the Crown that even if the writing were improperly admitted, yet the learned Judge by the following instruction sufficiently warned the jury against paying attention thereto:—

> "I think you should treat the evidence of that cripple (Joseph May) as only proving this fact: that is, that the trousers were the property of the accused. With regard to the identification of the shirt, I think Mr. Peters is right in saying that his evidence does not tend to prove that the shirt is the shirt of the accused. It simply proves that in the box before you where he was subject to cross-examination he was not prepared to identify the shirt. It was given in evidence—properly, I think, under the Code—that upon another occasion he had said that he did recognize the shirt as being his brother's, but I do not think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact that the shirt which was found there on the trail was in fact the shirt of the accused."

There is nothing in this to warn the jury that the improperly admitted evidence must be discarded by them. Naturally the learned Judge did not intend so to instruct them, because he told

them that the writing was properly admitted. His warning was as to the weight to be attached to the evidence of Joseph May. His instruction did not, in my opinion, go far enough. The jury should have been told that the writing was not properly before them at all, and was not legal evidence of the facts it purported to relate; that they must discard it altogether—not that "I do not think that" (the writing) "should lead you to decide the case upon his testimony that the shirt was the shirt of the accused."

In the absence of such sufficient warning, it must appear highly improbable that the jury was influenced by the writing: *Ibrahim* v. *Regem*, [1914] A.C. 616, 83 L.J.P.C. 185.

I think it highly probable that the jury were greatly influenced by the writing in question, and that hence the conviction should be set aside and a new trial ordered.

IRVING, J.A., dissented. Irving, J. dissented.

MARTIN, J.A.:—Dealing first with the second question reserved, I need only say that I agree with my brother McPhillips that it should be answered in the negative; it is covered in principle by *R.* v. *Aho* (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114. Martin, J.A.

The first question should be answered in the affirmative. It raises, clearly, I think, a "question of law" under sec. 1014, *viz.*, as to whether or no the learned Judge was entitled to take the course he did to decide the question of the witness "proving adverse" under sec. 9 of the Canada Evidence Act. I pause here to say that I feel there is much to be said in favour of the contention that was pressed upon us that as a matter of fact the learned Judge did not find that the witness had "proved adverse," but had allowed the question to drift along without giving a definite ruling upon it. If I were forced to come to a decision upon his action, it would be in favour of the accused, because, though others might take the view that though no definite ruling was given yet an adverse one may be gathered from the whole proceedings on the point, nevertheless, to my mind, and with all due respect, we ought not to be placed in such an unsatisfactory position when a man's life is at stake, and I should feel it my duty to give the accused the benefit of an ambiguous situation; no room for uncertainty should have been left in so important a matter.

But, assuming that the fact was found, then the evidence the

B.C.
C. A.
REX
v.
MAY.
Martin, J.A.

learned Judge resorted to in order to "prove" that fact was objected to, and if it were not permissible for him to consider it, then there was no ground at all for finding the witness to be "adverse" to the party who called him, and, as a consequence, allowing him to be cross-examined and, in effect, contradicted out of his own mouth by that party, since the learned Judge stated that he did not so find because of the witness's demeanour, and there was no other evidence. If the learned Judge had reached his conclusion upon demeanour as well as upon evidence he even wrongly admitted, then there would have been no appeal from his decision, as there would have been some evidence, at least, to ground it on: *R.* v. *Mulvihill* (1914), 19 B.C.R. 197, 209, 18 D.L.R. 189, 22 Can. Cr. Cas. 354; *Rice* v. *Howard* (1886), 16 Q.B.D. 681, 55 L.J.Q.B. 311, 34 W.R. 532; *Price* v. *Manning* (1889), 42 Ch.D. 372, 58 L.J. Ch. 649.

While I quite agree with what was said in *Rice* v. *Howard*, 16 Q.B.D. 631, about the necessity of the trial Judge being free to exercise his discretion in determining these "preliminary or interlocutory questions arising during a trial," and that he should not be hampered in the exercise of that discretion by requiring strict proof of the material upon which he does exercise it, yet that language does not apply, as will be seen later, to a case like the present, where the complaint is that there was no material at all before him upon which he could or did act. It is not a question of strict proof, but of no proof. While all the decisions since the statute was first passed in 1854 (those before are not of real assistance) are not uniform upon the meaning to be given the word "adverse," it having in some cases been apparently treated as meaning "unfavourable" or "opposed in interest," yet the weight of authority is overwhelmingly in favour of its being construed as "shewing a hostile mind," which was the view taken in the leading decision on the point by the Court of Common Pleas, *in banc*, in *Greenough* v. *Eccles* (1859), 5 C.B.N.S. 786. And not only has no Court of higher authority questioned that view, but it has been independently adopted (without citing it) by the Court of Appeal in *Price* v. *Manning*, *supra*, over-ruling *Clarke* v. *Saffery* (1824), Ry. & Mood. 126, wherein all the Lords Justices agree that the witness must be shewn to be "hostile" before he can be cross-examined by the party calling him, and Lord Justice Lopes says, in his judgment, that the Master of the

Rolls (Lord Esher) and Lords Justices Lindley and Bowen also took the same view, so the decision is one of great authority, including all the members of the Court of Appeal.

There is a direct authority against the contention that is put forward by the Crown here, and it is to be found in the ruling given by Lord Chief Justice Coleridge, in *Rice* v. *Howard*, *supra*, 16 Q.B.D. 631, at p. 682, where counsel for a defendant, having called a witness, Howard, found he was giving evidence in conflict with that which he had previously given in an affidavit, and for that reason "asked leave to treat Howard as a hostile witness, and in order to shew he was hostile asked Lord Coleridge, C.J., to look at" said affidavit, but the learned Judge, "being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to shew that he was hostile, refused to look at the affidavit." A new trial was moved for in the Queen's Bench Division, on the ground that the affidavit should have been looked at, but the Court refused it, holding that it had no power to review the discretion of the Chief Justice.

It will be observed that this result is precisely in accordance with what I have written above, in that the matter had been decided by the trial Judge upon evidence before him, *viz.*, the demeanour and the way in which the witness had given his evidence, and therefore there was no appeal; and in like manner there would have been none in this case if the learned Judge below had based his decision on that ground. It is further to be noted that in the course of the argument of *Rice* v. *Howard*, Mr. McCall, as *amicus curiæ*, drew the attention of the Court to a prior decision of Mr. Justice Field in 1878, in *Vestry of St. Leonards, Shoreditch* v. *Stimson*, where he adopted the same course as Lord Coleridge did, and "refused to look at a letter tendered for the same purpose as the affidavit here." And in the report given in the Weekly Reporter, 34 W.R. 532, at p. 533, Grove, J., said, with the concurrence of Stephen, J.:—

> "And Mr. McCall referred us to a case which is almost identically this case, except that there it was a letter instead of an affidavit on which it was proposed to cross-examine a witness. There the Judge refused to look at the letter; and the Court held that it was a matter entirely within his discretion. Thus we have one express decision and one strong *dictum*. And that is quite sufficient to bind us."

B. C.
C. A.
REX
v.
MAY.
Martin, J.A.

The proposition now put forward that the witness can be contradicted, as was done at the trial, either by his own inconsistent or other statements before he is found to be adverse, *i.e.*, "hostile," is, in my opinion, not only contrary to the best authority, but to the letter and spirit of the statute, which says that "if the witness in the opinion of the Court proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony. . . ."

There is a condition of hostility which must first be established before the party is entitled to the consequences of such proof, *i.e.*, the right to contradict or discredit his own witness; this result is stated in the statute to be conditional upon the proof, but what has been done here is to invoke the consequences to prove the condition, which would be something akin to hanging an accused to prove a murder; in other words, an inversion of the intention of the statute. The matter is clearly put by Williams, J., in *Greenough* v. *Eccles*, 5 C.B.N.S. 786, at 805, in what he says is the "reasonable and indeed necessary" construction of the statute:—

> "The section requires the Judge to form an opinion that the witness is adverse before the right to contradict or prove that he has made inconsistent statements is to be allowed to operate."

Willes, J., agreed "entirely" with Williams, J., and Cockburn, C.J., did not assent.

I am therefore of the opinion, following these three direct decisions upon the point, that it was not open to the learned trial Judge in the case at bar to have permitted the witness to be contradicted in advance by his own statement either to enable the Judge to form an opinion upon his hostile mind or for counsel to discredit him; in the circumstances, the failure to prove the witness to be adverse prevented his statement (ex. B) being admitted as evidence for any purpose.

In coming to this conclusion I do not wish it to be understood that in my opinion the trial Judge is necessarily restricted to the demeanour of the witness or the way he gives evidence in determining this preliminary question of hostility. He may be assisted to that end by questioning the witness, or allowing him to be questioned by counsel. It might be, *e.g.*, that in answer to the

Judge the witness might make such admissions of previous antagonistic or revengeful utterances against an opposite party as would establish the existence of a hostile mind; and said utterances might be proved against him if not admitted.

It follows from the foregoing that in my opinion there must be a new trial, because the statement, ex. B, was "improperly admitted" as evidence for any purpose against the accused, and it is clear to me that by such admission "some substantial wrong or miscarriage was thereby occasioned on the trial," within the meaning of sec. 1019 of the Criminal Code. It not only "*may* have influenced the verdict of the jury and caused the accused substantial wrong," as the majority of the Supreme Court of Canada held to be sufficient to grant a new trial in *Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, at 341, 363, but it must inevitably have done so in the circumstances before us: *cf. R.* v. *Davis* (1914), 16 D.L.R. 149, 19 B.C.R. 50, at 64, 22 Can. Cr. Cas. 431. It may be that the result would have been different if the learned Judge, after allowing the statement complained of to be "given in evidence," as he states (at p. 131 of the case), and read to the jury, had warned the jury to disregard it, not only as pertaining to the red shirt but otherwise, but instead of so doing he treated it as being an element in the weight of evidence before them for certain purposes at least, whereas it was not admissible at all.

In the case of a confession wrongly admitted, it was held by this Court, in *R.* v. *Sonyer* (1898), 2 Can. Cr. Cas. 501, that even a warning is not sufficient, but that the jury should be discharged and a new one impanelled; though, according to the late decision of the Privy Council in *Ibrahim* v. *Regem*, [1914] A.C. 616, 83 L.J.P.C. 185, which my brother Galliher has kindly called my attention to, it would appear that this course need not always be taken, their Lordships (after pointing out the difference between their duty and that of "a statutory Court of criminal review") saying (83 L.J.P.C., at p. 194), "the rule can hardly be considered to be settled . . . ," and the result has varied in different circumstances.

In considering the cases on the point the statutes on which they were decided must be closely scanned, because an apparently slight change from the language employed in our sec. 1019 may have grave results.

B. C.
C. A.
REX
v.
MAY.
Galliher, J.A.

GALLIHER, J.A.:—The case reserved for the opinion of this Court is:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or in any part thereof?

(2) Does my charge to the jury contain any comment on the failure of the accused to testify on his own behalf upon his trial?

When the whole of the Judge's charge is read as it relates to the second point, I am quite clear that this question should be answered in the negative.

The error in law complained of in the first question reserved is that in the examination-in-chief of Joseph May, a brother of the accused, called on behalf of the Crown, the learned trial Judge permitted Crown counsel to cross-examine him with regard to a previous statement made by him which was in writing, and which statement was read to the jury, and also in permitting other witnesses to be called to prove such statement.

Section 9 of the Canada Evidence Act, R.S.C. 1906, ch. 145, governs in this case.

That section is as follows:—

> "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

In the present case we are concerned only with the second alternative in that section: "or by leave of the Court may prove that the witness made at other times a statement inconsistent with his present testimony."

Is it a condition precedent that before the Court permits this course to be taken the witness shall in the opinion of the Court prove adverse?

I think it is, although I confess it is not clear to me why the words "by leave of the Court" are placed in this clause.

The principal test as to whether a witness is adverse or not is

that of demeanour in the box, but there may be cases, such as here, where the witness speaks through an interpreter, and it is impossible to detect from his demeanour whether he is adverse or not.

This seems to have been the predicament the learned trial Judge found himself in, and he permitted the written statement of the witness to be put in, the witness to be examined thereon, and evidence adduced to prove the statement before finding (and in fact he made no specific finding) that the witness was adverse.

A perusal of the English cases shews a considerable divergence of opinion as to the method to be pursued in such a case, but I find none of them which goes so far as to uphold the course pursued here.

I do not go so far as to say that the Judge at the trial may not satisfy himself in some way without having the whole statement go before the jury that the witness is adverse because he has made a contradictory statement at another time; in fact, I am of opinion that a witness may be found adverse by reason of his making such contradictory statement, although his demeanour in the box does not disclose the fact. However, be that as it may, the course pursued here, in my opinion, amounts to a wrongful admission of evidence.

This brings us to a consideration of sec. 1019 of the Code.

Did the admission of the evidence and the reading of the whole statement to the jury occasion a substantial wrong or miscarriage of justice?

In the recent case of *Ibrahim* v. *Regem*, [1914] A.C. 616, 83 L.J.P.C. 185, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, says, at p. 194:—

> "In England, where the trial Judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal, under the similar words of the Criminal Appeal Act, 1907, sec. 4, may refuse to interfere if it thinks that the jury, giving heed to that warning, would have returned the same verdict. . . . Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction if it thinks that the jury may have been influenced by it, even though without it there was

B. C.
C. A.
REX
v.
MAY.
Galliher, J.A.

evidence sufficient to warrant a conviction: *Rex* v. *Fisher* (1909), 79 L.J.K.B. 187, [1910] 1 K.B. 149."

A nice distinction seems to be drawn here in cases where the trial Judge has warned the jury not to act upon the objectionable evidence, and where the jury are not so warned.

We have, therefore, to consider under which of these two classes the case at bar falls.

The learned trial Judge instructed the jury that they were to treat the evidence of the cripple (meaning Joseph May) as only proving that the trousers were the trousers of the accused, and, with regard to the shirt, that what was given in evidence of a previous statement that he recognized the shirt as the shirt of the accused, should not lead them to decide the case upon any findings on Joseph May's testimony.

The learned trial Judge by this probably intended that the jury should have excluded from their minds as evidence the whole of the written statement put in in Joseph May's testimony, but I think he fell short in that respect by not specifically charging the jury to entirely disregard the written statement as proof of any material fact in the issue.

I feel all the stronger in this regard by reason of the fact that the written statement which counsel for the Crown read to the jury in addressing them contains a statement that the accused when he came home on the night of the murder had on no shirt, no hat, just underclothes, pants and boots.

That condition would fit in with the fact that what was said to be the coat, hat and shirt of the accused were found at the scene of the murder.

Joseph May was questioned as to whether he had not described to the police how the accused was dressed when he returned that night, and denied that he had.

As to this condition, there was, as I view it, no sufficient warning to the jury to disregard it, and as it was something very likely to impress itself on the minds of the jury and to influence them, I would answer the question in the affirmative and grant a new trial.

MCPHILLIPS, J.A.:—The case reserved calls for answers to the following questions:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?

(2) Does the charge to the jury contain any comment on the failure of the accused to testify in his own behalf upon his trial?

Answering the second question first—my opinion is that the learned trial Judge did not comment on the failure of the accused to testify. Therefore my answer to question two is in the negative: *Rex* v. *Aho* (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114.

In my opinion, however, question number one must be answered in the affirmative.

Firstly, in my opinion the learned trial Judge did not hold that the witness Joseph May was a hostile witness to admit of the production of extraneous evidence to contradict him, but, if I should be in error in this, the admission of the written statement to establish hostility was error in law on the part of the learned trial Judge. There should have been other evidence upon which the learned trial Judge could have proceeded in arriving at the conclusion that the witness was adverse; and, no such evidence being present, in my opinion there was no exercise of a proper judicial discretion and something was done not in accordance with the law: *Rice* v. *Howard* (1886), 16 Q.B.D. 681, 55 L.J.Q.B. 311; *Price* v. *Manning* (1889), 42 Ch.D. 372, 58 L.J.Ch. (C.A.) 649; *Wright* v. *Willcox* (1850), 19 L.J.C.P. 333; *Rex* v. *Crippen* (1911), 80 L.J.K.B. 290, at p. 293.

Secondly, the written statement of the witness Joseph May was improperly admitted in evidence. It was inadmissible evidence as against the accused, and was used against him.

This is clear, and cannot, in my opinion, be gainsaid (*Dibble* v. *The King* (1908), 1 Cr. App. R. 155, is high authority) that the contents of a previous statement to contradict and to discredit a witness are not evidence against the prisoner; and, in that case, there was present that which is absent here—the caution to the jury against putting any reliance on the statement, as it was not evidence against the accused. And, notwithstanding this caution, Lord Alverstone, C.J., in giving the judgment of the Court of Criminal Appeal (1 Cr. App. R., at p. 157), said:—

> "The statements of Williams and White were evidence against the latter, but not against Dibble, and it is difficult to doubt that the jury were prejudiced against Dibble by that evidence. Even the fair summing up and grave caution of the Recorder to the jury could not prevent that from

B. C.

C. A.

REX v. MAY.

McPhillips, J.A.

happening. . . . The unfortunate admission of Williams' and White's statements, unavoidable as it was, may have prejudiced the jury: it was impossible to believe that they had no effect on their minds; it was impossible to discover whether in their absence the jury would have considered Dibble's guilt to be proved."

In the reserved case it is stated that counsel for the Crown read the statement to the jury, and the learned trial Judge referred to the statement in his charge to the jury in the following terms:—

> "It" (referring to the statement) "was given in evidence—properly, I think, under the Code—that upon another occasion he" (referring to the witness Joseph May) "had stated that he did recognize the shirt as being his brother's, but I don't think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact that the shirt that was found there on the trail was in fact the shirt of the accused."

Upon the argument the learned counsel for the Crown frankly stated that the statement was a "crucial statement," but contended that it was not admitted in evidence, but only used to discredit Joseph May's story in the box and to contradict him. With all deference to the able argument advanced to establish this contention—and that no error in law occurred at the trial—I am impelled to say and to hold that the statement was admitted, and improperly admitted, in evidence.

In the consideration of all criminal appeals undoubtedly sec. 1019 of the Criminal Code is to be borne in mind, but in the present case exactly that which is provided against occurred; that is, a substantial wrong was done the accused on the trial.

In the result the inadmissible evidence may have influenced and prejudiced the jury, bringing about a miscarriage of justice which is to be relieved against.

It therefore follows that, in my opinion, the appeal must be allowed, the conviction quashed, and a new trial directed for the foregoing reasons: *Allen* v. *The King* (1911), 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, at 341.

New trial ordered.

LINKE v. CANADIAN ORDER OF FORESTERS.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. February 15, 1915.

1. INSURANCE (§ VI H—425)—LIFE INSURANCE — REFUSAL TO FURNISH CLAIM PAPERS—INSURED UNHEARD OF FOR SEVEN YEARS—COURTS —PRESUMPTIONS.

A condition in a life insurance policy that formal proofs of death shall be furnished by the beneficiary is waived by the written refusal of the insurer to furnish claim papers until the court should decide that the insured should be presumed to be dead because he had not been heard of for seven years.

2. INSURANCE (§ VI A—247)—PRESUMPTION OF DEATH—PROOF OF—ALL REASONABLE AVAILABLE EVIDENCE.

A claim for life insurance on the ground that the insured must be presumed to be dead because he had not been heard of for seven years must be supported by all reasonably available evidence of friends of the insured who might be expected to have heard from him were he alive.

Statement

APPEAL by the defendants from a judgment of Britton, J., on a policy of insurance.

G. H. Watson, K.C., for the appellants.

E. P. Clement, K.C., for the respondent, plaintiff.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B. (at the conclusion of the argument for the appellant):—Now, Mr. Clement, there is one branch of this case, that is, as to the plaintiff not having filed proofs of claim, as to which we do not think it necessary to hear you.

The firm of Clement & Clement, the plaintiff's solicitors, wrote to the Secretary of the High Court on the 31st August, 1914, saying that they had been consulted by the plaintiff, the wife of Carl Linke, and proceeding as follows: "We understand that you have been communicated with, but that you decline to recognise the claim made by Mrs. Linke. What she says is that she has not heard from her husband since June 7th, 1907, and that he has not been heard from by any one so far as she knows from that time. What became of him at that time she is utterly unable to say, but, as you are aware, after seven years' absence, unheard of, he is presumed to be dead, and we must ask you, therefore, to forward us the usual and necessary papers for making a claim under the certificate. The members of your local court must be very well aware of all the circumstances connected with this case. . . ."

ONT.
S. C.
LINKE
v.
CANADIAN ORDER OF FORESTERS.
Falconbridge, C.J.K.B.

To that letter the High Secretary replied on the 1st September, 1914, stating that the correspondence had been referred to the High Chief Ranger at his request, and again on the 8th September the stenographer writes that Mr. Stewart, the High Chief Ranger, is away from home, "but on his return about the 12th instant your letter will receive his attention."

Then we come to the letter of the High Chief Ranger of the 17th September, 1914, in which he says: "With further reference to your letter of the 31st of August with reference to the insurance certificate of Carle Linke. We have had so many disappearance claims that have proved fraudulent that, as a matter of general policy, we expect the death to be established to the satisfaction of a court of competent jurisdiction. We do not obligate ourselves to pay insurance aften seven years' membership or after seven years' absence. If the Courts decide this brother is dead, we will have no alternative but to pay, but, in the meantime, we cannot send you any claim papers."

We are of opinion that that constitutes a clear waiver of the filing of such papers, subject to the question of the authority of the High Chief Ranger.

Under some of the insurance cases the local agent and the adjuster were held not to be authorised to make the waiver. But the duties of the Chief Ranger, as laid down on p. 46, sec. 11, of the constitution, are as follows: "The Chief Ranger shall preside at all meetings of the court, preserve order and decorum, . . . sign all orders for the payment of moneys, after they have been voted by the court . . . see that justice is done to all parties, and that the by-laws of the court are strictly and impartially enforced."

The authority to see that justice be done to all parties included authority to make this waiver.

Now that point we have decided; but, Mr. Clement, you have heard the contention raised by Mr. Watson as to the other point in the case. We think at present that, while, of course, it is impossible to bring witnesses from Germany, the plaintiff has not exhausted the evidence that is obtainable here.

FALCONBRIDGE, C.J.K.B. (after hearing counsel for the respondent):—We are all of opinion that, without stating that the

learned trial Judge is wrong, we should have the evidence of friends in this country who might reasonably have been expected to have heard from the insured.

For that purpose we order a new trial at the sittings commencing on the 13th April, and we think that, under all the circumstances of the case, the costs should be in the cause unless the trial Judge should otherwise order. Of course, if the parties choose, they may use the evidence already given, instead of taking it all *de novo*.

Judgment accordingly.

REX v. THOMPSON.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley, Drysdale and Ritchie, JJ. February 13, 1915.

1. INTOXICATING LIQUORS (§ III J—91)—TRIAL OF OFFENDER—ABSENT DEFENDANT—PLEA OF GUILTY BY COUNSEL.

As the provisions of the Criminal Code, Part XV (Summary Convictions), are in terms applicable to prosecutions under the Nova Scotia Temperance Act, 1910, counsel may appear before the magistrate and plead guilty for the accused without the personal attendance of the latter in respect of an illegal sale of intoxicating liquor in contravention of the Act.

[*Rex* v. *Montgomery*, 102 L.T.R. 325, and *Rex* v. *Thompson*, [1909] 2 K.B. 614, 100 L.T.R. 970, applied; and see to the same effect *Rex* v. *McDonald* (1913), 11 D.L.R. 710, 21 Can. Cr. Cas. 229 (P.E.I.).]

DEFENDANT was convicted by a Justice of the Peace of an offence against the Nova Scotia Temperance Act on a plea of guilty entered by his solicitor on his behalf in the absence of defendant. A motion at Chambers to set aside the conviction on the ground that a magistrate cannot convict upon the confession of any person other than the accused himself was referred to the full Court by Drysdale, J. Statement

V. J. Paton, K.C., in support of motion.

A. Roberts, K.C., *contra*.

GRAHAM, E.J., concurred with RITCHIE, J. Graham, E.J.

LONGLEY, J.:—I have not been able to read the authorities or the statutes, as the rest of my brethren in this case have done, but I have felt the difficulty of differing from the majority and have waived my opinion. It is desirable that the Court should be unanimous in the opinion that without further legislation a Longley, J.

N. S.

S. C.

REX v. THOMPSON.

Drysdale, J.

barrister may now go before a magistrate without his client and plead guilty to a violation of the Nova Scotia Temperance Act, as will hereafter be the case in Nova Scotia.

DRYSDALE, J.:—The point involved in this application is as to the power of a defendant charged with an offence against the provisions of the Nova Scotia Temperance Act to plead guilty by counsel.

The defendant was charged with a specific offence of sale contrary to the provisions of said Act. By the terms of the Act every offence may be prosecuted in the manner directed by part 15 of the Criminal Code. By sec. 715 of the Code the person against whom the complaint is made shall be admitted to make his full answer by counsel, solicitor or agent on his behalf. It is admitted on this application that the defendant herein engaged and instructed counsel to appear for him before the magistrate on the day and at the time set for hearing of the charge and to plead guilty to the specific charge laid. This was duly done, and thereupon the magistrate convicted defendant in respect of the offence laid. On such conviction defendant has been imprisoned, and he now applies for his liberty under the Liberty of the Subject Act, alleging illegal imprisonment on the ground that he could not be convicted under a plea of guilty by counsel.

I would have thought, apart from authority that where the Code makes a special provision enabling a defendant to make his full answer by counsel in such a case that the defendant would be bound by the acts of counsel within the scope of his authority. No question arises here respecting counsel's authority, as it is admitted counsel was specially retained and instructed to plead guilty before the magistrate.

The application came before me at Chambers, and I was requested to refer it to the full Court in order that our magistrates might have an authoritative declaration on the subject, it being alleged that, by reason of several decisions cited, doubt existed in the minds of the profession on the point. I have been without doubt myself in the matter, and I am pleased to notice the question has been settled in favour of the validity of such a conviction by English authority. I agree with Mr. Justice Ritchie in the opinion he has prepared holding the case of *Rex* v. *Montgomery, ex parte Long*, 102 L.T.R. 325, conclusive.

The defendant's application must fail.

N. S.
S. C.
REX
v.
THOMPSON
Ritchie, J.

RITCHIE, J.:—Thompson was charged with an offence against the Nova Scotia Temperance Act. He instructed Mr. Matheson, K.C., to appear, and, if certain technical objections did not prevail, to plead guilty. Mr. Matheson accordingly appeared for Thompson, and, the technical objections being over-ruled, pleaded guilty. Upon this plea of guilty a conviction was made and a warrant issued thereon, under which Thompson was arrested and is now in jail. Mr. Paton, K.C., on his behalf, now moves for an order under the Liberty of the Subject Act. I had some doubt at the argument, but am glad to find that there is good authority for refusing the application, because Thompson is attempting to play a trick on the administration of justice by instructing one counsel to plead guilty for him, and then instructing other counsel to move for his discharge on the ground that the plea of guilty could not be legally made in his absence.

Rex v. *Montgomery*, 102 L.T.R. 325, is the authority to which I refer. It was the hearing of a summons for driving a motor car at a speed exceeding the limit. The defendant appeared by his solicitor, who pleaded guilty on his behalf and also to a previous conviction. The Justices, on the application of the inspector of police, ordered a warrant to compel the defendant to appear personally. The warrant was granted improperly, so it was held on appeal, because a valid plea of guilty had been made. Lord Alverstone, C.J., said:—

> "It was not necessary for the purpose of obtaining a conviction or of proving the previous conviction, for the appellant had pleaded guilty to both.

Bucknill, J., said:—

> "The justices were bound to proceed on the appearance and to convict in this case. That was all they had to do on the plea of guilty being made to the offence and to the previous conviction."

Rex v. *Thompson*, [1909] 2 K.B. 614, 100 L.T.R. 970, is also in point.

It was suggested that *Rex* v. *Montgomery*, 102 L.T.R. 325, might be distinguished because the defendant wrote a letter admitting his guilt, but that had nothing to do with the ground of the decision. It was held that the defendant could be properly convicted because he had, by his counsel, pleaded guilty, and,

N.S.

S. C.

REX v. THOMPSON.

Ritchie, J.

this being so, there was no necessity for the personal presence of the defendant. I cannot distinguish between that case and this case, and I hold the conviction good for the same reason, namely, the plea of guilty made by counsel upon the instructions of the defendant. I might deal with the question more fully, but, in view of the high authority which I have quoted, it does not seem necessary to do so. The attempt to trick the magistrate must fail and the application be refused.

Application refused.

N. S.

S. C.

McDONALD v. GALLAGHER.

Nova Scotia Supreme Court, Townshend, C.J., Graham, E.J., and Russell and Longley, JJ. January 12, 1915.

1. DEEDS (§ II C—30)—CONSTRUCTION OF—DESCRIPTIONS—BOUNDARIES—ROAD RESERVATION.

Where the descriptions in the plaintiff's chain of deeds prior to the defendant's title from the common grantor clearly pointed to a road reservation 50 feet in width as a boundary, such may be shown to be the true boundary rather than another and intermediate road reserve not corresponding to same in width although in one of the deeds in the plaintiff's chain of title the two road allowances were erroneously treated as identical, particularly where neither of them were in actual use as roads.

Statement

APPEAL from a judgment of Drysdale, J.

G. A. Rowlings for appellant.

H. Mellish, K.C., and *Hugh Ross*, K.C., for respondent.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—I rely on the findings of fact made by the learned trial Judge, in which I entirely concur.

It appears that, under the Probate Act, three commissioners appointed by the Court of Probate partitioned on May 7, 1878, a property near Sydney, known as the Gibbons-Ingoville property. It was an oblong block of land running east and west. They made two allotments, numbers 10 and 11. Allotment 11 they divided into six large lots, three in each tier. One tier is shewn to the east of a road labelled on the plan "Road 50 ft. wide." It is depicted as running north and south from the Lingan Road, which runs north-east and south-west at an angle of 45 degrees about. The other tier is shewn to the west of this road 50 ft. wide. Now, this road was clearly to be a road for the common

N. S.

S. C.

McDONALD v. GALLAGHER.

Graham, E.J.

use of these lots when they came to be built upon. On the west the lots are numbered from north to south, 1, 2 and 3, and on the east of the road, 4, 5 and 6. That 50 ft. reserved for a road and its name constitute an important point in this case. The other tier of lots had at the western end an actual road, the Sydney and Low Point road, now known as Victoria Road, which served also for the lots in allotment 10, and the eastern tier would require a road also.

This is called in the deeds—in the defendant's own deed, for instance—"a road reserved through the Gibbons property." In another deed, "road reserved 50 ft. wide," in the plaintiff's chain of deeds. But, in either case, with one exception, which I shall mention presently, the title deeds of the parties point unmistakably to this road reserved on this plan by the commissioners, and it is an apt description.

The exception is this: One of the deeds in the defendant's chain has an added expression. By bad luck there happened to be further to the west of this reserved road 50 ft. wide, an old reservation, where the old original grants were made, a reservation three chains in width. Like the present 50 ft. reservation, it only existed on paper, never on the ground, and is not used as a road. The two things give rise to a *falsa demonstratio*. The deed from the Gibbons to Morrison conveys lots 4, 5 and 6 solely by reference to the plan filed in the Court of Probate. But when Morrison, on January 4, 1896, conveyed to Moseley lot 4 and northern half of 5, a deed to which I have already referred, this is the description that was used:—

All that lot of land situate near the Whitney pier in Sydney, comprising part of the Gibbons-Ingoville estate so called, on the eastern side of Sydney harbour being on the eastern side of the road reservation known as the Cornishtown reservation which constitutes the boundary between lots 1, awarded to Susan Gibbons, 2 awarded Napoleon Gibbons, which lie to the westward of said reservation, and lot 4, awarded Julian Gibbons, and lot 5 awarded Franklin P. Gibbons, which lie to the eastward of said reservation, the land herein described commences on the eastern side of said reservation at the northwest corner of lot number 4 aforesaid, awarded Julian Gibbons, thence easterly by the northern boundary line of said lot number 4, 36 chains more or less, to the eastern rear line of the said Gibbons-Ingoville lands, thence southerly at right angles by the said eastern rear line six chains 50 links, thence westerly parallel to the said northern line of said Gibbons-Ingoville lands and the lot awarded Julian Gibbons aforesaid, 36 chains to the eastern side of the said road reservation and thence northerly by the same 6 chains and a half to the place of beginning, being lot number

N. S.

S. C.

MCDONALD v. GALLAGHER.

Graham, E.J.

4 and the northern half of lot number 5 of allotment 11 and awarded respectively to Julian and Frank Gibbons on the division of the Gibbons-Ingoville estate.

Later, in June, 1896, Moseley acquired, from some of the Gibbons heirs, lots numbers 1 and 3. Moseley later made a subdivision into smaller lots on a plan prepared by an engineer, one Morrison, and this plan is in evidence.

