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ANNOTATED

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

VOL. 45

EDITED BY

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 45 INCLUSIVE.

REIMER v. ROSEN.
(Annotated).

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A., and Curran, J. January 17, 1919.

CONTRACTS (§ II—170)—SALE OF LAND—BREACH—PENALTY OR LIQUIDATED DAMAGES—CONSTRUCTION.

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the court upon a consideration of the whole instrument.

Statement.

APPEAL from the trial judgment in an action on an agreement for the exchange of certain properties. Varied.

J. H. Leech, K.C., and *F. J. Sutton*, for plaintiff.

A. J. Andrews, K.C., and *F. M. Burbidge*, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—On March 23, 1916, the plaintiff as vendor entered into an agreement with the defendant Rosen as purchaser, by which the plaintiff agreed to make a sale and exchange of his farm, being 1,000 acres more or less, in township 8, ranges 4 and 5E, in Manitoba, to and with Rosen, "at and for the price or sum of $50,000 payable as follows:" The agreement then goes on to set out how the above sum is to be paid, the provision as to payment being to the following effect: Rosen assumed two mortgages on the land amounting together to $17,600; Rosen agreed to pay to the plaintiff the balance of $32,400 by "transferring or conveying an equity for that amount" in two properties in the City of Winnipeg referred to on the argument as (1) the Logan Ave. property, subject to a mortgage of $4,500, and (2) the land referred to as the Purcell St. property, subject to a mortgage of $6,000, both of which mortgages the plaintiff agreed to assume and pay off. Each party was to search the title to the other party's property at his own expense and each was to furnish a title satisfactory to the solicitor of the other party. Provision was made for the adjustment of taxes, interest, rents, insurance premiums, etc. to the date of the agreement.

The trial judge finds that the plaintiff owned the 1,000 acre farm at the time, subject to the specified encumbrances; that Rosen

MAN.

C. A.

REIMER v. ROSEN.

Perdue, C.J.M.

owned the Logan Ave. property subject not only to the mortgage of $4,500, but to a still larger mortgage which the defendant Finkelstein was under obligation to pay off; and that the defendant, Sarah Finkelstein, was the owner, under an agreement of sale, of the Purcell St. property subject to a mortgage of $5,000 and also to the payment of $1,000, balance of purchase-money. Sarah Finkelstein is the daughter of the defendant Rosen and the wife of the defendant M. Finkelstein. Rosen intended that Sarah Finkelstein should have a half interest in the farm. Early in May, 1916, the Finkelsteins entered into possession of the farm. It was arranged that the rents from the houses should be payable to the plaintiff from May 1, 1916. Shortly thereafter difficulties arose as to the titles to the Winnipeg properties. The Purcell St. property was held by Sarah Finkelstein under an agreement for sale on which $1,000 was still due. The Logan Ave. property was subject to a mortgage for $30,000 to three persons, one of whom had died, and his administrator was a United States corporation not licensed to do business in Manitoba. The plaintiff was the registered owner of the farm land, subject to the two mortgages to be assumed by Rosen, and was ready to close the transaction at any time. The plaintiff and his solicitors were pressing Rosen to furnish title to the Winnipeg properties and close the transaction. This led to the making of the agreement of July 11, 1916.

The last mentioned agreement is between Rosen of the first part, M. Finkelstein of the second part and Reimer of the third part. It recites the agreement of March 23, 1916, and the fact that Rosen is unable to deliver title to the Logan Ave. property. It further recites that for the purpose of avoiding any further delay in closing out the transaction it has been mutually agreed between the parties that Reimer give further time for the delivery of the title to the land mentioned on the conditions and agreements in the document. It then provides that Rosen and Reimer shall carry out and perform the first agreement except as to the delivery of the title to the Logan Ave. land. Rosen then agrees to deliver to Reimer a good title to the last-mentioned land subject to a first mortgage only of $4,500, setting out the terms of it and making certain stipulations as to interest and taxes, such title to be delivered on or before April 1, 1917. The all important clause in the agreement is as follows:—

In the event of the party of the first part being unable or neglecting or failing to deliver title as aforesaid to said particularly recited lands to the party of the third part on or before the first day of April, 1917, then the party of the first part and the party of the second part jointly and severally covenant and agree to pay at the option of the party of the third part, to the party of the third part, in lieu of such lands, the sum of twenty-five thousand, five hundred ($25,500.00) in cash, immediately upon the exercising of such option, being the amount agreed upon as the value of said lands, after deducting therefrom the said mortgage, and the party of the third part shall in addition thereto be entitled to retain all rent collected by him from said lands up to the said first day of April, 1917.

Provision is then made for the manner of exercising the option by mailing notices. For the further purpose of securing payment of the $25,500 to Reimer in the event of his exercising his option, Rosen agreed concurrently with the agreement to execute and register a mortgage on the farm and deliver same to Reimer, but in case Reimer exercised his right to take the land (the Logan Ave. property) then Rosen shall be entitled to a discharge of the mortgage only after delivery of a good and sufficient title subject as aforesaid.

A mortgage on the farm for $25,500 was prepared by Reimer's solicitors and executed by Rosen. This mortgage was made payable without interest on April 2, 1917.

Rosen did not deliver title on or before April 1, 1917. No sufficient justification or excuse for his failure is shewn. Reimer had executed a transfer of the farm, the name of the grantee being left blank, in case the transfer should be to Rosen and Sarah Finkelstein, in which event the written authority of Rosen was required. No such authority was furnished. The trial Judge finds that Reimer was ready and willing to complete his part of the original agreement at any time.

On April 4, 1917, the plaintiff exercised his option of taking the $25,500 in lieu of the Logan Ave. property and duly notified Rosen and Moses Finkelstein of his exercise of such option, in accordance with the terms of the second agreement.

The present action is in effect one for specific performance. The plaintiff claims that the Purcell St. property should be conveyed to him or that he be paid $6,900 in lieu thereof; that he should have judgment against Rosen and M. Finkelstein for the $25,500 and interest since April 4, 1917; a mortgage from Rosen to him upon the farm to secure the $25,500, and further or other

MAN.

C. A.

REIMER v. ROSEN.

Perdue, C.J.M.

relief. The plaintiff avers that he is ready and willing to perform the agreements on his part.

The case turns upon the interpretation of the second agreement. The main contention of the defendants Rosen and M. Finkelstein is that the provision relating to the payment of $25,500, at the option of the plaintiff, in case of failure by Rosen to furnish title to the Logan Ave. property on or before April 1, 1917, was a penalty. The statements of defence filed by Rosen and M. Finkelstein allege that the above sum is a penalty and ask the court to grant relief from the payment thereof. The bare conclusion of law is stated. No facts or special circumstances upon which these defendants rely as supporting that conclusion are pleaded. It is not set forth that the amount mentioned is extravagant in comparison with the value of the property for which title could not be made. Evidence was, however, offered by the defendants and admitted at the trial to shew the value of the properties. I do not think that this evidence should have been admitted. The plaintiff was not notified by the pleading that he would be called upon to go into the question of values. As to the necessity of stating the facts relied upon, see King's Bench r. 325, and the following cases: *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371; *Philipps* v. *Philipps* (1878), 4 Q.B.D. 131, 132; *Clark* v. *Hagar* (1894), 22 Can. S.C.R. 510; *Sutcliffe* v. *James* (1879), 40 L.T.N.S. 875, 877; *Lauder* v. *Carrier* (1885), 10 P.R. (Ont.) 612, 614. Evidence of values should not have been received under the statement of claim as framed: *Manitoba Free Press* v. *Martin* (1892), 21 Can. S.C.R. 518; *McKay* v. *Cummings* (1884), 6 O.R. 400; *Re Rica Gold Washing Co.* (1879), 11 Ch.D. 36, 43. This court may, as was done in *Jacker* v. *International Cable Co.* (1888), 5 T.L.R. 13, reject the evidence improperly received and deal with the case upon the evidence properly before it. If it appears upon a proper construction of the documents that the sum mentioned was a pre-estimate of the value agreed upon by the parties, extrinsic evidence as to value should not be received in any event: *Sun Printing Ass'n.* v. *Moore* (1902), 183 U.S. Rep. 642.

In *Dunlop Pneumatic Tyre Co.* v. *New Garage & Motor Co.*, [1915] A.C. 79, Lord Dunedin states the following principles:—

The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine coven-

anted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co.* v. *Castaneda*, [1905] A.C. 6).

The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner* v. *Hills*, [1906] A.C. 368, and *Webster* v. *Bosanquet*, [1912] A.C. 394).

When we turn to the first agreement, that of March 23, 1916, we find that a value of $50,000 is placed on the plaintiff's farm with the improvements and buildings erected thereon. This property he "agrees to sell and exchange to the party of the second part" (Rosen) "for the price and sum of $50,000 payable as follows." Then follow the particulars of how the purchase money is to be paid. Rosen assumes the two mortgages, one of $16,000 and the other of $1,600, and the balance of $32,400 is to be paid by Rosen transferring to the plaintiff the equity of redemption in the Logan Ave. property and in the Purcell St. property, the plaintiff assuming the mortgages upon the two properties last-mentioned. Rosen being unable to furnish title to the Logan Ave. property, the agreement of July 11, 1916, was prepared and signed by the parties to it. The time for delivering a good title to the last-mentioned property was extended to April 1, following—a period of nearly 9 months—and if a good title was not then furnished, the plaintiff was to have the option of receiving, instead of the property, the sum of $25,500 secured by the covenant of Rosen and M. Finkelstein and by a mortgage on the farm. The agreement declares that this sum is the amount agreed upon as the value of the Logan Ave. property, after deducting the mortgage of $4,500. It is clear from the document itself that the sum of $25,500 was a pre-estimate of the loss which the plaintiff would suffer if title to that property could not be delivered. It is true that this sum is a large part of the $32,400 which was placed as the value of the two properties which Rosen was to convey to the plaintiff under the first agreement, but the sum was agreed upon between the parties and the defendants understood the position in which they were placing themselves. It is unnecessary to go into the motives of the parties. The plaintiff took no unfair advantage. The sum in question was an amount agreed to be paid to the plaintiff, at his option, in lieu of the land for which title could not be made. In the case of a single stipulation which, if broken at all, can be broken

MAN.

C. A.

REIMER v. ROSEN.

Perdue, C.J.M.

once only and in one way only, there can be no inference or presumption that the sum payable on breach is not in the nature of agreed damages: *per* Lord Parker of Waddington in *Dunlop Pneumatic Tyre Co.* v. *New Garage Co.*, [1915] A.C. 79, at p. 97. See also *Lea* v. *Whitaker* (1872), L.R. 8 C.P. 70; *Law* v. *Redditch*, [1892] 1 Q.B. 127; *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332, *per* Lord Herschell, at p. 345; 10 Hals. 331, where other cases supporting this principle are collected.

When the second agreement was made the plaintiff was willing to carry out the first agreement. Rosen and his son-in-law Finkelstein, who was interested with him, could not carry out the agreement as to one of the two parcels of land. The plaintiff agreed to give them nearly 9 months to furnish title. But if they were not, at the expiration of that period, in a position to perform their part of the agreement, then the plaintiff, at his option, should be entitled to money in lieu of the particular land as to which they had failed to make title. The amount of money the plaintiff was, in such event, to receive was, instead of being left unascertained, then and there settled between the parties, as the agreement states upon its face. It would now be a difficult matter, one almost impossible it seems to me, to ascertain by the evidence of witnesses what was the value of the Logan Ave. property on March 23, 1916, or on July 11, 1916, or on April 1, 1917. That property may have had a special value in the mind of the plaintiff. In the then and present state of land values the greatest variety of estimates would be given. If the plaintiff were compelled to accept the value found by the Master, it would be a case of compelling him to part with his own property and, instead of receiving the property he was to get in exchange, to receive a sum of money designated by someone else. A new bargain would be made for him which he would be compelled to carry out. There was no other provision in the agreement for ascertaining the sum to be paid as the value of the land. In *Wallis* v. *Smith* (1882), 21 Ch.D. 243, at p. 275, Lindley, L.J., said:—

> When I come to look at the cases, I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of the damages.

This statement is cited with approval by Lord Parmoor in the *Dunlop Tire Co.* case at p. 104. If the sum mentioned in the present case is a penalty, what is the smaller sum to be paid? It would be

one impossible to fix accurately or justly in the circumstances of this case.