That description, Morrison to Moseley, is easily followed on the commissioners' plan, but the interpolation, "known as the Cornishtown reservation," is at variance with it, as we shall see.

Later, in 1907, ex. M.F., the Moseley heirs conveyed to Emma Taylor, lots 1 and 3, by reference to the commissioners' plan. The description of 1 runs:—

To a road reserved 50 feet wide which leads in a northerly direction from the Lingan Road thence in a southerly direction along the western side of said 50 foot road 4 chains, etc.

And in describing lot number 3:—

To the west side of a road reserved 50 feet wide leading in a northerly direction from the Lingan Road; thence southerly along the west side of said road, etc.

Further, on July 13, 1911, when the Moseley heirs conveyed to the defendant Gallagher his land, this is the description used:—

All that lot of land situate on the western side of Lingan Road at or near Sydney, bounded as follows: beginning at a point on the north west side of the Lingan Road where the boundary line of the property of the late E. T. Mosely and the Dominion Coal Company intersects said road, thence north 77 degrees 35 minutes west 1120 feet more or less to the eastern side of a road reserved through the Gibbons property; thence south 12 degrees 35 minutes west along the eastern side of said road reserved 429 feet to lands owned by J. A. Gillies; then south 77 degrees 35 minutes east 760 feet more or less to the north western side of Lingan Road and thence easterly along the northwestern side of the Lingan Road 600 feet more or less to the place of beginning, the above described land being a portion of a certain lot of land in the Gibbons subdivision number 4 allotted to Julian Gibbons and the northern half of a certain portion number 5 allotted to Frank Gibbons situated between the Lingan Road and fifty foot road reserved through the Gibbons property according to plan dated May, 1878.

I pause to emphasize the recurring words, "road reserved through the Gibbons property," as more suited to the 50 ft. strip. In that chain of title no description uses those interpolated words except in the one case I have referred to.

Then, in the description of one of the deeds of the plaintiff, who acquired from some of the Moseleys part of lot number 1

of the commissioners' plan, represented as on the west side of the 50 ft. reserve, the following words appear:—

To a road reserve 50 feet wide; thence in a southerly direction along the western side of the road reserve 117 feet 9 inches, etc.

Now, I am of opinion that when it is established that there are two reservations, not one merely, and that they are not identical, as the deed Morrison to Moseley contemplates, error in that description is shewn, and the false description must be rejected, because the other portions are all in favour of the 50 ft. reserve. And the learned Judge has decided the facts in favour of the 50 ft. strip rather than the Cornishtown reservation.

Moseley was the common owner of both titles, and he (or, rather, his heirs) first (1907) conveyed to Emma Taylor. Emma Taylor, in 1908, conveyed to Herbert C. and Gertrude Moseley, and these Moseleys conveyed, November, 1910, to the plaintiff. Thus the plaintiff has the earlier title. The defendant got his deed from some of the Moseleys July 13, 1911.

Whatever may be said about the deed Morrison to Moseley, with the interpolation, it is quite clear, I think, that the descriptions in the plaintiff's chain of deeds clearly point to the reserve 50 ft. wide, and carried the description that far to the eastward and across the Cornish reservation before the defendant got his deed.

Take these words in the description of lot number 3 in the deed M. F. to Emma Taylor, "Beginning on the east side," etc. And we have the obtuse angle formed by the junction of the Lingan road with the 50 ft. reserve given by courses and distances, and these correspond with that junction on the ground. The Cornishtown reserve does not fit at all. It does not join the Lingan road on the Gibbons lots. Someone suggested that the Lingan road may have been changed,but there is no trustworthy evidence to that effect, and the presumptions are against it. The Cornishtown reserve was 3 chains wide, but the defendant's surveyors have to reduce it to 1 chain. Midgely, the plaintiff's engineer, says that the point "O" on his plan, at the intersection of the Lingan road with the car line property, corresponds to point "A" on the commissioners' plan.

Then there are houses and fences along part of the 50 ft. reserve, and it is used as a road. The defendant himself fenced

N. S.

S. C.

McDONALD v. GALLAGHER.

Graham, E.J.

along that as the road. The Acton House, on lot 14 of the Morrison plan, is on this reserve 50 ft. wide just off the Lingan road.

In my opinion, the judgment appealed from is correct, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

ONT.

S. C.

McMULLEN v. WETLAUFER.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. February 19, 1915.

1. MALICIOUS PROSECUTION (§ II—5)—REASONABLE AND PROBABLE CAUSE —DEFENCE—ESSENTIALS.

There are four essentials to the defence of reasonable and probable cause in an action for malicious prosecution, namely: (1) an honest belief in the guilt of the accused; (2) this belief being based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) this belief based on reasonable grounds, *i.e.*, such as would lead any fairly cautious man in the defendant's situation so to believe; and (4) the circumstances so believed and relied on such as amount to reasonable ground for belief in the guilt of the accused.

[*McMullen* v. *Wetlaufer*, 32 O.L.R. 178, affirmed; *Hicks* v. *Faulkner*, 46 L.T.R. 127, applied.]

2. MALICIOUS PROSECUTION (§ II—5)—REASONABLE AND PROBABLE CAUSE —ADVICE OF COUNSEL—COMPLAINANT NOT BELIEVING IN GUILT OF ACCUSED.

The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him.

[*Connors* v. *Reid*, 25 O.L.R. 44, followed.]

Statement

APPEAL by the plaintiff from the judgment of Middleton, J.

H. H. Dewart, K.C., and *R. T. Harding*, for the appellant.

T. N. Phelan, for the defendant, respondent.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment at the trial of Middleton, J. The facts are stated in some detail in the reasons for judgment.

Upon the hearing, counsel consented that we should ask the learned trial Judge for his finding in respect of the belief of the defendant at the time of laying the information, etc.; and we have done so. Mr. Justice Middleton informs us that he considered that the defendant believed in the guilt of the plaintiff, but not on sufficient grounds.

In my view we are not called upon to pass upon the question, "If the facts are placed fully and fairly before experienced counsel or even the County Crown Attorney, and a prosecution is advised, does this constitute reasonable and probable cause?" As at present advised, I am not able to assent to an answer in the affirmative to that question, at least if the complainant does not himself believe in the guilt of the accused. The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him: *Connors* v. *Reid*, 25 O.L.R. 44. This is implied in the terminology to be found everywhere in cases and text-books: that the prosecution must be *bonâ fide*. A prosecution must necessarily be *malâ fide* which is conducted by a prosecutor who does not believe in the truth of the charge he makes.

Here, however, the defendant believed that the plaintiff was guilty; and, if he had reasonable grounds for such belief, he is excused.

The facts are not very numerous or complicated: I propose to exclude everything but what bears on the present question. The defendant came into possession of certain letters. His solicitor recommended that the letters should be submitted to a well-known expert on handwriting for report as to whether they were the production of either of two women suspected. The report was in the negative, and the matter dropped. Afterwards a subpœna, with admitted handwriting of the plaintiff, came into the solicitor's possession; and the expert was confident that the letters were written by the same hand. The plaintiff denied this on oath, and another expert was consulted, who agreed with the first. Thereupon the solicitor advised that the matter should be laid before the Crown Attorney. This was done. The first expert attended before Mr. Corley, and that very efficient Crown officer was convinced by the expert's reasoning that the handwritings were identical.

We are pressed with the language of Lord Denman, C.J., in *Clements* v. *Ohrly* (1847), 2 C. & K. 686, at p. 689: "In my opinion, similarity of writing is not enough to constitute pro-

ONT.
S. C.
McMULLEN v. WETLAUFER.
Riddell, J.

bable cause for charging a person with forgery without evidence of other circumstances, and parties cannot create probable cause by referring to others, whether they be the most practised attorneys or the most experienced counsel." The defendant in that case had "deposed that he believed that the direction in the corner of the bill was in the plaintiff's handwriting" (p. 687); and, so far as appears, there was nothing else to connect the plaintiff in any way.

It is to be observed, first, that the Chief Justice was not laying down any opinion as to the law (proper). "What is reasonable and probable cause in an action of malicious prosecution . . . is to be determined by the Judge. In what other sense it is properly called a question of law I am at a loss to understand:" Lord Chelmsford in *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521, at p. 535. "The existence of 'reasonable and probable cause' is an inference of fact:" Lord Westbury in the same case, at p. 538. We are, therefore, not at all bound by Lord Denman's opinion.

Again, it must be remembered that Lord Denman was one of the school of Judges who withstood the admission of evidence of this character. A very careful and comprehensive history of the course of decision will be found in Dr. Wigmore's exceedingly valuable work on Evidence, paras. 1991 *sqq.*

In *Doe dem. Mudd* v. *Suckermore* (1836), 5 A. & E. 703, 749, however, some remarks of Lord Denman's are to be found as follows: "If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury which every one of them, even though illiterate, might as well perform for himself. But, if he is a person of some skill (however low in degree, and however generally shared with him), he does what possibly the jury may be incompetent to do."

Moreover, the learned Chief Justice speaks only of "similarity of handwriting." Fifty years ago, thousands of pupils in Upper Canada were taught the Spencerian system of penmanship; the consequence was that of the pupils of the same teacher each of the "good writers" wrote a hand closely re-

sembling that of all the others; while each of the "bad writers" enjoyed his own idiosyncratic cacography. Hundreds wrote a similar hand, and it is plain that "similarity of handwriting" to that of one of these would not be "enough to constitute probable cause for charging a person with forgery without evidence of other circumstances." The Chief Justice says no more than this.

If the meaning of the language used in *Clements* v. *Ohrly* be more than what I have indicated, and Lord Denman intended to lay down a rule of law, he should not be followed. We cannot abjure our common sense at the bidding of any person, however eminent and able, judge or not, English or otherwise.

While mere similarity of handwriting may in many cases be no reasonable cause, the opinion of experts that the handwritings are not merely similar but identical is or may be of very great value, and furnish most reasonable and probable cause. Just as mere similarity of feature, etc., may not be much or any evidence of identity, such a similarity as convinces a competent observer of the identity is most cogent. Many a man has been convicted, and rightly convicted, of forgery on just such evidence—and indeed on less evidence than is to be found in this case. Had the criminal jury found the plaintiff guilty of forgery, no appellate tribunal would have thought of setting aside the verdict.

It may not be amiss to add that more than one member of this Court would, in the absence of the jury's verdict, have no hesitation in holding that the documents were by the same hand.

In that state of facts, how can it be fairly said that there were not reasonable and probable grounds for the honest belief of the defendant? With great respect, I think that the learned trial Judge sets too high a standard for this defendant, and that it should be found that the belief of the defendant was upon reasonable and probable grounds.

I am not losing sight of the contention that the defendant should have made further inquiry. In *Lister* v. *Perryman*, L.R. 4 H.L. 521, there was a contention that further inquiry should

ONT.
S.C.
McMULLEN
v.
WETLAUFER.
Riddell, J.

have been made. No doubt, in that case it was reasonable that further inquiry should have been made, but the "very sensible view" of Mr. Baron Bramwell was adopted, *i.e.*, "it would have been a very reasonable thing . . . to have done so, but it does not therefore follow that it was not reasonable not to have done so" (p. 533.)

It is very often taken for granted, and oftener argued, that, when a certain course of conduct is admitted or proved to be reasonable, the opposite must be unreasonable. Of course that is not so; the real test is rather negative than positive; and, if one avoids all that to be reasonable a man should avoid, he cannot be charged with unreasonable conduct.

One generally goes to his office by a certain route—a wholly reasonable route—but on a particular day for no assignable reason, for some mere whim or caprice or from some petty accident, he goes by another route. He cannot, therefore, be said to act unreasonably, and, if an accident happen, he could not be met, for that reason only, with the defence of contributory negligence.

Sufficient evidence to satisfy a reasonable man being available and at hand, there is, speaking generally, no need to make further inquiry. Of course if there is a belief or perhaps even suspicion that inquiry will displace the evidence already found, it would or might be different. That would in itself go to *bona fides*. Nothing of the kind is to be found in the present case.

Here then, in my view, we have the four essentials in such a a defence as laid down by Hawkins, J., in *Hicks* v. *Faulkner* (1882), 46 L.T.R. 127, at p. 129: (1) an honest belief in the guilt of the accused; (2) this belief being based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) this belief based on reasonable grounds, *i.e.*, such as would lead any fairly cautious man in the defendant's situation so to believe; and (4) the circumstances so believed and relied on such as amount to reasonable ground for belief in the guilt of the accused.

It must not be forgotten that it is not knowledge that is required, but belief. We know when we (1) believe (2) on rea-

sonable grounds (3) what is in fact true. The third element is or may be wanting, and yet the kind of belief required for this defence exist.

I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., concurred. Falconbridge, C.J.K.B.

LATCHFORD and KELLY, JJ., agreed in the result. Latchford, J. Kelly, J.

Appeal dismissed with costs.

FOSS v. STERLING LOAN.

Saskatchewan Supreme Court, Elwood, J. April 10, 1915.

1. EXECUTION (§ I—11)—LANDS—EQUITABLE INTERESTS NOT BOUND BY EXECUTION—UNREGISTERED INTEREST OF PURCHASER—LAND TITLES ACT (SASK.) 1912-13, CH. 16, SEC. 17.

An execution against lands does not by reason of sub-sec. (2) of sec. 118 of the Land Titles Act, Sask., as amended by Saskatchewan Statutes 1912-13, ch.16, sec. 17, bind equitable interests any more than equitable interests could have been bound prior to the passing of that amendment; and an unregistered interest of the purchaser under a contract of purchase from the registered owner under which the bulk of the purchase money remained unpaid is not bound by the execution.

[*C.P.R. Co. v. Silzer*, 3 S.L.R. 162, followed; *McPherson v. Temiskaming*, 9 D.L.R. 726, [1913] A.C. 145, distinguished.]

2. JUDGMENT (§ VI A—255)—EXECUTION CREDITOR—CAVEAT BY—WHEN ALLOWED—LAND TITLES ACT (SASK.), SEC. 125.

Sec. 125 of the Land Titles Act, Sask., which provides for lodging a caveat by an execution creditor, applies only where the interest of the execution debtor in the land is such as could be seized and sold by the sheriff under the execution were it not that the title is registered in a name other than that of the execution debtor.

[*Gaar-Scott v. Giguere*, 12 W.L.R. 245, considered.]

3. JUDGMENT (§ VI A—255)—EXECUTION CREDITOR—PROCEDURE TO REALIZE—UNREGISTERED INTEREST OF DEBTOR—SASK. RULES 336-341.

The procedure to be followed by an execution creditor to realize against the unregistered interest of his debtor as a purchaser of lands under contract is an application under Sask. rules 336-341 and not by the filing of a caveat in support of the execution.

Statement

ACTION by execution creditor to realize against the debtor's unregistered interest in land.

Hon. W. F. A. Turgeon, K.C., for plaintiff.

J. A. Allan, K.C., for defendant.

SASK.

S. C.

FOSS v. STERLING LOAN.

Elwood, J.

ELWOOD, J.:—On April 5, 1912, by an agreement in writing, one Frank W. Downing agreed to sell to W. G. Wilmoth the n.w. quarter of section 25, township 8, range 8, west of the 2nd meridian, and the n.e. quarter of section 26, in the same township and range, for the sum of $9,600, on the terms therein mentioned. On March 12, 1913, the said Downing assigned to the defendant the land mentioned in the aforesaid agreement, together with the said agreement and all moneys accruing due thereunder, subject to a prior assignment to the City Investment Co. as security for an advance of $1,500. The evidence does not shew when the defendant became the registered owner of the above lands, but the statement of claim alleges that the defendant was, at the time of the issue of the executions hereinafter referred to, and the registering of the caveat hereinafter referred to, the registered owner of the said lots, and I assume that the defendant became so registered between the assignment to it above referred to and the date of the executions hereinafter referred to. On or about July 11, 1913, the plaintiff recovered judgment in the District Court of the judicial district of Regina against said Wilmoth for the sum of $233.16, which judgment is still in force and unsatisfied. On or shortly after said July 11, 1913, the plaintiff caused writs of execution against the goods and lands of the said Wilmoth to issue upon the said judgment directed to the sheriff of the judicial district of Cannington, within whose bailiwick the said lands are situated, which said writs were delivered to the said sheriff on or about September 17, 1913; and on or about said September 17 the sheriff delivered or transmitted to the registrar of the Cannington land registration district a copy of the said writ of execution against lands. Said executions are still in force. On or about September 24, 1913, the plaintiff caused to be registered in the office of the registrar of said land registration district against the title to the whole of said lands a caveat under the plaintiff's said writs of execution, which said caveat has continued to be ever since and is still registered against the title to said lands. On or about April 3, 1914, the said Wilmoth was largely indebted to the defendant under the agreement entered into between the said Downing and the said Wilmoth, and the defendant was pressing the said Wilmoth for payment of same. The said Wilmoth could not pay this money; he had no horses or machinery or seed, and could not farm the

land; and it was therefore agreed between the said Wilmoth and the defendant that the said Wilmoth should execute to the defendant a quit claim deed of the said Wilmoth's interest in said land. Wilmoth accordingly, on April 3, 1914, executed to the defendant a quit claim deed of the interest of the said Wilmoth in the said land. At the time of the execution of this quit claim deed the defendant credited to the said Wilmoth the sum of $155 on account of the purchase price of another quarter section which the defendant at the same time sold to the said Wilmoth. This land was sold at $1,280, and the contract was made to the wife of the said Wilmoth. The land in question cost $900, and as it was practically prairie land and did not require to be worked, the defendant company thought Wilmoth or his wife might be able to trade it off to somebody else, as Wilmoth was a real estate dealer, and in this way the defendant would probably get its money out of the land. I accept the evidence of Mr. Tasker as to the reason this $155 was credited, and I find as a matter of fact that it was not credited for the purpose of repaying to Wilmoth any interest or equity that he had in the land, but was solely on account of the fact that the land required to be worked, that Wilmoth was unable to work it, and that, in order to induce Wilmoth to execute a quit claim deed and to deliver up possession to the defendant, the defendant agreed to credit him with this $155, but that it was not at all because the defendant thought that Wilmoth's equity in the land was worth anything; in fact, I find that at the time of the quit claim deed to the defendant the land was not worth as much as defendant's claim against the land, and that Wilmoth's equity was not worth anything. I also find as a fact that at the time of this quit claim deed the defendant had no notice of either the plaintiff's execution or the plaintiff's caveat. On April 16, 1914, the defendant entered into an agreement to sell said land to Thomas and David Crumley for the sum of $8,000, although the consideration was expressed to be $8,001. On or about May 14, 1914, the defendant, who about that time first learned of the plaintiff's caveat, caused the registrar to forward a notice under sec. 130 of the Land Titles Act to the plaintiff notifying the plaintiff that his caveat would lapse unless an order for continuance of the caveat should be filed. Subsequent proceedings were taken, and this action was commenced on July 15, 1914. In this action the plaintiff claims from the defendant (1) payment of the

SASK.
S. C.
FOSS
v.
STERLING
LOAN.
Elwood, J.

amount of the plaintiff's said judgment, with interest and costs; (2) a declaration and order of this honourable Court that the plaintiff's caveat is properly registered against the title to the said lands, and constitutes and has constituted since the date of the registration thereof a valid charge against the whole of the said lands; (3) equitable execution and the appointment of a receiver; (4) at the plaintiff's option an order for the sale of the said lands and the application of the proceeds in payment of the plaintiff's said execution and costs.

In *C.P.R. Co.* v. *Silzer*, 3 S.L.R. 162, my brother Lamont held that an execution against lands does not bind an equitable interest in lands such as Wilmoth had in the lands in question; and I concur in that conclusion. This case was decided before the amendment to sub-sec. 2 of sec. 118 of the Land Titles Act.

McPherson v. *Temiskaming Lumber Co., Ltd.*, 9 D.L.R. 726, referred to by counsel for the plaintiff, decided that a licensee under the Crown Timber Act of Ontario has an interest in land which is liable to seizure under the Ontario Execution Act, which provides that any estate, right, title or interest in land shall be liable to seizure and sale under execution in the same manner and on the same conditions as land.

Wallace v. *Smart*, 1 D.L.R. 70, was decided under the Judgments Act of Manitoba, in which the expression "land" is interpreted to cover all interests, whether legal or equitable.

Both of those cases, therefore, were decided under statutes quite different from ours, and do not appear to me to assist the plaintiff, nor does the case of *Rogers Lumber Co.* v. *Smith*, 11 D.L.R. 172, affect the question.

It was argued, however, on behalf of the plaintiff, that by virtue of sec. 17 of ch. 16 of the Statutes of Saskatchewan, 1912-13, which repeals sub-sec. (2) of sec. 118 of the Land Titles Act, and substitutes therefor the section hereinafter set out, the effect is produced of binding equitable interests in land. The above subsection substituted for sub-sec. (2) is as follows:—

(2) Such writ shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal from, and only from, the time of the receipt of a certified copy of the said writ by the registrar for the registration district in which such land is situated.

It was contended that the interpretation to be given to the word "lands" above is the same as that given to the word "land" in the interpretation clauses of the Land Titles Act (ch. 41, R.S.S.). "Land" is there interpreted to mean

> lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, and whether such estate or interest is legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges, easements, mines, minerals, etc.

I cannot bring myself to the conclusion that because the word "land" is given a certain meaning, therefore "lands" must also be taken to have the same meaning. To give "lands" the same meaning as "land," and to follow that principle out in every case, would lead to very absurd results. For instance: in the Workmen's Compensation Act the word "factory" is stated to mean a building, workshop or place where machinery driven by steam, water or other mechanical power is used, and to include mills where manufactures of wood, flour, meal, pulp or other substances are being carried on, also smelters where metals are sorted, extracted, or operated on; every laundry worked by steam, water or other mechanical power, and also to include any dock, wharf, quay, warehouse, shipbuilding yard, etc. Applying the principle contended for, and we would have it contended that a building or a smelter meant a wharf, quay or shipyard. The interpretation clause provides that in the particular Act, unless the context otherwise requires, the word "land" where used shall mean as therein set out. In dealing with the word "land" in *C.P.R. Co.* v. *Silzer*, *supra*, my brother Lamont expressed the opinion that the context required that it should not be used so as to include equitable interests. In my opinion the amending subsection to sec. 118 does not cause an execution to bind equitable interests any more than equitable interests could have been bound prior to the passing of that amendment. It does, however, affect, for instance, lands that a judgment debtor is the registered owner of, but with respect to which, were it not for the amendment, he would be entitled to claim exemption; and it seems to me that the amendment was passed in view of the many decisions of our Courts on the question of exemption.

It was contended, however, that under sec. 125 the plaintiff was entitled to lodge a caveat, and having lodged a caveat prior

SASK.

S. C.

FOSS v. STERLING LOAN.

Elwood, J.

to the quit claim deed the defendant was bound. Section 125 of the Land Titles Act provides that

> Any person claiming to be interested in any land ..... under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made, and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

In my opinion this section only covers a case where the interest of the execution debtor in the land is such as could be seized and sold by the sheriff under the execution under which the claim is made were it not that the title is registered in a name other than that of the execution debtor. *Gaar-Scott* v. *Giguere*, 12 W.L.R. 245, is an example of such a case. In that case the land was registered in the name of Giguere by his correct name. Judgment was recovered against him under another name under which he was known. Other instances would appear to me to be where land has been transferred by a judgment debtor to another in fraud of creditors, or where land is held by one as trustee for the execution debtor. In all of these cases, however, the whole beneficial interest in the land is in the execution debtor.

The caveat does not create an interest in the land or protect a right that does not exist. For instance, if a *fi. fa.* goods only had issued, and a caveat had been filed founded on the *fi. fa.* goods, it could not, I apprehend, be contended that the filing of a caveat gave the plaintiff any claim against the land; and it would therefore seem to me that to render the caveat of any effect the execution on which the caveat is founded must be one under which the interest of the execution debtor could be seized and sold. In the case at bar the sheriff could not, as I have above held, seize or sell the interest of the execution debtor under the execution under which the claim is made. In such a case the proper procedure would appear to be under our r. 338 and following rules, and r. 341 shews how in such a case the transfer of the property may be prevented. I am therefore of the opinion that the filing of the caveat does not assist the plaintiff.

In any event the evidence shews that the interest of Wilmoth

in the land was worth nothing, and in fact he had no interest in the land; and as it could only be his interest that could be sold, the plaintiff has lost nothing, and therefore could not in any event succeed. The case of *Ridout* v. *Fowler*, [1904] 2 Ch. 93, appears to me to be directly in point on this aspect of the case. The result will be that the plaintiff's claim will be dismissed with costs.

Action dismissed.

JACKSON WATER SUPPLY CO. v. BARDECK.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.
February, 26, 1915.

1. MECHANICS' LIENS (§ V—30)—WATER SYSTEM—INSTALLATION—LAND ENJOYED WITH HOUSE—ACTUAL LAND ON WHICH HOUSE SITUATE NOT REGISTERED—RELINQUISHMENT OF PART OF LIEN.

A mechanics' lien under the Mechanics' Lien Act, Alta., sec. 4, is maintainable for installing a water system in a dwelling house as against the land occupied or enjoyed therewith and which was specified in the mechanics' lien which was registered, although the parcel of land upon which the house itself was situate was not included in the registered claim of lien; its omission therefrom operated only as a relinquishment of part of the security and did not have the effect of extinguishing the remainder of it.

APPEAL from a judgment of Harvey, C.J. Statement

Duncan Stewart, for plaintiff, respondent.

E. A. Dunbar, for defendant, appellant.

The judgment of the Court was delivered by

SIMMONS, J.:—The defendant Jennings appeals from a judgment of the Chief Justice allowing the plaintiff's claim for a mechanics' lien upon three quarter sections of land, which were registered in the name of the defendant Jennings, and used and occupied by the defendant Bardeck, who had an agreement to purchase said lands from the defendant Jennings, on which he had paid a part only of the purchase price. Jennings was the owner of four quarter sections: The n.e. quarter of section 15; the n.w. quarter of section 14; the s.e. quarter of section 22, and the s.w. quarter of section 23. These four quarter sections are contiguous, and together make up a parcel of 640 acres, in the form of a square, and the buildings in question were situated on the n.e. quarter of section 15. Simmons, J.

Bardeck, who had purchased these lands from the defendant Jennings contracted with the plaintiffs for the construction of a water system in connection with a house then under construc-

ALTA.

S. C.

JACKSON WATER SUPPLY CO. v. BARDECK.

Simmons, J.

tion on said n.e. quarter of section 15. The whole parcel of land, including the four quarter sections, were used by Bardeck for farming purposes.

The defendant Jennings had been informed by three outside parties that the defendant Bardeck was installing a water system in the dwelling house on the n.e. quarter of section 15.

The plaintiff filed a mechanics' lien against three of the four quarter sections, but omitted to file his lien against the n.e. quarter of section 15, upon which the house in question was located. The learned Chief Justice found as a fact that the improvements in question were "constructed upon the lands in question with the knowledge of Jennings, and he was liable and his interest in said lands was liable under the plaintiff's lien upon the three quarter sections against which the lien was registered, pursuant to sec. 11 of the Mechanics' Lien Act, ch. 21, Alberta, 1906, since he had not given the notice of disclaimer required by sec. 11.

The defendant Jennings appeals from this judgment on two grounds:— (*a*) Against the finding of fact that the improvements were constructed with the knowledge of the appellants; and (*b*) the failure of the plaintiff to record his lien against the n.e. quarter of section 15, being the lands upon which the works were constructed, had the effect of invalidating the lien upon the remainder of lands. In other words, the lien did not attach to the buildings, upon which the work was done, by reason of the omission to record it against the land actually occupied by the buildings; therefore, it did not attach to other lands enjoyed, together with this particular quarter section.

In regard to the finding of fact of the learned Chief Justice, I am of the opinion that the question is properly determined upon the basis as to whether the appellant was satisfied in his own mind from the information that he had received that Bardeck was incurring expenditures in the way of construction upon the buildings in question. The appellant has very aptly put in these words, "hearing and seeing is two different things." He had knowledge of the work, but he did not confirm it by making a personal inspection. He was then probably unaware of his liability unless he gave the required notice, but he must be held to have had knowledge when he did not discredit what he heard and did not consider it necessary to make further investigation.

Section 4 of the Act gives the plaintiff a lien "upon such building . . . and the land, premises, and appurtenances thereto, occupied thereby or enjoyed therewith." Section 13 provides that, after the expiring of the time limited in the said section, the lien shall cease to exist unless in the meantime the lien has been filed, as provided for in this section. The effect of sec. 4 is to create the lien and the effect of sec. 13 is to limit the period of existence of the lien unless the lien holder conforms with the provisions of the section as to filing.

Section 35 imposes a similar limitation upon the continuance of the lien unless the claimant brings an action within 90 days of the date of filing of the lien.

The plaintiff had a right to a lien upon the n.e. quarter of section 15, which right he lost by reason of his failure to comply with the provisions of sec. 13. It cannot be held effective against the plaintiff further than abandonment of a part of his security. It is admitted that the remaining three quarter sections were enjoyed with this particular parcel on which the building was located.

These three parcels, in common with the parcel upon which the house was located, were all subject to the right of the plaintiff to have its lien enforced. It was in the power of the plaintiff to relinquish this right as to all or any part of the security. Neither within the Act nor upon any principle of law or equity can it be held that relinquishing a part of the security had the effect of extinguishing the remainder of the security.

I am of the opinion, therefore, that the appellant's grounds of appeal cannot be maintained.

The defendant Ellenor Jennings, the mortgagee of the south half of the land in question, did not defend the action and does not contest the judgment which gives the plaintiff priority over her mortgage to the extent of the increase of the lands mortgaged by the works in question.

It is not necessary, therefore, to express an opinion as to the effect of the relinquishment by plaintiffs of their security upon the n.e. quarter of section 15, upon their right of priority over the mortgagee to the extent of the increase of value of the lands mortgaged by the works constructed upon them.

Appeal dismissed.

SASK.

S. C.

STEWART BROS. v. SCHRADER.

Saskatchewan Supreme Court, Elwood, J. April 28, 1915.

1. TRESPASS (§ I A—5)—CONTRACT OF SALE OF LAND—PURCHASER IN POSSESSION—CONTRACT CANCELLED BY COURT—PURCHASE MONEY FORFEITED—ESTATE OF PURCHASER CANCELLED BY RESCISSION—SUBSEQUENT OCCUPATION—TRESPASS.

Where a purchaser has entered into possession of lands under a contract of sale and such contract is terminated by a final order of the court cancelling the same and forfeiting the purchase money paid on account thereof pursuant to its terms, the estate at will of the purchaser is determined by the rescission of the contract and he and his assigns will be liable in trespass for the subsequent occupation, and for removing the crop after the final order.

Statement

ACTION for the value of grain cut and removed.

A. M. Panton, K.C., for plaintiffs.

A. Brehaut, for defendants.

Elwood, J.

ELWOOD, J.:—On or about June 2, 1909, one Dickson entered into an agreement in writing for the sale to one Perry of the n.e. quarter of section 21, township 40, range 8, west of the 3rd meridian. The plaintiffs subsequently became entitled to the lands of the said Dickson and to the benefit of Dickson's interest in the agreement under an assignment. Perry, in or about the year 1911, entered into an agreement to sell the land in question to the defendant Schrader, and on July 16, 1913, executed to the defendant Schrader a quit claim deed of the said lands, and the defendant Schrader, on December 1, 1913, executed a quit claim deed of the said lands to the defendant company.

On or about January 12, 1914, the plaintiffs commenced an action in this Court against Perry, under which, on August 5, 1914, an order was made cancelling the agreement of sale, forfeiting to the plaintiffs all money that was paid thereunder, and ordering the defendant Perry and all other persons claiming under him and in possession of the above land, to deliver up possession thereof to the plaintiffs within 20 days of the service of the order. Neither of these defendants was made a party to the above action.

The above final order was made in consequence of an order *nisi*, April 25, 1914. On April 9, 1914, the defendant company filed a caveat against the above land under the above quit claim deeds. The above final order was served on the defendant

Schrader on August 5 or 6, 1914, and at that time no one was in actual possession of the lands.

On August 25, 1914, the defendant company obtained from the Master in Chambers an *ex parte* order giving the defendant company leave to appear and defend the action against Perry, and that order was made upon an affidavit which did not disclose the condition of the action or the fact that either a final order or an order *nisi* had been obtained.

At the time of the service of the final order there was standing on the above land a quantity of uncut grain, which, between August 10 and 15, 1914, was cut, and was, by the defendant Schrader for the defendant company, threshed on or about September 3, 1914, and subsequently removed by or under the instructions of the defendant Schrader, acting for the defendant company, and this action is brought to recover the value of the same. I am of the opinion that the above-mentioned final order, not having been appealed from and not having been set aside, is still standing, and that the order giving leave to appear and defend does not and cannot affect the final order.

It was contended on the part of the defendants that, the grain in question having been cut and removed within the 20 days allowed for giving possession, the plaintiffs must fail in this action.

The agreement of sale of June 2, 1909, *inter alia* provides that:

> No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned by the said Dickson or his duly authorized attorney, and no agreement or conditions or relations between the purchaser and his assignee, or any other person acquiring title or interest from or through the purchaser shall preclude the said Dickson from the right to convey the premises to the said purchaser on the surrender of this agreement, and the payment of the unpaid portion of the purchase money which may be due hereunder unless the assignment hereof be approved and countersigned by the said Dickson or attorney as aforesaid.

Neither the agreement of sale from Perry to Schrader, nor the quit claim deeds, was approved or consented to by the plaintiffs or Dickson.

In June, 1912, three cheques, aggregating $550, were paid to plaintiffs by Schrader, but the evidence did not disclose that at that time the plaintiffs were aware that Schrader had any interest in the land, and it will be noticed that those cheques were given prior to the quit claim deed from Perry to Schrader. However,

SASK.

S. C.

STEWART BROS. v. SCHRADER.

Elwood, J.

in view of the conclusion I have arrived at, it is unnecessary that I should express any opinion as to the effect of want of consent to the quit claim deeds.

In *Markey* v. *Coote*, Ir. R. 10 C.L. 149, it was held that:

> Where a purchaser has entered into possession of lands under a contract of sale which is subsequently rescinded and remains in possession after the rescission, he is liable in respect of his subsequent occupation.

And at 156 of the above report, I find the following:—

> I am of opinion that the estate at will was determined by the rescission of the contract, and that the defendant is liable in trespass for his subsequent occupation. . . . The estate ceases on the determination of the will.

As soon as the final order was taken out, the agreement of June 2, 1909, which must be the foundation for any title of the defendants, was cancelled, and Perry and any other person claiming under that agreement had no right to the land.

It is quite true that there were 20 days allowed for delivering possession, but no person was in actual possession at the time of the order, and I apprehend that the order for delivery of possession was only necessary where some person was in actual possession of the land, and, where no person was in actual possession, such an order would not be necessary.

The order limiting the 20 days for delivery of possession would create no tenancy, but would merely entitle occupancy for that period, and it would merely, in my opinion, give Perry or any person claiming under him, who had goods upon the land, the right to enter for the purpose of removing the same therefrom.

The cutting of the grain and the removal of the same from the land was a trespass, and, in my opinion, the defendants are liable to account to the plaintiffs for the value of grain so removed.

I find in the evidence that the defendants removed from the above land 888 bushels of wheat, which sold half at 91c. and the other half at 92c., making a total of $812.52. As against that the defendants are entitled to the cost of twine, cutting and stooking 95 acres at $1 an acre: $95; threshing at 10c. a bushel: $88.80; removing the grain to the elevator at 5c. a bushel: $44.40; making a total of $228.20, which, taken from the above, leaves a balance of $584.32, for which the plaintiffs are entitled to judgment with costs.

Judgment for plaintiffs.

CANADIAN BANK OF COMMERCE v. McLEOD.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J. January 7, 1915.

1. BANKS (§ VIII C 2—203)—FURTHER ADVANCES—CONSIDERATION—POSITION OF BANK MAKING—HOLDER IN DUE COURSE—UNMATURED NOTE—HYPOTHECATION.

The making of further advances by a bank to its customer is a consideration which would apply to all the securities held by it at the time of making such advances and place it in the position of a holder in due course of an unmatured note of a third party payable to its customer and by him endorsed to the bank under the terms of a general letter of hypothecation, where the bank had no notice of any defect in its customer's title to the note at the time of making the further advances on the customer's account in respect of which such promissory note was taken as collateral.

[*Canadian Bank of Commerce* v. *Wait*, 1 A.L.R. 68; *Bank of B.N.A.* v. *McComb*, 21 Man. L.R. 58, referred to.]

Statement

ACTION on two promissory notes.

Michael Smith, for plaintiff.

Alexander Knox, for defendant.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's claim is on two promissory notes, each for $425, with interest at 8%, dated June 26, 1912, given by the defendant to W. C. Kidd, Listowel, Ltd., and endorsed to the plaintiff, and payable one on October 1, 1913, and the other one year later.

The notes were delivered to the plaintiff on July 11, 1912, as collateral security for the payee's indebtedness. At that time the payee's indebtedness was entirely covered by its promissory notes, there being nothing then due and payable. The notes sued on were given for the price of a horse purchased by defendant from Kidd Ltd., in respect of which transaction defendant has obtained a judgment against Kidd Ltd. for $600 damages and costs. The defendant contends that the amount of this judgment should be set off against the plaintiff's claim, on the ground that the plaintiff is not a holder in due course, having given no consideration for the note, there being no debt payable at the time the note was negotiated to it. He supports this contention by the authority of *Canadian Bank of Commerce* v. *Wait* (1908), 1 A.L.R. 68, and *Bank of B.N.A.* v. *McComb* (1911), 21 Man. L.R. 58. It is not necessary for me to consider whether I would agree with the conclusions in those cases, because the present case is quite clearly distinguishable from them.

ALTA.

S. C.

CANADIAN BANK OF COMMERCE v. MCLEOD.

HARVEY, C.J.

In October, 1911, Kidd Ltd. borrowed money from plaintiff, and a few days later gave plaintiff a general letter of hypothecation covering all securities which it might subsequently lodge with plaintiff for its indebtedness from time to time. In pursuance of this letter, securities were given from time to time and advances were made to Kidd Ltd., all apparently covered by direct notes, until, on July 11, 1912, when the notes in question were given, the indebtedness amounted to over $18,000 and the collaterals to about $38,000. This course of business continued until after the first note in question became due, when for the first time defendant notified the plaintiff that he had a claim against Kidd Ltd. in respect of the transaction. On July 23, 1912, less than two weeks after the notes came into plaintiff's possession, one of the notes of Kidd Ltd. fell due, and the same thing happened every few days thereafter. On August 9 a further advance was given by plaintiff to Kidd Ltd., and this also happened every few days thereafter, and when the first note fell due in October, 1913, the indebtedness of Kidd Ltd. to plaintiff had increased to about $27,000.

The bank apparently preferred to keep the personal indebtedness of Kidd Ltd. covered by notes, and it would appear that on each day when a note fell due it was paid either by another note or in some other manner, but before such payment was made there was a past indebtedness then payable which under the Bills of Exchange Act would be a good consideration even with the limitation which the cases cited place on the terms of the Act.

In the *McComb* case the Judges are all careful to point out that before the note covering the principal debtor's debt fell due the bank had been notified of the infirmity of title of the debtor in respect of the note taken as collateral, being apparently of opinion that if such had not been the case there would have been consideration without notice of any defect.

Moreover, the making of further advances must undoubtedly have been a consideration which would apply to all the securities held by plaintiff at the time of making such advances. So that in both respects there was consideration given for the notes in question, if not on the day plaintiff received them certainly from time to time thereafter long before plaintiff had any notice of any defect in the title of Kidd Ltd. The plaintiff is therefore a holder in due course and entitled to recover the full amount from the defendant.

ALTA.

S. C.

CANADIAN BANK OF COMMERCE v. McLEOD.

HARVEY, C.J.

As plaintiff holds collaterals considerably in excess of the amount of the indebtedness of Kidd Ltd., and is at present realizing on them, no further advances being made, defendant's counsel asks that execution may be stayed until it appears whether plaintiff may not be able to satisfy its claim against Kidd Ltd. out of its other collateral.

It appears to me that this might work an injustice to the plaintiff, and as Kidd Ltd. were horse dealers it is not impossible that there may be claims similar to defendant's in respect of some of the other collaterals. I think, however, the defendant is entitled to some protection, and it appears to me that the most satisfactory way in which I can give it is to give him liberty to pay into Court in this action the amount of the judgment recovered by him against Kidd Ltd., or any part of it if he cannot pay the whole. The amount paid into Court will only be paid out—whether to plaintiff or defendant—on a Judge's order, and it will probably not be long before it can be ascertained with reasonable certainty whether plaintiff can realize sufficient on its other securities to pay the indebtedness of Kidd Ltd. to it.

The plaintiff, of course, will be entitled to enforce payment from defendant of the amount of this judgment over and above what defendant pays into Court. The judgment for plaintiff will be for the amount of the two notes with interest at 8% till maturity and 5% thereafter with costs.

Judgment accordingly.

McCREADY v. INTERNATIONAL HARVESTER CO.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., May, 1915.

1. CHATTEL MORTGAGE (§ II A—7)—"$1,500 NOW PAID"—NO FRESH ADVANCE—CONSIDERATION MONEY PAST DUE AND ACCRUING DEBTS—CONSIDERATION NOT TRULY EXPRESSED—SEC. 13, CHATTEL MORTGAGE ACT (SASK.).

A chattel mortgage in which the consideration is stated to be "the sum of $1,500 now paid" does not truly express the consideration so as to satisfy sec. 13 of the Chattel Mortgage Act, R.S.S. ch. 144, where there was in fact no fresh advance and the consideration money was made up of past due and accruing debts from the mortgagor to the mortgagee.

[*Patterson* v. *Palmer*, 4 S.L.R. 487; *Credit Co.* v. *Pott*, 6 Q.B.D. 295, applied.]

TRIAL of an interpleader issue.

Statement

SASK.

S. C.

McCREADY v. INTERNATIONAL HARVESTER CO.

Haultain, C.J.

Graham, for plaintiff.

J. S. Rankin, for defendant.

HAULTAIN, C.J.:—This is an interpleader issue to decide the question of the validity of the plaintiff's chattel mortgage as against the defendant's execution.

On July 21, 1913, one Leslie B. Quinn was indebted to the plaintiff for the amount due under a promissory note for $1,000 and interest, dated January 2, 1908. This note was given to secure the sum of $1,000 which was lent by the plaintiff to Quinn. On May 8, 1913, the plaintiff obtained another note from Quinn for $250 in consideration of a further loan to him of $250 made on that date. This note did not fall due until some time in the late summer or early autumn of 1913.

On July 21, 1913, the plaintiff pressed Quinn for further security and obtained from him the chattel mortgage in question. The amount due under the chattel mortgage was made payable in one year from July 21, 1913.

The consideration is "expressed" in the mortgage as follows:

> In consideration of the sum of $1,500 now paid to L. B. Quinn by E. A. McCready the receipt of which the said L. B. Quinn hereby acknowledges, etc.

The question to be determined is whether the consideration, for which the mortgage was made, was "truly expressed therein" so as to satisfy the requirements of sec. 13 of the Chattel Mortgage Act, ch. 144, R.S.S.

I do not see anything in these facts to distinguish this case from *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295, 50 L.J.Q.B. 106, which was followed in our own Court in *Patterson* v. *Palmer* (1911), 4 S.L.R. 487, and *Palmer* v. *May* (1911), 5 S.L.R. 20. I, therefore, find in favour of the plaintiff on the issue and there will be judgment accordingly with costs.

Judgment for plaintiff.

CANADA STEEL AND WIRE CO. v. FERGUSON.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 5, 1915.

1. LIENS (§ I—1)—DEBT—CHATTEL HELD TO ENFORCE PAYMENT—CHARGE FOR STORAGE—IMPLIED PROMISE.

A person who has a lien upon a chattel for a debt cannot, if he keeps the chattel to enforce payment on the lien, add to the amount for which the lien exists, a charge for keeping the chattel until the debt is paid; there is no implied promise to pay for storage when the bailee has retained the goods for his own benefit.

[*Somes* v. *British Empire Shipping*, 8 H.L.C. 338, applied.]

2. BAILMENT (§ I—8)—AGREEMENT OF BAILMENT—IMMEDIATE DELIVERY—FUTURE PAYMENT—RIGHT TO RETAIN GOODS—INCONSISTENCY—LIEN AT COMMON LAW.

If by the agreement of bailment the party owning the goods is entitled to have them immediately and the payment in respect of their storage is to take place at a future time, as in the case of an agreement for monthly settlements with the warehouseman, such is inconsistent with the latter's right to retain the goods until payment, and negatives his claim to a lien at common law.

[*Fisher* v. *Smith*, 4 App. Cas. 1; *Crawshay* v. *Homfray*, 4 B. & Ald. 50, applied.]

Statement

APPEAL from *Canada Steel, etc.*, v. *Ferguson*, 19 D.L.R. 581.

T. J. Murray, for appellant, plaintiff.

E. B. Fisher, for respondent, defendant.

Howell, C.J.M.

HOWELL, C.J.M.:—I think I may say from the findings of fact and the evidence that the contract set up by the defendants is that they are to receive carloads of the plaintiff's steel, unload the same from cars, store it in their warehouse from time to time and ship the same from time to time on cars and apparently on waggons for city customers at all times when required and when directed by the plaintiffs. The defendants are to be paid for this at the rate of $100 per month for storage, with additional charges when amount stored exceeds 150 tons and are to pay a proportion of the business tax against the warehouse, which is a charge that the defendant has to pay annually to the city of Winnipeg. The plaintiffs are also to pay the defendant 2½c. per 100 pounds for unloading the steel and a like sum for loading the same on cars or waggons. According to the agreement with the Wiseman Co. the monthly warehouse charges were to be paid not later than the eighth day of the following month, and this seems to have continued with the defendants; at all events the defendants admit that the charges were not to be paid in advance but after the end of the month for which the charges

MAN.

C. A.

CANADA STEEL AND WIRE CO. v. FERGUSON.

Howell, C.J.M.

are made. The charges for loading would not be payable until after the goods had gone out of the possession of the defendants. The charges for unloading were apparently paid before any trouble began. The proportion of the business tax would not be payable until the tax had been imposed by the city and it would be an annual payment.

Because of alleged shortages in the stock the plaintiffs refused to make some of the monthly payments and arranged to end the contract, and in June, 1911, wished the defendants to ship the goods and adjust the claim afterwards upon the shipping weights. It is clear that on May 31 they gave notice to quit the premises as if it was leasehold and it is clear, too, that on June 30 the plaintiffs directed the defendants to ship all the goods and the defendants admit that this could all have been done readily in the month of July. The defendants did, during that month, ship all but about 10 tons of steel and refused to ship the latter because their claim for charges for the month of June, amounting to $110.25, had not been paid. The defendants clearly state that they refused to ship these goods because they claimed a lien thereon for charges which had not been paid. At the time of their refusal there was due them according to the contract the charges for June only, amounting to $110.25. The July charges were not payable until after the expiration of the month.

The value of the goods so held by the defendants amounts to $1,109.89, and the learned trial Judge allowed the defendants for retaining these goods after July 1 up to the date of filing the counterclaim, the sum of $3,719. The June account and the charges for loading were paid in January, a few months after the dispute and long before action.

Assuming that a warehouseman has a lien at common law for his storing charges, which is to my mind not quite clear, are the defendants in this case entitled to a lien for their charges under this contract?

To me it is clear that during any month the plaintiffs could have under the contract required the defendants to ship all the goods without paying that month's charges and, of course, without paying their share of the business tax not yet levied, and it was clearly not a term of the contract that the goods were

not to be shipped until the charges were paid. The case of *Fisher* v. *Smith*, 4 App. Cas. 1, it seems to me is applicable to this case. In that case an insurance agent rendered his accounts at the end of the month and expected to be paid by the 10th of the following month and he claimed a lien on the policies. Lord Cairns at p. 6 uses the following language:—

A case of *Crawshay* v. *Homfray*, 4 B. & Ald. 50, was cited, in which there was an additional element in the course of business. There, a wharfinger was in the habit of receiving goods upon which he might have had a lien, but the course of business was that he parted with the goods from time to time, receiving payment at the end of every six months, or at the end of every year, for all his dues; and it was held that that course of business prevented him from maintaining his right of lien. If it had been the course of business here for the respondent not merely to effect these policies, but from time to time to give them up as they were effected, and simply to stand upon his right to be paid at the end of the month, then I can understand that the case ought to be likened to the case to which reference was made.

In the same case Lord Penzance says, at p. 8:—

If the agreement is, that the thing is to be surrendered and that the payment is to be postponed, that is inconsistent with a lien.

In the case of *Crawshay* v. *Homfray*, 4 B. & Ald. 50, Holroyd, J., uses the following language:—

Now, if by such agreement the party is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain the goods till payment.

Best, J., at p. 53, says:—

The principle has been truly stated, that, unless the special agreement be inconsistent with the right of lien it will not destroy it. Here, however, it seems to me, that it was inconsistent, the wharfage not being, by the usage of the trade, payable till a subsequent period, and the goods being to be delivered immediately. There was, therefore, in this case no original right of lien in respect of these charges; and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist.

In that case, as in the one at bar, some goods remained in possession after default in payment and the last sentence in his judgment meets the case of the plaintiff in claiming the creation of a lien after default.

Where the payment of the claim and the delivery of the chattel are by law to be concurrent acts there might well be a lien, but I do not think in this case the claim of lien is in harmony with the contract. I think the contract is inconsistent with the claim of the defendants.

MAN.

C. A.

CANADA STEEL AND WIRE CO. v. FERGUSON.

The defendants are entitled under their counterclaim to any amount due them under the contract. All has been paid them before action, except for the month of July and I assume the parties can agree as to this amount. The defendants could have shipped these goods in July, but in breach of their contract, they refused to do so.

Howell, C.J.M.

If it were necessary to consider the case of *Somes* v. *British Empire Shipping*, 8 H.L.C. 338, with great deference, I would apply it to this case and refuse the defendants the charges subsequent to July. In 19 Hals. at 25 the law is stated:—

> A person who chooses to insist on his right of retainer may do so, but he has no further right and must put up with any inconvenience which the retention may entail.

Contrary to their contract the defendants refused to load the goods and held the goods of the plaintiffs and try to make them liable for taxes and warehouse charges for 1912, 1913, and 1914, not for the plaintiffs' benefit, but for their own benefit.

My attention has been called upon this point to *Devereigh* v. *Flemming*, 53 Fed. Rep. 405. I gather from that case that the contract was to hold the goods until the charges were paid which is widely different from this.

The plaintiff must have the costs in the King's Bench and of this appeal. The plaintiff is entitled to a return of the goods or to have them loaded as under the contract provided, and the defendants are entitled to their charges for the month of July, and if not agreed upon the amount will be fixed by the registrar.

Richards, J.A.
Perdue, J.A.

RICHARDS and PERDUE, JJ.A., concurred with HOWELL, C.J.M.

Cameron, J.A.

CAMERON, J.A.:—That a warehouseman should have a lien on goods stored with him for his charges seems to me a reasonable thing. And it does seem to me that the authorities uphold, with sufficient clearness, the contention that a warehouseman has a lien for his services at common law. I refer to the passage in Hals. Laws of England, vol. 19, para. 8, cited in the judgment of the learned trial Judge. Also to Cyc. XL. 454:—

> At common law warehousemen had a specific lien, not a general, in property stored with them for their proper charges in connection with the special bailment, and the consequent right to retain possession of it until the charges are paid,

and p. 457:—

The lien may be asserted against a part of the goods for charges on all; and it extends to charges incurred after the lien has been asserted.

In this case, however, the right to the lien has been suspended by a special contract. I have read the judgment of the Chief Justice and I concur in his reasoning and conclusion.

HAGGART, J.A.:—I have had the privilege of reading the reasons of the Chief Justice. The conclusion arrived at by him is that there was no original right of lien and that no subsequent default could create such a right. That finding alone disposes of the case. I have arrived at the same general result, even conceding the contention of the defendants that a lien arose out of the original agreement of bailment or by implication. The defendants had lost their right, if such ever existed, to storage charges claimed from and after asserting that lien.

A lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are complied with. A person who chooses to insist on his right of retainer may do so, but he has no further right, and must put up with any inconvenience which the retention may entail. The holder of the property, as a rule, is not permitted to make any claim for the use of the place in which it is detained, or otherwise for keeping it. 19 Hals. 2, 25; *Bruce* v. *Everson*, 1 Cab. & El. 18; *Thames Iron Works* v. *Patent, etc., Co.*, 1 J. & H. 93; *Dimsdale* v. *London and Brighton R. Co.*, 3 F. & F. 167.

Have the defendants a right to warehouse charges incurred after asserting their lien?

I have carefully considered *Somes* v. *Directors of British, etc., Co.*, 8 H.L.C. (Clark) 338, cited to the trial Judge, and with all due respect, I differ from him. I think that it applies to the case before us. That was a decision upon a stated case and three Courts, the Court of King's Bench, the Court of Exchequer Chamber, and the House of Lords, all came to the same conclusion, and have laid down the law that a person who has a lien upon a chattel for a debt cannot, if he keeps it to enforce payment, add to the amount for which the lien exists a charge for keeping the chattel until the debt is paid.

There a ship owner desired to have his ship repaired. On

MAN.

C. A.

CANADA STEEL AND WIRE CO. v. FERGUSON.

Haggart, J.A.

asking a shipwright for an estimate, he received one, the last item of which was "the cost of use of graving dock for the job will be from one hundred and twenty to one hundred and fifty guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying it was unnecessarily occupying his dock, that he had other ships waiting to go in, and finally, that from a certain day he should charge £21 a day for the use of the dock. It was held there that these facts did not constitute an implied contract on the part of the ship owner to pay the additional charge, and that (having paid it under protest) he might maintain an action for money had and received.

Lord Cranworth, on p. 343, after stating the case, said:—

It was admitted, that although, where goods are delivered to have any work done upon them, and of course, among other things, a ship to have great repairs done upon it, the person doing those repairs has a lien upon the goods for the amount of the sum charged; but that is confined to a lien for the amount of that sum, and the party doing the repairs cannot add to that lien a charge for the use of his premises while keeping the goods (in this case the ship), not for the benefit of the shipowner, but for his own. It must be taken to be now decided, that at common law there is no right to such a demand; and the question, therefore, to be considered here is this: Do the letters which are in evidence, and which constitute part of the case, shew that there was a special contract to give such a lien?

And on p. 344, he further proceeds:—

But the short question is only this, whether Messrs. Somes, retaining the ship, not for the benefit of the owners of the ship, but for their own benefit, in order the better to enforce the payment of their demand, could then say, "We will add our demand for the use of the dock during that time to our lien for the repair." The two Courts held, and, as I think, correctly held, that they had no such right.

And Lord Wensleydale, on p. 345, says:—

I am entirely of the same opinion. Two principal points have been made in this case. The first is, whether if a person, who has a lien upon any chattel, chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has, by law, a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession.

The foregoing case is cited as an authority for the proposition laid down in all of the text-books. I cannot see any real distinction between a lien for repairs and a lien for storing and preserving safely goods in a warehouse. In this case there certainly was no express contract to pay for storage while the warehouseman may be asserting his lien, and upon the above authority, there is no implied promise to pay for storage when the bailee is retaining the goods for his own benefit. The defendants have not, by law, a right to add to their lien upon goods a charge for keeping them till the debt is paid.

With all due respect, I would reverse the finding of the trial Judge. I would set aside the verdict for the defendants and enter a verdict for the plaintiffs for the return of the goods, or their value, namely, $1,109.89.

The appeal should be allowed.

Appeal allowed.

THE KING v. BRYSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. CERTIORARI (§ I A—9)—PETITION UNDER LIQUOR LICENSE ACT (B.C.)—LICENSE COMMISSIONERS—JURISDICTION.

A sufficiently signed petition under the B.C. Liquor License Act is a condition precedent to the founding of jurisdiction in the license commissioners to act thereon, and their acceptance of the petition as being sufficiently signed is open to review on *certiorari*.

2. CERTIORARI (§ I A—9)—LICENSE COMMISSIONERS—REVIEW OF JURISDICTION—PETITION INSUFFICIENTLY SIGNED—APPLICANT NOT SPECIALLY AGGRIEVED—DISCRETION.

Certiorari to review the jurisdiction of license commissioners in granting a license upon a petition, said to have been insufficiently signed, is discretionary with the court where the applicant is not specially aggrieved beyond the injury suffered by the public generally.

Statement

APPEAL by licensee from an order of Morrison, J.

Ritchie, K.C., for appellant.

Craig, for respondent.

The judgment of the Court was delivered by

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Several objections were taken by appellant's counsel to the procedure in the Court below which I think are not well founded. He also attacked the sufficiency of

B. C.

C. A.

THE KING v. BRYSON.

Macdonald, C.J.A.

the affidavits relied on by the respondent, but in my opinion the affidavits were sufficient, and from these affidavits I think it is apparent that the petition was not signed by the requisite number of lot holders in the area in question.

The argument before us was principally directed to the question as to whether or not the License Commissioners were without jurisdiction in the absence of a sufficiently signed petition. Counsel for the appellants contended that a sufficiently signed petition was not a condition precedent to the founding of jurisdiction and that if the Commissioners accepted the petition as sufficiently signed their decision was not open to review on *certiorari* proceedings. I cannot agree with that contention. I think the jurisdiction of the Commissioners is conditional upon a properly signed petition being before them.

It was further contended by appellants' counsel that the respondents were not persons aggrieved by the granting of the license, and, therefore, had no right to initiate these proceedings. While they were not specially aggrieved in the sense that they suffered an injury beyond that suffered by the rest of the public, they were in common with the rest of the public interested in having the law in respect of licenses in the city of New Westminster observed. Had they been specially aggrieved, their right would have been to have the relief prayed for *ex debito justitiæ*. As they were not specially aggrieved it was discretionary with the Court either to grant or refuse the order.

The learned Judge appealed from has exercised his discretion in favour of the respondents, and I do not think we ought to interfere with such exercise of discretion and should dismiss the appeal.

I refer to *The Queen* v. *Justices of Surrey* (1870), 5 Q.B. 466.

Appeal dismissed.

REVELSTOKE SAW MILL CO. LTD. v. ALBERTA BOTTLE COMPANY.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. January 6, 1915.

1. MECHANICS' LIENS (§ VIII—67)—REGISTRATION — PROCEDURE—PLACE OF FILING—VALIDITY.

Where the official with whom the affidavit of a mechanics' lien is to be filed under the Mechanics' Lien Act, Alta., is not only a deputy clerk of the Supreme Court (in which capacity he was entitled to receive the filing), but also a deputy clerk of the district court (in which capacity alone the filing would not be authorized), the stamping of the filing as in the district court will not invalidate the lien where it was duly forwarded to the Land Titles office in like manner as it would have been had it been stamped as a Supreme Court filing if no prejudice resulted, the curative clause, sec. 14 of the Act being operative in respect of the error.

[27 Cyc. 132, referred to.]

2. MECHANICS' LIENS (§ VIII—61)—PARTIES—ERRONEOUS DESCRIPTION OF —AFFIDAVIT—VALIDITY.

The error in the affidavit of a mechanics' lien under the Mechanics' Lien Act, Alta., of misnaming the company for whom the work was done as equitable owner of the land as the Alberta Plate Glass Co., Ltd., instead of the Alberta Glass Bottle Co., Ltd., is cured by sec. 14 of the Act where no prejudice has been shewn.

3. MECHANICS' LIENS (§ VIII—66)—TIME OF FILING—SUNDAY—TIME OF ACTION.

Where the nineteenth day after the filing of the affidavit of a mechanics' lien falls on a Sunday, an action to enforce the lien is in time if brought on the following day under the Interpretation Act, Alta., sec. 7, sub-sec. 21.

4. MECHANICS' LIENS (§ VIII—63)—SUFFICIENCY OF NOTICE—CERTIFICATE OF LIS PENDENS.

It is not essential that the certificate of *lis pendens* in a mechanics' lien action shall in terms state that the action was instituted "to realize the lien;" it is a sufficient compliance with sec. 35 of the Mechanics' Lien Act, Alta., that such purpose was indicated by the mention of the title or interest being called in question under that statute.

5. MECHANICS' LIENS (§ VII—58)—HOW WAIVED—RETENTION OF TITLE—TOWNSITES—IMPROVEMENTS ON.

Lands agreed to be conveyed by a city to a purchaser buying same as an industrial site upon his building and equipping a factory and performing certain conditions as to the operation of the factory, are not exempt from having a mechanics' lien enforced against the city's title for the cost of the building under the Mechanics' Lien Act, Alta., if the city has failed to post up the notice repudiating responsibility under sec. 11 of the Act.

[*Limoges* v. *Scratch*, 44 Can. S.C.R. 86, applied.]

Statement

TRIAL of a mechanics' lien action.

C. S. Blanchard, for the plaintiff.

W. A. Begg, K.C., for the defendant city.

Walsh, J.

WALSH, J.:—This is a mechanics' lien action brought in respect of material used in the construction of a building on land

ALTA.

S. C.

REVELSTOKE SAW MILL CO. LTD. v. ALBERTA BOTTLE CO.

Walsh, J.

of which the defendant the city of Medicine Hat is the registered owner.

Many objections to this claim, some of a technical and some of a substantial character were urged on behalf of the city.

Sec. 13 of the Mechanics' Lien Act provides for filing the affidavit in support of the lien "in the Land Titles office of the land registration district, in which the land is situate, or in the office of the clerk of the Supreme Court of the province in the Judicial District in which the land lies." According to one of the written admissions on which the case was tried the affidavit in this case was filed in the office of the deputy clerk of the District Court of the Judicial District of Calgary at Medicine Hat, which, of course, was not a compliance with the above quoted provision of sec. 13.

It was stated in argument and not denied that the gentleman, who, as deputy clerk of the District Court of Calgary at Medicine Hat, received and filed this affidavit, was at the same time the Deputy Clerk of the Supreme Court for the same district, at Medicine Hat, and that he carried on these two offices in the same room in the Court House there. The stamp of the District Court on the affidavit bears upon it the words, "S. A. Wallace, Deputy Clerk." I know and I think I am entitled to use the knowledge that that is the name of the gentleman who, at the date of this filing was such Deputy Clerk of the Supreme Court. The only evidence before me of any filing of the document, other than the admission to which I have referred, is the impression upon it of the District Court filing stamp. It looks to me as though Mr. Wallace had inadvertently picked up that stamp instead of that of the Supreme Court and impressed it upon the document, but of this there is no evidence. The lien reached the Land Titles office from the District Court office on the third day after its filing there. Two provisions of the Act are invoked in aid of this defective filing. The first of these is that part of sec. 13 which enacts that "no affidavit shall be adjudged insufficient on the ground that it was not filed in the proper registry office or clerk's office." I do not think that this meets the difficulty. My opinion of these words is that they are intended simply to cover the case of a filing in the

office of a clerk of the Supreme Court other than that of the Judicial District in which the land lies, and are not meant to validate a filing in any other place that could properly be called a clerk's office. The office of a District Court clerk is certainly a clerk's office, but so is the office of a city clerk or of a Police Court clerk. No one would seriously contend that the filing of a mechanics' lien in one of the two last-named offices would be saved by this provision, and neither, in my view of it, can a filing in the office of a District Court clerk. The other provision relied upon is sec. 14 which provides that,

> A substantial compliance only with sec. 13 of this Act shall be required and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless, in the opinion of the Court or Judge adjudicating upon the lien under this Act the owner, contractor, sub-contractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is prejudiced, and the Court or Judge may allow the affidavit and statement of claim to be amended accordingly.

There is a great deal to be said in favour of the view that a filing in one of the prescribed places is just as much an essential to the continued existence of the lien as is a filing within the allotted time, and that sec. 14 can only be relied upon to validate some defect in substance or in form which is found in a properly filed affidavit. The concluding words of the section "and the Court or Judge may allow the affidavit and statement of claim to be amended accordingly," lend strength to this contention. I was not referred to, nor have I been able to find any Canadian authority on the point. Many American authorities are noted in support of the statement in 27 Cyc., at p. 132, that

> it is necessary to the perfection of the lien that the notice, claim or statement should be filed in the place designated by the statute

and of the statement in Rockel on Mechanics' Liens, at p. 226, that "the claim must be filed in the place designated by statute," but none of them have been available to me and I am therefore unable to say of what value they are in determining this point under our statute. With a great deal of doubt, however, I think that, under the facts of this case the plaintiff's lien is saved by this section. Section 13 has been substantially complied with in this respect by a filing with the very person and in the very office (speaking of it as a structure) with whom

ALTA.

S. C.

REVELSTOKE SAW MILL CO. LTD. v. ALBERTA BOTTLE CO.

Walsh, J.

and in which it should have been filed. The filing of the affidavit may properly be described as one of the requisites of the section. There has been no suggestion of prejudice to anyone from this erroneous filing, nor do I see how any could possibly have arisen. Mr. Wallace did everything as District Court clerk which he would and should have done as Supreme Court clerk. Any person wishing to know whether or not the lien had been filed would have ascertained that fact just as readily from him as if he had filed it in the proper Court. It is, in the result, as though being directed by statute to use his right hand in impressing the seal of the Court on the document he had used his left. To hold this mistake fatal to the lien would give rise to this anomaly, that though filed in the right district with the right man and in the right place, it is bad because, through some unexplained mistake, the stamp of the wrong Court is impressed upon it. While it would have been quite good if filed with the clerk of the Supreme Court at Lethbridge, in the wrong district entirely and in a place where all sorts of prejudice might have arisen from the mistake, for it would have been saved by the provision of sec. 13 above referred to. I cannot take so narrow a view of the section as that and so I overrule this objection to the lien. At the same time I wish to guard myself against saying anything which would indicate an opinion upon my part that a filing in the wrong office under any circumstances other than those present can be cured by sec. 14. At the moment I can think of no circumstances other than those with which I am dealing which would justify the application of sec. 14 to them.