I think that the defendant Sarah Finkelstein was and is a proper party to the suit. The arrangement amongst the defendants was a family one. Rosen was to give his daughter a half interest in the farm. She was to turn in the Purcell St. lot. Her husband was interested in the transaction. It clearly appears from a number of statements in the evidence that she knew and approved of the transaction and that her father and her husband acted for her. It is not actually necessary to the plaintiff's case that she should be a party. Rosen and M. Finkelstein are bound to carry out their agreements with the plaintiff. It is to their interest that she should remain a party and be bound by this judgment. If they cannot make title to the Purcell St. property, they will have to pay the value of that property to the plaintiff if the transaction is carried out. The plaintiff fixes the value of the last-mentioned property at $6,900 over and above the mortgage upon it. This sum is the difference between $32,400 and the $25,500 fixed as the value of the Logan Ave. property. I think the values placed on the properties by the parties should be taken where it is necessary to go into the question of value.

With great respect, I would vary the judgment of the trial judge by entering judgment against Rosen and M. Finkelstein for $25,500 and by striking out clause 3 of the judgment. The agreement of March 23, 1916, should be specifically performed except that the sum of $25,500 takes the place of lot 44, plan 11, part of parish lot 11 St. John, being the parcel referred to above as the Logan Ave. property. It should be referred to the Master to inquire whether a good title can be made to the Purcell St. property by the defendant Rosen, subject only to the incumbrance mentioned in the said agreement of March 23, 1916, and in case a good title can be made, then Rosen shall convey the said last-mentioned property to the plaintiff by a sufficient conveyance in which all necessary parties are to join, or in default pay the value of the property (subject to the said incumbrance) to be ascertained by the Master of the Court of King's Bench. Upon the defendant Rosen paying to the plaintiff the said sum of $25,500, and upon the defendant Rosen conveying to the plaintiff the Purcell St. property in accordance with the above direction, or, in case of failure to

MAN.

C. A.

REIMER v. ROSEN.

Perdue, C.J.M.

make title, then by the said Rosen paying to the plaintiff the sum ascertained by the Master as the value thereof, such sum not to exceed $6,900, the plaintiff shall convey to the defendant Rosen or to whom he shall appoint, the said farm mentioned in the pleadings, subject only to the incumbrances mentioned in the said agreement of March 23, 1916. The entry of judgment against Rosen and M. Finkelstein for the sum of $25,500 should not be taken as a payment of that amount and the plaintiff should not be compelled to convey the farm until the judgment has been satisfied and the other condition performed by Rosen. The plaintiff might, at his option, accept a mortgage on the farm for the above amount in accordance with the terms of the agreement of July 11, 1916, instead of the payment of the amount in cash. The mortgage, if accepted, should carry interest. The plaintiff's lien for the purchase money of his farm should be preserved, notwithstanding the entry of judgment for the $25,500. It is further referred to the Master to settle the conveyances, take accounts and to direct the carrying out of the provisions of this judgment; and the parties hereto, or any of them are to be at liberty to apply generally in respect to the due carrying out of the terms hereof. The minutes of judgment may be spoken to, in case any party is dissatisfied with the form above outlined and the nature of the relief granted.

The defendants Rosen and M. Finkelstein are ordered to pay the costs of this appeal. The plaintiff having succeeded upon the question respecting penalty or liquidated damages, he will be entitled to the full costs thereof up to and including the trial and entry of judgment. There will be no costs either for or against the defendant Sarah Finkelstein.

Cameron, J.A.

CAMERON, J.A.:—This action has its origin in an agreement for the exchange of property, dated March 3, 1916, whereby the plaintiff agreed to "sell and exchange" to the defendant a farm of 1,000 acres lying to the south-east of this city in consideration of the defendant assuming encumbrances on the farm to the amount of $16,600 and "transferring and conveying" his equity in two parcels of land in Winnipeg, one known as the Logan Ave. property, subject to a mortgage of $4,500, and the other known as the Purcell St. property, subject to a mortgage for $6,000.

As a matter of fact, the Logan Ave. property was subject to a further mortgage, and Sarah Finkelstein, the daughter of the defend-

ant Rosen, and the wife of the defendant Moses Finkelstein, Rosen and Moses took possession of the farm shortly after the execution of the agreement. The plaintiff inspected the Winnipeg properties and commenced to receive the rents therefrom on and after May 1, 1916.

Difficulties arose with reference to the title to the Winnipeg properties, and there was consequent delay in carrying out the terms of the above agreement, although the plaintiff was urging its completion. Accordingly, on July 11, 1916, a second agreement was entered into between Rosen, of the first part, Moses Finkelstein of the second part, and Reimer of the third part, in which the previous agreement was recited and Rosen's previous inability to deliver title to the Logan Ave. property was stated and it was agreed that the time for delivery of such title should be extended until April 1, 1917, and further that:—

"In the event of the party of the first part being unable or neglecting or failing to deliver title as aforesaid, etc." (Clause cited in full in judgment of Perdue, C.J.M.)

It was further agreed that Rosen should give forthwith a mortgage on the plaintiff's farm to secure the payment of the $25,500, but should Reimer exercise his rights to take the lands the mortgage was to be discharged on delivery of a good title thereto.

Reimer was always ready to perform his part of this agreement. The defendants failed to complete their delivery of the title on April 1, 1917, and on April 4 notice was given, pursuant to the clause in the agreement quoted above, exercising the option and electing to take the $25,500 as provided therein in lieu of the Logan Ave. property.

The action was commenced April 27, 1917, (1) for a conveyance of the Purcell St. property by the defendants Rosen and Sarah Finkelstein or $6,900 in lieu thereof, and (2) judgment against Rosen and Finkelstein for $25,500 and interest. It was tried by Galt, J., who held that the sum of $25,500 stipulated for in the second agreement was extravagant and unconscionable and that it must be treated as a penalty and not as liquidated damages. He held the plaintiff entitled to retain the rents collected by him and to a reference as to damages and that the original agre ment should be otherwise specifically performed. As to Sarah Finkel-

MAN.

C. A.

REIMER v. ROSEN.

Cameron, J.A.

stein, he held that she never was a party to the original agreement and that she was legally unable to ratify it and as to her he dismissed the action without costs.

The documents and the history of the transaction are fully set out in the judgment of the trial judge.

It is to be observed that the stipulation is not one to convey the Logan Ave. property with a liquidation of the damages in case of default; but it is a covenant to convey within a limited time or afterwards to pay the amount. It is not to be paid by way of damages for not conveying; but it is to be paid, if no conveyance is made, as part of the contract price for the property conveyed by the plaintiff. It is an optional agreement. The defendants had the choice of making the conveyance; or of omitting to do so and then paying the stipulated sum, if the plaintiff should demand it.

The questions involved on this appeal (so far as the defendants other than Sarah Finkelstein are concerned) are whether the stipulation in issue is to be considered as a penalty or as liquidated damages, and whether certain evidence as to the values of the properties involved was properly admitted at the trial.

Lord Mersey said in *Webster* v. *Bosanquet*, [1912] A.C. 394, 397, that the cases raising the question of penalty or liquidated damages "are innumerable and perhaps difficult to reconcile." The case before us certainly presents difficulties, but we now have the advantage of recent decisions on the subject of the highest authority, and it is no longer necessary to refer to the authorities in detail. The subject was discussed by this court in *Farmer's Advocate* v. *Master Builders* (1917), 38 D.L.R. 409, 28 Man. L.R. 340.

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the judge upon a consideration of the whole instrument. (*Sainter* v. *Ferguson*, (1849), 7 C.B. 716, 137 E.R. 283, where it appears that at one time it had been left to the jury.)

And the principle upon which he is to proceed is simply to ascertain the real intention of the parties from the language they have used. Mayne on Damages, 8th ed., p. 173.

In this case the sum of $25,500 is to be paid by the defendants, who are parties to the agreement, in the event of their being unable to convey the Logan Ave. property by April 1, 1917, should the plaintiff call on them to do so. Evidence was given by the defence as to the value of the Logan Ave. property and of the farm. The

object of the introduction of this evidence was to shew that values on both sides were intentionally inflated. But the real question here is whether the stipulation, which affects the Logan Ave. property only, is to be considered as a penalty or as fixing the damages for the breach. The evidence as to values was objected to but, even if not objected to, it was argued that it would be disregarded as not being legal evidence on the authority of *Jacker* v. *International Cable Co.*, 5 T.L.R. 13.

As already stated, it is well settled that in actions of this kind the question of penalty or liquidated damages (which has embarrassed the judges from the time of the great Lord Eldon, *Astley* v. *Weldon* (1801), 2 Bos. & Pul. 346, 350, 126 E.R. 1318), is one for the judge and a question of law, not one of fact for the jury. It is the duty of the judge on proof of the breach to construe the document for the jury defining its character as the one thing or the other and directing them as to the damages to be awarded accordingly. If he holds the stipulation in the nature of a penalty the damages, if any, are such as are established as resulting from the breach; if, on the other hand, he regards it as liquidating the damages, the jury is to award the full amount. In this case no evidence was called for the plaintiff on the question of damages other than the agreement sued on. But if it is determined that the agreement, being in the nature of a penalty, called for evidence of the damage actually sustained, then the subject would be one for a reference.

Here we have a defence setting up that the stipulation is a penalty and there can be no doubt that is a conclusion of law and, therefore, not a proper pleading under our system, which requires the material facts only to be stated: K.B. r. 325. See the corresponding English rule: O. 19, r. 4. Conclusions of law, or of mixed fact and law, are no longer to be pleaded. Odgers on Pleading, 6th ed., 80. It is not necessary for any defendant to plead any denial or defence as to damages claimed or their amount: they will be deemed to be put in issue in all cases unless expressly admitted. Annual Practice, 1917, p. 358. Neither party should plead to any matter of law set out in his opponent's pleading. *Ib.* See the judgment of Willes, J., in *Gautret* v. *Egerton*, L.R. 2 C.P. 371, approved in *West Rand* v. *Rex*, [1905] 2 K.B. 391, 399-400, by Lord Alverstone; *Lord Harrmer* v. *Flight*, 35 L.T.N.S. 138; *Stokes*

MAN.

C. A.

REIMER v. ROSEN.

Cameron, J.A.

v. *Grant* (1878), 4 C.P.D. 25, per Lindley, J., at p. 28; *Lauder* v. *Carrier*, 10 P.R. (Ont.) 612.

In *Clark* v. *Hagar*, 22 Can. S.C.R. 510, where there was a defective plea that the contract sued on was entered into for an immoral consideration, though the plea was not objected to, it was held that to admit evidence in respect to the consideration, the particular facts on which the defence was based must be set forth and the defendant was not allowed to base a defence on the evidence under the defective plea.

In *Clydebank* v. *Castaneda*, [1905] A.C. 6, at p. 17, Lord Davey says:—

> My Lords, I hold it to be perfectly irrelevant and inadmissible for the purpose of shewing the clause to be extravagant, in the sense in which I use that word, to admit evidence, such as the learned counsel who has last addressed us has drawn our attention to, of the damages which were actually suffered by the Spanish government.

Upon this question I must refer to the case of *Sun Printing Ass'n.* v. *Moore*, 183 U.S. Rep. 642, where a yacht was hired by the plaintiff company and the sum of $75,000 was fixed to be paid in the event of the non-return of the ship, which was wrecked. It was held by the Supreme Court of the United States that as the stipulation for value was binding upon the parties, evidence tending to shew that the admitted value was excessive was rightfully refused. See the exhaustive judgment of the present Chief Justice of the Supreme Court at pp. 659-674, where a great many of the English decisions are discussed, and it was held that the naming of a stipulated sum to be paid for on the non-performance of a covenant, is conclusive upon the parties in the absence of fraud or a mutual mistake.

Hereafter I refer to the judgment of Lord Dunedin in *Dunlop Tyre Co.* v. *New Garage Co.*, where he states that this is a question of construction to be decided upon the terms and inherent circumstances of the contract, not intimating any possibility of the construction being modified by extrinsic evidence. See also *Manitoba Free Press* v. *Martin* (1892), 21 Can. S.C.R. 527, and *McKay* v. *Cummings*, 6 O.R. 400.