The affidavit describes the work as having been done for the Alberta Plate Glass Co., Ltd., which is also referred to as being the equitable owner of the land. The name of this company then was the Alberta Glass Bottle Co., Ltd. This mistake in the name of the contracting defendant is urged against the validity of the lien but this is so clearly within the curative provisions of sec. 14 that I cannot give effect to this contention. The plaintiff's solicitors should be devoutly thankful for sec. 14.

This action was commenced on May 2, 1913, which was the ninety-first day after the filing of the affidavit. The ninetieth

day after that event, which was the last day within which the lien could, under sec. 35, be saved by the commencement of proceeding to realize it, fell on a Sunday and that being so, under sub-sec. 21 of the sec. 7 of the Interpretation Act, the time was extended to the following day, and the action is therefore in time.

Sec. 35 provides that the lien shall cease to exist after the expiration of ninety days from the filing of the affidavit unless the claimant shall in the meantime have instituted "proceedings to realize his lien under the provisions of this Act and a certificate thereof . . . is duly filed in the Land Titles office," etc. A certificate issued in this action was filed in the proper Land Titles office setting out that "some title or interest is called in question in the following lands (describing the lands as they are set out in the statement of claim) "under the Mechanics' Lien Act of Alberta." It is objected that this certificate is not in conformity with the requirements of sec. 35 inasmuch as it does not shew that the proceedings referred to in it were taken by the plaintiff "to realize his lien." I think that this objection also must fail. It is true that it does not appear from the certificate in so many words that the action was brought to realize the plaintiff's lien, but I think that the language used sufficiently indicates that such was its purpose. Strictly speaking no "title or interest is called in question" in a mechanics' lien action. The plaintiff has no title to or interest in the land. At best he has but a charge upon it. The owner's title or interest is not "called in question," it is simply sought to be affected by the charge of the claimant. And yet I think that anyone reading this certificate and seeing from it that the action was brought under the Mechanics' Lien Act and knowing that the lien of the plaintiff was recorded against the land would at once conclude that the action was brought to realize the lien, and that I suppose is the object of requiring the registration of the certificate. The registrar apparently had no trouble in determining what the certificate meant for he simply entered it on the certificate of title under its proper number and with its date and date of registration as "*lis pendens* re lien 4026 A. 5," which is the registered number of the plaintiff's lien.

ALTA.

S. C.

REVELSTOKE SAW MILL CO. LTD. v. ALBERTA BOTTLE CO.

Walsh, J.

This disposes of the technical objections to the plaintiff's right to succeed. The substantial objections rest upon the following facts. The defendant corporation (meaning the city) bought for industrial purposes a parcel of land of which that in question forms a part. The by-law authorizing the borrowing of money with which to make this purchase and which was assented to by the burgesses, provides that it "shall be expended in the purchase of the above described property for industrial sites." Before this by-law was passed the corporation had agreed with one Ernest A. MacKay, on behalf of himself and a company to be incorporated in Alberta as the Alberta Glass Co., to convey to him "all that piece of land situate in the city of Medicine Hat in the industrial property containing three acres more or less" upon the happening of certain events and the performance of certain conditions set out in it. This agreement was approved by the burgesses who appear to have voted on it on April 11, 1912, although, according to the certificate of the city clerk it was not finally passed by the city council until April 18, 1914. I fancy, however, that this last-mentioned date is a mistake of the clerk and that the by-law was really passed in 1912, but this does not appear to be material. It is admitted that the land covered by this agreement is the land in question. After the making of this agreement MacKay procured the incorporation in Alberta of a company known as the Alberta Glass Bottle Co., Ltd. which name was afterwards changed to the Alberta Bottle Co. Ltd. A building was erected by this company on this land. It was a term of the agreement with MacKay that he should equip this building with a plant of a specified value for manufacturing purposes and that the land covered by the agreement should not be conveyed by the city until the plant had been installed and in operation for sixty days. It is admitted that the installation of this plant has never been completed. It was to this company and for the purposes of this building that the plaintiff sold and delivered the materials for the value of which it now claims a lien.

On these facts it is contended by the city that this land is not chargeable with this indebtedness. It is said that the land is public property which was acquired by the city for certain

public purposes which purposes would be defeated if it is sold to satisfy the plaintiff's lien, and that it would be contrary to public policy to allow a lien to attach to it. I do not think that this objection is well taken. It is true that the land was acquired for certain purposes, but in the carrying out of them was involved the purchase of materials in the erection of buildings upon it by those who acquired from the city the right to build on it with the inherent risk of liens attaching to it for their price. I think that the city must be assumed to have recognized the possibility of its purposes being defeated by just such an event as has here happened. It is urged in support of this contention that this land is not subject to the operation of the Mechanics' Lien Act as the Act does not in express terms extend to the property of a municipality and it can only apply to it when the legislature in clear and explicit language has made it so applicable. Whatever may be said in favour of this view when applied to such municipal institutions as a city hall, a fire-hall, a police station and other structures in that category, I cannot think it applicable in such a case as this. The very purpose of the acquisition of this property by the city was the alienation of it for manufacturing purposes. It would undoubtedly be liable to seizure and sale under execution against the city and according to some of the authorities that is one test of its liability to a mechanics' lien. It was held in Manitoba that the Winnipeg City Hall was subject to a mechanics' lien, *McArthur* v. *Dewar*, 3 Man. L.R. 72. In Saskatchewan a schoolhouse and the land on which it is situate were held so subject: *Lee* v. *Broley*, 2 S.L.R. 288. A *fortiori* land held for such a purpose as that for which this land was acquired must be liable.

The final contention is that the lien could only attach to such interest as the defendant company had in the property as it was at its request that the materials were furnished and as it never had any interest in the land at all inasmuch as the conditions of the agreement with the city were never performed, there is nothing upon which this lien can be fastened.

It seems to me that this case comes within *Limoges* v. *Scratch*, 44 Can. S.C.R. 86. It is plain from the mayor's examination for discovery at Q. 69 that the city authorities knew that this

ALTA.

S. C.

REVELSTOKE SAW MILL CO. LTD. v. ALBERTA BOTTLE CO.

Walsh, J.

building was being erected in alleged fulfillment of the MacKay contract. There is no evidence of the posting of the notice called for by sec. 11 and I think the onus of proving that was on the defendant, the city. Whether or not, therefore, the contracting defendant had any interest in the land, the registered owner knew that the building was being erected and failed to give notice under sec. 11, and the building must therefore, in the words of the sec. 11 be held to have been constructed "at the request of such owner" with a consequent liability upon the land by way of lien to such claimants as can satisfactorily prove their claims.

There will be the usual mechanics' lien judgment except that the plaintiff will have no costs down to and including the trial. The plaintiff's proceedings down to and including the issue of its certificate were filled with errors which doubtless helped to bring about this contest. I think that some punishment is due the plaintiff for the carelessness which led to the making of these mistakes and the consequent encouragement of this litigation, and as none other than the deprivation of costs is available to me I will impose it.

Judgment accordingly.

MAN.

C. A.

MEHNER v. WINNIPEG ELECTRIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 19, 1915.

1. EVIDENCE (§ II H—250*d*)—NEGLIGENCE—VERDICT OF JURY—INCOMPETENCE OF MOTORMAN—DIRECT ACT OR OMISSION CAUSING INJURY.

A finding by the jury in a negligence action against an electric railway company that the defendants were guilty of negligence consisting of the motorman being incompetent of running the car will not in itself be sufficient to render the company liable unless it is proved in evidence and found by the jury that the incompetence of the motorman resulted in some definite act or omission which was the direct cause of the injury.

2. EVIDENCE (§ II H—250*d*)—COLLISION—NEGLIGENCE — FINDING OF JURY —PRESUMPTION.

Where the only finding of the jury on the question of negligence in a collision case against an electric railway company was, that the defendants were negligent in appointing an incompetent motorman, it is to be assumed that the jury found in defendants' favour on the other questions raised in the case, such as the speed of the car, the failure to sound the gong, the sufficiency of the brakes and the alleged operation of the car on the wrong track of a double track system.

APPEAL from the judgment of the trial Judge in a negligence action.

E. Anderson, K.C., for appellant, defendant.

W. W. and *F. C. Kennedy*, for respondent, plaintiff.

The judgment of the Court was delivered by

RICHARDS, J.A.:—At the time of the injury complained of a line of the defendant's railway ran easterly from Main St. along Redwood Ave., across the Redwood Bridge, and along Hespeler Ave. to Kelvin St. Between the Bridge and Kelvin St. is Beatrice St., which runs north and south, crossing Hespeler Ave. one block west of the Kelvin end of the line.. There were two tracks on Hespeler Ave. and two of the defendants's cars ran on these tracks, their route being from Main St. to Kelvin and then back to Main.

There was at the Kelvin end no provision for switching a car from one track to the other. As a result each car had to run both east and west on the track it started on, instead of, as is ordinarily done, taking each way the track to the right, which would cause cars to run east on the southerly track and west on the northernly one. One car therefore ran all day each way on the north track, and the other did the same on the south one.

The plaintiff, with other city employees, was going north on Beatrice St. from a point south of Hespeler Ave. to some place north of that avenue. In crossing the avenue the plaintiff was struck and severely injured by one of the defendant's cars going east.

There is direct contradiction between the plaintiff's and defendant's witnesses, as to which track that car was on, the former insisting that it was on the north track and the latter being equally certain that it was the south one.

Those of the plaintiff's witnesses who were with him say that, as they came to the south track, a car passed going west on it; that they and the plaintiff waited till it had passed and then crossed the south track and attempted to cross the north one when the car going east on the latter struck the plaintiff.

It is claimed that the car that had just passed on the south track had hidden the coming one from their view and that they

MAN.

C. A.

MEHNER v. WINNIPEG ELECTRIC R. Co.

Richards, J.A.

did not, at the north track, look to the west as they supposed that cars there, as elsewhere, took the track to the right, and so no car would run on the north track except from the east, and that, seeing none from the east on that track, they supposed they could cross in safety.

The learned trial Judge put to the jury questions, which, with their answers, are:—

Q. 1. Was the company guilty of negligence? A. Yes. (*a*) And if so, how? A. Motorman incompetent of running said car.

Q. 2. Was the plaintiff guilty of contributory negligence? A. No. (*a*) And if so, how? (Not answered).

Q. 3. Even if the plaintiff was guilty of contributory negligence, could the company have avoided the accident by using reasonable and proper care? A. Yes. (*a*) And if so, how? A. By having a capable motorman operating said car.

The only other question was as to quantum of damages, which is not attacked on this appeal. The learned Judge entered judgment for the plaintiff for the amount found by the jury, and the defendants have appealed.

With deference, the answers do not seem to me to be findings upon which the judgment can be upheld. They say that the company was guilty of negligence in that the motorman was incompetent, and that they might have avoided the accident by having a capable motorman operating the car.

Now, whether the motorman was or was not incompetent or incapable, it was not that fact which caused the injury to plaintiff. If the defendants are liable because of the motorman, it is because the injury was caused by something which the motorman negligently did, or negligently omitted to do. No such act or omission is found by the jury. The injury might have been caused, so far as their findings go, by something done or omitted which was not in any way connected with incompetency. It might in fact not have been possible for the motorman to avoid the accident, no matter how capable he was. There is no finding that the doing of anything which he omitted to do, or the omitting to do anything which he did, would have prevented the accident. The question then is, whether we should grant a new trial, or enter a nonsuit.

The evidence of the plaintiff's witness Schmidt who was

walking beside the plaintiff in crossing the track, but who saved himself by jumping quickly, is that, while they were crossing, their foreman, who had already crossed, called to them to "look out." He says that he then saw the car, which was almost upon them, and looked to him, Schmidt, to be as big as a house.

It is evident that, if the car was, as claimed by the defence, running on the south track, there was nothing to prevent the plaintiff from seeing it; and, in spite of the jury's finding to the contrary, it was the plaintiff's own negligence that caused his injury.

The matter is more involved if the car was on the north track. If the passing west of the other car on the south track, just before the injury, hid from the plaintiff the coming of the car that did the damage, so that he could not, by reasonable care, have seen it coming, his negligence was thereby lessened in part, and there was a duty cast on those in charge of the north track car, to slow up in passing and ring the gong as a warning.

But the plaintiff's witnesses shew that the car that they say passed west had gone by at least 40 or 50 ft. before Savinski (who crossed a little in advance of the plaintiff) had started. Savinski got over safely, and, after doing so, had time to turn and see the east going car and call to plaintiff and Schmidt to look out.

All witnesses agree that, other than the west going car, there was, all the way west to the bridge, nothing to prevent the plaintiff seeing the east-bound car coming.

The motorman, according to his own evidence, acted continuously. He says that he threw off the power and partly put on the brakes 100 yds. away when he saw plaintiff and others on the south side of Hespeler Ave. Then, as soon as he saw that plaintiff was going to cross, he put the brakes on full.

Plaintiff's witnesses shew that the motorman had the brake on when they saw him, and was trying to stop the car.

There is no suggestion that the motorman on seeing that the plaintiff was crossing, did not do his best to stop the car, except that by Schultz, a passenger on the car, that he did not throw on the reverse. I do not find in the testimony evidence that

MAN.

C. A.

MEHNER v. WINNIPEG ELECTRIC R. CO.

Richards, J.A.

makes me believe that putting on the reverse would have helped when the car was so close as it was when the plaintiff tried to cross. It seems to me too, that until the plaintiff did start to go over, there was nothing to lead the motorman to suspect that he would try to cross in front of a car that was so close and in plain sight. Schultz says that so far as he could see the motorman did the best he could except in not reversing.

Even the finding that the motorman was incompetent does not seem to me supported by evidence. The suggestion that he should have put on the reverse, is claimed to be such. I do not agree with that, even if that would have helped, which I doubt. The car was so close to plaintiff when he started to cross that nothing could, in my opinion, have stopped it in time. The negligence, if any, would be in not suspecting, in time to stop the car, that the plaintiff might cross. As stated above, I see nothing that should have caused such a suspicion.

One is naturally sorry for the plaintiff. But I can see no reason for granting a new trial when, as here, the available evidence has apparently been fully gone into and discloses no reasonable ground for finding negligence on the part of the defendants, and particularly when, as here, the evidence does shew, as I think, that the plaintiff's own negligence really caused the injury.

I would allow the appeal with costs, set aside the judgment entered and enter one of nonsuit with costs.

Appeal allowed.

CAN.

Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners. January 7, 1915.

1. CARRIERS (§ IV C 4—541)—UNJUST DISCRIMINATION—TRAFFIC—PASSENGER—TOLLS—THROUGH—MILEAGE BASIS—COMPETITION—EFFECTIVE—INITIAL, INTERMEDIATE AND TERMINAL POINTS—RAILWAY ACT, SEC. 315.

Under sec. 315, unjust discrimination does not exist, where there is actual competition at the initial and terminal points reached by railway lines, and the potential choice of a passenger at an intermediate point whereby he may elect to buy a through ticket for the whole distance between the initial and terminal points, cheaper than one on a mileage basis from such intermediate point to the terminal point, spreads the effect of competitions over the whole journey.

2. CARRIERS (§ IV A—519)—COMPETITION — EFFECTIVE — DISSIMILAR CIRCUMSTANCES AND CONDITIONS—TOLL—LOWER—RAILWAY ACT, SEC. 315.

The general scope of sec. 315 makes it clear that the Board is empowered to recognize the existence of competition and its effects, therefore, when it is satisfied that such competition exists, it may allow a lower toll on the section of railway where the dissimilar circumstances and conditions created by such competitions exist.

[*Malkin & Sons* v. *Grand Trunk Ry. Co.* (*Tan Bark Tolls Case*), 8 Can. Ry. Cas. 183, at pp. 186, 187; *Almonte Knitting Co.* v. *Canadian Pacific and Michigan Central Ry. Cos.* (*Almonte Knitting Co. Case*,) 3 Can. Ry. Cas. 441, followed. *Fredericton Board of Trade* v. *Canadian Pacific Ry. Co.*, 17 Can. Ry. Cas. 433, reheard and reversed.]

CAN. Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

APPLICATION to remedy the arbitrary and unjustly discriminatory tolls on passenger traffic to and from Fredericton *via* C.P.R. and I.C.R., and for a re-hearing by the respondent. Statement

The application was heard at Ottawa, November 17, 1914.

E. W. Beatty, for the respondent.

W. C. Chisholm, K.C., for the Grand Trunk Ry. Co.

W. P. Torrance, for the Michigan Central Ry. Co.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

January 7, 1915. MR. COMMISSIONER MCLEAN:—Under date of July 18, 1914, judgment was given dealing with the complaint of the Board of Trade of Fredericton, N.B., in regard to the arbitrary and discriminating rates alleged to exist on passenger traffic to and from Fredericton. What is now material was set out in the judgment in the following language:— Com. McLean.

"It was stated in evidence by Mr. Wells, for the railway, that, generally speaking, the fares from Fredericton were less than from St. John, except where the element of competition entered; and that wherever the rates were made on mileage Fredericton had a lower rate. It is apparent that where there is competition at St. John, which is not operative at Fredericton, it may bring about a lower rate basis at the former point. So long as the discrimination so created is not unjust, it is permitted by the Railway Act. However, while there may be, on account of competition, a justification for a lower rate to a longer distance point, as, for example, Moncton, it does not follow that this justifies the granting of an identical rate to a shorter distance point where such competition does not exist. Yet the railway makes the Moncton rate the maximum to intermediate main line

CAN.

Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

Com. McLean.

points, although it is not alleged that there is competition at these points.

"The railway, in its answer, has drawn attention to the established practice of fixing the rates to non-competitive points by adding the local fare to the junction point to the competitive fare. But this practice has not been applied in connection with the Moncton and St. John rates. The Moncton rate has been met because, as Mr. Wells stated, the railway wants to share in the business. The extension of this rate to St. John is ascribable to choice, not to competition. Further, in connection with the competitive rates from St. John, the rates are not limited to the point where the competition exists. They are also made applicable to main line stations. That is to say, the competitive rate is made a maximum for these stations, although it is not alleged that competition exists at them. On the other hand, the practice as to branch line business is stated in the railway's answer to be as follows:—

"'In making the fares from points north and south of the main line, such as Fredericton, St. Stephen, St. Andrews and Woodstock, the fares were made by adding the one-way fare to the junction point to the competitive rate.'

"While the existence of sufficiently potent competition at a particular point may be a justification sufficient to take the railway out from the inhibitions of the Railway Act in regard to discrimination if the same rate is not extended to another point where competition does not exist, that is not the situation which here exists. The railway, from considerations of traffic policy, has extended the advantage of the competitive rate to points where competition does not exist. On such a state of facts, the contention of Fredericton is well-founded; and so long as the condition exists as it is now spread before us, the St. John rates should be the maximum for Fredericton."

After the issuance of the judgment, a communication was received from the Canadian Pacific Railway Company alleging that, through imperfection of presentation, the matter had not been so developed before the Board as to seize it of all the essential facts concerned. It was alleged that, while the principle as set out in the above extract from the judgment might be accepted as operative in freight traffic, there were special conditions which,

in this respect, differentiated the freight traffic from passenger traffic. It was stated that the practice of making the passenger fares to and from intermediate points such as not to exceed the fares to more distant points on the direct line was in general use over the North American continent, and that, in the application of this practice in the United States, no exception thereto had been taken by the Interstate Commerce Commission. The railway then applied for a reconsideration of the matter, so that the facts pertinent to the matter might be fully developed in rehearing.

On checking certain of the tariffs, it appeared that the practice was of more general use than had been apparent from what was presented before the Board in the hearing at St. John. The checking of the tariffs shewed, for example:

Second-class $10 rate from St. John applies to all strictly intermediate stations to Montreal where first-class is over $10; in other words, it backs eastwardly to Bury, Que., 54 miles inside the boundary.

To stations on the Drummondville Branch (from Foster) the $10 rate also applies in competition with the I.C.R., Drummondville being on the I.C.R. main line to Montreal.

The situation is similar on the St. Hyacinthe Branch from Farnham.

To stations on these branches intermediate to Drummondville, the $10 rate also applies.

To all other branch points not held down by I.C.R. competition, arbitraries are added to the $10 rate.

On consideration of what was submitted by the railway, as well as of what the tariffs shewed, it seemed proper that the matter should be spoken to by the railways generally. Consequently, the matter was set down for hearing on November 17th, to be spoken to by the Canadian Pacific, Grand Trunk, Canadian Northern, Michigan Central, and the Toronto, Hamilton & Buffalo Railway Companies. Certain additional material in regard to the practice in the United States and the rulings of the Interstate Commerce Commission thereon was found to be necessary. The material in question is now before the Board.

The matter as presented by the Canadian Pacific Railway Company in the hearing was of the nature of an elaboration of

CAN.

Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

COM. McLEAN.

what had been set out in its letter above referred to. It had therein stated:—

"It is quite practicable to charge a competitive rate for a freight shipment which is lower than the rate for such a shipment made to or from some intermediate point. The carrier has complete control of the freight, which cannot be unloaded without its consent and cannot be billed from an intermediate point on payment of the lower rate from the point beyond.

"On the other hand however, a passenger can buy a through ticket at the lower rate to the farther competitive point and leave the train at any intermediate point where it stops, or he can send to the more distant competitive point for a ticket and board the train at an intermediate point where a higher fare applies.

"Thus, it will be seen that, in so far as passenger fares are concerned, it is impracticable to put fares to intermediate points on the main line on a lower (higher) ? basis than the fares applying to points beyond on the same line."

The Michigan Central shewed that its practice was the same as the Canadian Pacific. The Grand Trunk, without adducing evidence, supported the same general position.

The fact that the practice may be of general use is, of course, not an answer to the allegation of discrimination. The question is whether the discrimination alleged is such as constitutes unjust discrimination or undue preference, under the Railway Act.

In regard to the practice in the United States, the Act to Regulate Commerce, as amended June 8, 1910, provides, in sec. 4 thereof—the long and short haul clause—that :

". . . it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route, in the same direction, the shorter being included in the longer distance. . . ."

This prohibition is, however, qualified by a subsequent provision in the section whereby, upon application to the Interstate Commerce Commission, authorization may be obtained for charging less for longer than for shorter distances for the transportation of passengers or property.

Formerly, the long and short haul clause of the Act to Regulate Commerce was qualified by the words "substantially similar circumstances and conditions."

This difference in language, however, does not affect the description of the route over which the traffic concerned moves; so the decision given in *Baer Bros. Mercantile Co.* v. *Missouri Pacific Ry. Co. and Denver & Rio Grande Ry. Co.*, in April, 1908, 13 I.C.R. 336, is pertinent as showing the practice of the Interstate Commerce Commission. It is true that this case was a freight case, but the provisions of the long and short haul clause apply to passenger traffic as well. In this case, the traffic in question formerly passed through the city of Leadville, Colorado, and both freight and passenger trains of the railway were operated through that city. Subsequently, the route was changed so that the traffic was handled through a junction point known as Malta Junction, and the traffic into Leadville was thereafter handled over a branch line 4½ miles in length. The following words, which are to be found on p. 336, are pertinent to the interpretation of what is meant by the description of the route under the long and short haul clause:—

"Under these circumstances, we are inclined to hold that Leadville should not be treated as intermediate within the meaning of the fourth section. A town might be intermediate, although located some short distance from the line of the railway, so that the railway did not literally pass through it. But when, as in this case, the town is connected with the main road by a branch load, requiring a separate and independent service at considerable cost to reach it, it should not be regarded as intermediate."

More recently, in 1914, the Interstate Commerce Commission has dealt with this in *Dood* v. *T. & P. Ry. Co.*, Unreported Opinion A-223. In this, what was involved was a higher rate in effect on cotton wood from Annona, Texas, to Springfield, Missouri, a less distance than from Shreveport, Louisiana, to Kansas City, Missouri, a greater distance. The Commission held that the points in question were not intermediate *via* the direct line or usual routes of movement, and the complaint of the violation of the fourth section of the Act to Regulate Commerce was dismissed.

The distinction as between the branch line movement and

CAN.

Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

Com. McLean.

the main line movement has turned upon the scope of the discrimination concerned as delimited in section four. In addition the Commission has recognized that, where there is dissimilarity, of circumstances, it is not unlawful to charge somewhat higher rates from branch line stations to a particular point than from stations equally distant, on the main line, to the same point: *Logan et al.* v. *Chicago & N.W. Ry. Co.*, 2 I.C.R. 431; *Board of Winston-Salem* v. *N. & W. Ry. Co.*, 26 I.C.C. 151; *Page Milling Co.* v. *N. & W. Ry. Co.*, 30 I.C.C. 610.

So far as explicit statement is concerned, there does not appear to be any ruling on the particular phase of passenger rate regulation involved in the present application. The Commission has, indeed, said in its Conference Rulings, 304, Subsection F, of March 13, 1911, which will be found republished in its Conference Bulletin No. 6:—

"That if a carrier is authorized to maintain rates to or from a given point which are not in conformity with the fourth section, it may establish rates upon branch lines connected with the main line at these points which are higher than such commodity rates by arbitraries, or by the branch line locals, without special authority from the Commission."

This, however, applies to a case not where the longer distance rate is made a maximum, but where an exemption from the rigid application of the section is granted. But, inferentially, no greater concession to branch line points would be called for by the Commission when the competitive rate is made a maximum by the carrier, on the main line movement, than when the Commission itself exempts the carrier from the necessity of so applying it. This inference is substantiated by the practice in regard to freight rates already adverted to. A particular example may be referred to as indicating the method of rate structure used in practice.

It appears that the present first-class fare between Chicago and Spokane is $46.10. This is a distance *via* St. Paul and short line movements of 1,885 miles. From Chicago to Spokane, *via* Union Pacific route, moving through Omaha, Ogden, Pocatello, and Umatilla Junction, is a distance of 2,415 miles. Where the movement is *via* Granger, the distance is slightly less, viz., 2,349 miles. In this case, in accordance with common practice, the short line makes the rate between initial and terminal points.

In addition to this, the rate of the short line mileage is made the maximum to intermediate points in the case of a direct line movement where the ordinary mileage fare would be higher. But on a movement westward from Umatilla to Portland, a distance of 187 miles, the fares are made up by adding to the rate to Umatilla Junction the local rate beyond: that is to say, the competitive factor is limited to the portion of the route controlled by the short line mileage.

While it does not appear that an explicit sanction has been given to this practice by the Interstate Commerce Commission, there does not appear to be anything in its decisions which finds it unjustifiable.

By sec. 315 of the Railway Act of Canada provision is made that:—

"All such tolls shall always, under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons and at the same rate, whether by weight, mileage, or otherwise."

Sub-section 5 of the same section provides that:—

"The Board shall not approve or allow any toll which for the like description of goods or for passengers carried under substantially similar circumstances and conditions, in the same direction, over the same line, is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll."

The Board, in the application of J. S. Mitchell & Co., dated February 1, 1911, File 16686, had before it a situation where, on a shipment to Boynton, Que., a higher rate was charged by the Boston & Maine than to Beebe Junction and Rock Island stations, which were further along the line. The situation was that to the further distant points commodity rates existed, while only the mileage rate was at the time available to Boynton, which is a flag station. The Board, in dealing with this matter, held that, since the circumstances were not shewn to be dissimilar, and there being no plea that the lower rate for longer distance was attributable to competition, it had power to disallow the toll under sub-sec. 5 of sec. 315.

CAN.

Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

Com. M-Lean.

As has been indicated, the C.P.R. makes the same rate to St. John as it makes to Moncton, the Moncton rate being made to meet the Intercolonial rate. It appears from tariffs on file with the Board that the Intercolonial extends its Moncton rate to St. John.

The Board has found that at St. John and at Montreal competitive conditions exist. On what was before it at the former hearing, it appeared that the extension of this competitive rate to intermediate points on the main line was a matter of mere gratuity on the part of the railway. On further consideration, in view of what has been submitted, this conclusion appears to have been in error. It appears that, in practice, an individual travelling to a point between St. John and Montreal, either Montreal or St. John being the initial point of the journey, can purchase a through ticket at either of these points, and then use it on his journey to the intermediate point. The effect of this is to cut out on the journey to the intermediate point the application of the mileage rate. It is also open to a traveller beginning his journey at a point intermediate to Montreal, for example, and travelling to Montreal, to send to St. John to purchase a ticket. He can then travel on this ticket to his destination; and the effect of this is that as to this journey the mileage rate is also cut out. This situation may arise wherever the competitive rate is less than the mileage rate of the intermediate point in question. It was submitted before the Board that where formerly on the lines of the Canadian Pacific in Western Canada, the Coast rate was not made a maximum to intermediate points, the people travelling from such intermediate points did send to the Coast to purchase tickets, and that, in view of this practice, the present method of making the Coast rate a maximum developed. It certainly would appear that any passenger travelling with any degree of regularity would soon know how to take advantage of such an arrangement.

If, in the case of freight, a higher rate exists from an intermediate point to destination, the freight, in order to take advantage of the lower rate on a movement to Montreal, assuming, for example, that a lower rate existed from St. John to Montreal than from the intermediate point to the same destination, would have to move to St. John on the local rate and then move back

westward through the intermediate point to Montreal. This is what actually did take place in the United States in the '70's of last century, where points such as Pittsburg moved goods east to the Atlantic Coast in order to obtain the advantage of the Atlantic Coast rates westbound. The situation at present in connection with the Panama Canal presents a somewhat similar condition, although here there is a rail and water route as distinguished from the all-rail route. Goods are being moved from west of Chicago by rail to the Atlantic seaboard to take advantage of the water rate between the Atlantic seaboard and the Pacific coast.

In the case of passenger traffic, a roundabout movement such as freight may take in order to get the advantage of a lower rate is less common. The directness of the route, the time taken, and the incidental expenses of travelling attaching to the longer route are factors which exercise an influence on the passenger movement. But, as indicated, it is not necessary for the passenger to go in person to the ticket office at the longer distance point which has a competitive rate. The effect of competition at the longer distance point may thus be spread by the action of the passenger over the whole route between the two terminals affected by the competition, since it is open to the passenger to take advantage of the compelled rate instead of paying on mileage. The only limitation apparent is the checking of baggage. It does not appear, however, that this is a prohibitive factor.

The contention of the railway that as to the journey between St. John and Montreal there is a competitive situation throughout is well taken. There is an actual competition at the initial and terminal points, and the potential choice of the prospective passenger spreads the effect of competition over the whole journey.

Section 315 of the Railway Act prescribes that in respect of traffic of the same description ". . . under substantially similar circumstances and conditions . . . carried in or upon the like kind of cars passing over the same portion of the line of railway . . ." there shall be equality of charge.

Sub-section 6 of sec. 315 does not arise in the present application, as it is concerned simply with the power of the Board to declare that "any places are competitive points" within the meaning of the Railway Act. It has been laid down by the Board, in its decision in the *Western Rates Case*, at p. 11:—

CAN.

Ry. Com.

FREDERICTON BOARD OF TRADE v. CANADIAN PACIFIC R. CO.

Com. McLean.

"Sub-sections 5 and 6 are the long and short haul sections, the effect of which is to permit a reduced charge on movements to a competitive point, even although that reduced charge is smaller than the charge made for carriage for lesser distances along the same line to intermediate points. The sub-sections are sections which directly recognize the necessity, in proper cases, of operation at a reduced toll justified by competitive conditions. The result is, therefore, that lesser tolls may be legal under such circumstances, and that a discrimination may exist between different localities without such discrimination amounting to an illegal practice."

It does not appear necessary to develop here the significance of the words as set out in the main section, viz., "passing over the same portion of the line of railway," or the further words as set out in sub-section 5 of the section, viz., ". . . in the same direction over the same line is greater for a shorter than for a longer distance, within which such shorter distance is included. . . ." The significance of these limitations has been dealt with in *Malkin & Sons* v. *Grand Trunk Ry. Co.*, 8 Can. Ry. Cas., pp. 186,187; see also *Almonte Knitting Co.* v. *Canadian Pacific and Michigan Central Ry. Cos.*, 3 Can. Ry. Cas. 441.

The general scope of sec. 315 makes clear that the Board is empowered to recognize the existence of competition and of its effects. The existence of competition is one factor creating dissimilar circumstances and conditions, and when the Board is satisfied that such competition exists, it may allow the lower toll in respect of the section in which the dissimilar circumstances and conditions so created exist.

In the former hearing, the decision on the point herein involved turned on the absence of competition at the intermediate point on the main line movement. Now, on further evidence and consideration thereof, the existence of pervasive competition on the main line movement is established. Consequently, the finding of the former judgment dealing with the point herein involved should be revised.

The Chief Commissioner.

THE CHIEF COMMISSIONER:—In light of the fuller information now before the Board, I am obliged to agree in dismissing the application of the Board of Trade of Fredericton. It is to be regretted that the record was not made complete in the first instance.

RENDALL, MACKAY, MICHIE, LTD. v. WARREN & DYETT.

ALTA.

S. C.

Alberta Supreme Court, Beck, J. March 6, 1915.

1. MECHANICS' LIENS (§ IV—15)—LIEN FOR WAGES—6 WEEKS—CONTINUOUS PERIOD.

The wages claims of labourers which are given a special privilege under the Mechanics' Lien Act, Alta., if for "not more than six weeks' wages," are the wages earned within a continuous period of six weeks counting backward from the last day's work, and do not include that part of the wages prior to such period which may be included in the wages for services at different times, spread over a larger time, but aggregating six weeks' wages or less.

2. MECHANICS' LIENS (§ VI—46)—SUB-CONTRACTOR—LABOURER — RIGHT TO LIEN.

A sub-contractor is not a "labourer" under the Mechanics' Lien Act, Alta., so as to acquire as to labour done as part of the contract, the special privileges given by that Act to labourers.

3. MECHANICS' LIENS (§ III—14)—PRIORITIES—DIFFERENT LIENHOLDERS.

The priority acquired by notice under sec. 32 of the Mechanics' Lien Act, Alta., is a priority only over other lienholders of the same class as fixed by sec. 30, and does not interfere with the priority fixed by that section as between the different classes of lienholders.

4. MECHANICS' LIENS (§ I—1)—MECHANICS' LIEN ACT, ALTA.—CONSTRUCTION OF—"PREJUDICED"—"UNJUSTLY MADE TO SUFFER."

The word "prejudiced" as used in sec. 14 of the Mechanics' Lien Act, Alta., validating certain liens where there has been failure to strictly comply with the statute, means "unjustly made to suffer."

Statement

ACTION on a mechanics' lien.

C. A. Grant, and *G. E. Winkler*, for Rendall-Mackay Co.

G. E. Winkler, for Zimmerman.

S. S. Cormack, for J. H. Lavallee Co.

S. W. Field, for the Board of Trustees.

Beck, J.

BECK, J.:—A question was submitted to me in these cases a short time ago which I decided, leaving several other questions open. On the matter coming up before me again it appeared that I had not been given all the facts.

RENDALL, MACKAY, MICHIE LIMITED'S CLAIM.

It now appears that there were, in addition to the notice by the Rendall Co. to the owners of November 14, 1913, two subsequent notices, one of which was given on the 12th, and again on 18th of December, as follows:—

Warren & Dyett—[the contractors]—now owe us for material supplied to the above building the sum of $2,681.69. In addition to the above we also hold an order from Phil. Malone—[a sub-contractor under Warren & Dyett for the plastering]—directing them to pay us $500 and charge to his account. Mr. Warren has accepted this account, so we would ask you to kindly protect us in the amount of $3,181.69.

ALTA.

S. C.

RENDALL, MACKAY, MICHIE, LTD. v. WARREN & DYETT.

Beck, J.

The Malone order is as follows:—

Edmonton, Dec. 12th, 1913.

Warren & Dyett kindly pay to Rendall, MacKay, Michie Five Hundred Dollars and charge to my account. (Sgd.) P. J. Malone. (Sgd.) Warren & Dyett, *per* Warren.

It was sent by the Rendall Co. to the owners' superintendent on December 17, enclosed in a letter saying:—

We herewith beg to hand you order from P. J. Malone on Warren & Dyett to pay us the sum of $500 on account of Separate School contract. This order has been accepted by Mr. Warren, as you will see. We would like to have an acknowledgment from the School Board that they will protect us on the enclosed order so it will not be necessary for Mr. Malone to attach a lien to the building. His time for lien is up in the course of a day or so and your early attention to this matter will greatly oblige.

No reply was given to this letter. Malone's claim for $500 was made up of $348.70 for materials used in the plastering work and $151.30 for the labour. The materials were supplied by the Rendall Co.

The other notice given by the Rendall Co. was on January 15. It claimed as the total amount $3,404.50. Rendall, MacKay, Michie, Ltd. filed a lien on January 16, 1914, for $3,404.50. The amount of the claim sued for is $3,300. The amount seems to have been reduced from $3,404.50 to $3,300. By the deduction of a small item of four dollars and some cents and a payment of $100 on January 6 by Warren & Dyett.

I must return to this $100 later. The Rendall Co.'s claim of lien filed, contained no indication that a part of the claim represented either work or materials relating to the Malone subcontract. The Rendall Co. did no work but merely supplied materials. The claim of lien states that the particulars of the work done or materials furnished are as follows: Lumber and building materials, that the work or materials were finished, furnished or discontinued on or about December 20, 1913.

I think I must hold that the claim of lien is sufficient to the full extent of the $3,300. My first impression was that it was good at all events to the extent of the amount represented by the materials supplied, whether directly to the contractors Warren & Dyett or to the sub-contractor Malone, whether directly or indirectly being a matter of indifference: but perhaps not as to

ALTA.

S. C.

RENDALL, MACKAY, MICHIE, LTD. v. WARREN & DYETT.

BECK, J.

the sum of $151.30, representing the labour in Malone's claim. On further consideration I retain my view with respect to the materials but now think it should be held sufficient as to the item for labour also; subject to this, that Malone being a sub-contractor, the portion of the claim not representing material furnished would rank, in accordance with sec. 30, after the claims of material men. Sec. 32 (the new section substituted by sec. 12 of the Statute Law Amendment Act, ch. 20, 1908) I think is not confined to material men but applies to all lien claimants except, as the section expresses it, "for more than six weeks' wages in respect of labour." But I think that a sub-contractor is not a "labourer" in respect of the labour done as a part of the contract, so as to acquire the special privileges given by the Act to labourers. I think too, that the priority acquired by notice under sec. 32 is a priority only over other lienholders of the same class, as fixed by sec. 30, and does not interfere with the priority fixed by that section as between the different classes of lienholders.

I think the lien of the Rendall Co. sufficient to include the portion of the claim relating to Malone's sub-contract for these reasons: The right of a lienholder may be assigned (sec. 15); the form of lien provided for in sec. 13, and set out in schedule A is very general in its terms: Sec. 14 says that a substantial compliance only with sec. 13 shall be required and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof unless, in the opinion of the Court or Judge adjudicating upon the lien, the owner, contractor, sub-contractor, mortgagee, or other person is prejudiced thereby; "prejudiced," I think, must be taken to mean "unjustly made to suffer," for, in the connection in which the word is used there is contemplated that the property, and consequently, some persons interested in it are made to submit to a liability from which but for the provision they would have been freed. In this case the owner certainly was not prejudiced for he had full notice before the filing of the lien of the claims upon which it was founded; and I think other lienholders cannot be said to have been prejudiced inasmuch as if they had such knowledge they could be no more prejudiced than the owner, and if they had

ALTA.

S. C.

RENDALL, MACKAY, MICHIE, LTD. v. WARREN & DYETT.

Beck, J.

not, they must be supposed to have taken this particular lien-holder's claim to have been as it was stated in the verified claim of lien registered, and not to have been misled or to have altered their position in any way by reason of the irregularity in the claim of lien.

Now, what I have said with regard to the materials supplied through Malone for the building is subject to this: That I think those supplied to Malone must be taken to have been on a separate and distinct account, in this sense, that though each account was a continuous account, so that the last item of each would carry with it the earlier items so as to make effective a claim of lien filed within thirty-one days of the last item, the two accounts cannot be confused for this purpose, but that the last item of each must be shewn to have been delivered within thirty-one days of the filing of the claim of lien.

Subject to proof of this I hold that Rendall, MacKay, Michie, Ltd., are entitled to a lien for $3,300, less $151.30 (the Malone labour) that is for $3,148.70, and to a lien for $151.30 to take rank only as a claim by a sub-contractor, but it is clear that there are no funds to satisfy this later portion of the claim.

And, now, inasmuch as this latter sum is greater than the amount which, at the conclusion of the contract, was left owing by the owners to the contractors, other questions call for determination.

In my former reasons for judgment when there was a question only of the $1,694.09, I expressed the opinion that this sum was payable out of the $2,821.81. I adhere to this opinion for the reasons then given. As to the surplus of the $3,300, namely, $1,605.91, I think that Rendall, Mackay, Michie, Ltd., rank for it *pro rata* with all other lien claimants of the same class upon the residue of the $2,821.81. My reason for so thinking is that liens come into being by reason of the supplying of materials or the doing of work; they are preserved in being by the filing of claims of lien followed by the commencement of proceedings and the registration of a certificate of *lis pendens;* the notice which is provided for by sec. 32 is effective for none of these ends, but the lien being created and kept alive, a lien-holder who gives such a notice places the owner in this posi-

tion: The owner will be liable to the lienholder giving the notice beyond the contract price, if, and to the extent that payments made subsequently to the notice, unless made on account of claims having priority, reduce the balance of the contract price below the amount of which notice has been given, if it was greater, or reduce it at all, if less. But, subject to this, subsequent payments, *bonâ fide* made, with like attention to subsequent notices, if any, cannot increase the liability of the owner beyond the contract price. The notice enures to the benefit only of the lien claimant who gives it. If there are no payments subsequent to the notice, the notice has in no way affected the owner's liability.

Here, as I understand the facts, the balance of the contract price at the date of the service of the first notice by Rendall, MacKay, Michie, Ltd., was $3,500 plus $2,821.81. After the service of that notice, in which the amount then owing was stated to be $1,694.09, the owners paid to the contractors $3,500; but this still left in the hands of the owners as the balance of the contract price $2,821.21, sufficient, obviously, to pay the amount stated in the notice, $1,694.09. No payments were made by the owners subsequently. The subsequent notices given by Rendall, MacKay, Michie, Ltd., had, therefore, under the circumstances, no effect; the company secured priority upon the $2,821.21 to the extent of $1,694.09; and they, as to the residue of their claim and the remaining lienholders of the same class as they are classified in sec. 30, which provides for the distribution of the proceeds of a sale of the property, though they gave no notices, must rank *pro rata*.

What I have said, I think, disposes of the questions raised on the claim of Rendall, MacKay, Michie, Ltd.

I have now to deal with the claim of Zimmerman. He was a labourer. The period during which he worked and in respect of which he makes his claim, was a period greater than six weeks, but the total number of hours or days spread over this larger period when added together make less than six weeks. I am of opinion, that the expression in the Act, "not more than six weeks' wages" is intended by the Act to mean wages earned within a continuous period of six weeks counting backward

ALTA.

S. C.

RENDALL, MACKAY, MICHIE, LTD. v. WARREN & DYETT.

Beck, J.

from the last day's work. For wages so described, labourers are given special privileges. Sec. 17 provides in the case of contracts where the contract price exceeds $500, for the posting up of a copy of the *receipted* pay rolls on the first legal day after pay day, and the delivery to the owner of the original pay roll with a receipt in full from each labourer; and provides that no payment made by the owner without the delivery of such pay roll shall be valid for the purpose of defeating or diminishing any lien in favour of the labourer. Sec. 32, which limits the liability under conditions to the contract price, excepts liens for not more than six weeks' wages. Sec. 30 (the distribution section) places six weeks' wages first in order of priority after the costs of the proceedings, and any residue of wages are made payable out of the moneys, if any, going to the contractor or sub-contractor who employed the labourer.

Zimmerman's claim for wages earned within a period of six weeks amounts to $103.50. For this amount I hold he has a claim upon the $2,821.21, prior to that of Rendall, MacKay, Michie, Ltd.

Another claim is that of the J. H. Lavallee Co., Ltd.

During the argument I fixed the amount of this claim at $449.43, made up as follows:—

1913. Sept. 19. Tile (supplied to Warren & Dyett), $341.43. Oct. 2'3. Roofing as per contract, $188.50. 1 yd. roofing gravel, 83.50—532.43. Sept. 19. Freight repaid, $84—$440.43.

As will have been observed, the first item is for materials supplied in the usual way to the contractors; the other two were in respect of a sub-contract with the contractors. I think the three items cannot be treated as items of a running account, the first item, being for materials, must stand by itself, the other two by themselves.

The lien was not filed in time with respect to the first item. I find that it was filed in time with respect to the other two items because I find as a fact, on the evidence, that the work on the sub-contract was not completed and was *bonâ fide* left incomplete until a period within a month of the filing of the lien, when it was completed and some additional gravel was supplied and used, made necessary by some injury having in

ALTA.

S. C.

RENDALL, MACKAY, MICHIE, LTD. v. WARREN & DYETT.

Beck, J.

the meantime occurred to the roof for which the sub-contractor was not responsible.

It was claimed that there was a waiver by the owners of the obligation of filing a lien. No doubt an owner may waive the provisions of the statute, at all events so as to make himself personally liable and even so as to preserve the lien without prejudice to the rights of lienholders who have complied with the Act; but I cannot, on the evidence, hold that a waiver has been established. The $84 credit is applicable to the first item. In the result, therefore, I hold that the lien of J. H. Lavallee, Ltd., is valid to the extent and to the extent only of $192. But as this claim is that of a sub-contractor it can rank only, under sec. 30, subsequent to the claims of material men.

There is a claim by the Edmonton Iron Fence & Wire Works Co. No one appeared for them before me but I think I should not disallow their claim without affording them a further opportunity of proving their claim if they can do so.

In the result, the $2,821.21 is, in my opinion distributable as follows: (1) In payment of the proper costs of all parties; (2) In payment to Zimmerman of $103.50; (3) In payment to the Rendall, MacKay, Michie Co. of $1,694.09; (4) In payment *pro rata* of the claims of Rendall, MacKay, Michie, Ltd., to the extent of $1,605.91; of the Edmonton Iron & Wire Fence Co., to the extent, if any, that they prove a claim as material men.

Order accordingly.

INTERNATIONAL HARVESTER CO v. KNOX.

SASK.

S. C.

Saskatchewan Supreme Court, McKay, J. April 14, 1915.

1. BILLS AND NOTES (§ VI—150)—CONDITIONAL SALE OF CHATTEL—SEVERAL LIEN NOTES—DEFAULT ON ONE—ACCELERATION CLAUSE—RIGHT TO SUE ON ALL NOTES—NOTICE—COSTS.

Where several lien notes, given on the conditional sale of a chattel, each contained a proviso that in default of payment of such note or of any of the other notes, the whole amount of the price and interest and all obligations and notes given therefor should forthwith become due and payable without making presentment or demand which were thereby waived, the conditional vendor may sue on all of the lien notes where one only is in default; no preliminary notice is necessary of an intention to claim the benefit of the acceleration clause, or, if such were necessary the service of the writ was sufficient, subject to any right as to costs which might have arisen had the defendant forthwith paid the note which was past due.

[*Westaway* v. *Stewart*, 2 S.L.R. 178, distinguished.]

SASK.

S. C.

INTERNATIONAL HARVESTER CO. v. KNOX.

McKAY, J.

ACTION on a number of lien notes.

W. B. Willoughby, K.C., for plaintiff.

C. E. Armstrong, for defendant.

McKAY, J.:—This case was tried by me at Moose Jaw with a jury. The plaintiff sued on a number of lien notes, but at the trial it was admitted that all the lien notes, with the exception of three, had been paid; the three lien notes not paid being those set out in paragraphs 12, 13, 14 of the plaintiff's statement of claim, all dated February 25, 1913, payable to the plaintiff and made by the defendant, and all given to secure part of the purchase price of one 45 h.-p. Mogul engine and 8 furrow P. & O. engine plow.

The first lien note for $1,505 due July 1, 1913, with interest thereon at 7 per cent. per annum until maturity and 10 per cent. per annum after maturity until paid. The second lien note for $1,505, due Oct. 1, 1914, with interest thereon at 7 per cent. per annum until maturity and 10 per cent. per annum after maturity and 10 per cent. per annum after maturity until paid. The third lien note for $1,505 due Oct. 1, 1915, with interest thereon at 7 per cent. per annum, until maturity and 10 per cent. per annum after maturity until paid.

The defendant contends that the order for the engine and plows and the lien notes sued on, and a mortgage given as collateral security were obtained by fraud, and that there was a breach of implied and express warranties, and claims cancellation of the order and discharge of the mortgage, and damages. The defendant also pleaded that the outfit (the engine and plows) was not a new outfit as represented, but was a second-hand outfit. The only evidence given as to whether the outfit was second-hand or new was the evidence of one of the plaintiff's witnesses to the effect that it was a new outfit, there was therefore no evidence to submit to the jury on this point.

The following clauses appear in the order under which the outfit was sold, and which was signed by the defendant:—

No employee or agent has the right to alter, add to, or vary this form, verbally or otherwise.

. . . . .

The above description is for identification only, and the buyer expressly

agrees that said machinery is not sold by description and that there are no conditions or warranties either general, express or implied, statutory or otherwise, other than the condition and waranty set forth below.

. . . . . .

All the said articles are sold subject to the following express warranty and none other, which said warranty excludes all implied warranties and is hereby made to apply separately to each machine or attachment herein ordered: 1st, the company warrants the said machine to be well made, of good materials, and durable if used with proper care. If upon one day's trial, with proper care, the machine fails to work well, the purchaser shall immediately give written notice stating full particulars wherein it fails, by registered letter mailed to International Harvester Co. of America, Weyburn, Sask., and allow a reasonable time for a competent man to be sent to put it in order, and shall render necessary and friendly assistance to operate it. If the machinery or any part thereof, cannot then be made to work well, the purchaser shall immediately return such part as does not work well, to the above-mentioned place to which the machinery is hereby requested to be shipped, and shall immediately in the manner hereinbefore prescribed give the company written notice of such return, and the said company may either furnish another part or may require the return by the purchaser of the remainder of such machinery to the above-mentioned place to which the machinery is hereby requested to be shipped, and then furnish other machinery in its place or refund cash and notes received for same, thereby rescinding the contract *pro tanto* or in whole as the case may be, and thereby releasing the company from any further liability whatever herein. If other machinery or parts be furnished, same shall be complete fulfilment of this warranty, and, in consideration thereof the purchaser agrees that the other machinery or parts shall be so furnished without any general, express or implied warranty thereon. If, however, the trouble arose from improper handling of the machine, the purchaser shall pay the cost of thus righting it. The use of part or all the said machinery, after three days trial or failure to give notice as herein provided, shall be conclusive evidence that said machinery is as warranted and represented; and shall estop the purchaser from all defences on any ground to the payment therefor and any assistance rendered by the company, its agents or employees in operating or in remedying any actual or alleged defect, shall in no case be deemed any waiver or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty, nor operate as an extension or renewal of the conditions thereof, and the purchaser shall pay all expenses incurred by the company, incidental to rendering such assistance. No claims, counterclaims, demands or offsets shall ever be made or maintained by the purchaser on account of delays, imperfect construction, or any cause whatever, except as provided herein, and the purchaser expressly waives all claims for damages on account of the non-performance of any of the above described machinery.

. . . . . .

Any verbal or written statements, representations, or guarantees made by any agent or person on behalf of the company, which are not set forth

SASK.

S. C.

INTERNATIONAL HARVESTER CO. v. KNOX.

McKay, J.

and expressed herein and made a part of this contract, the purchaser hereby agrees shall not be binding upon the company, nor be claimed by the purchaser at any time to be part of this contract, nor be claimed by the purchaser at any time to be a consideration, term or condition for his execution and delivery of this contract. The purchaser further agrees that any consideration, term and condition for his execution and delivery of this contract are herein expressed and that the terms and conditions hereof shall not be waived, altered or changed except by special written agreement signed by said International Harvester Co. of America, authorized general agent at Weyburn, Sask.

At the trial, on the authority of *Sawyer-Massey* v. *Ritchie*, 43 Can. S.C.R. 614, I ruled that the foregoing provisions excluded all implied warranties, or any representations or agreements made by plaintiff's agents, except by way of fraud.

As to the express warranties I interpret the contract to warrant that the machinery would work well and was well made, of good materials, and durable if used with proper care, and that the notice above required is to be restricted to the warranty as to the machinery working well. The outfit was delivered to the defendant on April 11, 1913, and as the defendant did not give the written notice required to be given after one day's trial of the machinery, by registered letter mailed to the plaintiff company at Weyburn, Sask., and he used the machinery practically during the plowing season of 1913, until after July 24, of that year, the machinery is presumed to have fulfilled this warranty.

At the close of the evidence, counsel for the plaintiff applied to have the defence and counterclaim withdrawn from the jury on several grounds, all of which I overruled, except the one advanced on the ground that the defendant's defence and counterclaim were barred by the following clause in the order:—

It is expressly understood and agreed that all warranty of this machinery terminates and expires, and all liabilities of the vendor for breach of warranty or recoupment for damages, set off or otherwise, cease entirely at the expiration of one year from the date of shipment, any statutes or limitations to the contrary notwithstanding.

The outfit (engine and plows) was shipped and delivered to defendant on April 11, 1913, and the defence and counterclaim were filed on May 18, 1914. The defendant's counsel contended that as the writ was issued on February 24, 1914, within the year from the date of shipping the outfit, the rights of the par-

ties should be determined as they stood on this latter date. I reserved my decision on this point, and decided to let the case go to the jury in the meantime, but in view of the answers given by the jury to the questions submitted to them, which are favourable to the plaintiff, and the result of my judgment on the merits, I do not consider it necessary to give a decision on the question reserved.

At the trial the plaintiff proved that the defendant made the three lien notes sued on, and that nothing had been paid thereon.

Only one of these notes was actually past due at the time of issuing the writ, but there is a clause in each of the notes as follows:—

> If I make default in payment of this note or any other note or obligation given on account of the said price . . . the whole amount of the said price and interest thereon and all obligations and notes given therefor shall forthwith become due and payable, and the said company may forthwith, without making presentment or demand, take action against me therefor, and I hereby waive presentment and demand of payment of this and every other note given on account of the said price and interest thereon. . . .

The plaintiff pleaded that, by virtue of this clause in the lien notes, they were all past due at the time of the issuing of the writ, and claimed judgment thereon.

Counsel for defendant contended that this clause in itself did not make the lien notes due which were not yet actually due according to their due date, but that the plaintiff company, the payee, should do something indicating its intention to make the notes due and payable, and cited in support of his contention: 18 Hals., p. 530, 1036; Bell's Landlord and Tenant, p. 208; *Westaway* v. *Stewart*, 2 S.L.R. 178, at 181.

The cases referred to by Halsbury and Bell are cases dealing with leases and are to the effect that provisos in leases declaring in words, however clear and strong, that the term shall be forfeited and void on a breach of a covenant or condition, have been construed by the Courts to mean that the term is voidable only, at the option of the lessor, and that the lessor must do some act which shews his intention to determine the lease. These cases, to my mind, are distinguishable from the present, as the lessee would be considered to be rightly in pos-

SASK.

S. C.

INTERNATIONAL HARVESTER CO. v. KNOX.

McKay, J.

session and occupation until the lessor did something to determine the lease, so as to bring it to the notice of the lessee, that the lease was determined.

The *Westaway* v. *Stewart* case was an action on a chattel mortgage, in which the mortgagee seized under a clause providing that in case of default in payment of any of the moneys secured, or if the mortgagee did at any time during the currency of the mortgage "deem himself unsafe" as far as the security of the mortgage was concerned . . . then in any such case the full amount of principal and interest . . . should forthwith become due and payable, and in such case the mortgagee had the right to enter and sell the goods.

Chief Justice Wetmore, who delivered the judgment of the Court in this case, held that as the chattel mortgage was given as security for certain notes which had not matured, the seizure was premature in so far as it was a seizure in default of payment, as the seizure was made on the last day of grace of the note falling due on the 21st day of August, and the seizure on the ground that the mortgagee deemed himself insecure could not be supported, as the evidence shewed that the seizure was made on the alleged default in payment of the notes. And at p. 183 the Chief Justice, as a reason for reducing damages, observes:—

> In view of the fact that the defendants could have seized the property next day, on default in payment, the plaintiff was only in a sense dispossessed for part of a day.

I do not therefore consider this case as authority for the question under consideration in the case at bar.

In the case at bar the notes expressly provide for maturity of all other notes in default of payment of any one of them. The evidence clearly shews default in payment of the note falling due July 1, 1913, and if anything was required to be done by plaintiff to shew that it intended to claim maturity of these notes, although I do not think that such was necessary, I think the issuing of the writ claiming payment of the notes is sufficient. If defendant, after issue of the writ had tendered payment, and the writ was issued on the last two notes only, then the question of costs might arise, but neither of these things happened.

SASK.

S. C.

INTERNATIONAL HARVESTER CO. v. KNOX.

McKAY, J.

I therefore, am of the opinion, that plaintiff is entitled to judgment on the three notes, with interest thereon at the rate of 7 per cent. per annum to their due dates and 10 per cent. per annum thereafter to judgment.

I submitted in all 21 questions to the jury, among which were questions as to whether or not the plaintiff's agents made the alleged fraudulent representations, to which latter questions the jury answered in the negative.

I also submitted to the jury the following questions as to the express warranties, to which they answered as indicated: "11. Was the engine well made of good materials? A. Yes, except cylinder. 12. Was it durable if used with proper care? A. Yes."

The cylinder above referred to, in the answer to question 11, was replaced by a new cylinder by the plaintiff as appears by the evidence on July 24, 1913.

Questions 18, 19 and 21, and answers thereto are as follows:—

18. If the engine was not in good condition after July 24, 1913 and not developing all the power for any reason, did it develop 45 h.p. and reasonably do its required work? A. Yes. 19. If any power at all was lost after July 24, 1913, did it affect the efficiency of the engine? A. No. 21. What damages, if any, did the defendant sustain? (*a*) by the breach, if any, of the warranty or warranties as to the engine being well made of good materials; (*b*) and durable if used with proper care, and on what warranty do you allow the damages? (*c*) on account of the fraudulent representation alleged to have been made by the agents, if you find they were so made? A. No damages."

The jury having found against defendant on the question of fraud, and having found that the engine (the complaint being as to the engine only) was well made of good materials except the cylinder (which was replaced by the plaintiff) and having also found that the engine was durable with proper care, and that the defendant had not sustained any damages, I dismiss the defendant's defence and counterclaim with costs to the plaintiff.

SASK.

S. C.

INTERNATIONAL HARVESTER CO. v. KNOX.

I therefore order and direct that judgment be entered for the plaintiff against the defendant for the amount due on the three lien notes sued on, with interest as above stated, with costs.

Judgment for plaintiff.

SASK.

S. C.

GARDNER v. STAPLES.

Saskatchewan Supreme Court, Newlands, Brown, Elwood, and McKay, JJ. March 20, 1915.

1. ADVERSE POSSESSION (§ I C—10)—LICENSEE—CROPPING LAND ON SHARES—SALE OF LAND—NOTICE.

A growing crop of wheat, or other product of the soil not produced spontaneously, is a chattel interest which may be claimed against the transferee of the title to the land under the Land Titles Act, Sask., by the tenant or licensee under an agreement made with the transferor for cropping land on shares; if the agreement constituted a lease it is within the exception of sec. 66 of the Land Titles Act, but if not a lease, the person put in possession under the cropping agreement would hold a license with an interest entitling him to go upon the land for the purpose of harvesting the grain and removing same to the elevator in conformity with this agreement, and such interest and parol evidence of notice to the transferee and of the latter's acceptance thereof as a term of his purchase may be shewn notwithstanding the production by the transferee of a certificate of title in which the crop agreement was not mentioned.

[*Marshall* v. *Green*, 1 C.P.D. 35, applied; *Wood* v. *Lang*, 5 U.C.C.P. 204, distinguished.]

Statement

APPEAL from a judgment of Haultain, C.J.

Russell Hastings, for appellant.

John Milden, for respondent.

The judgment of the Court was delivered by

McKAY, J.

McKAY, J.:—This is an action commenced by A. P. Berube, the original plaintiff, and continued by his executor and trustee the present plaintiff.

The original plaintiff claims to have purchased section 8, tp. 39, r. 1, west of the 3rd meridian, in this province, from the former owner, Andrew Johnson, on June 17, 1912, under a transfer of the same date, for the sum of $21,680, and alleges that the defendant in August, 1912, broke and entered into said land, and cut, took and converted to his, defendant's, use, some of plaintiff's wheat from off said land, whereby and by other wrongful acts of trespass plaintiff suffered damage and

that defendant refuses to discontinue cutting the plaintiff's said grain. The plaintiff claims damages and an injunction.

The defendant, on the other hand, claims that he was justified in entering upon said land and cutting the grain thereon, by virtue of a lease dated May 17, 1912, made between the former owner Johnson and himself, which gave him the right to enter upon the said land until December 1, 1912, that he went into possession and occupation of said land under said lease in May, 1912, and so remained until after the commencement of this action when served with an injunction while cutting said grain. That original plaintiff bought the land subject to this lease. That he is entitled to half the said grain, less half of the threshing and twine bills. That plaintiff wrongfully took all the grain and he counterclaims for his share of said grain or damages, etc.

The facts in this case are that Johnson made the agreement, ex. 2, dated May 17, 1912, with defendant, whereby it was agreed amongst other things that defendant would till and farm during the season of farming in the year 1912, and ending December 1, 1912, all the land theretofore broken and under cultivation upon said section 8. Defendant was to harvest and thresh the crop. Each party to get one-half of the crop raised and to pay one-half the cost of threshing and the twine for binding the grain.

The defendant, about May 17, 1912 went into possession and occupation, and seeded the land with wheat, flax and oats, and continued in possession and occupation until served with the injunction in this action while he was cutting the wheat.

On June 17, 1912, the original plaintiff purchased this land from Johnson through one Dr. Dorien, with whom Johnson had listed the land for sale, subject to the agreement with defendant. Dr. Dorien swears that he told the purchaser, the original plaintiff, when the land was sold to him, that the purchaser would get only one-half the crop delivered at the elevator, minus one-half twine and threshing bill, on account of the land being already leased, and that the original plaintiff said "he would buy on those conditions, said it was all right." This is not denied.

SASK.

S. C.

GARDNER v. STAPLES.

McKay, J.

The transfer of the land was signed on June 17, 1912, and registered August 24, 1912. The transfer was not produced at the trial and no evidence given of its contents.

The plaintiff claims all the crop, and, as a matter of fact, took it all, and rests his claim to the same on his certificate of title to the land dated August 24, 1912, issued to the original plaintiff, subject only to an indorsement thereon of a mortgage from the original plaintiff to Johnson dated June 17, 1912. The question is, under the foregoing facts is plaintiff entitled to all the crop as against defendant?

If the agreement above referred to were a lease, the plaintiff's title would be subject to it by virtue of sec. 66 of the Land Titles Act, and the defendant's claim would prevail. But from the conclusion I have arrived at it is not necessary to decide that it is. I am of the opinion that these growing crops of wheat, flax and oats in question in this action were chattels, and not an interest in land, at the time the plaintiff purchased and continued so to be.

With respect to *fructus industriales*, *i.e.*, corn and other growth of the earth which are not produced spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods: 1 Hals., p. 293, 649; *Marshall* v. *Green* (1875), 1 C.P.D. 35, 39.

In *Marshall* v. *Green*, which was a verbal purchase of growing trees, it was held it was a purchase of chattels, and not an interest in land. And in *Smith* v. *Surman*, 9 B. & C. 561, also a sale of growing trees, it was held it was not an interest in land, and at p. 573, referred to by Lord Coleridge, C.J. In *Marshall* v. *Green*, at p. 40, Littleton, J., held that

if in this case the contract had been for the sale of the trees, with specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in land within the meaning of the statute.

And that the plaintiff and Johnson his vendor so treated them is shewn by the special agreement made as to the sale of the crop, namely, that Johnson was selling only his one-half interest in the crop minus one-half cost of threshing and twine, in fact Johnson could not sell any more than that in these chattels.

In support of plaintiff's contention that he got all the crop his counsel cited *Wood* v. *Lang*, 5 U.C.C.P. 204. I do not think this case is an authority for the case at bar. In the *Wood* v. *Lang* case the plaintiff claimed some wheat grown on land he had previously conveyed by deed to defendant, the defendant claimed under the deed, which was put in evidence at the trial, and the defendant offered parol evidence to shew that half of the wheat was reserved to the plaintiff, when the deed was executed, which was objected to as inadmissible. Macaulay, C.J., at pages 205 and 206, in his judgment states:—

> A verbal reservation of the growing crops or half the growing wheat, accompanying *a deed of the land in terms that transferred the right of property in such crops* or wheat, cannot afterwards be set up in opposition to the deed; it is inconsistent with it, and contradictory to its legal import.

Note the above words in italics.

In the case at bar the transfer or deed from Johnson to plaintiff was not put in evidence at the trial, and we do not know anything of its contents except that it must have been a transfer of the land in question as the certified copy of Johnson's cancelled certificate of title produced at the trial shews that it was cancelled on August 24, 1912, and a new certificate of title issued on that day to the original plaintiff.