In my opinion, therefore, the plaintiff was entitled to pay no attention to the pleading as was indicated by Lindley, J., as the course he should adopt with reference to the paragraphs of the defence before him in *Stokes* v. *Grant*, *supra*. It follows that the

evidence of values on the issue whether the stipulation is for liquidated damages or otherwise is inadmissible and, according to decisions of the Court of Appeal in *Jacker* v. *International Cable Co., supra*, it must be rejected, and the question decided on legal evidence. There was nothing in the circumstances surrounding the making of this agreement that can affect its construction.

It is the fact that, as it is brought to our knowledge by this evidence that according to the values placed by the defendant's witnesses upon the Logan Ave. property and contrasting this with the sum of $25,500 fixed as the sum to be paid on failure to convey it, there does appear such a discrepancy as to strike the mind as extravagant. But we are without any evidence from the other side on the point and, in any event, the question must be determined on the construction of the document itself and without regard to the evidence given by the defence.

A great number of cases were cited on the question of penalty or liquidated damages. But there is no need to refer to all of them. Each case differs from the others and presents its own peculiar difficulties.

There is in this agreement but one breach, on which the sum mentioned becomes payable, and that breach occurs only, as already noted, at the option of the defendants who are parties to it.

Where a contract contains only a single stipulation, on the breach of which a specified sum, whether large or small, is to become payable, such a sum is liquidated damages, provided that there is no adequate means of ascertaining the precise damage that may result from the breach. 10 Hals. 331.

Mayne says (p. 178):—

There never was any doubt that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty.

A long list of authorities is given in support of this rule practically all of which were cited before us: *Sainter* v. *Ferguson, supra; Sparrow* v. *Paris* (1862), 7 H. & N. 594, 158 E.R. 608; *Elphinstone* v. *Monkland*, 11 App. Cas. 332; *Law* v. *Redditch*, [1892] 1 Q.B. 127, where Lord Esher says, p. 130:—

Where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the court as liquidated damages and not a penalty.

MAN.

C. A.

REIMER v. ROSEN.

Cameron, J.A.

Ward v. *Monaghan* (1895), 11 T.L.R. 529; *Strickland* v. *Williams*, [1899] 1 Q.B. 382, where A. L. Smith, L.J., says, p. 384:—

In my opinion, it is the law that where payment is conditioned on one event the payment is in the nature of liquidated damages.

It was stated by Lindley, L.J., in *Wallis* v. *Smith*, 21 Ch.D. 243, at 275:—

When I come to look at the cases I cannot find a single case in which the larger sum has been treated as a penalty where there has been no smaller sum ascertainable as the amount of damages,

a statement approved by Lord Parmoor in *Dunlop Tyre Co.* v. *New Garage Co.*, [1915] A.C. 104.

Now it cannot be said that there was present in the contemplation of the parties any other or smaller sum as damages than that stated in the agreement. Nor can it be said that there is any other sum readily ascertainable as damages resulting from the defendants' default. It is impossible to estimate the damages caused to the plaintiff where the subject-matter of the agreement is lands necessarily of an uncertain value and where the ramifications of the various consequences of the breach are difficult to foresee. It is a proper presumption that the amount was fixed in the agreement for the very purpose of avoiding these difficulties and I see no reason why the parties should not have had in contemplation all kinds of possible damage whether of a strictly legal character or otherwise. There is no other reason apparent in the document why the amount was so explicitly declared and

the very reason why the parties do in fact agree to such a stipulation is that sometimes, although there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult and expensive: *Per* Lord Halsbury in *Clydebank* v. *Castaneda*, [1905] A.C. 6, at 11.

I have referred to *Clydebank* v. *Castaneda*, from the judgment in which the general principle to be drawn is thus stated in *Commissioner of Public Works* v. *Hills*, [1906] A.C. 368, at 375:—

The criterion (in such cases) is to be found in whether the sum stipulated for can or cannot be regarded as a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation."

The circumstances must be taken as a whole and must be viewed at the time the bargain was made. This decision was followed in *Webster* v. *Bosanquet*, [1912] A.C. 394, where it was held that the contract there in question "stipulated for what in words it says."

In *Dunlop Tyre Co.* v. *New Garage Co., supra*, we find authoritative decisions on this subject. Lord Dunedin says, at p. 86 (2):—

> The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (citing *Clydebank* v. *Castaneda* (3)). The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract and not as at the time of the breach.

Lord Parmoor says, at p. 101:—

> No abstract rule can be laid down without reference to the special facts of the particular case, but when competent parties by free contract are purporting to agree a sum as liquidated damages there is no reason for refusing a wide limit of discretion.

To justify interference there must be an extravagant disproportion and he illustrates this by referring to Lord Halsbury's example of an agreement that if one did not build a house for £50, one should be liable to a penalty for a million of money. All the judgments are of the utmost value and need not be cited at length.

On the legal evidence, that is to say, on consideration of the document itself, and the circumstances in which it was entered into, I think the conclusion must be drawn that the stipulation in question was, at the time it was made, a genuine pre-estimate by the parties of the probable or possible loss in consequence of a breach by the defendants of it. There is only one event upon which the money is to become payable and the rule in such a case is very positive. The means of ascertaining the damage resulting from a breach were at the time of making the contract difficult and inadequate. The contract itself was entered into as a result of prolonged negotiations and dealings between the parties. There is no hint of any imposition or fraud. The stipulation for payment is part of a contract and itself comes into force only on the election of the defendants parties to it to omit to do that which they had covenanted to perform. We have the express words of the stipulation which leave the intention of the parties beyond the slightest doubt. As I have indicated, my opinion is that judgment must be entered against the defendants Rosen and Finkelstein for the amount claimed.

As for the appeal against that portion of the judgment dismissing the action against Sarah Finkelstein, I think her position, throughout, was that she was willing to part with her property

MAN.

C. A.

REIMER v. ROSEN.

Haggart, J.A.

when she received a half-interest in the farm and I am not disposed to interfere with the judgment of the trial judge.

HAGGART, J.A. (dissenting):—The question as to whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is dealt with very fully in Mayne on Damages, at p. 173 and following pages, and the authorities up to the date of the issue of that text-book are carefully reviewed by the author.

It is a question of law to be decided by the judge upon a consideration of the whole instrument, and the principle upon which the judge is to proceed is simply to ascertain the real intention of the parties from the language they have used, and amongst some of the proposed rules or tests offered as aiding to ascertain that intention are the following:—

Where the sum is expressly stated to be a penalty and there are no other words or circumstances altering, controlling or affecting this statement, the sum cannot be considered as liquidated damages: *Smith* v. *Dickenson* (1804), 3 Bos. & Pul. 630, 127 E.R. 339. But the language used in describing the amount payable on a breach is not conclusive. In *Sainter* v. *Ferguson*, 7 C.B. 716, at 727, 137 E.R. 283, at 288, Coltman, J., said:—

> Although the word "penalty," which would *primâ facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. . . .

On the other hand, notwithstanding the contrary ruling in *Reilly* v. *Jones* (1823), 1 Bing. 302, 130 E.R. 122, it is now settled that the mere use of the words "liquidated damages" is not decisive against the sum being held to be a penalty. The principle is that although the parties may have used the term "liquidated damages," yet if the court can say upon the whole of the instrument taken together that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the word and consider it as being in the nature of a penalty. And on p. 175 the author goes on to state:—

> Where it is doubtful from the terms of the contract whether the parties meant that the sum should be a penalty or liquidated damages the inclination of the court will be to view it as a penalty. . . . In considering whether a stipulation to pay a sum of money on breach of condition is to be treated as a penalty or as liquidated damages, the test appears to be whether the loss which will accrue to the plaintiff from an infringement of the contract can,

or cannot, be accurately or reasonably calculated in money antecedently to the breach. If it can be so calculated, then the fixing of a larger sum of money will be treated as a penalty. Where the loss is absolutely uncertain, it will be treated as liquidated damages.

And again, at p. 185:—

It was said that the criterion of whether a sum, be it called penalty or liquidated damages, is truly liquidated damages, and, as such, not to be interfered with by the court, or is truly a penalty which covers the damage, if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole and must be viewed as at the time the bargain was made.

Subsequently to the issue of the edition which I have referred to of Mayne on Damages, there are later authorities, and the recent case of *Dunlop* v. *New Garage*, [1915] A.C. 79, was cited to us by both parties and relied upon by them respectively. In that case a single sum was agreed to be paid as liquidated damages on the breach of a number of stipulations of varying importance and the damage was the same in kind for every possible breach and was incapable of being precisely ascertained. It was held that the stipulated sum, provided it was a fair estimate of the probable damage and not unconscionable, would be regarded as liquidated damages and not as a penalty. There the dictum of Tindal, C.J., in *Kemble* v. *Farren* (1829), 6 Bing. 141, 130 E.R. 1234, is referred to and affirmed, who said liquidated damages cannot be reserved on an agreement containing various stipulations of varying degrees of importance unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined. Lord Dunedin, one of the majority of the court, carefully reviews other recent cases, namely: the *Clydebank* case, [1905] A.C. p. 6; *Public Works* v. *Hills*, [1906] A.C. 368, and *Webster* v. *Bosanquet*, [1912] A.C. 394. After consideration of these cases and the other authorities cited to him, he proceeds to state several rules or propositions deducible therefrom and some in terms not differing much from the tests laid down by Mayne, and are as follows, at p. 86:—

Though the parties to a contract who use the words "penalty" or "liquidated damages" may *primâ facie* be supposed to mean what they say, yet the

MAN.

C. A.

REIMER v. ROSEN.

Haggart, J.A.

expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

Now, in the case at bar it was claimed on the hearing that evidence as to values should have been excluded. I cannot understand very well how this court could ascertain whether the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party, or a genuine covenanted pre-estimate of damages, or comply with this other rule, which affirms that the question whether the sum stipulated is a penalty or liquidated damages was a question for conclusion of the court to be decided upon the terms and inherent circumstances of each particular contract.

If I were the trial judge I would do as Galt, J., did. I would admit the evidence as to the values. Lord Dunedin goes on further in his reasons to state (p. 87):—

> It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

And further:—

There would be a presumption only that it was a penalty if such a term were expressed in the writing. From the conclusion arrived at by the trial judge, we must assume that the trial judge considered the deal an extravagant one.

I think he was right in admitting the evidence and the question decided was whether as a conclusion of law or a question of fact it was competent for the judge to decide as he has decided.

I think it is a rule also that when the language describing the amount payable on a breach is not conclusive, yet the court must look at the nature of the agreement and surrounding circumstances to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Where it is doubtful the instruction of the court will be to view it as a penalty.

The case above mentioned, *Kemble* v. *Farren*, 6 Bing. 141, 130 E.R. 1234, was a case where the defendant had engaged to act as principal comedian at Covent Garden Theatre for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay him £3 6s. 8d. every night the theatre was open, with other terms. The agreement contained a clause that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, to which sum it was

thereby agreed that the damages sustained by any such omission, neglect or refusal should amount; and this sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. Tindal, C.J., p. 148, in discussing this part of the agreement said:—

> But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement.

A similar decision was arrived at in the case of *Boys* v. *Ancell* (1839), 5 Bing. N.C. 390, 132 E.R. 1149.

The cases cited and commented upon in the above appeal were *Astley* v. *Weldon*, 2 Bos. & Pul. 346, *Davies* v. *Penton* (1827), 6 B. & C. 216, 108 E.R. 433, and *Kemble* v. *Farren*, 6 Bing. 141, 130 E.R. 1234.

I do not think, upon considering all the surrounding circumstances, that there was any genuine pre-estimate of the damages likely to be suffered by the plaintiff by reason of the defendants' breach of the stipulation. As to the evidence given by Mr. Bain on the values of the lands in question, I think him a competent and reliable witness; that his values are more correct than those of the parties to the suit, who evidently were each trying during the negotiations to enhance the sum mentioned in the agreement as to each particular parcel.

I believe that more substantial justice would be done by the judgment of the trial judge than a judgment in the terms suggested by the majority of this court.

With all due respect I would dismiss the appeal and affirm the verdict of Galt, J.

Fullerton, J.A.

FULLERTON, J.A.:—The main question argued on this appeal was whether the sum of $25,500 stipulated by the agreement of July 11, 1916, to be paid by the defendants Finkelstein and Rosen to the plaintiff in the event which has happened is a penalty or liquidated damages. By that agreement the two defendants agree to deliver title to the Logan Ave. property to the plaintiff on or before April 1, 1917. In the event of failure so to do they jointly and severally covenant and agree to pay the plaintiff the sum of

MAN.