All that we have then in the case at bar, apart from the plaintiff's certificate of title, is the uncontradicted testimony of Johnson and Dr. Dorien that only half the crop was sold to plaintiff. The plaintiff's certificate of title gives him a clear title to the land free of all encumbrances, etc., except the mortgage to Johnson endorsed thereon, and the implied reservations set forth in sec. 66 of the Land Titles Act.

But it does not give him title or ownership or any interest in chattels not otherwise acquired by him that are, or were, at the time he received it, on the land contained in such certificate of title.

If then I am correct in my conclusion that these growing crops were chattels at the time the original plaintiff purchased the land, the defendant's claim to one-half thereof less half the cost of threshing and twine does not affect the plaintiff's title to the land.

SASK.

S. C.

GARDNER v. STAPLES.

McKay, J.

At the time the land was sold to the original plaintiff as above stated, Dr. Dorien, Johnson's agent, told him of the lease or agreement to defendant, and that he was to get only one-half the crop at the elevator, minus half the cost of threshing and twine, owing to the land being leased. Now, even if this agreement under which defendant cropped the land is not a lease, it would be at any rate a license with an interest, or, in other words, would give defendant license to go on the land and work there in looking after harvesting and threshing the crops and removing same to the elevator. He had been put in possession and was in occupation for that purpose.

Marshall v. *Green* and *Smith* v. *Surman*, above cited, are sufficient authority for this proposition.

When original plaintiff was told the conditions on which and when he was to get the half crop, he would know that defendant would necessarily have to enter, remain and work upon the land for the purpose of harvesting, threshing and removing the grain. And he consented to the conditions. In other words, he confirmed and consented to the license which defendant had from Johnson to enter and work upon the land in question for the purpose of looking after and harvesting and removing the crop: *Wood* v. *Manley* (1839), 11 A. & E. 34, 113 Eng. Rep. 325.

I am therefore of the opinion that this appeal should fail.

It was admitted by defendant's counsel at the argument of this appeal that the plaintiff had furnished some of the twine and paid for all the threshing. The judgment of the learned Chief Justice will therefore be varied to the extent that the defendant will be entitled to judgment for one-half the value of the crop to be ascertained by the local registrar, less the amount of the cost of threshing and twine, paid by the plaintiff in excess of his half share of said cost.

As counsel for plaintiff admitted that the defendant had offered to adjust this excess before appeal, there will no costs to plaintiff. This appeal will, therefore, be dismissed with costs, and the judgment below amended as above indicated.

Appeal dismissed.

FLETCHER v. POINT GREY.

B. C.

S. C.

British Columbia Supreme Court, Macdonald, J. January 22, 1915.

1. MUNICIPAL CORPORATIONS (§ IID—25)—CHARTERS — CONSTRUCTION OF —MUNICIPAL ACT, B.C. 1914, CH. 52.

The powers and responsibilities contained in the Municipal Act, B.C. 1914, ch. 52, apply to all municipalities and should not be held to be impaired by a collateral statute with restricted application such as the Shaughnessy Settlement Act, B.C. 1914, ch. 96, unless that intention is expressly shewn.

Statement

ACTION for rebate of taxes.

R. S. Lennie, for plaintiff.

R. L. Reid, for defendant.

Macdonald, J.

MACDONALD, J.:—In 1914, plaintiff and other residents of a part of the municipality of Point Grey petitioned the legislative assembly to divide such municipality and have a portion thereof incorporated as a district municipality under the name of "Corporation of the District of Shaughnessy." The municipality of Point Grey opposed such incorporation, and a settlement of all matters in difference between the parties was then brought about and the terms were set forth in the "Shaughnessy Settlement Act," being ch. 96 of the B.C. Statutes, 1914.

Plaintiff is the assessed owner and liable to pay taxes to the defendant municipality in respect of lot 13, block 54, according to a sub-division of lot 526, group 1, New Westminster District, B.C. Such lot is within the "prescribed area" referred to in the second section of said Act. It was one of the terms of settlement stipulated by such Act that:—

7. A special rebate of $15,900 over and above all rebates allowed by law shall be made by the corporation of Point Grey on the municipal taxes assessed and levied on lands and improvements within the prescribed area in each and every year for ten years commencing with the year 1914; such rebate shall be distributed rateably over all the assessed lands and improvements on which the said taxes are levied within the prescribed area: Provided, however, that the said allowance shall not be considered as a debt of the Corporation of Point Grey in any computation of the aggregate debt of the municipality under the provisions of the Municipal Act relating to borrowing of money.

Plaintiff contends that this sec. not only entitles him to a proportionate benefit of the rebate, but that he should not contribute any taxes to make up the deficiency in the available revenues of the municipality caused by the allowance of such

B. C.

S. C.

FLETCHER v. POINT GREY.

Macdonald, J.

rebate; in other words, that the balance of the municipality outside the "prescribed area" should bear the burden thus imposed by legislation. While the sum of $15,900 is mentioned as a rebate, it is in effect a debt created by statute and requires that for ten years the municipality shall allow such rebate and raise annually by taxation or otherwise a further amount sufficient to cover the shortage that would otherwise ensue. It is submitted that the rate-payers within the "prescribed area" are not concerned as to the manner in which this is to be accomplished. Can they thus divest themselves of the responsibility imposed on them as part of a municipality? The council of every municipality is empowered by sec. 201 of the Municipal Act, ch. 52, B.C. Statutes 1914, to pass a by-law for levying rates

> on all the lands and improvements as assessed . . . to provide for all sums which may be required for the lawful purposes of the municipality for such year.

There is no provision in the Municipal Act whereby the rate of general taxation thus to be imposed can differ in one part of the municipality from that imposed in another part. All such taxation should be on the same basis. Then does the Shaughnessy Settlement Act override the Municipal Act and relieve the plaintiff, even though the municipality has no power to recover the amount of such rebate from the remainder of the municipality. It is urged that even though this should be the result, still effect should be given to the Settlement Act in the manner indicated. Sec 8 of the Settlement Act allows a different rate to be imposed on lands and improvements within the remainder of the municipality, but this departure from the provisions governing the imposition of taxes throughout the municipality under the Municipal Act is for the purpose only of providing for necessary improvements within such area during such period of ten years. It does not empower the municipality in fixing the rate of such area to lower the rate so as to relieve such portion of the municipality from payment of its proper portion of the deficiency caused by the allowance of the rebate of $15,900. It is contended that sec. 7 of the Settlement Act is not worded so as to support the position assumed by

B. C.

S. C.

FLETCHER v. POINT GREY.

Macdonald, J.

the plaintiff: Maxwell on Statutes, 4th ed., 449, referring to private Acts states that:—

> As regards enactments of local or personal character which confer any exceptional exemption from any burden . . . they are constructed . . . more strictly perhaps than any other kind of enactment.

In view, however, of the scope and intention of this Act as indicated by the preamble, I doubt if this rule should be fully applied. If the provisions of the Settlement Act were inconsistent with the provisions of Municipal Act, then the latter Act must yield to the Settlement Act. There is nothing expressly different between the two acts to shew that this rebate is to be dealt with in a different manner to other annual liabilities and payments of the municipality. There is a further point to be considered—that the rebate of one-sixth is allowed on the general rate to all the ratepayers in the municipality, while this rebate of $15,900 is only given to a portion of the rate-payers; but both rebates are allowed by the municipality as a whole, and should, unless it is repugnant to or inconsistent with the special legislation contained in the Settlement Act, be borne in like manner. The powers and responsibilities contained in the Municipal Act apply to all municipalities and should not be impaired except by express legislation to that effect. The Act provides:—

> Sec. 3. This Act shall extend and apply to all municipalities, except in so far as, in its application to any municipality, it is altered or modified by the provisions of some special Act. Sec. 5. Nothing contained in any general or special Act relating to any municipality to which this Act applies shall be deemed to impair, restrict, or otherwise affect the powers conferred on any such municipality by this Act.

In my opinion, if it were intended that the ratepayers of the "prescribed area" were to be relieved from their share of the common burden imposed on all the ratepayers of the municipality with respect to the rebate of $15,900, the statute should have so stated in clear and unambiguous language. The defendant municipality takes the further ground that Property Tax Levy By-law No. 12 (1914) was passed by the municipality in accordance with sec. 201 of the Municipal Act, and that, with the exception of a different rate being required as to the "prescribed area," on account of the improvements necessary in

B.C.

S. C.

FLETCHER v. POINT GREY.

Macdonald, J.

such portion of the municipality, a general rate was thus properly imposed. The by-law was proved to have been properly passed, duly registered and there was no application to quash the same entertained within one month from such registration. The provisions of sec. 180 of the Municipal Act were invoked and it provides that, under these circumstances, no person assessed under or subject to a rate under a by-law imposing a rate, shall be entitled to plead any defect in such by-law as a valid defence against a claim for payment of the rate, except by application to quash the by-law made within the prescribed period. Such by-law fixed a general rate of 14.12 mills on the dollar on the assessed value of the lands within the "prescribed area" while the general rate in the balance of the municipality was on improved lands 9.41 mills on the dollar, and on wild lands 23.81 mills on the dollar. Such difference is accounted for by the improvements already referred to and intended to be carried out within the "prescribed area." There was a special rate on all taxable lands of the municipality of 10.16 mills on the dollar. According to ex. 1 there was a certain amount of money required to be raised, levied and collected by the municipality and said by-law number 12 was passed to effect such purpose. In my opinion, the rates applicable to the "prescribed area" and referred to in such by-law are valid and binding upon the plaintiff, so that as to said lot 13 he should pay the taxes pursuant to the tax notice, ex. 2. The action is dismissed with costs.

Action dismissed.

QUE.

C. C.

THE BELL TELEPHONE CO. v. DUCHESNE.

Quebec Circuit Court, Montreal, Purcell, J. April 30, 1915.

1. CONTRACTS (§ V C—390)—CONTRACT FOR ONE YEAR—INSTALMENT PAYABLE QUARTERLY—DEFAULT IN PAYMENT—REMOVAL OF INSTRUMENT—BALANCE FOR YEAR DUE.

The regular form of contract in use by the Bell Telephone Company is a contract for one year with instalments payable quarterly and on default of payment of any instalment the company may remove the instrument and collect the amount owing for the balance of the year, and a customer will not be relieved from the contract on the ground that he did not read the conditions and did not receive a copy of the contract.

Statement

ACTION on a Bell Telephone contract.

S. L. Dale Harris, for plaintiff.

G. E. Depocas, for defendant, opposant.

PURCELL, J.:—The plaintiff claims from the defendants jointly and severally the sum of $42.75, balance due from July 15, 1913, to April 15, 1914, under contract for telephone service entered into between plaintiff and defendants, at Montreal, on April 10, 1913.

The defendant opposant by his opposition alleges that he paid in advance for the use of the telephone every three months; that he dissolved partnership before the expiration of the three months and the company at the expiration of the three months knowing that he no longer used the telephone immediately removed it; that the conditions on the back of the contract are not signed by the defendant and were not agreed to by him and are not binding on him and that the contract was never read to him and he never received a copy thereof.

The plaintiff by its answer admits that the defendant made an advance payment covering three months and alleges that the contract speaks for itself and that in accordance therewith it was entitled to discontinue the service and cancel the contract by reason of any default by the defendant and that if such event occurred within the initial period of the contract the unexpired portion of the initial term, to wit: one year, forthwith became due and payable; that the defendant made default to pay the sums becoming due under the contract of July 15, 1913, and in consequence the plaintiff after duly notifying the defendant, discontinued the service on August 22, 1913, as it was entitled to do, and such default having occurred during the initial period of the contract, the balance for the year forthwith became due.

Considering that it has been proved that the defendant made default to pay the quarterly instalments becoming due on July 5, 1913, and that the plaintiff after duly notifying him, discontinued the service on August 22, 1913. Considering that in accordance with the terms of the contract between plaintiff and defendants, which is the regular form of contract in use by the plaintiff in Montreal, the balance due for the remainder of the year, namely, until April 15, 1914, forthwith became due. Considering that the defendant is bound by the contract which he

QUE
C. C.
BELL TELEPHONE CO. v. DUCHESNE.
Purcell, J.

has signed and by the conditions on the back of the contract which form a part of it, and the defendant cannot be relieved of the contract on the ground that he did not read the same and did not receive a copy; although in the contract itself defendant acknowledges to have received a copy of it. Considering that the defendant is indebted to the plaintiff in the sum of $42.75 and that the opposant has failed to prove the allegations of his opposition.

Doth dismiss the said opposition to judgment with costs distraits to Mr. S. L. Dale Harris, attorney for plaintiff, and doth condemn the said defendant opposant to pay to the plaintiff the said sum of $42.75 with interest from October 7, 1914, and costs, and the plaintiff to withdraw the amount deposited with the defendant's opposition.

Judgment for plaintiff.

SASK.
S. C.

CAMERON v. ROYAL BANK OF CANADA.

Saskatchewan Supreme Court, Newlands, Elwood, and McKay, JJ. March 20, 1915.

1. BANKS (§ I—4)—CHARTERED BANK—PURCHASE OF ENTIRE ASSETS OF ANOTHER CHARTERED BANK—RIGHTS—LIABILITIES—BANK ACT (CAN.).

The purchase by one chartered bank of the entire assets of another chartered bank can only be carried out under statutory authority; and where it is a term of the arrangement as approved by the governor-in-council under secs. 99-111 of the Bank Act, Can., that the purchasing bank shall assume the liabilities of the selling bank, a statutory obligation is created in respect of each liability which is enforceable by the creditor of the selling bank.

[*Davis v. Taff Vale R. Co.*, [1895] A.C. 542; *Watkins v. Naval Colliery Co.*, [1912] A.C. 693, applied.]

Statement

APPEAL from the judgment dismissing the plaintiff's action on a lien note.

T. D. Brown, for appellant.

Arthur Frame, for respondents.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—The plaintiff was the owner of a lien note or agreement in writing for $255, dated March 24, 1911, payable November 1, 1911, with interest at 8 per cent. per annum till due and 10 per cent. per annum after due till paid, made in his favour for valuable consideration by J. H. and H. Clavelle.

This note was left at the Traders Bank of Canada at Zealandia, Saskatchewan, for collection, where, on April 23, 1912, J. H. Clavelle one of the makers paid the amount due on the note to the Traders Bank, and the note was surrendered to him.

The Traders Bank, by virtue of secs. 99 to 111 of the Bank Act (ch. 29 R.S.C. 1906) sold and transferred all its assets to the defendant bank, under an agreement dated July 3, 1912, made between the said two banks, and which agreement was approved by the Governor in Council on September 3, 1912.

By this agreement, as part of the consideration the defendant bank covenanted to assume and pay all the liabilities of the Traders Bank. The plaintiff demanded a return of the said note or the money due thereunder, but this was refused; thereupon this action was brought.

The learned trial Judge dismissed the plaintiff's action on the ground that he had no right of action against the defendant, and that his only recourse was against the Traders Bank, relying on the authority of Pollock on Contracts, 7th ed., at p. 212 (citing *Tweddle* v. *Atkinson*, 30 L.J.Q.B. 265), where it is laid down that:—

> The rule is now settled that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may.

From this decision the present appeal is brought by the plaintiff.

It is contended by plaintiff's counsel that the principle of law invoked by the learned trial Judge is one applicable solely to contracts, the ground being that there is no consideration moving from the third person; and that this principle is not applicable to the present case because here the obligation is statutory, and not merely contractual, and being a statutory obligation the plaintiff has the right to sue defendant.

I am of opinion that this contention is correct.

If authorities be required for the proposition that plaintiff has the right to sue defendant if the obligation be statutory, the following are sufficient:—

In vol. 27, Hals. Laws of England, p. 483, sec. 939, it is there stated:—

SASK.

S. C.

CAMERON v. ROYAL BANK OF CANADA.

McKay, J.

If a duty is laid by statute on any person or authority, every member of the public who is concerned in the performance of it has the right to have that duty performed.

Also see secs. 942 and 398 same volume.

And in *Davis* v. *Taff Vale R. Co.*, [1895] A.C. 542, at 560, Lord Macnaghten says:—

No doubt, it is perfectly true that, as a general rule, no one can enforce a contract who is not a party to it. A third person, though intended to be benefited by a contract, cannot enforce it, because no consideration moves from him. But the simple answer to the argument is, that the obligations in sec. 23 are statutory and not contractual.

Now, as to the other question: Is the defendant's covenant to pay all the liabilities of the Traders Bank a statutory obligation? To arrive at a correct conclusion as to this we must consider how and why the defendant bank entered into this covenant.

It appears the Traders Bank desired to sell to the defendant bank and the defendant bank desired to purchase all the assets of the Traders Bank, both banks being chartered banks, and, of course, subject to the Bank Act.

It is a well recognized principle of law that a corporation created by a statute for a particular purpose cannot do anything not authorized by the statute creating it, unless it receives further statutory authority (*Attorney-General* v. *G.E. R. Co.*, 5 App. Cas. 473, at 481). Hence, before 1900, the purchase of the assets of one bank by another bank, now authorized by secs. 99 to 111 inclusive of the Bank Act, could only have been carried out under a special act of parliament: Maclaren on Banks and Banking, 4th ed., 305.

By these sections, parliament has delegated to the Governor in Council power to approve of such purchase, on compliance with the conditions therein imposed.

It is also to be borne in mind that banks are created for the benefit of the public generally, and not only for the benefit of the persons immediately interested in the banks. And we find sections throughout the Bank Act for the benefit and protection of the public, such as sec. 91, which restricts the rate of interest recoverable by a bank from its customers to not more than 7 per cent. per annum. Then when we read secs. 99 to 111 we find

that parliament still kept in mind and provided for the benefit and the protection of the public, when passing these sections, see. 107 particularly, which in part reads as follows:—

> The agreement shall not be approved if unless it appear that (*a*) *proper provisions* have been made for the payment of the liabilities of the selling bank; (*b*) the agreement provides for the assumption and payment by the purchasing bank of the notes of the selling bank issued and intended for circulation, outstanding and in circulation.

When, therefore, these two banks were making their agreement they had to comply with the statutory requirements for the benefit and protection of the public.

Sub-sec. (*a*) requires that "proper provisions" are to be made in the agreement for the payment of, in this case, the liabilities of the Traders Bank. When considering what "proper provisions" were made, it is important to bear in mind that the Traders Bank sold all its assets to the defendant bank, consequently there was nothing left wherewith the Traders Bank could pay its liabilities. Even the shares to be allotted and issued by the defendant bank as part of the consideration could, under the agreement, be issued to the nominees of the Traders Bank, presumably its old shareholders (paragraph 7 (*a*)). Bearing this in mind then, we find in the petition presented by the defendant and Traders Banks to the Governor in Council therein stated:—

> That as will appear by the terms of the said agreement hereunto annexed marked "A." *proper provision* has been made for the payment of the liabilities of the selling bank (meaning the Traders Bank).

The only provisions made by the agreement for the payment of these liabilities are in paras. 2 and 7, the portions of which material to this case are as follows:—

> 2. The consideration for the purchased premises shall be:—(*b*) The assumption by the purchaser of all debts, liabilities, contracts and obligations of the vendor (including notes issued and intended for circulation, outstanding and in circulation, and leasehold obligations) existing on the day this purchase takes effect, including liabilities in respect of any present or future actions, proceedings, claims or demands in connection with any matter or thing.
>
> 7. The purchaser covenants with the vendor:—(*c*) To assume, pay, discharge, perform, and carry out all debts, liabilities, contracts and obligations of the vendor (including notes issued and intended for circulation and leasehold obligations existing on the day this purchase takes effect) including all liabilities in respect of any present or future actions, pro-

SASK.

S. C.

CAMERON v. ROYAL BANK OF CANADA.

McKay, J.

ceedings, claims or demands in connection with any matter or thing, and including all statutory requirements upon the vendor and its liquidator with respect to the vendor's notes in circulation.

These then are the "proper provisions" referred to in the petition and which the statute requires, by sec. 107, sub-sec. (*a*). The defendant bank then having agreed to pay these liabilities, and the agreement having been on September 3, 1912, approved by the Governor in Council under the authority conferred by sec. 102 of the Bank Act, this covenant on the part of the defendant bank to pay these liabilities became a statutory obligation, and the absolute duty of paying all these liabilities was imposed upon it, by such approval. And for the breach of such absolute duty the defendant bank is liable to the plaintiff: *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693.

In *Davis* v. *Taff Vale R. Co.*, [1895] A.C. 542, which dealt with the construction of local and personal Acts of two railway companies, regarding an agreement arrived at between them, it was there held that:—

A clause in a railway company's Special Act limiting the rates for certain traffic—the result of a parliamentary contest between the two companies—has the effect, not merely of a contract between the two companies, but of a statutory obligation which may be enforced by any person chargeable with the rates for such traffic.

And in Hals. Laws of England, vol. 7, p. 343, n. (*h*), referring to the foregoing case, it is there stated:—

Where by a contract which is scheduled to and confirmed by a local and personal Act of Parliament obligations are imposed on two railway companies for the benefit of the public, such obligations are to be regarded as statutory and not merely contractual, so that third parties for whose benefit the obligations were imposed are entitled to enforce them.

It is also to be noted that the covenant sued on herein is not a covenant to indemnify, as is the case in par. (*e*) of the agreement intended to protect the directors and other officers of the Traders Bank, but it is a covenant to *assume and pay* all debts and liabilities of the Traders Bank.

In fact, it is the paragraph in the agreement which complies with and fulfills the statutory requirement contained in sub-sec. (*b*) of section 107 of the Act above quoted, which in express words requires the purchasing bank to assume and pay the notes of the selling bank.

Supposing some person held $1,000 in bank notes issued by the Traders Bank, and sued the defendant bank for the payment of the same, I do not think the defendant bank could successfully resist payment. And yet, the covenant under which it would be sued for such notes is the same covenant under which the plaintiff sues herein.

The payment of the liabilities of the selling bank, and the payment of its notes are both statutory obligations. Except that in the latter it is compulsory for the purchasing bank to assume the statutory obligation, but in the former it is optional but, having once assumed it, it becomes a statutory obligation.

The learned trial Judge says,

> if the statute had intended to afford a direct remedy by creditors of the selling banks against the purchasing banks, I think it would have done so in express terms;

and he refers to sec. 111 of the Act, and concludes this section evidently contemplates that the selling bank is to discharge its liabilities.

In my opinion, there is a satisfactory explanation of this.

The Act (sub-sec. (*a*) of sec. 107) provides that the agreement shall not be approved of unless it appears that proper provisions have been made for the payment of the liabilities of the selling bank.

These "proper provisions" could be made in various ways, not only by the purchasing bank agreeing to pay them, for instead part of the purchase money might be set aside for this purpose, or the selling bank might retain all its cash on deposit, and sell only part of its assets, and if provision were made in this way, then the selling bank could continue to transact business to pay and discharge its liabilities. Apparently sec. 111, in so far as it contemplates the selling bank paying and discharging its liabilities, is for cases where the selling bank does not part with all its assets but makes some "proper provisions" whereby it can pay and discharge its own liabilities. And therefore as parliament no doubt had in view such cases arising (see beginning of sec. 99) it did not desire to make a hard and fast stipulation that the purchasing bank should pay the liabilities of the selling bank, but provided that "proper provisions"

SASK.

S. C.

CAMERON v. ROYAL BANK OF CANADA.

McKay, J.

should be made. It might possibly be contended that sub-sec. 1 of sec. 108 is put there for the purpose of making the purchasing bank directly liable to the holders of the bank notes of the selling bank. I do not think so. Sub-sec. (*b*) of sec. 107 already does this. In my opinion, sub-sec. 1 of sec. 108 is for the purpose of making the purchasing bank liable to the penalties imposed by secs. 125 and 135 of the Act. Were it not for this sub-sec. the purchasing bank would not be subject to secs. 125 and 135, for these bank notes of the selling bank, because sec. 107, sub-sec. (*b*) only says the purchasing bank is to assume and pay these bank notes.

If the learned trial Judge is correct in his conclusion that the plaintiff's cause of action is not against the defendant bank but against the Traders Bank then no "proper provisions" have been made for the payment of the liabilities of the Traders Bank.

The Traders Bank has no assets, it has sold them all to the defendant bank, and the plaintiff cannot follow them. On September 3, 1912, all these assets became vested in the defendant bank (sec. 110 of the Act).

If therefore the plaintiff sued the Traders Bank in this case he would only get a judgment and writs of execution with nothing to realize upon.

And the same thing would happen to all other creditors of the Traders Bank—such as depositors who might number in the thousands—if the defendant bank did not voluntarily pay them. In the light the learned trial Judge regards this agreement—as a contract for indemnification between the two banks—the only way the plaintiff could recover from the defendant bank would be through the good offices of the Traders Bank. He would first have to sue the Traders Bank, then if the Traders Bank saw fit to do so, it could apply to make the defendant bank a third party to the action. But this would depend entirely on the good-will of the Traders Bank, it could not be compelled to do so. If it were not willing to do this, the plaintiff would be in no better position than he is now.

But even if the Traders Bank were willing to do so, it was surely never the intention of the Governor in Council that the

creditors, depositors and others of the Traders Bank, who are promised "proper provisions," for the payment of all liabilities of the Traders Bank, should be exposed to such a hazardous and roundabout remedy.

For the foregoing reasons I am of the opinion that this appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff with costs.

Appeal allowed.

CARTER v. HICKS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. February 1, 1915.

1. APPEARANCE (§ I—2)—WRIT—SPECIALLY ENDORSED—LIQUIDATED DEMAND—AFFIDAVIT—REQUISITES OF—RR. 56, 57.

A defendant on entering his appearance to a specially endorsed writ for a liquidated demand must do more than make affidavit that he has a good defence on the merits; he must shew facts and circumstances on which he relies as a defence so that the court may judge whether they afford an answer; so where the defendant, suing for the price of goods sets up a deficiency in quality and quantity, his affidavit should state what reduction he claims on that account.

Statement

APPEAL by the defendant from an order for summary judgment made by the Judge of the District Court.

G. H. Sedgewick, for the appellant.

H. D. Gamble, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from an order for summary judgment, dated the 10th October, 1914, made by the Judge of the District Court of the District of Temiskaming. The appeal is supported upon the proposition that the appellant had filed the affidavit required by Rule 56, and that, having done so, the order should not have been made.

The affidavit, is not, in my opinion, a sufficient affidavit within the meaning of the Rule. In it the appellant deposes that he has "a good defence on its merits" to the action; that the quality of the pulpwood supplied to him, for which the respondent claims payment, was not such as he agreed to deliver to him; and that the respondent did not deliver to him the amount of the pulpwood for which the respondent claims payment.

ONT.
S. C.
CARTER
v.
HICKS.
Meredith, C.J.O.

The object of the requirement of the Rule that a defendant shall, besides deposing that he has a good defence on the merits, also in his affidavit shew "the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action," is plainly that the Court may see whether the facts and circumstances on which he relies afford an answer to the plaintiff's claim; and, if they do not, the affidavit is not a bar to the making of an order for summary judgment.

It is plain from the appellant's affidavit that he owes some part of the respondent's claim, and it is quite consistent with the affidavit that he has no defence to the whole of it except $10.

It was, in my opinion, necessary, to make the affidavit sufficient, that the appellant should have shewn what reduction he claimed in respect of the objection to the quality of wood and the quantity of wood, payment for which was claimed, that was not delivered.

For these reasons, I would dismiss the appeal with costs.

Having come to that conclusion it is unnecessary for us to determine the question raised by the respondent as to the competency of the appeal. The order appealed from was made on the 10th October, 1914, and the appeal was set down on the 29th November following, upon the fiat of my brother Hodgins, on the undertaking of the appellant "to file all papers within one week" from that date. The certificate of the Judge of the District Court bears date the 8th December, 1914, and the papers were, therefore, not completed within the week allowed for filing them, and it follows from this that the appeal was not set down within the time prescribed by sec. 44 of the County Court Act, R.S.O. 1914, ch. 59. No indulgence should be granted to the appellant. The letters which he wrote to the respondent and to the respondent's solicitor, which may be looked at at all events for the purpose of determining whether any indulgence should be granted, contain clear admissions of the respondent's claim, and repeated promises to pay it. Besides this, the result of the delay that has taken place has been to prevent the respondent from taking the case to trial at the December sittings of the District Court, as he might have done if the appeal had been brought on promptly, and the result of it had been adverse to him. *Appeal dismissed.*

Re KEMP AND CITY OF TORONTO.

ONT.

Ontario Railway and Municipal Board. January 18, 1915.

Mun. Board

1 MUNICIPAL CORPORATIONS (§ II C—50)—LOCAL IMPROVEMENT ACT, R.S.O. 1914, CH. 193—GENERAL SCHEME OF.

The general scheme of the Local Improvement Act, R.S.O. 1914, ch. 193, is to authorize the council to undertake a work, then to execute it, then to procure an assessment roll to be made for imposing the tax; the latter follows automatically on the work being authoritatively undertaken and fully executed and there is no appeal except that provided from the court of revision.

2. STATUTES (§ II A—95)—LOCAL IMPROVEMENT ACT—AMENDMENT OF—INTENTION.

The amendment to the Local Improvement Act, R.S.O., 1914, ch. 193, made by the statute 4 Geo. V. Ont., ch. 21, sec. 42, is intended to give dissentient land owners a remedy analagous to those given by counter-petition and by notice to the council, and provides an appeal from the discretion of the council in undertaking the work at all or in respect of some detail of the work such as the apportionment of the cost; but when the work has been executed in assumed conformity with the council's declared intention, an appeal does not lie to the Ontario Railway and Municipal Board to review the council's discretion.

PETITION under the Local Improvement Act, R.S.O. 1914, ch. 193, sec. 9, sub-sec. (2). Statement.

James S. Fullerton, K.C., for certain of the petitioners.

R. J. Maclennan, for other petitioners.

Irving S. Fairty, for the city corporation.

The opinion of the Board was delivered by

THE CHAIRMAN:—This is an application under sub-sec. (2) of sec. 9 of the Local Improvement Act, as enacted by 4 Geo. V. ch. 21, sec. 42, which became operative on the 1st May, 1914. Objection was made to the Board's entertaining the application, on the grounds: (1) that sub-sec. (2) was passed subsequently to the execution of the work, and was not retroactive; and (2) that before the application was made, the work had been fully executed, and a special assessment roll had been prepared, and a sittings of the Court of Revision had been held for imposing the assessment, although the Court has not as yet confirmed the assessment roll. The Chairman

On the 16th June, 1911, under sec. 11 of the Local Improvement Act, notice was given to the applicants by the corporation of its intention to construct a 24-foot macadam roadway, with concrete kerbing and brick gutters, on a portion of East Roxborough street, as a local improvement, and to make a special

ONT.

Mun. Board

RE KEMP AND CITY OF TORONTO,

The Chairman

assessment of a part of the cost upon the land abutting directly upon the work. The notice contained the particulars of cost required by the Act, and, furthermore, intimated that persons desiring to petition against undertaking the work should do so on or before the 21st July, 1911. Subsequently a petition was presented to the city council by the applicants protesting against the work.

On or about the 7th September, 1911, a notice was served by the corporation on the petitioners to the effect that the city engineer had reported that the construction of a 24-foot macadam roadway with concrete kerbing and brick gutters was desirable and necessary on the portion of East Roxborough street named: that the council had power by a two-thirds vote of all the members to pass a by-law to undertake the work, notwithstanding any petition or protest against the same, and that the lands to be specially assessed consisted of all real property fronting or abutting on the proposed work. The notice contained the particulars of cost required by the Act, and intimated that a by-law to undertake the work would be considered by the council at a meeting on the 18th September, 1911, and that at such meeting all property-holders affected by the work would have the right to be heard, before the council finally decided upon proceeding therewith. It is alleged that on the 18th September, 1911, the petitioners, with others liable to be assessed for the work, appeared before the council and protested against its cost being assessed against them, on the ground that they were not liable to be assessed, their lands not being benefited.

Notwithstanding the hostile attitude of the applicants, and their fellow-protestants, the council on the 31st October, 1911, passed by-law No. 5867, declaring that it was desirable that the work in question should be undertaken, and authorising its construction.

Subsequently, the work was executed, and an assessment roll was prepared, and on the 13th March, 1914, the corporation notified the applicants of the sittings of the Court of Revision to be holden on the 31st March, 1914, to hear complaints against such roll, all in pursuance of the provisions of the Local Improvement Act.

For some reason, the assessment roll was withdrawn from the Court of Revision by the officers of the corporation, and on the 30th October, 1914, the corporation notified the applicants of a sittings of the Court of Revision to be held on the 17th November, 1914, to hear complaints against the proposed assessment of the cost against the property-owners. It would appear that in the interval between the two sittings of the Court of Revision there had been a new computation and apportionment of the cost of the work, with the result that the roll was altered, and the burden upon both the corporation and the property-owners was slightly increased. At this latter sittings of the Court of Revision, it is alleged, the officers of the corporation were not prepared to go on, and the consideration of the assessment roll was adjourned till the 8th December, 1914. No further action was taken by the Court of Revision on this latter date, as the Board understands, and on the 21st December, 1914, this application was made.