C. A.

REIMER v. ROSEN.

Fullerton, J.A.

$25,500 "being the amount agreed upon as the value of said lands."

The terms of the agreement are clear and distinct: there is nothing ambiguous about it and in the absence of authority one would say that the case was unarguable.

A difficulty is created, however, by the fact that in construing agreements of this nature the courts have laid down certain arbitrary rules of construction.

The rule applicable in the present case, however, is one which does not interfere with the expressed intention of the parties. The rule is that if the sum is payable on the happening or non-happening of one event, it is to be regarded as liquidated damages: *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *Elphinstone* v. *Monkland*, 11 App. Cas. 332; *Law* v. *Redditch*, [1892] 1 Q.B. 127; *Ward* v. *Monaghan*, 11 T.L.R. 529; *Sparrow* v. *Paris*, 7 H. & N. 594; *Dunlop* v. *New Garage*, [1915] A.C. 79.

There are two well recognized exceptions to the above stated rule: 1, where a sum of money is payable in default of payment of a smaller sum; 2, where "the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."

Counsel for the respondent contends that the agreement in this case comes within the second exception, that the sum of $25,500 agreed to be paid is "extravagant and unconscionable" in relation to the value of the Logan Ave. property and that in consequence it is a penalty and not liquidated damages.

In order to lay a foundation for this argument, he tendered evidence at the trial to shew that the value of the Logan Ave. property was less than one-half the amount sued for. This evidence was received subject to objection.

I think the evidence was inadmissible on two grounds: 1, the parties have themselves fixed the value of the Logan Ave. property and their valuation is conclusive: *Sun Printing & Publishing Association* v. *Moore*, 183 U.S. Rep. 642. 2. There is no proper pleading under which such evidence could be given.

The only paragraph of the defence under which such evidence could possibly be given is par. 8 which simply alleges that the sum of $25,500 is a penalty. One of the chief objects of pleadings is to acquaint each party with the case proposed to be made by

his opponent and thereby prevent surprise at the trial. Under such a pleading the plaintiff could not anticipate that the defendant would call evidence as to values.

Moreover, the plea is not in accordance with the rules which require that pleadings shall contain a concise statement of the material facts upon which the party pleading relies.

Even if the evidence were receivable and clearly established that the Logan Ave. property was actually worth, say, only $7,600, I would still be of opinion that the sum of $25,500 fixed by the parties is liquidated damages and not a penalty.

In *Rolfe* v. *Peterson* (1772), 2 Brown 436, 1 E.R. 1048, the lessee covenanted not to plough up ancient pasture and if he did to pay an additional yearly rent of £5 per acre. The lessee ploughed 10 acres. It was held that £5 was not to be considered as a penalty, but as liquidated satisfaction, fixed and agreed upon by the parties.

In this case counsel for the defendant stated that the penalty of £5 an acre reserved during the remainder of the term for once ploughing amounted to more than thirty times the value of the inheritance of the ten acres before they were put into a state of cultivation by the defendants.

In *Astley* v. *Weldon*, 2 Bos. & Pul. 346, Lord Eldon, at p. 351, said: "A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty though agreed to be paid in the form of contract . . . There is indeed a class of cases in which courts of equity have rescinded contracts on the ground of their being unequal. It has been held, however, that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it."

In *Reynolds* v. *Bridge* (1856), 6 E. & B. 528, 119 E.R. 961, Lord Coleridge, at p. 540, referring to the judgment of Lord Eldon in *Astley* v. *Weldon*, said: "Lord Eldon distinctly laid down that the mere magnitude of the sum named could not prevent it from being liquidated damages." (He says further) "I think there is no great disagreement among the authorities, as to the instances in which the sum named is to be considered constituting liquidated damages or a penalty. All that the courts have done has been only

MAN.

C. A.

REIMER v. ROSEN.

Fullerton, J.A.

to lay down a canon for establishing the intention of the parties. In no case is it said that the question can be determined from the circumstance that the sum named may very often be an exaggerated estimate of the actual damage."

In *Wallis* v. *Smith*, 21 Ch.D. 243, Jessel, M.R., discussing the judgment of Lord Eldon in *Astley* v. *Weldon*, *supra*, says, at p. 260: "He (Lord Eldon) perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive where the parties were of full age and at arm's length." Lindley, L.J., at p. 275, says: "But when I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages."

In *Dunlop* v. *New Garage*, [1915] A.C. 79, Lord Parmoor said, at p. 101: "There are two instances in which the court has interfered when the agreed sum is referable to the breach of a single stipulation. It is important that the principle of interference should not be extended. The agreed sum, though described in the contract as liquidated damages, is held to be a penalty if it is extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was made. No abstract rule can be laid down without reference to the special facts of the particular case, but when competent parties by free contract are purporting to agree (on) a sum as liquidated damages there is no reason for refusing a wide limit of discretion. To justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate." See also *Clydebank* v. *Castaneda*, [1901] A.C. 6.

Again, the form of the contract lends itself to the construction that the sum named is liquidated damages. In almost every case you find an agreement to do a certain thing and a provision that if default be made a certain sum shall be paid. Lord Dunedin in *Dunlop* v. *New Garage*, [1915] A.C., at p. 86, says that "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party, the essence of liquidated damages is a genuine covenanted pre-estimate of damage."

Here the two defendants agree to deliver the title to the

Logan Ave. property on or before April 1, and in the event of their being unable or neglecting or failing to deliver title to pay "in lieu of said lands" the sum of $25,500 in cash, being the amount agreed upon as the value of said lands.

Defendants had a choice in the matter either to transfer the title or pay the money. They neglected to transfer the title and it must be presumed that it was more in their interests to pay the money.

The case of *Sun Printing & Publishing Co.* v. *Moore*, 183 U.S. Rep. 642, appears to be on all fours with the case at bar.

In this case the respondent Moore chartered his yacht to the appellants for the term of 4 months for the sum of $10,000. The agreement provided that the lessor should be liable and responsible for any and all loss and damage to hull, machinery, etc. It also contained the following term: "That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000."

The yacht was wrecked and became a total loss and the owner sued for breach of the covenant to return the vessel claiming $75,000, the amount fixed by the charterparty as the value of the vessel.

The company introduced some evidence tending to shew that the value of the yacht was a less sum than $75,000, and it claimed that the recovery should be limited to such actual damage as might be shewn by the proof. The trial judge refused to hear further evidence offered on this subject and in deciding the case disregarded it altogether.

The judgment of the court was delivered by White, J., in a very lengthy and able judgment in which he reviews all the important English cases and arrives at the conclusion that as the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to shew that the admitted value was excessive.

The trial judge has found "that the defendant Sarah Finkelstein never was a party to the original contract as an undisclosed principal." He quotes the following evidence in support of this finding:—

Rosen: Q. 13. When did you tell her that you had entered into ex. 1 (*i.e.*, the agreement)? A. I think it was on a Friday and I told her on Sun-

MAN.

C. A.

REIMER v. ROSEN.

Fullerton, J.A.

day. She was at our place, and I told her I had made a deed and she would be the owner of half the farm. Q. 16. You told her that you had entered into the agreement with Reimer? A. Yes. I told her that I signed it and I signed it.

Sarah Finkelstein: Q. 27. And he told you he had entered into an agreement whereby he was to exchange the Logan Ave. property and your Purcell property for the farm? A. Yes. Q. 23. That was perfectly satisfactory to you? A. Yes.

The trial judge has evidently overlooked the following evidence:—

Rosen: Q. 10. She was a partner to it? A. She knew we were entering into this agreement. I told her and she was to get half the farm and I was to get half. Q. And she consented? A. She told me it would be all right. Q. 235. She consented to your entering into ex. 1? A. Yes. Q. She knew beforehand that you were going to make a deal with respect to this land? A. Yes.

In addition to the above there is other evidence to shew that the defendant Sarah Finkelstein, prior to the making of the original agreement, gave her father Rosen, full authority to deal with the Purcell St. property.

I would allow the appeal.

Curran, J.

CURRAN, J., concurred in allowing the appeal.

Judgment varied.

Annotation.

ANNOTATION.

Penalties and Liquidated Damages in Contracts.

In cases where there is added to the contract a clause for the payment of a sum of money in the event of non-performance, the question arises whether the contract will be satisfied by its payment, or whether it will not. In the former case, equity will not interfere; in the latter it may.

The question always is, What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court's enforcing performance of the very act, and thus carrying into execution the intention of the parties: *Howard* v. *Hopkyns* (1742), 2 Atk. 371, 26 E.R. 624; *French* v. *Macale* (1842), 2 Dr. & War. 269; *Roper* v. *Bartholomew* (1823), 12 Pri. 797, 147 E.R. 880. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

Contracts of the kind now under discussion may be divisible into three classes:—

(i.) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty in a bond:

(ii.) Where the sum named is to be paid as liquidated damages for a breach of the contract:

Annotation.

(iii.) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the court to compel the specific performance of the other alternative of the contract. "There are," said Lord Bramwell, in *Legh* v. *Lillie* (1860), 6 H. & N. 165, 171, 158 E.R. 69; "three classes of covenants; first, covenants not to do particular acts, with a penalty for doing them, which are within the 8 & 9 Wm. III., c. 11: secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute: and thirdly, covenants that acts shall not be done unless subject to a certain payment." It will be convenient to consider the three classes of cases separately.

A penalty (strictly so called) attached to the breach of the contract will not prevent it from being specifically enforced.

"The general rule of equity," said Lord St. Leonards, in *French* v. *Macale*, 2 Dr. & War. 274-5, "is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. (The case referred to seems to be *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528, 28 E.R. 337.) So if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money; it would seem that he would be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract."

Thus, where two persons entered into articles for the sale of an estate, with a proviso that, if either side should break the contract, he should pay £100 to the other, and the defendant, by his answer, insisted that it was the intention of both parties that, upon either paying £100, the contract should be absolutely void, Lord Hardwicke nevertheless decreed specific performance of the contract to sell. *Howard* v. *Hopkyns*, 2 Atk. 371. In another case, the condition recited a contract for a settlement comprising a sum of money and also real estate: the penalty was double this sum of money, but had no relation to the real estate: the court granted specific performance of the contract embodied in the condition. *Prebble* v. *Boghurst* (1818), 1 Swans. 309, 36 E.R. 402. And where a father, in consideration of his daughters giving up a part of their interest in the property, agreed to make up their incomes arising out of it to £200 a year, and entered into a bond for the payment of such sum as might be needful for that purpose, and the bond recited the contract, the court took this as evidence of the contract, and accordingly granted relief on the foot of it beyond the bond, *Jeudwine* v. *Agate* (1829), 3 Sim. 129, 57 E.R. 948; and in a case which went to the House of Lords, a contract (contained in the condition of a bond) to give certain property by will or otherwise, was held

Annotation. not to be satisfied by the penalty, but was specifically performed: *Logan* v. *Wienholt* (1883), 7 Bli. N.S. 1, 5 E.R. 674. See also *Butler* v. *Powis* (1845), 2 Coll. 156, 63 E.R. 679; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112.

So, again, a contract not to carry on a particular kind of business within certain limits expressed in the condition to a bond can be enforced by injunction: *Clarkson* v. *Edge* (1863), 33 Beav. 227, 55 E.R. 354; *Gravely* v. *Barnard* (1874), L.R. 18 Eq. 518; *cf. William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 451, at 458.

The difference between penalty and liquidated damages is, as regards the common law remedy, most material. For, according to common law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money: *Anon.*, (1737), Hard. 390, 95 E.R. 252; *Lowe* v. *Peers* (1768), 4 Burr. 2225, 98 E.R. 160; *Hurst* v. *Hurst*, 4 Ex. 571; *Legh* v. *Lillie*, 6 H. & N. 165; *Mercer* v. *Irving* (1858), El. Bl. & E. 563, 120 E.R. 619; *Atkyns* v. *Kinnier* (1850), 4 Ex. 776, 154 E.R. 1429. As to the distinction between penalty and liquidated damages, see also *Elphinstone* v. *Monkland*, 11 App. Cas. 332, 346-348; *Clydebank* v. *Castaneda*, [1905] A.C. 6, 15; *Public Works Commissioner* v. *Hills*, [1906] A.C. 368, 375; *Wallis* v. *Smith*, 21 Ch. D. 243, 249, 258; *Pye* v. *British Automobile Commercial Syndicate*, [1906] 1 K.B. 425; *Diestal* v. *Stevenson*, [1906] 2 K.B. 345, 350; and *General Billposting Co.* v. *Atkinson*, [1908] 1 Ch. 537, at 544. But as regards the equitable remedy the distinction is unimportant: for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie: *City of London* v. *Pugh* (1727), 4 Bro. P.C. 395, 2 E.R. 268; *French* v. *Macale*, 2 Dr. & War 269; *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, 43 E.R. 768; *Carden* v. *Butler* (1832), Hayes & J. 112; *Bird* v. *Lake* (1863), 1 H. & M. 111, 71 E.R. 49; *cf. Bray* v. *Fogarty* (1870), Ir. R. 4 Eq. 544.

The simplest illustration of this is the ordinary case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit, and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses. "A purchaser," said Lord Eldon in *Crutchley* v. *Jerningham* (1817), 2 Mer. 502, at 506, 35 E.R. 1032, "has no right to say that he will put an end to the agreement, forfeiting his deposit." *Cf. Long* v. *Bowring* (1864), 33 Beav. 585, 55 E.R. 496. Such a condition has never been held to give the purchaser the option of refusing to perform his contract if he choose to pay the penalty, nor to stand in the way of specific performance of the contract.

In *French* v. *Macale*, 2 Dr. & War. 269, Lord St. Leonards fully discussed the law as to compelling the performance of contracts of the kind under discussion. In that case there was a covenant in a farming lease "not to burn or bate the demised premises or any part thereof under the penalty of £10 per acre to be recovered as the reserved yearly rent for every acre so burned." His Lordship appears to have considered this increased rent as in the nature of liquidated damages and not a penalty, but nevertheless he granted an injunction against the burning, saying after a careful review of the authorities that in every case of this nature the question is one of construction, and that the court will always interfere unless there is evidence of an intention that the act is to be permitted to be done on payment of the increased rent.

Annotation.

In one case a deed was executed dissolving a partnership between H. and L., and containing a recital that it had been agreed that the deed should contain a covenant by L. not to carry on the trade within one mile from the old place of business "without paying to H., as or by way of stated or liquidated damages," a sum named. In a subsequent part of the deed there was an absolute covenant not to carry on the trade within that limit, followed by a proviso that if L. should act contrary to or in infringement of that agreement he would immediately thereupon pay to H. the sum of £1,500 by way of liquidated damages. Notwithstanding the recital and the form used, it was held that L. was not entitled to break the covenant on paying the £1,500, and an injunction was granted: *Bird* v. *Lake*, 1 H. & M. 111.

The same view was put forward, though perhaps in slightly different language, by the Lords Justices in *Coles* v. *Sims*, 5 De G. M. & G. 1. That was a case in which there were mutual covenants between a vendor of part of his land and the purchaser of that part as to building on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant. On an application for an interim injunction (which was granted), Knight Bruce, L.J., said (5 De G. M. & G. 1, at 9): "If I were now deciding the cause, I should probably come to the conclusion that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound upon the ground of it to refuse an injunction if otherwise proper to be granted: and that in the present case, the circumstances are such as to render it right for the court to grant an injunction." Turner, L.J., p. 10, added: "The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum."

Where the contract to do or not to do the act is distinct from the obligation to pay a sum of money, it seems that either the contract or the obligation may be sued on.

"Where a person," said Lord Romilly, M.R., in *Fox* v. *Scard* (1863), 33 Beav., 327, at p. 328, 55 E.R. 394, "enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both courts."

It is clear that the fact that the contract may be comprised in a bond does not of itself import any election to pay the money and refuse to do the act: *Hobson* v. *Trevor* (1723), 2 P. Wms. 191, 24 E.R. 695; *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Clarkson* v. *Edge*, 33 Beav. 227. "The form of marriage articles by bond does not import election": *Roper* v. *Bartholomew*, 12 Pri. 797.

In the third class of contracts, which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these cases the contract is as fully performed by the payment of the money as by the doing of the act, and therefore where the money is paid or tendered there is no ground for interference by way of specific performance or injunction.

The question to which of the three foregoing classes of contracts any particular one belongs is of course a question of construction. In considering

Annotation.

it "the court must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation": *Roper* v. *Bartholomew*, 12 Pri. 797, at 821. Consequently each case depends on its own circumstances, but it may be noticed that "a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid": *Per* Lord Cranworth in *Ranger* v. *Great Western R. Co.* (1854), 5 H.L. Cas. 94, 10 E.R. 824; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; and that, "on the other hand, it is certainly open to parties who are entering into contracts to stipulate that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation": *Ranger* v. *Great Western R. Co.*, 5 H.L. Cas. 94.

On this question it is by no means conclusive that the contract may be alternative in its form, for nevertheless the court may clearly see that it is essentially a contract to do one of the alternatives: so that where there was a contract to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the court decreed specific performance of the lease, the second alternative only expressing what the law would imply: *Finch* v. *Earl of Salisbury*, Finch, 212.

The largeness or smallness of the sum named is no reason for considering it a mere penalty, unless that be the apparent intention: *Roy* v. *Duke of Beaufort* (1741), 2 Atk. 190, 26 E.R. 519; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *French* v. *Macale*, 2 Dr. & War. 269. But see *Burne* v. *Madden* (1835), Ll. & G. *t.* Plunk. 493; but where the amount of the penalty is small, as compared with the value of the subject of the contract, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528.

In a case where a man, being very uncertain what estate he should derive from his father, entered into a bond in £5,000, on the marriage of his daughter, to settle one-third of such property, and the contract so to settle was recited in the condition of the bond, it was specifically performed in full, and not up to £5,000 only: *Hobson* v. *Trevor*, 2 P. Wms. 191. "Such agreement," said Lord Macclesfield, 2 P. Wms., at p. 192 (6th ed.), "was not to be the weaker but the stronger for the penalty."

The fact that the benefit of the contract would result to one person or flow in one channel, and the benefit of the sum, if paid, in another, is a strong circumstance against considering the contract alternative in its nature: thus where, on a marriage, the husband's father gave a bond for the payment of £600 to the wife's father, his executors or administrators, in the penalty of £1,200 if he did not convey certain lands for the benefit of the husband and wife and their issue, Lord Hardwicke held that the obligor was not at liberty to pay the £600, or settle the lands, at his election, but compelled the specific performance of the contract to settle—partly on the ground that the £600 would not have gone to the benefit of the husband and wife and their issue, but of the wife's father and his representatives, and partly that the lands to be settled were worth much more than £600: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Roper* v. *Bartholomew*, 12 Pri. 797.

Where the sum reserved is single, and the act stipulated for or against is in its nature continuing or recurring, as, for instance, particular modes of

Annotation.

cultivating a farm, the sum will be considered as a security and not an alternative: *French* v. *Macale*, 2 Dr. & War. 269; and see *Roper* v. *Bartholomew*, 12 Pri. 797.

On the other hand, where the sum or sums made payable vary in frequency of payment or amount according to the thing to be done or abstained from, the courts have, in many cases, found that the payment is an alternative.

In *Woodward* v. *Gyles* (1690), 2 Vern. 119, 23 E.R. 686, a covenant by the defendant not to plough meadow land, and if he did, to pay so much an acre, was held not to be a fit case for an injunction restraining the ploughing: but the exact form of the covenant does not appear. "If," said Lord St. Leonards, *French* v. *Macale*, 2 Dr. & War. 284, "as in *Woodward* v. *Gyles*, 2 Vern. 119, and *Rolfe* v. *Peterson*, 2 Bro. P. C. 436, there is evidence of intention that the party is to be at liberty to do the act if he choose to pay the increased rent, of course the court cannot interfere, because this court never interferes against the express contract of the parties."

In *Rolfe* v. *Peterson*, *Ibid.*, the question was whether the payment was a penalty and so came within the doctrine of equitable relief against penalties: but of it Lord Loughborough said, in *Hardy* v. *Martin* (1783), 1 Cox, 26: "That was a case of a demise of land to a lessee to do with the land *as he thought proper:* but if he used it one way he was to pay one rent and if another way another rent." Similarly, a covenant in a farm lease not to do certain things "under an increased rent of," etc., was held to give the tenant the right to do the act on paying the increased rent: *Legh* v. *Lillie*, 6 H. & N. 165; and see *Hurst* v. *Hurst* (1849), 4 Ex. 571, 154 E.R. 1341; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; and a contract to renew perpetually "under a penalty of £70" was held alternative: *Magrane* v. *Archbold* (1813), 1 Dow, 107, 3 E.R. 639.

But where, in addition to the increased rent, there is a stipulation that the act provided against shall be a forfeiture of the covenanter's interest, the sum is held to be a security only and not an alternative: and consequently the court would restrain the doing of the act: *Barret* v. *Blagrave* (1800), 5 Ves. 555, 31 E.R. 735, as explained by Lord St. Leonards in *French* v. *Macale*, 2 Dr. & War. 278-9; and, of course, the usual form of lease giving the lessor the right to re-enter and avoid the lease on breach of covenant offers no impediment to the enforcement of the covenants specifically: *Dyke* v. *Taylor* (1861), 3 De G. F. & J. 467, 45 E.R. 959.

Where the contract would be unreasonable unless it gives an option to the person stipulating to pay the sum, this will be a strong circumstance for treating the contract as alternative. So where a lady, administratrix of her husband, covenanted, under a penalty of £70, to renew a sub-lease as often as she obtained a renewal of the head-lease, and it appeared that the fines on the head-lease were raised on renewal, according to the then value of the property, so as to render her covenant unreasonable except upon the construction of its giving her an option, the House of Lords treated the contract as alternative: *Magrane* v. *Archbold*, 1 Dow, 107.

In the case of *Re Dagenham Dock Co.; Ex parte Hulse* (1873), L.R. 8 Ch. 1022, a company incorporated by Act of Parliament for making a dock, agreed with a land owner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, and the remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 and interest

Annotation. was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate without any obligation to repay any part of the purchase-money.

The court held that this stipulation was in the nature of a penalty from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest,

In *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79, the appellants, who were manufacturers of motor tyres, covers and tubes, supplied these goods to the respondents, who were dealers, under an agreement whereby the respondents, in consideration of certain trade discounts, bound themselves not to tamper with the marks on the goods, not to sell or offer the goods to any private customers or to any co-operative society at less than the appellants' current list prices, not to supply to persons whose supplies the appellants had decided to suspend, not to exhibit or export without the consent of the appellants, and to pay the sum of £5 by way of liquidated damages for every tyre, cover, or tube sold or offered in breach of the agreement.

The respondents sold a tyre cover to a co-operative society below the current list price. In an action for breach of contract, it was proved that substantially the whole of the appellants' business in these articles was done through the trade; that in order to prevent underselling the appellants insisted upon all their trade customers signing agreements of this nature, and that the probable effect of underselling by any particular trade customer was to force their other trade customers to deal elsewhere. The Court of Appeal had held that this £5 agreed to be paid was a penalty: The House of Lords reversed this, holding it to be liquidated damages. The list of cases and authorities are carefully reviewed in this case.

Among the Canadian cases may be noted *Fisken* v. *Wride*, 7 Grant's Ch. 598.

Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless and indemnify the purchaser against the encumbrance, and a sum of £500 by way of liquidated damages for non-performance by either was to be paid to the other. The court held that this did not enable either party to repudiate the contract upon paying to the other £500, and in a suit by the vendor a reference as to title was directed, but without the usual declarations that the plaintiff was entitled to specific performance, reserving a right on the hearing on further directions to refuse specific performance in the event of the vendor's failing to effect, or endeavouring to effect an arrangement with the mortgagee, which the vendor alleged he could make. It was also held that the fact of the vendor being a partner in a mercantile firm who since the execution of the contract had made a composition with their creditors was not such an objection as could prevail against the claim to specific performance.

Kilmer v. *B. C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, was an appeal to the Privy Council from the British Columbia Court of Appeal. (2 D.L.R. 306.)