Upon this statement of facts, whether or not the Board has jurisdiction to entertain this application, must turn upon a consideration of the provisions of the Local Improvement Act as amended. This enactment contains a detailed code of procedure for the initiation and prosecution of the local improvement work from its inception down to the act which finally determines the incidence of the cost upon all the taxable interests. Three stages are clearly expressed or implied in the evolution of the work; (1) the undertaking of the work; (2) the execution of the work; (3) the imposition of the special assessment to meet the cost of the work.

A local improvement work may be "undertaken" by a municipal corporation in various ways. This work the council elected to undertake in the way authorised by sec. 9. To the validity of its being undertaken under this section a by-law of council was necessary, passed by a two-thirds vote of all the members, declaring that its construction was desirable, while a prerequisite to its validly passing was publication of the notice of the council's intention, under sec. 11. Upon these provisions being observed, and until the passing of the amendment of 1914, the authority of the corporation to proceed with such a work so undertaken could not be questioned, the foundation for the work

ONT.

Mun. Board

RE KEMP AND CITY OF TORONTO.

The Chairman

so laid was unassailable—the statute expressly providing that the owners of the land affected should not have the right to lodge a counter-petition with the council. This deprivation of the right of counter-petition, or other effective protest, was anomalous when the work was undertaken on the council's own motion, the one exception being the case of such subsidiary works as private drain connections. For instance, where the council proceeds on the initiative plan under sec. 13, the right of counter-petition is vested in a majority of the property-owners representing one-half in value of the lots liable to be specially assessed. Under sec. 7, in the case of a work, however undertaken, falling in one of the several enumerated catagories and exceeding in cost $50,000, any person whose land is to be specially assessed may give notice that he objects on certain grounds to the work being undertaken, and thereafter the work cannot be proceeded with until the approval of this Board has been obtained. It is to be noted that in these cases the action of the corporation is arrested at the preliminary stage of the work, and the objector is remediless, once the work has been executed.

The Board is of the opinion that the amendment of 1914 is intended to remedy the anomaly above noted, and to give to dissentient land-owners a remedy analogous to those given by counter-petition under sec. 13, and by notice to the council under sec. 7. As, however, the latter remedies are exercisable and effective at the earliest stage of the work, and before it has been actually executed, so the Board is of opinion that under the amendment of 1914 its intervention may be invoked only at that stage. True, secs. 7 and 13 prescribe a time-limit for action by the dissentient land-owners, while the amendment of 1914 is silent as to the period within which the intervention of the Board may be invoked. Notwithstanding this omission, obviously at some point of time the right of appeal to the Board is gone. It would scarcely be contended that, after the work had been executed and the assessment roll finally confirmed, the Board could reopen the question of the assessment as between owners and corporation. To fix the point of time at which the remedy by appeal is gone, it is necessary to ascertain the intention of the Legislature in this respect from a consideration of the general scheme of the Local Improvement Act. The council is

ONT.

Mun. Board

RE KEMP AND CITY OF TORONTO.

The Chairman

authorised to undertake such a work, then to execute it, and then to procure an assessment roll to be made for imposing the tax. Once the work has been authoritatively undertaken and fully executed, as this work has been, it seems to the Board that the final step of imposing the assessment in terms of the by-law follows automatically, and without any appeal, except that provided from the Court of Revision. In short, the amendment of 1914 seems to be intended to provide an appeal from the discretion of the council in undertaking the work at all, or in respect of some detail of the work, such as the character or kind of the pavement, the apportionment of the cost as between the owners and the corporation, etc. But, when the work has been executed in assumed conformity with the council's declared intention, then, in the opinion of the Board, the time has gone by to question the council's discretion as exercised and expressed in the by-law.

This conclusion seems warranted by the fact that the amendment of 1914 is an amendment of a section whose subject-matter is concerned with "procedure for undertaking the work;" implying that what the amendment aims to confer is a right to question the soundness of the foundation on which the council proposes to build, but necessarily exercisable before the superstructure is raised. Besides this, the amendment of 1914 provides that an application to the Board can be made only by a majority of the owners representing one-half the value of the lots to be specially assessed—precisely the requisite qualification of a counter-petition under sec. 13—thus furnishing an argument for the analogy above suggested. Furthermore, the amendment expressly provides that, after notice to the clerk of such an application as this, and pending its determination, the council shall not proceed with the work—indicating clearly that the work is yet in the initiatory stage.

The Board is also affected by the consideration urged by Mr. Fairty that the Legislature could scarcely have intended by this enactment to authorize the Board to interpose and remodel the general scheme of assessment proposed by the council under the powers vested in it by sec. 23, at a stage in the prosecution of the work when it was too late for the council to withdraw. A

ONT.

Mun. Board

RE KEMP AND CITY OF TORONTO.

The Chairman

material inducement to the council to undertake a work might well be its declared intention to assess the cost, or the major part of it, on the abutting land-owners. If, however, after the work is executed, and the debt incurred by the corporation, the Board may intervene and alter the apportionment of the tax, not only is there disturbance of the financial arrangements of the corporation—greater or less according to the magnitude of the work—but possibly the very intention of the council, inducing it to undertake the work, is frustrated.

In the opinion of the Board, it is not without significance that sec. 36(2) of the Act provides that the Court of Revision shall not have authority to review or alter the proportions of the cost which the lands to be specially assessed, and the corporation, are respectively to bear, according to the provisions of the by-law for undertaking the work. That is to say, when a work has reached the stage this had reached when the application was made to the Board, the financial scheme of the council, on the faith of which it undertook the work, cannot be altered by the Court of Revision.

In view of the conclusion reached by the Board as to the general application of the amendment of 1914, it is not necessary to discuss the question of its retroactivity raised at the hearing.

The petition will be dismissed; there will be no costs to either party, but the petitioners will pay $10 in stamps on the order.

Petition dismissed.

ONT.

S. C.

OSHAWA LANDS v. NEWSOM.

Ontario Supreme Court, Middleton, J. April 3, 1915.

1. CONTRACTS (§ V C—390)—RESCISSION—FRAUD AND MISREPRESENTATION—CONTRACT ASSIGNED—ALL PARTIES BEFORE COURT—MAY DIRECT REPAYMENT.

Rescission of a contract for sale of lands may be granted on the ground of fraud and misrepresentation, although the purchaser seeking the rescission had assigned the contract, if the assignees are parties to the action and therein repudiated the contract; and if it appears that the money paid to the vendor was in fact the money of such assignees with whom the original purchaser had contracted in advance of his own agreement to purchase, the Court may in such action in which all parties are before it, direct repayment of such moneys to be made direct to the assignees.

[*Medcalf* v. *Oshawa Lands and Investments Ltd.*, 15 D.L.R. 745, referred to.]

ACTION to recover the purchase-price of land sold.

H. C. Macdonald, for the plaintiff company.

N. W. Rowell, K.C., for the defendant.

E. T. Coatsworth, for the third parties Medcalf and Poutney.

The third party Mackenzie, in person.

MIDDLETON, J. (after setting out the facts):—I do not think that the defendant ever was or intended to become the agent of the plaintiff company. He became a purchaser seeking to make a profit by turning the property over at an advance. In point of fact, he had in each case agreed with his purchaser before he contracted with the plaintiff company for the purchase.

I have then to consider the question whether there was fraud on the part of the plaintiff company in bringing about the sale to the defendant; and this task is made the more difficult because the defendant did not himself impress me favourably. Nevertheless I have come to the conclusion that he is entitled to relief.

The whole scheme of the plaintiff company and its mode of flotation were such as to call for investigation. It was conceived in sin, shapen in iniquity, nurtured in fraud, and during its whole brief life it lived in an atmosphere devoid of truth or any kind of business morality. . . .

The defendant has put forward the misrepresentation upon which he relies under six different heads.

First, that the Canadian Pacific Railway passenger station had been located upon the Ritson estate, as the land in question was called. The station never was located on the land in question. . . . The railway company did build a station for Oshawa, but not upon the Ritson estate.

The next representation complained of was, that the town council of Oshawa had chosen the Ritson estate for a new industrial centre, and that a large area of land had already been sold for factory sites. . . . The council had undertaken to give a site to the Oriental Textile Company under some bonus arrangement. An offer was made of a suitable site on this property at $2,500. The mayor announced that he could get a site which he regarded as equally satisfactory for $1,000. Thereupon the price was reduced to $1,000, and this was accepted by the

ONT.
S. C.
OSHAWA LANDS v. NEWSOM.
McMeton, J.

company. On the strength of this, 25 acres, for which $25,000 had been asked, was marked upon the plan as "sold," and the significant words "factory site" were written on the plan. . . . Upon the plan other lots were marked off as sold which were not in fact sold. All this was done with the idea of conveying to prospective purchasers the impression that the land was selling rapidly. . . . At the time this advertisement was published, three sales had been made. . . . Not a single sale had been made to one who might be described as an outsider. No land save that purchased for the textile company has even yet been sold for a factory. . . .

[The learned Judge then set out the other representations and summarised the evidence with regard to them.]

All this chaos of untruth and exaggeration existed. . . . The defendant was taken to the property and was shewn the situation upon the ground. He made some inquiries himself, and he appears to have become intoxicated by the optimism which surrounded the whole undertaking. He passed on the representations made to him to those who purchased from him, and I incline to think that he did this after persuading himself that they were true. . . . The third parties . . . were all entirely innocent victims of the scheme. . . . The plaintiff company and its agents, having clothed themselves in garments of falsehood, cannot be heard to complain when it is found that the fraud and misstatements did in truth bring about the contracts in question.

This is not the first time that this matter has been in Court. . . .

[Reference to *Medcalf* v. *Oshawa Lands and Investments Limited* (1914), 15 D.L.R. 745.]

The judgment in that action is relied upon as in some way constituting a defence of res judicata. I cannot see that it in any way determines or precludes investigation of the issues raised in this action. The issue there was whether fraud had been practised on Medcalf. The issue here is whether fraud was practised upon Newsom.

I think the action fails, and ought to be dismissed with costs. The contracts should be directed to be cancelled, and the moneys paid under them should be directed to be repaid.

ONT.
S. C.
OSHAWA LANDS v. NEWSOM.
Middleton, J.

As there cannot be rescission except upon the terms of restitution, the defendant must relieve the plaintiff company from all embarrassment by reason of his assignment of the contract. The assignees were all before the Court, and were only too anxious to disclaim any interest under the contract. As the money which is to be repaid was in truth the money of the third parties, I think I am justified in directing repayment to be made direct to the third parties. The defendant, on his part, must do all that may be necessary, by signing any assignment or direction, in order that this may be worked out.

I have had much difficulty in making up my mind as to the proper incidence of costs between the defendant and the third parties. I am not sure that the defendant's practice has been entirely right. Possibly he ought to have made the third parties defendants by counterclaim. Details do not appear to be important, when all the parties are before the Court in one capacity or another. On the whole, justice will probably be done by giving the defendant his costs against the plaintiff company and making no award of costs as between the defendant and the third parties.

TAYLOR v. MULLEN COAL CO.

ONT.
S. C.

Ontario Supreme Court, Lennox, J. February 8, 1915.

1. DAMAGES (§ III K—225)—NUISANCE—INDUSTRIAL WORKS—SMOKE, DUST, NOISE—DAMAGES DIFFERENT IN CHARACTER—NUISANCE INTERFERING WITH ORDINARY PHYSICAL COMFORT.

An action for damages in respect of the nuisance caused to a neighbouring owner by reason of smoke, dust and noise from industrial works, may be maintained if the plaintiff has suffered damages different in character and distinct from any injury, inconvenience, or annoyance occasioned to the public generally, and the nuisance is of such a character as to interfere with the ordinary physical comfort of human existence.

[*Appleby* v. *Erie Tobacco Co.*, 22 O.L.R. 533; *Dewar* v. *City and Suburban Racecourse Co.*, [1899] 1 Irish R. 345, referred to.]

Statement

ACTION for damages and an injunction in respect of an alleged nuisance.

T. Mercer Morton, for the plaintiffs.

A. R. Bartlet, for the defendant company.

Lennox, J.

LENNOX, J.:—The disposition of this action has given me a great deal of anxious thought. I should be careful, on the one

ONT.

S. C.

TAYLOR v. MULLEN COAL CO.

LENNOX, J.

hand, that industrial enterprise and the company's business is not unnecessarily obstructed, and, on the other, that the reasonable comfort and enjoyment, quiet and happiness, of the plaintiffs' homes are not unlawfully or wantonly sacrificed or set at naught. The acts complained of may constitute a public nuisance; I am not sure that they do; but, however this may be, the plaintiffs have shewn their right to maintain this action—they have clearly shewn that they have suffered damage different in character and distinct from any injury, inconvenience, or annoyance occasioned to the public—direct actual injuries to their properties, as well by depreciation in marketable values as by sensible diminution in their enjoyment, comfort, and utility for owners and occupants.

The inconvenience complained of is not in any sense fanciful, nor are the complaints to be attributed to mere delicacy, fastidiousness, or supersensitiveness.

The nuisances shewn to exist are of a character to interfere "with the ordinary physical comfort of human existence, not merely according to dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people," as defined in *Walter* v. *Selfe* (1851), 4 DeG. & Sm. 315, and the principles enunciated in *Fleming* v. *Hislop* (1886), 11 App. Cas. 686; Halsbury's Laws of England, vol. 21, pp. 530, 531.

For recognition in our own Courts of the same principles of determination, and distinguishing mere public nuisances from actionable wrongs causing direct special and peculiar injury to one or more persons, of a long line of uniform decisions, *Ireson* v. *Holt Timber Co.* (1913), 18 D.L.R. 604; *Drysdale* v. *Dugas* (1896), 26 S.C.R. 20; *Rainy River Navigation Co.* v. *Ontario and Minnesota Power Co.* (1914), 17 D.L.R. 850, and *Appleby* v. *Erie Tobacco Co.* (1910), 22 O.L.R. 533, may be referred to.

After sufficient evidence had been given last May to establish an actionable wrong on the part of the company, the case was adjourned to enable the company if possible to abate the nuisances; and the trial was resumed on the 9th January, 1915. Very little had been accomplished. In the interval the workmen were less noisy, the creaking of the machinery was diminished,

ONT.

S. C.

TAYLOR v. MULLEN COAL CO.

LENNOX, J.

there was a little less Sunday work; perhaps there may have been some improvement effected—not very much, I think—in the method of navigating the lighters to and from the wharf; and I think it might be said that the ground of complaint as to exhaust steam was pretty well eliminated. This was all.

The chief cause of complaint—smoke enveloping and entering the residences of the plaintiffs, the deposit of dust and coal cinders in the dwellings and upon the lawns and gardens, and the continuous disturbance caused by the loading, unloading, and shifting coal—is as it was before the opening of the trial.

It was shewn that after the adjournment the company gave orders for the occasional use of Pocahontas coal for firing. The method adopted was peculiar. If the fireman noticed that the wind was carrying the smoke upon the plaintiffs' residences, he was to use a little of this coal. But there was no supply of it kept in the derrick-house, and the floor of this building is 8 or 10 feet above the level of the wharf. The special coal was 12 or 15 rods away. To get it by day or by night, he had to climb down a ladder, make way across this space—which is very uneven—bring the coal back over this rugged way, and elevate it in some manner to a height of 8 or 10 feet through a doorway at the south side of the derrick, then come round to the other side, climb the ladder again, and put in just the right quantity, in just the right way: an operation which is said to be one of very great nicety and judgment; and so from time to time, by day and by night, as occasion might require. It is impossible to believe that such a method would work out as a practical remedy; and it did not; and it is also impossible to believe that the company expected that it would.

However, the evidence, as I remember it, only went to the colour of the smoke. It was not shewn that Pocahontas coal does not make cinders, or that the great body of ordinary coal beneath it would not continue to throw out cinders as before. It is shewn by the plaintiffs that the smoke nuisance was not even partially abated. In any case, it leaves the question of dust and cinders from coal-heaving untouched.

As to all the nuisances complained of, the company devoted a lot of effort to shewing that a remedy or further improvement

ONT.

S. C.

TAYLOR v. MULLEN COAL CO.

LENNOX, J.

is impossible. This does not meet the issue; for, if actionable wrongs exist, and a remedy is impossible, then an injunction must be granted; and, if I believed this, I should feel compelled to order an immediate, perpetual injunction restraining the defendant company from operating its plant.

But I have come to the conclusion that there is a means open to the company to get rid of some of the wrongs complained of; and possibly all of them, although I am not sure. The smoke, and its cinders, from the stack of the company's stationary plant, can be got rid of, either by the application of electricity to operate the plant or by an apparatus to consume the smoke. As to the smoke from the lighters and other craft I do not know. As to the dust and cinders carried by the wind from the coal as it is being handled—and that is, I believe, the most potent cause of injury to the plaintiffs—and the noise occasioned by these operations, I have nothing to enable me to judge except the company's contention that nothing more can be done. It may be so; and, if so, it will force a very unfortunate alternative. The existing condition of things is not to be tolerated.

The unloading of coal on Sunday is also made ground of complaint. There is a right to quiet and rest on the seventh day, which the plaintiffs should not be deprived of except for works of necessity: *Dewar* v. *City and Suburban Racecourse Co.*, [1899] 1 I.R. 345; *Attorney-General for Ontario* v. *Hamilton Street R. Co.*, [1903] A.C. 524. The unloading of the large carriers, whether directly upon the dock or wharf, or indirectly into the chutes, on Sundays, must be discontinued.

The plaintiffs ask for a reference to assess damages already accrued. It is not a case for heavy damages, and it is better that I should assess them than that the heavy costs of a reference should be incurred.

There will be judgment for the plaintiffs for $1,000 damages; and, if they cannot agree upon an apportionment, a reference to the Local Master at Sandwich, at the cost of the plaintiffs, to apportion the damages between them, these costs to be borne by each party in proportion to his share. If, however, either the plaintiffs or the defendant company desire a reference as to the

ONT.

S. C.

TAYLOR v. MULLEN COAL CO.

LENNOX, J.

whole question, I may be spoken to; and, if this is done, it should be done promptly.

I have not overlooked what is said about alleged statements of Doctor Cruickshanks. This cannot affect the maintenance of the action or the right to an injunction. For this purpose one plaintiff is as effective as a score.

There will be an injunction restraining the defendant company from so operating its plant and works as to cause a nuisance to the plaintiffs or any of them by reason of smoke or dust or cinders, or by reason of noise in the loading, unloading, handling, or dumping of coal, or the operation of the machinery or plant, and from unloading coal in any way from vessels upon Sunday; but the operation of this injunction will be stayed for four months to allow the company to abate the nuisances if it can do so, or to make other arrangements. Should the company, acting diligently and in good faith, be unable, within this time, completely to abate the nuisances, or to locate their plant elsewhere, an application by the company for an extension of time will be considered.

I do not think it is advisable to decide now as to nuisance alleged to be caused by lighters and vessels operating in conjunction with the operations of the company's plant and the carrying on of its business. This question may never have to be dealt with, and I reserve its consideration during the four months' delay, and will deal with it later if necessary.

Upon consideration I have not thought it advisable to engage an expert.

The plaintiffs are entitled to costs.

[May 20th, 1915. Appealed to Ontario Supreme Court, Appellate Division. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ. The Court varied the judgment by adding to para. 3 the words *so as to create or substitute a nuisance* and in other respects affirmed the judgment.]

ONT.

S. C.

BALDWIN v. CHAPLIN.

Ontario Supreme Court, Latchford, J. January 8, 1915.

1. WATERS (§ II—60)—RIPARIAN PROPRIETOR—ERECTION OF PIER—ACCESS TO LAND NOT INTERFERED WITH—NO SPECIAL DAMAGES.

No right of action accrues to one riparian proprietor against another for the latter's erection and maintenance of a pier in the navigable waters of a lake where the plaintiff's right of access to his lands is not interfered with and he suffers no damages of a special character in addition to the interference with the public right of navigation, notwithstanding that the pier was not erected in compliance with the lawful requirements and is maintained contrary to law.

[*Volcanic Gas Co.* v. *Chaplin*, 19 D.L.R. 442, 31 O.L.R. 364, referred to.]

Statement

ACTION for an injunction.

W. M. Douglas, K.C., *I. F. Hellmuth*, K.C., and *J. G. Kerr*, for the plaintiffs.

O. L. Lewis, K.C., *J. W. Bain*, K.C., and *Christopher C. Robinson*, for the defendants.

Latchford, J.

LATCHFORD, J.:—The plaintiff Frank P. Baldwin was, at the time of the commencement of this action, the owner in fee of the east quarter of lot No. 185, Talbot Road survey, in the township of Romney, in the county of Elgin; and the plaintiff Nicholas Baldwin was the lessee from him of the same lands. After the action was begun, Frank P. Baldwin conveyed all his interest in the lands to his mother, Eliza Baldwin, who was thereupon added as a plaintiff.

Nicholas Baldwin resides on the property, and is engaged, under a license from the Crown, in extensive fishing operations in the waters of Lake Erie fronting upon the said lands and other lands in the vicinity. His license enables him to operate in front of lots 179 to 189 of the Talbot Road survey. On lot 189, more than two miles to the west of lot 185, he has leased a landing place, with store-houses for ice and fish. No similar accommodations at present exist upon his own property. He, however, states that it is his intention to erect a proper landing stage and the buildings necessary for his fishery. All along the shores, pound-net fishermen, like Nicholas Baldwin, are operating under licenses from the Government of Ontario.

On the 1st August, 1911, the defendant James B. Chaplin, of St. Catharines, was granted by the Government of Ontario a lease, at a nominal rental, for a period of ten years, and renew-

able, of "all the portion of land covered by the waters of Lake Erie in the township of Romney (sic), in front of lots 181 to 187 inclusive, in the said township of Romney, and extending 40 chains into the lake, containing about 608 acres, with the right to dig and explore for petroleum and natural gas and to remove the same."

The locality is known as a gas-producing district. Many gas-wells were in operation in the township of Romney when the lease was given. Mr. Chaplin's purpose in obtaining the concession was to bore for gas, or to dispose of his lease to persons engaged in producing natural gas or promoting companies with that object.

The lease is subject to conditions which, with one exception, have no bearing on the issues presented in this case.

The exception is, that the lessee or his assigns shall not in any way interfere with navigation or with the use of any docks or wharves existing or thereafter to be constructed in or upon the water covering the demised lands, or with the right of access to the water by the riparian proprietors.

When the township was surveyed, a reservation of one chain for a road was made near the shore. This road, known as the Old Talbot Road, may have existed as a trail before the survey was made. Many years ago, the land between the old road and the lake, and the old road itself, disappeared, owing to erosive agencies, and the waters of Lake Erie now roll over part of the lands originally granted to the predecessors in title of the plaintiffs. A road, also called the Talbot Road, was opened up in 1838, several hundred feet from the shore.

The plaintiffs' buildings are on a plateau about 100 feet above the level of the lake. The shores are steep and the beach narrow. A road allowance extending along the easterly side of the Baldwin farm has been opened as far south as the present Talbot Road. From the point of intersection to the lake, a ravine, increasing in depth and width, descends to the water in the line of the road allowance.

The soil and other materials falling into the lake form a bar approximately paralleling the shore and distant 200 or 300 feet from the water's edge. Ordinarily there is sufficient water—

ONT.

S. C.

BALDWIN v. CHAPLIN.

Latchford, J.

about 6 feet—over the bar to enable the fishermen to cross it without danger in their flat-bottomed boats. Tugs and large boats cannot come in near shore, but are obliged to anchor or lay-to some distance outside the bar, where they receive the fish collected from the pounds.

In January, 1913, Mr. Chaplin assigned all his interest in the lease to the Glenwood Natural Gas Company. Prior to the date of the assignment in November, 1912, Mr. Chaplin or the Glenwood Company, acting through the defendants Symmes and Tripplehorn, utilised the road allowance leading to the lake for bringing down timber and other materials to be used in erecting the structures necessary in sinking a gas-well opposite lot 185.

From the point where the end of the road allowance reaches the lake they constructed a platform upon bents, extending in front of the plaintiffs' land in a broken line to a point on the bar, where piles were driven, a pier erected, and a gas-well bored. The platform and its supports were but temporary structures, which were removed when the well was completed. While they were in position, they obstructed any approach by boat to lot 185 from the east inside the bar—a course frequently taken by fishermen when heavy seas were running. It is not improbable that part of the platform was actually within the original boundaries of the plaintiffs' land. The plaintiffs are not, however, proceeding on the ground that they are the owners of the *situs* of the pier, and no evidence was submitted to establish what was originally the southerly boundary of the Baldwin property.

In this respect the present case differs from *Volcanic Gas Co.* v. *Chaplin* (1912), 6 D.L.R 284, and (1914), 19 D.L.R. 442, where the judgment of the trial Judge and that of a Divisional Court of the High Court were reversed by a Divisional Court of the Appellate Division on a question of fact. An appeal to the Supreme Court of Canada is now, I think, standing for judgment. In that case it was found by the learned and experienced trial Judge that the *situs* of the structures then in question was within the boundary of the lands granted to the predecessor in title of the plaintiff Carr. The case is unimpeached on the question of accretion, but it does not apply here.

In this case the plaintiffs seek an injunction restraining the defendants from invading their riparian rights, a mandatory order to compel the removal of the structures placed in the lake opposite lot 185, and a declaration of their rights.

Up to the time the pier was built, and for long afterward, the only rights any of the defendants had were such as the lease from the Government of Ontario conferred. The waters of Lake Erie are navigable, and the Navigable Waters Protection Act (R.S.C. 1906 ch. 115, as amended by 9 & 10 Edw. VII. ch. 44) applies to them. Section 4 prohibits the building of any pier or other structure in or across any navigable water, unless the site has been approved by the Governor in Council, and unless such pier or structure is built and maintained in accordance with plans approved by the Governor in Council. These provisions do not apply to small wharves nor to groynes or beach protection works or boat-houses which do not interfere with navigation.

All the structures other than the pier, with the well sunk in the centre of it, had been removed by the defendants prior to the trial of this action.

At a time not stated in evidence, but during or after the construction of the pier, the Glenwood Company applied to the Department of Public Works at Ottawa for approval of their plans for a wharf and 10 piers in Lake Erie. The company had apparently acquired an additional concession, as their application covered the front not only of lots 181 to 186 but lots 172 to 186. The application itself was not before the Court. Its purport in part can, however, be ascertained from recitals in the order in council of the 22nd January, 1914, approving a memorandum, dated the 13th December, 1913, of the Minister of Public Works, stating that approval of the plans of the 10 piers "might be granted" subject to certain conditions.

With several of these conditions the pier in front of the Baldwin farm does not comply. It is not surrounded by a talus composed of stones of not less than one ton each. An automatic bell to indicate in a fog the position of the pier has not been installed, nor has a bright fixed red light to indicate the location at night and avert possible disaster to fishermen.

I find that the pier has been erected and is maintained con-

ONT.

S. C.

BALDWIN v. CHAPLIN.

Latchford, J.

trary to law, and interferes with navigation. It affords no protection to fishermen. . . .

The defendants have absolutely disregarded the conditions imposed by the order in council, but that is a matter giving the plaintiffs no right of action.

Additional piers, even if erected conformably to the conditions, will of course greatly add to the dangers now existing; and a situation may arise when it will be practically impossible for riparian owners to leave or reach their beaches in rough weather when the bar along the shores of the gas-area in Romney and Tilbury East is dotted with piers, each undoubtedly as dangerous as a large rock. But that is not the situation at the present time.

Whatever may be the inconvenience and danger to which fishermen and the public generally may be exposed by the pier erected by the defendants, it is quite clear that, before the plaintiffs can obtain relief, they must establish that they have suffered some special injury over and above that suffered by the rest of the public. Apart from the slight interference with access and regress while the temporary platform was in place, there has been, I find, no damage of a special character suffered by any of the plaintiffs.

It is, however, contended that the right of access of a riparian proprietor to a navigable water is a right of property distinct from the public right of navigation, an injury to which is actionable without proof of special damage: Coulson & Forbes' Law of Waters, 3rd ed., p. 111, citing *Rose* v. *Groves* (1843), 5 M. & G. 613; *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *North Shore R. Co.* v. *Pion* (1889), 14 App. Cas. 612; and other cases. . . .

In each of the cases mentioned it was found as a fact that the obstruction did interfere with a private right.

The distinction is well illustrated in *W. H. Chaplin & Co. Limited* v. *Westminster Corporation*, [1901] 2 Ch. 329, between a private right and an individual interest in a public right. . . .

In the case at bar, the pier is not an interference with the plaintiffs' right of access, but merely with the public right of navigation enjoyed by the plaintiffs in common with others of the public.

ONT.

S. C.

BALDWIN v. CHAPLIN.

Latchford, J.

I, therefore, feel obliged to hold—notwithstanding the unwarranted acts of the defendants in obstructing navigation without authority from the only source competent to grant it, and in failing to comply with the principal conditions imposed by the order in council—that the plaintiffs are not entitled to the relief which they claim. Damages are not specifically asked for the interference with the plaintiffs' access and regress caused by the temporary platform, and, if asked, they would be so trivial as not to merit consideration.

I, therefore, dismiss the action, but without costs.

[April 26, 1915. Appealed to Ontario Supreme Court, Appellate Division. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A. Appeal dismissed without costs.]

RITCHIE v. JEFFREY.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. May 15, 1915.

1. ASSIGNMENT (§ II—20)—CHOSE IN ACTION—ASSIGNMENT OF—WHEN VERBAL—FORM OF WORDS NECESSARY—INTENTION.

An assignment of a chose in action may be verbal where a writing is not required by law; no particular form of words is necessary so long as they clearly shew an intention that the assignee is to have the benefit of the chose in action.

2. ASSIGNMENT (§ II—20)—EQUITABLE—INFERRED FROM CONDUCT—WHERE BILL OF EXCHANGE OR ORDER NOT SUFFICIENT—EQUITABLE ASSIGNMENT MAY BE SHEWN SUPPLEMENTARY THERETO.

An equitable assignment may be inferred from conduct or a course of dealing, and this although a bill of exchange has been drawn or a mere order has been given which alone would not constitute an assignment; and where the written order does not specify the debt owing by the addressee or the fund intended to be assigned, the fact of an equitable assignment may be shewn as supplementary to the writing.

[*Galt* v. *Smith*, 1 Terr. L.R. 129; *Perceval* v. *Dunn*, 29 Ch.D. 128, referred to.]

3. ASSIGNMENT (§ II—20)—EQUITABLE—WHAT CONSTITUTES—EQUITABLE OR LEGAL CHARGE—DISTINCTION.

Where the holder of the fund intervenes and assumes a responsibility in respect of an order drawn on him not amounting to an equitable assignment, the question against him is one of a charge either equitable or legal and not one of assignment; the question of an equitable assignment must depend solely upon what took place between the assignee and the assignor.

Statement

APPEAL from the decision of Ives, J., at the trial without a jury, by which he gave judgment for $800 and costs in favour of the plaintiff.

C. A. Grant, K.C., for plaintiff, respondent.

G. V. Pelton, for defendant, appellant.

ALTA.

S. C.

RITCHIE v. JEFFREY.

Beck, J.

The judgment of the Court was delivered by

BECK, J.:—The statement of claim was briefly this: The plaintiff had sold building material to one Horn, who had contracted to erect a building for the defendant. Horn gave an order to the plaintiff on the defendant for $800 on account of the debt, and the defendant accepted the order, "and the defendant represented to the plaintiff that the said order was good and that he would pay to the plaintiff the said sum of $800." On the strength of the acceptance and representation and promise the plaintiff refrained from registering a lien for his claim.

The learned trial Judge held that the plaintiff was not entitled to judgment on this claim, on the ground, apparently, that, assuming an unequivocal promise to pay, the provision of the Statute of Frauds requiring a guarantee to be in writing, made the promise, which was not in writing, unenforceable, but he allowed the plaintiff to amend by setting up an equitable assignment, and founded his judgment upon the amendment. The order referred to is as follows:—

Edmonton, Alta., Jan. 27th, 1914.

W. S. Jeffrey, Esq.,
2005 Jasper W.

Please pay to John Ritchie Lumber Co. the sum of $800.00 on account of material delivered and shipped to Jasper Park.

(Sgd.) C. R. Horn.

This order by itself is clearly not an equitable assignment, for the reason that it does not specify the debt owing by Jeffrey to Horn or the fund in Horn's hands which it is said was intended to be assigned: *Percival* v. *Dunn* (1885), 29 Ch.D. 128; *Galt* v. *Smith*, 1 Terr. L.R. 129.

The order is clearly nothing more than an unaccepted bill of exchange, and the Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 127, expressly enacts — what had previously been declared to be the law of England—that

> A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act (*i.e.*, by writing on the bill signed by the drawee: sec. 36) is not liable on the instrument.