The question on the appeal arose out of a claim by the respondent company—an unpaid vendor of a tract of undeveloped land in British Columbia—to enforce a condition of forfeiture contained in the agreement for sale. By the terms of the agreement, the purchase-money was to be paid together with interest, by specific instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual pay-

Annotation.

ment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void and all payments made under the agreement were to be absolutely forfeited to the vendor; and the vendor was to be at liberty to sell the property immediately. The first instalment of $2,000 was duly paid on the execution of the agreement. The second instalment of $5,000 with interest as provided by the agreement was not paid on the day fixed for payment. The Privy Council held that the case was entirely within the ruling in the *Dagenham Dock* case (*supra*) and that the court should relieve against the strict letter of the contract, the arrears having been paid into court in the vendor's action brought shortly after the default for the enforcement of the forfeiture, particularly as the strict wording of the agreement would involve the right to confiscate sums of money increasing from time to time as the agreement approached completion, in case of default occurring upon subsequent instalments.

Massey v. *Walker* (1913), 11 D.L.R. 278, was a decision of the Court of King's Bench, Manitoba. The facts were as follows: The plaintiffs purchased from the defendant under an agreement of sale, the lands and premises therein described for the sum of $2,700 and made a payment of $100, being the first cash payment referred to in the said agreement, and entered into possession of the lands. The plaintiffs made default in payment of the principal and interest falling due under said agreement and by reason of the non-observance of the covenants, etc., the whole of the moneys secured by the agreement became due and payable. The court distinguished this case from *B. C. Orchards* v. *Kilmer*, 10 D.L.R. 172, in that in this case there was an express stipulation between the parties, providing and agreeing to a means by which the agreement might be put an end to. There was not an automatic conclusion resulting from default, but the result of a deliberate agreement by which the mode of cancellation was arrived at. Notices of default were served according to the terms of the agreement in September, 1912, and the plaintiffs after receipt of such notices had made no move towards making their default or satisfactorily explaining their delay or asserting their right to redeem until the following March. The court held that the defendant was entitled to a declaration that the agreement had been cancelled.

Papineau v. *Guertin*, 15 D.L.R. 513, was decided by the Quebec Court of King's Bench in 1913. In this case a proprietor while he had a building in course of erection entered into a distinct contract with the builders to have work done, the doing of which caused the completion of the work originally contracted for to be delayed. The court held that he must be taken to have abandoned his right to enforce a purely penal covenant in the contract upon which he relied. The court, while realizing that the principles to be applied in the decision of the action differed from those which would be applied in English law, referred to *Public Works Commissioners* v. *Hills*, [1906] A.C. 368, and *Kilmer* v. *B. C. Orchards*, 10 D.L.R. 172.

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE Co.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin and Brodeur, JJ., and Cassels, J., ad hoc. December 9, 1918.

1. COMPANIES (§ VII C—375)—FOREIGN ACTION TO RESTRAIN FROM APPLYING FOR PROVINCIAL LICENCE—AMENDMENT OF INSURANCE ACT—DOMINION LICENCE NECESSARY—ACTION PREMATURE.

An action brought to restrain a foreign insurance company from applying for registration under a Provincial Act was dismissed. Between the date of the trial judgment and the hearing of the appeal the Dominion Insurance Act was amended (7 & 8 Geo. V., c. 29) and ss. 4 and 11 provided that a foreign insurance company could not carry on its business in Canada unless and until it had obtained a licence from the Minister of Finance for the Dominion of Canada. The court held that the Court of Appeal for the province should have taken judicial notice of the Dominion amendment, and that as the company could not transact any business by the issuing of a provincial licence the proceedings by way of injunction were premature.

[*Boulevard Heights* v. *Veilleux* (1915), 26 D.L.R. 333, 52 Can. S.C.R. 185, distinguished.]

2. PARTIES (§ II A—65)—FOREIGN INSURANCE COMPANY—GENERAL AGENT—ACTION TO RESTRAIN FROM APPLYING FOR REGISTRATION—COMPANY A NECESSARY PARTY.

The general agent of a foreign insurance company whose capacity to sue and be sued on behalf of the company does not commence until it has become registered, is not its agent, in an action brought to restrain it from applying for registration under a Provincial Insurance Act; the action is improperly constituted without such company being made a party thereto.

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1918), 40 D.L.R. 455, *sub-nom. Guardian Assurance Co.* v. *Garrett*, reversing the judgment of Clement, J., at the trial and maintaining the plaintiff's action.

G. F. Henderson, K.C., and *Cameron*, for appellant; *Lafleur*, K.C., and *Atwater*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—As to the point taken by my brother, Sir Walter Cassels, on the argument that the Guardian Fire Insurance Co. of Salt Lake City, Utah, the real defendant in this case, was a necessary party to the action brought to restrain its agent Matthew, the appellant, from applying to the superintendent of insurance in British Columbia for a provincial licence to that company to do business in that province, I am not at present ready to pronounce the objection a fatal one. I agree that the company is a proper party to be joined as defendant, and I think the court of the province would have been well advised not to proceed in the hearing of the cause unless and until it had been added as a defendant.

But, as a matter of fact, Matthew, its general agent in British Columbia, made the application to the superintendent of insur-

ance as the authorized agent of the company in that behalf and while the absence of the company may not be absolutely fatal, it must necessarily lessen and narrow the measures of relief to which the plaintiff company claims to be entitled.

The main and substantial question before us is the meaning and effect of the Dominion Insurance Act, 1917, which came into force September 20, 1917. The appeal from the trial judge to the Court of Appeal of British Columbia was argued November, 1917, and the Act was, therefore, in force at that time.

It should, in my judgment, have been taken judicial notice of by the Court of Appeal and, if it had been, it would have appeared, which was common ground on the argument at bar, that no foreign insurance company can carry on its activities in the business it is authorised to deal in anywhere in Canada unless and until it first obtains the licence from the Dominion Minister provided for in s. 4 of the statute.

The obtaining of a provincial licence such as that applied for in British Columbia by the appellant, Matthew, to the superintendent of insurance in British Columbia would not operate to permit of the company carrying on any of its activities in that province. It would not affect the prohibitions prescribed in s. 11 of the Dominion Act against the company doing any kind of insurance business unless and until it has first obtained a Dominion licence. The provincial licence was, therefore, useless, innocuous and impotent in itself in any way to injure, hurt or damage the plaintiff company.

The result would be that this application was in any event premature. I agree that the official charged with the issuing of provincial licences would be well advised to do so only to companies which had first obtained a Dominion licence. But I do not see anything in either the Dominion or provincial statutes which prevents him granting a provincial licence, useless as it may be, to enable the licencee to carry on any business until after the Dominion licence has been obtained.

Upon this ground alone I would allow the appeal, but, under the circumstances, without costs in this court and in the courts below. For fear that in thus allowing the appeal I might mistakenly be supposed to have done so on the merits, I desire to add that nothing could be further from my intention.

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Davies, C.J.

Idington, J.

The power to determine whether, under circumstances and facts as disclosed in this case, or whether in any case such a licence should be granted to any company, is now vested in the Minister of Finance, and neither this court nor any other court, I take it, can interfere with the exercise of his statutory discretion. At the same time I desire not to leave it open to be said that I had in any way, directly or obliquely, reversed or thrown doubt upon the judgment of the Court of Appeal in this case so far as the merits were concerned.

IDINGTON, J.:—It seems to me there has existed from the outset a fundamental misconception of the actual legal situation in which the respective parties concerned were placed, otherwise I imagine we should have been presented with some other evidence than submitted and argument thereupon helpful to solve, what I venture to look upon as an entirely novel claim.

The appellant happened to be named as attorney, to act for the Guardian Fire Insurance Co., in the event of its obtaining a licence under the British Columbia Fire Insurance Act, and amending Acts. And I assume he consented in such event to so act and may have taken a part in filing with the provincial authorities part of the necessary material for obtaining such a licence.

Both the respondent and the Guardian Fire Insurance Co. in question were foreign corporations. The respondent was created such in Great Britain, and the other in Utah, one of the United States of America. Neither had any right to do any business in Canada against the will of the Parliament of Canada.

That parliament, as early as 1868, passed an insurance Act which prohibited the carrying on of such business in Canada by any foreign companies or persons unless and until duly licensed under said Act, and then subject to the conditions laid down therein.

That Act was amended from time to time and, by an early amendment, required the licence to be renewed from year to year. The respondent had been, under another name, it is said, duly licensed under said Act. That name was changed more than once, and in 1902 took the form now appearing herein. It also had obtained a licence under, and pursuant to, the provisions of the British Columbia Insurance Act to do business in British Columbia.

That Act, passed for purposes of revenue and other good reasons, rendered registration there necessary and provided for the issuing of a licence as evidence thereof.

Each insurance company of those concerned saw fit and was possibly required thereby to describe itself as of its place of origin or creation.

So far as appears in this case the Guardian Fire Insurance Co. had never applied to the Dominion authorities. Until it had done so and obtained a licence or at least had made an application therefor, I think the action was premature. There was nothing to be feared from the merely preparatory and formal application made in British Columbia.

Whatever might be said for an action such as this had it been taken against the company, I think it cannot properly be maintained as against a mere agent doing no more than appellant had done, apparently in good faith and depending, no doubt, upon his principal duly proceeding to obtain, and duly obtaining, a Dominion licence before doing anything in the way of carrying on business.

The respondent had, until that done, presumably nothing to fear. Unfortunately, from the misconception I have adverted to, this objection never seems to have been considered by those concerned until my brother Sir Walter Cassels, on argument, called attention to the failure to make said company a party, and hence we are without argument on the question.

So far as I have been enabled to discover, the nearest approach to an agent in an analogous case being held thus liable to be attacked and enjoined, without his principal being made a party, is the case of those handling goods of a principal who was infringing some trade mark as, for example, in the case of *Upmann* v. *Elkan* (1871), L.R. 7 Ch. App. 132, and other analogous cases cited in Kerr on Injunctions, 4th ed., pp. 342 *et seq.*

In such like cases the agent was clearly doing that which was in itself illegal and hence responsible in an action for an injunction. Here, presumably, there was nothing of that kind. The purpose certainly was neither nor pretended to have been that of proceeding to carry on the business without obtaining a Dominion licence. If another purpose was had in view it ought to have been established by evidence, which is not attempted.

It is true that as early as 1910, before the Utah company was

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Idington, J

created, ss. 4 and 70 of the Dominion Insurance Act of 1910 had been called in question as being *ultra vires* the Dominion parliament; by reason of the infringement thereby of provincial rights.

In consequence of such question being raised, a case was submitted to this court. That submission, although directed by order-in-council in 1910, was, for some reason or other, not proceeded with to argument until 1912, and not decided here till the following year.

An appeal was taken from the judgment of this court (1913), 15 D.L.R. 251, 48 Can. S.C.R. 260, to the Judicial Committee of the Privy Council, which was argued in December, 1915, and judgment given there in the following February, 26 D.L.R. 288, [1916] 1 A.C. 588.

I hardly think any one ever supposed that if the said section had been framed to deal only with foreign corporations, that there could be a question of the power of the Dominion Parliament in that regard.

For my part I felt bound to so limit the effect of my answer to the second question submitted, as to avoid all appearance of questioning that power so far as regards the foreign insurance companies.

The Judicial Committee, in giving an affirmative answer, seemed to feel bound to express clearly its opinion that as regards foreign corporations the Dominion Parliament had the power if expressed in "properly framed legislation."

If it, in fact, was ever supposed by respondent to have been part of the purpose of the Guardian Fire Insurance Company, created in Utah, pending this litigation, to deny the power of the Dominion Parliament and insist upon a right to operate in British Columbia by virtue only of a licence under the British Columbia Insurance Act, I think it should have so alleged and proven such an allegation.

The surmise comes too late after it has obtained an injunction by the court below recognising the unquestioned validity of the Act of 1917, which contained in other respects identical provisions I am about to deal with.

In other words, when the appeal seeking for an injunction was argued, and the injunction now in question was granted by the court below, there was no longer, if ever, the slightest reason to seek for such relief.

That brings me to a consideration of the situation presented by the application of s. 6 of the Dominion Insurance Act, 1910, and its repetition in the Act of 1917, which enacts as follows:—

> 6. Before issuing a licence to a company the Minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable.

which had been brought into and remained part of the Act since 1894.

It may be arguable, as I suggested on the argument herein, that the whole situation of the legal relation of the parties concerned is not and cannot be affected by anything contained therein. And hence it may be further arguable that an agent or clerk of any kind can be attacked alone and restrained upon the basis of what we might hold to be the right interpretation and construction of this section.

Even assuming that such a claim might be arguable as against appellant's principal, I cannot see how such a case can be maintainable against the agent alone.

The appellant, it is true, has, by his pleading and his conduct of the defence, gone beyond that, but his foolishly doing so cannot determine the actual legal rights and liabilities existent between such parties and bind us to hold that the granting or withholding of an injunction must be governed thereby.

The offence to be considered, and for repetition or continuation of which he is sought to be enjoined, is not that of pleading such a defence but an alleged offence anterior thereto.

I might rest my opinion here, but the claim, even if to be considered in light of the possible presence of the principal, is one of such a remarkable character that I feel it desirable to point out briefly the actual situation and need of pausing before, in such a case as is presented, laying down as law, in the absence of the Minister and without having his ruling, that he must not entertain for a moment the consideration of such an application.

And when we find that in Canada there actually are carrying on business no less than three or four different sets (and possibly many more) of foreign insurance companies possessing such similar names as "The Phœnix of London, England"; "The Phœnix of Hartford, Connecticut"; "The Phœnix of Paris," and, it is said, "The Phœnix of Brooklyn," we should, I submit, infer that such

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Idington, J.

a condition of things is the result of a considered and settled policy in the administration of the Act.

Indeed there is the case amongst others of the Guardians (one of which is a branch of that at Utah) competing with respondent in the accident line of insurance, from which it is fairly inferable that the respondent company or its parent company had for many years assented to such an interpretation and construction of the section as being correct.

Confronted with such a situation it seems to require some boldness on the part of respondent, well knowing all, to ask us to declare it all done illegally and in violation of the section I have just quoted. For my part I cannot assent to the creation of such inevitable confusion as would result from our so declaring in a case launched, as this has been, and steered, as far as possible, clear of an investigation of the actual facts.

We are asked to do that on the strength of a decision in which, as I read the case, there was ample ground for suspecting unfair dealing and a conscious purpose of doing wrong.

True, the court put it on another ground—as many of its kind were politely put when in fact reading between the lines there existed grave ground for suspecting intentional wrong-doing or a determination to attempt it.

Case law, however helpful, is often a blind guide to follow. I do not think that line of cases applicable herein or that they should govern the decision of this.

I think we should become possessed of a full realisation, or as full a realisation as we can, of the actual legal and commercial situations respectively, and observe an understanding of what men, even when incorporated, are about, and then ask ourselves if there is in truth that exact resemblance between the respective situations which each of the lines of cases presented, and that which confronted the minister (or succession of ministers) asked to administer the law as enacted in the Dominion Insurance Act.

Let us never forget that the foreign corporation has no rights save in a recognised comity liable to be set aside absolutely or conditionally.

Let us further bear in mind that each of the foreign corporations now in question herein was created in a different country, conformably to the respective laws thereof, without, so far as we can see, any thought of coming into Canada.

And again let us bear in mind that respondent has never attempted to do business in the United States. The incorporation of the Utah company no doubt used what had become an apt word to catch the ear of him desiring to be insured, and could hardly dreamed of rivaling or invading any property of respondent. Moreover, the literature used by it in business does not suggest such a purpose, but the contrary purpose of avoiding the possible evil complained of.

It seems to me that the presentation of each of such foreign companies so created and named respectively, of a claim to be licensed in Canada, ought rather to be allowed to stand on the like footing and be considered from the like point of view on which the court (and I might be permitted to say so a very capable court) proceeded in the case of *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896, 43 E.R. 351, and which was followed by another strong court 36 years later in *Turton* v. *Turton* (1889), 42 Ch. D. 128.

The measure of prosperity that tempts a corporate creature to wander from its place of birth to do business in foreign lands surely has the like attendant inconveniences facing it when asked to change its name, as the son of his father might have to face in taking over the latter's business, if forced to abandon his name, and the like consideration, I submit, ought to be extended to it.

Indeed, it may be competent for the minister to deal with such a difficulty in a practical manner as the court did in the case of *Guardian Fire and Life Assurance Co.* v. *Guardian and General Insurance Co.* (1880), 43 L.T. 791.

Moreover, the names here in question are not identical, but if they had been the section in question might be held to constitute an imperative prohibition.

In regard to the alternative of either bearing names liable to be confused with others, can either claim a licence?

There is no priority given by reason of seniority or otherwise in the section. Nor is there anything else in the statute very helpful. These licences only last for a year and are renewable, but "subject, however, to any qualification or limitation which is considered expedient." Who is to determine the matter of expediency? Is it not the minister? Can he not provide in such a case for a mark of distinction that will suffice unless in the case of customers exceptionally stupid or unintelligent?

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Idington, J.

And the mistake liable to occur from such causes would be reciprocal and the only inconvenience worth a moment's consideration would be from the competition created by adding another insurer, or two others, as one reads the section, to those already on the roll.

That is, of course, the real grievance, but it enures to the benefit of the public.

The monopolistic tendencies of commercial life increase with prosperity and courts as well as legislators should, I submit, be astute to see that when it is the administration of a great Department of State that is in question, as in truth it is herein, the specious and plausible resemblance, of its problems to be solved, to a decided case is not carried too far.

I forbear expressing any decided opinion upon what the section of the statute may mean in several of these features I point out, beyond the decided opinion that no injunction should be granted in entire disregard of its consideration which has been avoided heretofore in the progress of the case.

I have not overlooked the fact that the Companies Act in England contains a somewhat analogous section enabling the registrar to refuse in cases of conflict of names, and that courts have passed upon the result. One grave question, however, is that the relative positions of the Minister of Finance here and Registrar of Companies there, are hardly the same, and in any event the section here in question clearly imposes a duty to discharge, possibly decisively, and the other merely enables, knowing that the court can rectify.

Can the court here rectify? We know the court can advise if asked.

There may be another arguable side of the question of the minister's power.

It was attempted, unsuccessfully, it is true, in *Steele* v. *North Metropolitan R. Co.* (1867), 2 Ch. 237, to enjoin the defendant from petitioning parliament for relief. In dismissing the application, Lord Chelmsford, L.C., remarked that judges of great eminence had said the court had power to enjoin an application to parliament; but they had all declined to define the occasion which would justify such interference.

On the other hand, in *The Queen* v. *Registrar of Friendly Societies* (1872), L.R. 7 Q.B. 741, the court, while declining to

interfere with the ruling of a registrar, did not seem to doubt such a jurisdiction existed in a proper case. *Grand Junction Waterwork Co.* v. *Urban District Council*, [1898] 2 Ch. D. 331, 336, was another of similar character not denying power, but only to be exercised in an extreme case.

Another shade of opinion, as it were, arising out of a different set of circumstances, it is true, but in relation to the proper exercise of the power of injunction is there presented, when a specific remedy had been furnished by statute. The judgment of Stirling, J., is well worth reading. It seems to furnish food for thought before resorting to an injunction in such a case as this where the minister seems, impliedly at least, to have been given more power.

Many of the cases cited by Stirling, J., in his judgment should be well considered before interference in such a case as this.

Norton v. *Nichols* (1858), 4 K. & J. 475, 70 E.R. 198, is one of the cases in which the question of letting plaintiff resort to an action at law instead of granting injunction is dealt with and is valuable as containing, though on an interlocutory motion, the expressions of opinion of eminent equity judges.

I need not continue on the lines of thought I indicate. I am clear the judgment of the learned trial judge should not have been reversed and an injunction granted in light of the clear enactment existing when the judgment appealed from was pronounced.

I think the appeal should be allowed and the judgment of the learned trial judge be restored with costs, but without prejudice to the rights of respondent, if any, as events develop, and if the purpose is continued on the part of the Utah company of applying for a Dominion licence.

At most the result should be no higher than in the cases when application for injunction failed and the plaintiff was relegated to a court of law to claim damages.

ANGLIN, J.:—For the reasons stated by Cassels, J., I doubt whether this action is properly constituted in the absence of the Guardian Fire Insurance Co. (of Utah). The purpose of the plaintiff is to restrain projected activities of this Utah company in British Columbia. It is, I think, quite clear that the defendant Matthew does not represent it for the purpose of this action. His capacity to sue and be sued on its behalf under the power of attorney in evidence would arise only upon the licence sought being granted. It is for the conduct in matters therein specified,

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Anglin, J.

of the affairs of the company when so licensed that the power of attorney is furnished as required by the statute, R.S.B.C. 1911, c. 113, s. 10 (*g*). If not a necessary party—as I incline to think it was—the Guardian Fire Insurance Co. (of Utah) would certainly have been a proper party; and I think judicial discretion would have been soundly exercised by declining to entertain this action until it had been added as a defendant. Where the injunction sought will injuriously affect the rights of a person or body not before the court it will not ordinarily, and without special circumstances, be granted. *Hartlepool Gas & Water Co.* v. *West Hartlepool R. Co.* (1865), 12 L.T. 366. I prefer, however, not to rest a judgment of dismissal of the action on this ground, but rather on another which a little more closely touches the merits of the issue, having regard to the nature of the relief sought—an injunction *quia timet*.

In *Att'y-Gen'l* v. *Manchester*, [1893] 2 Ch. 87, at p. 92, Chitty, J., says:—

> The principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must shew a strong case of probability that the apprehended mischief will in fact arise.

Whatever ground the decision of the Judicial Committee, 26 D.L.R. 288, [1916] 1 A.C. 588, 597 (see, however, *Farmers Mutual Fire Ins. Co.* v. *Whittaker* (1917), 37 D.L.R. 705, in regard to the validity of s. 4 (*et seq.*) of the Dominion Insurance Act, 1910, ch. 32), may have given the present plaintiff to apprehend injury from the granting of a British Columbia licence to the Utah company since the enactment of the new Dominion Insurance Act of 1917 (c. 29, ss. 4-11) it seems abundantly clear that the granting of a provincial licence (assuming the legislation providing for it to be within the ambit of provincial legislative jurisdiction as defined in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, annotated, [1915] A.C. 330,) would not enable the Utah company to solicit or transact any business in British Columbia until it should obtain a licence from the Dominion authorities. So essential is the Dominion licence that without it the transaction of any business by the company is prohibited (7 & 8 Geo. V. (D.), c. 29, s. 11), and upon its being granted the right to a provincial licence on payment of the prescribed fee is indisputable (R.S.B.C. 1911, c. 113, s. 7). The granting of the British Columbia

licence will, therefore, not entail the mischief to avoid which the desired injunction is sought.

Under these circumstances the British Columbia registrar might be well advised to refrain from granting the provincial licence until the applicant company has obtained its federal licence. Should the latter licence be refused, or should it be granted to the company under different or modified name, as is not improbable, a British Columbia licence obtained under the present name might be entirely useless. But I know of no ground for holding that applications for both licenses may not be made concurrently or that that for the provincial licence may not precede that for the Dominion licence. For aught that appears it was the Utah company's intention to apply for the necessary Dominion licence before undertaking to carry on business in British Columbia. It may already have done so. The defendant Matthew, in making the application complained of, has not done anything illegal.

The Dominion Act of 1917 was in force when this case was heard by the British Columbia Court of Appeal and should have been taken account of by that court. Since, therefore, in view of that legislation a British Columbia licence, if granted to the Utah company, would be impotent to enable it to transact any business to the prejudice of the plaintiff, I am, with respect, of the opinion that when this action came before the Court of Appeal a case for the granting of the injunction asked did not exist and that it should have been refused. Our statutory duty is to pronounce the judgment which that court should have rendered. *Boulevard Heights* v. *Veilleux*, 26 D.L.R. 333, 52 Can. S.C.R. 185. This ground suffices for the disposition of the appeal without considering the other questions dealt with at bar.

I agree with my brother Cassels that the injunction should also be dissolved as to the defendant Garrett, although he did not appeal against it.

BRODEUR, J.:—I concur in the opinion of the Chief Justice. Brodeur, J.

CASSELS, J.:—An appeal from the Court of Appeal of British Columbia. The plaintiff, the Guardian Assurance Co. Ltd., commenced this action by writ issued on March 27, 1917, and the case came on for trial before Clement, J. Judgment was rendered on June 26, 1917, dismissing the action with costs to be paid by the plaintiff to the defendant Matthew. Cassels, J.

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Cassels, J.

The plaintiff's statement of claim alleges that the plaintiff is a company duly authorised to carry on business in the Dominion of Canada. It alleges that a company called the Guardian Fire Insurance Co., incorporated in Utah, and with power (on obtaining a proper licence) to carry on business in British Columbia, had made application to the defendant Garrett for the issue of a licence under the British Columbia Fire Insurance Act.