It is true that an assignment may be verbal (where a writing is not required by law), and that no particular form of words is necessary so long as they clearly shew an intention that the assignee is to have the benefit of the chose in action. I think it

is also true that an assignment may be inferred from conduct or a course of dealing; and it is clear that where a bill of exchange has been drawn or a mere order has been given, neither of which is by itself an assignment, it may be supplemented so that the bill or order plus, *e.g.*, letters, oral words, conduct, or a course of dealing, may constitute an assignment.

In *Brown* v. *Kough* (1885), 29 Ch.D. 848, Chitty, J., whose decision was affirmed on appeal, said:—

> An agreement to pay *out of the fund* is a good equitable charge. It matters not whether it (the agreement) be to pay an existing debt or a sum of money advanced at the time or whether it (the money to be paid) be (the amount of) a bill of exchange; but it must be shewn on the part of those who assert an equitable charge that they have obtained it (the charge) by agreement. The agreement may be shewn by producing a written document which is clear, or the agreement may be fairly derived from the course of dealing, and, where there is a contest as to an oral agreement, the Court must decide whether there is such an oral agreement or not, and the plaintiffs have to make out in this case one or other of the things I have mentioned before they can succeed in establishing an agreement amounting to an equitable charge or an equitable assignment of part of the fund. An agreement may be shewn by the terms which the parties come to with reference to the supposed course of dealing, and derived also from the course of dealing itself relating to the transactions which have been entered into or transaction which it is proposed shall be entered into, or it may be shewn by the special terms agreed to at the time when the transaction takes place.

It is clear, too, that there may be an equitable charge upon or an equitable assignment of a debt to come into existence: *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523.

Assuming for argument's sake that there was a present or future fund to which an agreement might have had reference, has an agreement been proved by the plaintiff?

First—with Horn. Horn was not called as a witness. It appears he was not available. The only evidence available was that of John W. Ritchie, the plaintiff's son, to whom Horn gave the order; and John W. Ritchie tells really nothing of what took place between him and Horn beyond the fact of the giving of the order. Of course the circumstances as they existed appear and were known to both, namely, that Horn had contracted to erect a building for the defendant, that the plaintiff had sold building material to Horn to an amount greater than the amount of the order to be used in the construction of the building, and that Horn had already made some progress towards fulfilling his contract.

ALTA.
S. C.
RITCHIE v. JEFFREY.
Beck, J.

But it seems clear to me that, while these circumstances shewed a very good and obvious reason for the order as they would for a cheque from Horn or his bill of exchange on the defendant (and the order *per se* is nothing more), they are far from sufficient for the further step, namely, to imply an agreement to charge specifically the moneys then or ultimately to be owing by the defendant to Horn.

Secondly—was there an agreement between the plaintiff and the defendant whereby Horn having by the order authorized the defendant to pay the plaintiff, the defendant agreed to pay out of the moneys then or ultimately earned by Horn?

It was contended on the argument that the learned trial Judge had found as a fact that the defendant had promised to pay the amount of the order; but I do not so read what the learned Judge said, which is as follows:—

> As to the facts: I think that on January 27, when Ritchie got the order and notified the defendant of it, none of them had any idea that the order was to be paid from any other source except the contract price; and they were all satisfied at that time that there was no question but what the contract price was ample to meet all claims and would meet the order; and upon these conditions and with that mental attitude, young Ritchie was satisfied and the defendant agreed to pay it. The trouble is that later on it was disclosed that the balance of the contract price was not nearly sufficient to finish it, because as a matter of fact, although they may not have known it, that first $1,400 (a mistake for $1,000) never went into the Jasper (*i.e.*, this) building.

I take the learned trial Judge to mean nothing more than that he finds that the defendant promised to pay the amount of the order out of the amount which would ultimately remain owing to Horn on the completion of the contract, this involving, in my opinion, the right in the defendant to make all proper payments for material and work, at least in respect of which liens might be filed against the property. If the learned Judge meant more than this I think that he is not supported by the evidence.

The defendant refused to give any written acceptance of the order of written promise to pay it; he says that he made it clear to Ritchie that he would pay it only to the extent that moneys were coming to Horn on the completion of the contract; and his conduct throughout was consistent with what he states was his expressed intention; and it seems to me that the probabilities are against one, in the circumstances in which he was, giving an

absolute and unconditional promise to pay. I should, therefore, decline to accept the evidence of John W. Ritchie, the plaintiff's son, who tells another story, as sufficient to sustain the onus of establishing such a promise on the defendant's part.

So that I am of opinion that the extent of the promise given by the defendant was to pay the amount of the order to the extent to which there would be moneys owing to Horn out of the contract price on the completion of the building, there being impliedly preserved to the defendant as a matter of course his right to make such payments on account of the contract price as were necessary to ensure the completion of the contract, *i.e.*, payments or material and work in relation to the building, at least, such as liens might have been filed in respect of: *Newfoundland Government* v. *Newfoundland R. Co.* (1888), 13 App. Cas. 199, 212.

Now, there were, in fact, no payments, except of that kind, made after the defendant's conditional agreement. No serious question was raised except with regard to two items: (1) $75 to Horn; but this was with respect to something not comprised in the original agreement. It related to some addition to the building as originally contemplated, and there is nothing to shew that the contract provided for additions and a consequent increase in the contract price. (2) $558.10, April 10, balance O. J. Haugen (for labour). It was admitted that Haugen was a sub-contractor in relation to the building, but it was said that under the Mechanics' Lien Act a sub-contractor ranks after material men; and this is so; but the contention that the plaintiff should have the priority given by that Act presupposes that the plaintiff has established that in consideration of the defendant's promise to pay the amount of the order he, the plaintiff, refrained from registering a lien. I think the plaintiff has entirely failed to establish this, and not having done so I think there is no force in his contention.

On the completion of the contract $296.86 was found to be the balance of the contract price, and this amount the defendant paid into Court. In my opinion that was all that was affected by the defendant's promise to pay. This conditional promise of the defendant did not create an equitable assignment. I think the question of an equitable assignment must depend solely upon what took place between the assignor and the assignee. Where

ALTA.

S. C.

RITCHIE v. JEFFREY.

Beck, J.

the holder of the fund intervenes and assumes a responsibility, that is a question of a charge, equitable or legal, as the case may be, and not of an assignment; and in the latter case the original assignor would not, I think, be a necessary party to the action. I mention this because of the question raised as to the constitution of the action.

What I have said makes it sufficiently clear, I think, that in my opinion the plaintiff was not entitled to succeed on the case as originally set up. I would therefore allow the appeal with costs, and direct that judgment be entered for the plaintiff for the sum of $296.87 paid into Court with costs to the defendant, this sum and the sum of the costs of the action and the appeal to be set off the one against the other, and execution to go for the balance in favour of the party entitled to it.

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 decided by local or district Judges, Masters and Referees.

DUBE v. ALGOMA STEEL CORPORATION LTD.

ONT.

S. C.

Ontario Supreme Court, Britton, J. June 18, 1915.

DEATH (§ II—6)—*Derrick—Negligence of owner—Negligence of hirer—Contributory—Damages.*]—Action by Mary Dube, widow and administratrix of the estate of Martin P. Dube, deceased, on behalf of herself and children, to recover damages resulting from the death of Dube from one or both of the two defendants, the Algoma Steel Corporation Limited and the Lake Superior Paper Company Limited.

A travelling derrick owned by the paper company was, with its crew—consisting of the deceased, as engineer, and a fireman—hired by the steel corporation to do some work upon its premises. The derrick was taken by the crew to the steel corporation's premises; and, while it was upon those premises, and while Dube was lifting by the derrick an iron tank of the steel corporation from one side of the track to replace it upon a flat car on the other side of the track, the derrick was overturned and fell, in its fall instantly killing Dube.

The plaintiff alleged negligence on the part of both defendants.

At the trial before BRITTON, J., and a jury, at Sault Ste. Marie, both defendants, at the close of the evidence, asked to have the case withdrawn from the jury. Upon these motions judgment was reserved, and questions were submitted to the jury, upon which they found: (1) that the paper company was guilty of negligence which caused the death of Dube; (2) that the negligence was "not furnishing proper equipment, clamps, and ballast in deck of crane;" (3) that the crane was a dangerous machine at the time when used and as used by the steel corporation; (4) that it was dangerous "in not being properly

ONT.
S. C.

clamped to track or blocked under decking—deck of crane not being properly ballasted;" (5) that the steel corporation was guilty of negligence which caused the death of Dube; (6) that the negligence was "in not having a proper rigger to superintend the work that had to be done;" (7) that Dube could not, by the exercise of reasonable care, have avoided the accident. The jury assessed the damages at $3,000, to be apportioned by the learned Judge; if both companies were liable, each was to pay $1,500; if only one, that company to pay $3,000.

U. McFadden and *E. V. McMillan*, for the plaintiff.

J. E. Irving, for the defendant the Algoma Steel Corporation Limited.

P. T. Rowland, for the defendant the Lake Superior Paper Company Limited.

BRITTON, J., said that no question was submitted to the jury as to whose servant Dube was at the time of the accident; the facts were not in dispute; and, upon the undisputed evidence, it was a question of law.

It was manifest that the danger was in the using of the crane, as and in the circumstances in which it was used, and not by reason of anything wrong or dangerous in the crane as it stood; and, in the opinion of the learned Judge, there was no evidence of negligence on the part of the paper company which should have been submitted to the jury.

Action against the paper company dismissed, but without costs.

There was evidence against the steel corporation that could not properly have been withdrawn from the jury; and judgment should go against that defendant for $3,000, with costs proper to an action in which there is only one defendant.

The $3,000 should be apportioned in the sums of $1,250 to the plaintiff and $1,750 divided equally among the children. If it should be necessary to deduct anything for costs between solicitor and client, the minutes may be spoken to and the apportionment varied. The moneys of the infant children to be paid into Court.

TORONTO ELECTRIC LIGHT CO. v. CITY OF TORONTO.

ONT.

S. C.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Magee and Hodgins, JJ.A. March 15, 1915.

[*Toronto Electric Light Co. v. Toronto*, 20 D.L.R. 958, reversed.]

MUNICIPAL CORPORATIONS (§ II F 1—171)—*Electric light—Erection of poles—Limits of municipality—Territory subsequently added—Ambiguity—Intention.*]—Appeal by defendant from the judgment of Middleton, J., 20 D.L.R. 958, 31 O.L.R. 387.

G. R. Geary, K.C., and *C. M. Colquhoun*, for appellant municipality.

I. F. Hellmuth, K.C., and *A. W. Anglin*, K.C., for the respondent company.

THE COURT allowed the appeal and dismissed the action with costs, GARROW, J.A., dissenting.

It was held by the majority of the Court that, under the statute, 45 Viet. Ont., ch. 19, respecting companies supplying electricity for the purposes of light, heat, and power, the intention of sec. 2 is that a company shall not have the right to conduct electricity through, under, and along the streets, highways, and public places of the municipality until it shall have entered into an agreement with the corporation of the municipality by which it shall be authorized to do so upon such terms and conditions as the corporation may impose. *B.C. Electric R. Co. v. Stewart*, [1913] A.C. 816, 14 D.L.R. 8, explained and distinguished.

Appeal allowed.

BLOOMFIELD v. MUN. OF STARLAND.

ALTA.

S. C.

Alberta Supreme Court, Stuart, J. June 8, 1915.

DAMAGES (§ III L—230)—*Arbitration — Application for—Owner of land—Temporary road through land—Municipalities—Rights of—Rural Municipalities Act (Alta.)*]—Application by the owner of section 29 in tp. 33, r. 20, west of the 4th meridian, which is within the limits of the municipality for the appointment of an arbitrator to assess the damages suffered by

ALTA.
S. C.

the applicant by reason of the opening of a temporary road through his property by the council of the municipality under the provisions of sec. 196, sub-sec. 5, of the Rural Municipalities Act, being ch. 3 of the statutes of 1911-12.

W. S. Morris, for applicant.

Tweedie & McGillivray, for respondent.

STUART, J. (after referring at length to secs. 185, 186, 191, 192, 194 and 196 of the Act):—On October 11, 1913, the council of the municipality passed the following resolution:—

Moved by Mr. Bussard that as complaint has been made to him that Mrs. Bloomfield has fenced in whole of section 29-33-20, rendering it impossible for people to get into Rumsey from the east, the council resolved that the said trail be left open and have instructions to that effect sent Mrs. Bloomfield in the shape of a letter signed by the reeve and secretary that trail be left open as road fixed.

This is the form in which the resolution is set forth in the certificate signed by the secretary. On the same day a letter was sent to Bloomfield to the effect stated. Bloomfield acquiesced in the order given and did not question the mode of procedure adopted by the council. But, now, when he seeks to have his compensation fixed as provided by the Act, counsel for the council objects that no by-law was passed, that the powers exercized could only be exercised by by-law and that therefore he is not entitled to have recourse to the summary method provided for determining the compensation and damages, if any, which he is to be paid, but must have recourse to an action at law.

I am unable to agree with this contention. It is probably correct that Bloomfield could *have refused* to recognize the authority of the resolution *although* I think a good deal could be said in favour of the view that, by virtue of the provisions of sec. 185, the power here exercised is one of which it was intended *could* be exercised either by law or by resolution. But I do not think it necessary to decide that point. In my opinion, it is not now open to the council, having acted by resolution, having exercised the power even though informally having forced Bloomfield to open the trial, to turn around now and object that they themselves had proceeded irregularly and *that* therefore the owner must be driven to an action. There is no

reason in my opinion why the principal of estoppel should not be applied against them.

For these reasons I allow the application and appoint His Honour Judge Carpenter as arbitrator. No question was raised as to whether the notice provided for in sec. 6 of the arbitration Act has been given and I assume that this has been done.

SMITH v. SMITH.

Alberta Supreme Court, Walsh, J. June, 1915.

GIFT (§ I—4)—*Delivery of transfer and duplicate certificate —Revocation—Repossession of transfer before registration — Title.*]—Action for the recovery of land.

H. B. Robertson, for plaintiff.

H. R. Milner, for defendant.

WALSH, J.:—I found at the close of the trial that the transfer from the defendant to the plaintiff was entirely voluntary on his part, his intention in handing the same to the plaintiff's father, ready for registration, accompanied by his duplicate certificate of title, being to make to her a gift of the land. He repossessed himself of this transfer and duplicate certificate of title by means not at all credible to him before the plaintiff had a chance to record the transfer. I reserved for consideration the question as to whether or not upon these facts the intended gift of this land was complete so as to entitle the plaintiff to be now recorded as the owner of the land.

Sec. 41 of the Land Titles Act provides that no instrument until registered under the Act shall be effectual to pass any estate or interest in any land except a leasehold interest for three years or less. This unregistered transfer did not pass the legal estate in this land to the plaintiff, and I am of the opinion that its interception and destruction by the defendant before it reached the hands of the registrar and therefore before the gift was completed and perfected, effected a revocation of this intended gift which makes it impossible for me to declare, as I am asked to, that the plaintiff is the owner of the land. What the plaintiff practically asks is that the Court should assist her to

ALTA.
S.C.

perfect this incomplete gift by divesting the defendant of the legal estate in this land and vesting it in her. The Court has the undoubted power to aid a purchaser for value who, having paid his purchase money in full and thereby become the beneficial owner is unable to perfect his legal title because of the default of the registered owner. It can, in such a case, either decree the execution and delivery of a proper transfer or by its judgment direct the vesting of the legal estate in the purchaser. It can also, under *Wilkie* v. *Jellett*, protect the beneficial owner against the claims of execution creditors of the holder of the registered title which have arisen since he parted with his beneficial ownership. But these cases are vastly different from this. To give the plaintiff the relief which she asks would be to round out this inchoate but effectually revoked gift into an effective and completed transaction, and thus deny the defendant the undoubted right of revocation which is permitted every donor before the perfecting of his gift.

The plaintiff's action will therefore stand dismissed as to the cause of action with which I have dealt which was the only part of it that was before me. There will be no costs of it.

MAN.
C. A.

HOGG v. HOGG.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. March 15, 1915.

[*Hogg* v. *Hogg*, 20 D.L.R. 85, affirmed.]

DIVORCE AND SEPARATION (§ V A—45)—*Alimony—Wife's ante-nuptial chastity.*]—Appeal by defendant from the judgment of Macdonald, J., in an alimony action, *Hogg* v. *Hogg*, 20 D.L.R. 85.

RICHARDS, J.A.:—We adopt the judgment of the learned trial Judge. In our opinion, he has therein so dealt with both the facts and the law that we can see nothing to add to or detract from it.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Re LIZZIE JONES.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 23, 1915.

WILLS (§ I E 2—45)—*Physician drawing will on day of death—Obvious hurry—Error in name of beneficiary—Large amount—Strict investigation.*]—Appeal from an order of Macdonald, J.

W. H. Curle, for applicant.

H. V. Hudson, for Momberg.

The judgment of the Court was delivered by

PERDUE, J.A.:—An application was made to the Surrogate Court of the Eastern Judicial District by Charles David Momberg for probate of the alleged last will of Lizzie Jones, deceased, who was the mother of the applicant by a former marriage. The alleged will is dated March 17, 1915, and on the 27th of the same month a caveat against granting probate of the will was entered in the above Court by Henry Jones, the husband of the deceased. A motion was then made by Jones, under sec. 62 of the Surrogate Courts Act, R.S.M. 1913, ch. 47, to a Judge of the Court of King's Bench to remove the cause to the higher Court. Mr. Justice Macdonald, to whom the motion was made, dismissed the application. The caveator then appealed to this Court. The facts of importance are as follows:—

The deceased was first married to Charles Momberg on June 5, 1875, and he died on November 5, 1912. Charles David Momberg is the only child of this marriage. On December 30, 1914, the deceased was married to the caveator, Henry Jones, and she died on March 17, 1915. Charles David Momberg is her only child. The will in question was made on the day of her death. It was drawn by the physician who was in attendance upon her and is written in pencil upon the back of an ordinary prescription form. The following is a copy:—

Wpg., Man., March 17, '15.

I wish my son Cleasby Momberg to have all my property.

[X] MRS. H. JONES.

Mrs. Elizabeth Simpson [X].

Dr. H. Yonker.

The value of the estate is placed at $45,990.98.

An appeal against the order complained of may be brought to this Court: *Re Estate of B——*, 16 Man. L.R. 269. It was

MAN.
C. A.

objected on the part of the beneficiary, that the matter could be duly contested before the Surrogate Court Judge and that an appeal from his decision might be made to this Court under sec. 92 of the Act. It was also contended that the Court of Appeal should not interfere with the discretion of the Judge to whom the application had been made. The following cases were cited by the respondent in support of the order: *Re Wilcox* v. *Stetter*, 7 O.W.R. 65; *Re Graham* v. *Graham*, 11 O.W.R. 700; *Re Reith* v. *Reith*, 16 O.L.R. 168.

We think the manner in which the will purports to have been executed by the deceased and by the witnesses, the fact that all the writing appears to have been made by one person, the obvious hurry in which the document was drawn up and signed on the very day of the death of the testatrix, and the peculiar error in the name of the beneficiary, are circumstances which *primâ facie* shew that a strict investigation should be made of all the facts surrounding the making of the alleged will before admitting it to probate. The large amount involved is also a circumstance which may well be taken into account in considering such an application. The Court of King's Bench possesses an ampler and a more effective machinery for the conduct of such an investigation than is possessed by the Surrogate Court. For these reasons we think the appeal should be allowed and the cause removed to the Court of King's Bench.

The costs of the application to Mr. Justice Macdonald and the costs of this appeal are to be paid out of the estate.

Appeal allowed.

MAN.
K. B.

LEDOUX v. CAMERON.

Manitoba King's Bench, Galt, J.

MORATORIUM ACT (§ I—1)—*Registered Judgment*—"*Instrument Charging Land with the Payment of Money*"—*County Courts Act, R.S.M.* 1913, *ch.* 44, *secs.* 215, 216—*Staying Proceedings.*]—Appeal by the plaintiff from a Master's refusal to settle an advertisement, the refusal being based on the Moratorium Act (Man.).

B. L. Deacon, for the appellant.

MAN.

K. B.

GALT, J.:—Under secs. 215 and 216 of the County Courts Act a registered judgment binds and forms a lien and charge on all the lands of the judgment debtor, the same as though charged in writing by the judgment debtor under his hand and seal, with the amount of the judgment.

The plaintiff bases his right to sell the land of his judgment debtor upon rules 741 and 742 of the King's Bench Act. He is entitled to the relief which he seeks, unless the Moratorium Act prevents it. Section 2 of this Act provides as follows:—

> Notwithstanding any provision in any mortgage of land, or agreement to purchase land, or in any other instrument charging land with the payment of money, not including liens under the Mechanics' and Wage Earners' Lien Act, no proceedings for the sale of any land under any power of sale contained in any such instrument or otherwise existing for default in payment of any of such moneys shall be taken by or on behalf of the mortgagee, vendor or other person to whom such money may be payable until after the lapse of 6 months from the first day of August, 1914, if such default took place on or before that date, or until after the lapse of 6 months from the happening of such default if the same took place after the said first day of August, 1914, or takes place after the coming into force of this Act, and any such proceedings now pending are hereby stayed until after the lapse of 6 months from the first day of August, 1914, or 6 months from the date of default if such default took place since the said first day of August, 1914. Any sale made or purporting to be made in contravention of this section shall be absolutely null and void. This section shall not affect the sale of land by private sale where before the first day of August, 1914, the land has been advertised for sale, and the sale has been abortive and where the mortgage had been in arrears more than six months.

I am of opinion that a registered judgment is included in the words, "or in any other instrument charging land with a payment of money" above referred to in sec. 2 of the Moratorium Act, and that no proceedings for the sale of the land can be taken by the plaintiff until after the lapse of 6 months from August 1, 1914, the default having taken place before that date.

Accordingly I affirm the decision of the Referee and the appeal must be dismissed.

Appeal dismissed.

MALOTTE CREAM SEPARATOR CO. v. GRAHAM.

SASK.

S. C.

Saskatchewan Supreme Court, Elwood, J. May 31, 1915.

COSTS (§ I—14)—*Security for—Discovery — Examination for—No defence shewn—Goods repossessed—Rights of defendant.*]—Application for security for costs.

SASK.
S. C.

Pope, for applicant, defendant.
P. H. Gordon, for plaintiff.

ELWOOD, J.:—It was contended on behalf of the plaintiff that the examination for discovery shewed that the defendant had no defence to the action, and that therefore the application should be refused. Par. 11 of the defence states that the plaintiff in or about the month of April, 1914, repossessed the engine for which the notes sued on were given, and denies that it was sold in accordance with the provisions of ch. 145 of the R.S.S. 1909, and amendments thereto. On the examination for discovery the defendant says that he never received any notice of the sale. My brother Lamont, in *American Abell* v. *Weidenwilt*, 4 S.L.R. 388, held that where goods were sold under a lien agreement such as the one in question, and were repossessed, but the provisions of the above ch. 145 were not complied with by the person repossessing the machine, the sale was rescinded. Without expressing any opinion as to whether I would follow the above decision, there does appear to me to be a question raised by par. 11 of the defence with regard to the effect of the repossessing and the sale of the machine, and in view of this I do not think that I would be justified in saying that there is no defence to the action. The defendant has the right to have this question disposed of at the trial. That being so, the defendant is entitled to the order for security. There will therefore be the usual order for security in the sum of $300. The costs of this application will be costs in the cause to both parties.

LONERGAN & HANSFORD v. SASKATOON CO.

Saskatchewan Supreme Court, Elwood, J. June 7, 1915.

BILLS AND NOTES (§ III A—59*a*)—*Note—Sureties executing —Condition attached—Release of sureties.*]—Action on a promissory note.

McFadden, for plaintiff.
R. Hogarth, for defendants.

ELWOOD, J.:—In this matter I find that the defendants, except the defendant company, executed the note in question as sureties for the defendant company. I also find as a fact that

SASK.

S. C.

at the time of the delivery of the note there was no condition attached to it that one Martin should sign the note before it should become effective, but that it was delivered absolutely without any condition attached. I also find as a fact that Bucknall, at the time of the signing of the note, had the same delivered to him to use as he saw fit, and that in consequence of its being delivered to him, secured from the plaintiffs and the bank a waiver of any liens which the plaintiffs had against the property with respect to which the note in question was given. The evidence shews that after the commencement of the action the plaintiffs made a settlement with the defendant Sutton in the words and figures following:—

We, the undersigned, Lonergan & Hansford, do hereby in consideration of the sum of $200 agree to release J. Sutton and his estate from all liability whatsoever in respect to a certain promissory note made by the said J. Sutton and others, and dated 15th day of December, 1913.

We further agree to discontinue a certain action brought to recover the amount of the said note, commenced in the Supreme Court, Judicial District of Saskatoon, on the 18th day of January, 1915, in so far and in so far only as J. Sutton is concerned.

Dated at Saskatoon, Saskatchewan, this 27th day of March, 1915.

I am of the opinion, however, that the effect of this release was merely a release against Sutton and his estate, and that the plaintiffs by that release reserved their rights against the other defendants. Sutton, I may say, was also a joint and several maker of the note. In *Re E. W. A.*, [1901] 2 K.B. 642, Collins, L.J., states the law to be as follows:—

Whenever you can find from the terms of a document an agreement for the reservation of rights against the co-debtor, then I agree the document cannot be construed as an accord and satisfaction of the joint debt, and, therefore, as a release of the debtor.

I am therefore of the opinion that the plaintiffs having reserved their rights against the other defendants, the release of Sutton and his estate did not operate as a release of the defendants.

There will therefore be judgment for the plaintiff against the defendants Kemmish, Laycock, Smith, Vannatter and Bucknall for the amount claimed in the statement of claim, less the sum of $200 to be credited as of March 27, 1915. The plaintiffs will also have judgment for their costs of action.

SASK.

S. C.

HAGEN v. FERRIS.

Saskatchewan Supreme Court, Lamont, J. June 10, 1915.

VENDOR AND PURCHASER (§ I C—13)—*Agreement for sale—Instalments—Action to recover—Vendor unable to give clear title.*]—Vendor's action for the entire balance of purchase money due under an agreement for sale of land.

Squires, for plaintiff.

Wakeling, for defendant.

LAMONT, J.:—By an agreement in writing, dated December 20, 1912, the plaintiff agreed to sell, and the defendant agreed to buy lot 9 in block 30, according to plan C. E. Saskatoon, for $5,000, payable $1,667 cash, and the balance in three equal payments of $1,111 each, on June 20 and December 20, 1913, and June 20, 1914. The defendant paid the cash payment, but none of the subsequent ones. In December, 1914, the plaintiff started this action.

The defence was that the plaintiff could not give a good title to the land, according to his agreement. The agreement contained a clause by which it was provided that, if the purchaser paid the instalments of purchase money and performed the other conditions of the contract, he should be entitled to a conveyance of the land in fee simple, subject to the reservations contained in the original grant from the Crown and to a reservation of the minerals.

At the trial it was shewn that there was a mortgage of $900 registered against the property, which did not mature until December, 1915. At the close of the plaintiff's case, counsel for the defendant moved that the action be dismissed, on the ground of the inability of the plaintiff to make good title. Counsel for the plaintiff asked to have a reference as to title, stating that he could get a release from the mortgagees.

I was of opinion that the plaintiff was entitled to a reference and directed that it be taken. On the reference, the plaintiff filed an agreement between himself and the mortgage company made subsequent to the trial, by which the company agreed to discharge their mortgage before maturity on being paid the amount due. On further consideration, I am of opinion that the

SASK.
S. C.

defendant was entitled to have the action dismissed at the trial. The plaintiff, at the trial, was not in a position to compel the mortgage company to release their mortgage before December, 1915. He was, therefore, not in a position to deliver to the defendant the title which he had agreed to give, had the Court directed payment.

[Reference to *Weston & Thomas's Contract*, [1907] 1 Ch. 244, *Baskin* v. *Linden*, 17 D.L.R. 789, 27 Hals., at p. 83, Fry's Specific Performance of Contracts, 4th ed., at p. 563, *Halkett* v. *Dudley*, [1907] 1 Ch. 590, *Ewing* v. *McGill*, 8 A.L.R. 104.]

From these authorities it seems to me clear that, where, at the trial, it is admitted or proved that the vendor is not possessed of the title he agreed to give, and is not in a position to compel that title, the action should be dismissed as being brought prematurely. There will, therefore, be judgment for the defendant with costs.

PRESTON v. ADILMAN.

Saskatchewan Supreme Court, Lamont, J. June 9, 1915.

VENDOR AND PURCHASER (§ I C—13)—*Agreement for sale—Instalment due under—Mortgage against land—Rights of parties.*]—Vendor's action for an instalment of purchase money under an agreement for the sale of land. The defence is that he cannot make title, owing to the fact that there is on the property a mortgage for $3,000, which has not matured and the plaintiff has not obtained from the mortgagees any agreement to release their mortgage before maturity.

MacDonald, for plaintiff.

McIntyre, for Adilman.

Newcombe, for the Dutton Wall Lumber Co.

LAMONT, J.:—In *Hagen* v. *Ferris*, 21 D.L.R. 868, I held that when at the trial of an action in which the vendor (plaintiff) sued for the entire balance due under the contract, it appeared that the plaintiff could not make a clear title because he had failed to secure an agreement from the mortgagees that they would release this mortgage before maturity on payment of the amount secured thereby, the action should be dismissed. This case differs from *Hagen* v. *Ferris*, in this, that here the plaintiff

SASK.
S. C.

is not suing for the balance of purchase money, but an instalment only, and the time for delivering a good title has not arrived and will not arrive until August 30, 1915, when the final instalment under the contract becomes due. At that time the mortgage now on the property will have matured and can be paid off, and the balance still due under the contract is more than sufficient to meet it. Under these circumstances the plaintiff is entitled to an order that the defendants pay within a fixed time, as asked, and in default the interest of the defendants in the land be extinguished.

Defendants to pay on or before October 1, 1915. In default the interest of defendants will be foreclosed.

ONT.
S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE v. SATURDAY NIGHT LTD.

Ontario Supreme Court, Clute, J. June 14, 1915.

PLEADING (§ II K—246)—*Particulars — Delivery of — Relevancy—Vague or embarrassing—Striking out.*]—Appeal by the plaintiff company from an order of the Master in Chambers refusing a motion by the plaintiff company to strike out the particulars delivered by the defendant company or for better particulars under a paragraph of the statement of defence.

The action was for libel, the writing complained of being an article published in the defendant company's newspaper.

The defendant company denied the publication and the innuendo alleged by the plaintiff company, and pleaded that, if the defendant company did publish the words complained of, "the said words, in so far as they consist of allegations of fact, are true in substance and in fact, and, in so far as they consist of expressions of opinion, are fair and bonâ fide comments, made in good faith and without malice upon the said facts, which are matters of public interest, and the publication of the same was for the public benefit."

An order was made by the Master in Chambers directing the defendant company to deliver particulars under the paragraph quoted, and the particulars now complained of were delivered pursuant to that order, which was not appealed against.

W. J. Elliott, for the plaintiff company.

G. M. Clark, for the defendant company.

ONT.
S. C.

CLUTE, J., said that the plea under which the particulars were delivered was not one of justification but of fair comment: *Digby* v. *Financial News Limited*, [1907] 1 K.B. 502; *Peter Walker & Son Limited* v. *Hodgson*, [1909] 1 K.B. 239; *Lyons* v. *Financial News Limited* (1909), 53 Sol. J. 671. Particulars must be relevant to the issue; if they are irrelevant or vague or embarrassing, they will be struck out: *Markham* v. *Wernher Beit and Co.* (1902), 18 Times L.R. 763 (H.L.); *Higginbotham* v. *Leach* (1842), 10 M. & W. 363. A defence which leaves it in doubt what the defendant justifies and what he does not will be struck out as embarrassing: *Fleming* v. *Dollar* (1889), 23 Q.B.D. 388; Halsbury's Laws of England, vol. 18, para. 1245, p. 674. The plaintiff company complained that it was not sufficient to state, as the defendant company did in paragraph 1 (c) of the particulars, that the financial editor of the defendant company's newspaper was informed of certain things by one Simons, but should state whether he averred that the statements made were true in substance and in fact; and so of clauses (d), (e), and (f). It was incumbent upon the defendant company in its particulars to point out with clearness the facts upon which it intended to rely as the facts upon which it pleaded that it made fair comment.

The particulars were insufficient and embarrassing. The plaintiff company was entitled to know what the defendant company alleged to be the facts upon which fair comment was said to have been made and which were said to be in the public interest and for the public benefit.

Clauses (c), (d), (e), and (f) of paragraph 1 of the particulars should be struck out, with liberty to the defendant company to amend by stating the allegations of facts which it alleged to be true in substance and in fact.

Under paragraph 2 (a), (b), and (c) of the particulars, the defendant company should state what the allegations were which were said to be fair and bonâ fide, or mark the same in his particulars with red ink.

To this extent the appeal should be allowed; costs of the appeal to the plaintiff company in any event of the cause.

INDEX

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CAVEAT—

CERTIORARI—