The statement of claim further alleges that the Guardian Fire Insurance Co. proposes and intends to carry on the business of fire insurance in the Province of British Columbia under the name of the Guardian Fire Insurance Co.

The statement of claim asks for an injunction to restrain the defendant Matthew, the agent of the Utah company, from making any application for the licensing of the Utah company and to restrain the defendant Garrett from issuing any licence.

The Utah company, namely, the Guardian Fire Insurance Co., were not made defendants to the action.

It will be noticed that there is no allegation in the statement of claim that the defendant Garrett intended to issue such a licence as had been applied for. The defendant Garrett filed no defence to the action.

A mass of evidence was adduced at the trial, a considerable portion of which was inadmissible if the decisions of the House of Lords in trade mark cases are assumed to be binding upon our courts. For reasons which I give hereafter I do not see that the action could have been properly tried in the absence of the parties who were interested. The action having been dismissed, and, as I think, rightly dismissed by the trial judge, the question does not become one of very great moment were it not for the decision of the Court of Appeal now before this court.

The appeal before the Court of Appeal of British Columbia (1918), 40 D.L.R. 455, was heard on the 16th and 19th days of November, 1917, and the order of the Court of Appeal bears date April 2, 1918. The formal judgment of April 2, 1918, is beyond what was evidently contemplated by the judges. It provides as follows:—

And this court doth further order and adjudge that the respondent Matthew be, and he is, hereby perpetually restrained from applying to the superintendent of insurance of the Province of British Columbia, and the respondent the superintendent of insurance be, and he is, hereby perpetually

restrained from granting any application for the licensing under the British Columbia Fire Insurance Act of any company under the name of the Guardian Insurance Co. or any other name likely to mislead or deceive the public into the belief that the company being licensed as aforesaid is the same as the Guardian Assurance Co., Ltd.

This seems to me to be rather a sweeping injunction if the judgment were otherwise correct. It not merely restrains the Superintendent of Insurance from granting a licence to the Utah company, the company whose agent the defendant Matthew is, and a company as I have mentioned not a party to the action unless the action against Matthew, the agent, means an action against them, but it restrains the issuing of a licence to any other company that may apply whether the Utah company or not.

The defendant Garrett did not appear on the appeal and the judgment of the Court of Appeal orders and adjudges that the appellant's costs of the said action and of this appeal be taxed and paid by the respondent Matthew.

The statute of British Columbia, the one in question, is c. 113, of R.S.B.C., 1911. It provides by s. 4 as follows:—

No company shall undertake or solicit, or agree or offer to undertake, any contract within the intent of s. 2 of this Act, whether the contract be original or renewed, or accept or agree or negotiate for any premium or other consideration for the contract, or prosecute or maintain any action or proceeding in respect of the contract, except such actions or proceedings as arise in winding up the affairs of the company, without in each such case having first obtained from the superintendent and holding a licence under this Act.

S. 6 provides as follows:—

6. So soon as a company applying for a licence has deposited with the superintendent the security hereinafter mentioned, and has otherwise conformed to the requirements of this Act, the superintendent may issue the licence.

By s. 10 it is provided that "before the issue of a licence to a company other than a provincial company, such company shall file in the office of the superintendent," certain documents which are set out.

Sub-s. (*d*) provides:—

Notice of the place where the head office without the province is situate.

Sub-s. (*g*) provides:—

A duly executed power of attorney under its common seal, empowering some person therein named and residing in the city or place where the head office of the company in the province is situate, verified in manner satisfactory to the superintendent, to act as its attorney and to sue and be sued, plead or be impleaded, in any court, and generally on behalf of such company, and within the province, to accept service of process and to receive all lawful

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Cassels, J.

notices, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney; provided that whenever the company has by power of attorney under the seal of the company appointed a general agent for Canada, and has thereby authorised such general agent to appoint other agents in the various provinces of Canada, then, after filing with the superintendent a copy of said power duly certified by a notary public to be a true copy thereof, other powers of attorney executed by the said general agent for Canada, under his seal, in the presence of a witness, verified in manner satisfactory to the superintendent, shall be deemed sufficiently executed by the company for all the purposes of this Act.

S. 11 of the Act is as follows:—

11. Such power of attorney shall declare at what place in the province the chief agency, head office, or office of the attorney of the company is or is to be established, and shall expressly authorise the attorney to receive service of process in all actions, suits and proceedings against the company in the province in respect of any liabilities incurred by the company therein; and shall declare that service of process for or in respect of such liabilities thereat, or on the attorney, or any adult person in the employ of the company at the said office, shall be legal and binding on the company to all intents and purposes whatsoever.

I do not think that, on the proper construction of this statute, it was sufficient to have made the defendant Matthew the sole party. He is constituted the agent of the company for the purposes set out in the Act, but that does not, to my mind, get rid of the necessity in an action of this nature of having the company before the court.

It has been argued that an injunction may be applied for against an agent of the company, and for this proposition, Kerr on Injunctions (5th ed., p. 377), and the case of *Upmann* v. *Elkan*, L.R. 7 Ch. App. 132, are cited. This case was an action based upon a trade mark, and against a fraudulent mark on cigars, viz., the trade mark of the plaintiff, a resident of Cuba. Even in that case it will be noticed that the consignees to whom the cigars were consigned were, on their names being disclosed, added as parties to the action.

In Bowstead's Laws of Agency (5th ed., pp. 445 & 446) will be found a number of cases, the nearest of which is the case of *Nireaha Tamaki* v. *Baker*, [1901] A.C. 561, but in that case it is expressly stated that the defendant was not the agent for the Crown.

In cases of tort the plaintiff can, of course, sue an agent who is a joint tort feasor, but that is not the case in question in this

action. There is no suggestion of any fraud on the part of Matthew or in fact on the part of the Utah company.

I fail to see by what process of reasoning an incorporated company with a status to carry on business can be restrained from applying for a licence; and I also fail to see how the registrar can be restrained from entertaining such an application. If he were of opinion that the licence should not be granted he would probably have refused it.

The case which seems to be greatly relied upon, viz., *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638, is a case of a different character. In that case the company was not incorporated, and the facts were different.

I think the remarks of Mr. Henderson in his argument before this court, that the facts in *Saunders* v. *Sun Life*, [1894] 1 Ch. 537, are applicable and should be followed, are well founded. In that case the effect of *Hendriks* v. *Montagu* is discussed. The appellants in the *Hendriks* case were represented by Mr. Chitty, Q.C., and Mr. H. W. Horn. Mr. Chitty, it is needless to remark, was an eminent counsel—and on p. 643 will be found his remarks as follows:—

> The Master of the Rolls was under a misapprehension in thinking that our motion was founded on the 20th section of the Companies Act, 1862. That is not the case. We only referred to the section as a statutory embodiment of the law on the subject. If we were applying under the Act, it would not be necessary to come to this court, as the registrar would take care of us.

It seems to me the case should have been left to the registrar to deal with it, and I utterly fail to understand how jurisdiction can exist to restrain a company duly incorporated with power to carry on business in British Columbia from applying for a licence.

On the question of suing an agent in place of the principal, reference is made to *Archibald* v. *The King* (1917), 39 D.L.R. 166, 56 Can. S.C.R. 48, (on appeal from 35 D.L.R. 560), recently decided by this court. This case does not, to my mind, maintain the proposition. That case proceeded upon the ground that the municipal council not having chosen to pass a by-law in regard to the issuance of a licence, the clerk was bound to issue the licence. The Chief Justice, at p. 168, so treats it; Idington, J., at p. 169, and Anglin, J., at pp. 169-70. It is no authority for the proposition that in a case of the nature of the one in appeal an agent can be sued alone.

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Cassels, J.

On the question of what is necessary to prove in the so-called passing of cases, the case in the Privy Council of the *Standard Ideal Co.* v. *Standard Sanitary Co.*, [1911] A.C. 78, 85, may be looked at.

I am of opinion that the appeal in this case should be allowed and the judgment of the trial judge restored. Having come to this conclusion, the case might rest there, but I think there is another reason why the Court of Appeal in British Columbia should not have granted the injunction.

In the case of the *Boulevard Heights* v. *Veilleux*, 26 D.L.R. 333, the question arose as to the effect of a curative statute on the right of the appellant. It is material in the case before us to keep in mind the dates.

As I have pointed out, the case was not argued in the Court of Appeal for British Columbia prior to November 16, 1917; and the order in appeal is dated April 2, 1918. Between the date of the trial judgment and the hearing in appeal, the law affecting the rights of the Utah company was changed. This is by the Insurance Act (c. 29, 7-8 Geo. V.), which was assented to on September 20, 1917. In considering whether or not the court should not have taken cognizance of this statute, it will be seen that the facts in the *Boulevard Heights* case are dissimilar. At p. 334 of the report, Idington, J., refers to the fact:—

> The Act was amended after judgment was given herein by the Court of Appeal, and the amendment, it is urged, does away with his right therein. Whatever might be said in the case of such an amendment as appears, enacted before the hearing in appeal, cannot, I think, help the appellant now.
>
> That judgment was right when given. We can only give the judgment which the court below appealed from should have given. To go further would be to exceed our jurisdiction.

Duff, J., at p. 336, puts it as follows:—

> If we are governed by these amendments in the decision of this appeal, then the respondent must fail in so far as his case rests upon the illegality of the agreement of sale.
>
> There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal. *Quilter* v. *Mapleson* (1882), 1 Q.B.D. 672.

Anglin, J., at p. 337, puts it:—

> The amending statute of 1915, although made applicable to pending litigation, is not declaratory of the law as it stood at the time of the contract in question or at any subsequent period anterior to its enactment. It became law only after the judgment of the appellate division in this case had been delivered. This court is bound by statute to render the judgment which the

court appealed from should have given—of course upon the law as it was when that court delivered judgment.

Brodeur, J., at p. 339, states:—

At the time the court below was considering this case, the statute now invoked had not been passed. It could not be then acted upon by that court. Our duty is to render the judgment which the court below should have rendered.

In this case, as I have stated, the Dominion Insurance Act came into force prior to the hearing of the appeal in British Columbia.

In the case of *Att'y-Gen'l of Canada* v. *Alberta*, 26 D.L.R. 288, 292, which was decided by the Board of the Privy Council, Lord Haldane, who delivered the judgment of the Board, states:—

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens.

The Dominion statute relating to insurance, referred to, namely, c. 29, 7 & 8 Geo. V., was enacted, and by the interpretation "minister" means the Minister of Finance. The "company" includes any foreign company for the purpose of carrying on the business of insurance. "Foreign company" means a company incorporated under the laws of any foreign country for the purpose of carrying on the business of insurance, and having the faculty or capacity under its Act or other instrument of incorporation to carry on such business throughout Canada.

By the admissions in the present case the Utah company has power to carry on business in British Columbia, and I think that it should be assumed that they also have the faculty or capacity to carry on business throughout Canada.

By the statute, s. 4, it is provided that "it shall be competent to the minister to grant to any company which shall have complied with the requirements of this Act preliminary to the granting of a licence, a licence authorising the company to carry on its business of insurance or any specified part thereof, subject to the provisions of this Act and to the terms of the licence."

Sub-sec. (*b*) provides that "in the case of any other company, throughout Canada or in any part of Canada, comprising more than one province which may be specified in the licence."

CAN.

S. C.

MATTHEW v. GUARDIAN ASSURANCE CO.

Cassels, J.

S. 6 provides "before issuing a licence to a company, the minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable."

There is a prohibition preventing a company doing business without this licence. S. 11 legislates as to this.

The effect of the licence is provided for by sub-sec. 2 of s. 4, which reads as follows:—

> 2. Any company other than a Canadian company which may obtain from the minister a licence or a renewal of a licence shall thereupon and thereby become and be deemed to be a company incorporated under the laws of Canada with power to carry on throughout Canada, or in such part or parts of Canada as may be specified in the licence, the various branches or kinds of insurance which the licence may authorise.

This is a wide provision.

At the time the appeal was taken to the Court of Appeal in British Columbia the Utah company had not obtained a licence under the British Columbia Act. The licence has to be obtained from the Dominion. Had the Minister of Finance issued the licence no legislation in British Columbia preventing them from carrying on business would have been valid. See *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330.

It seems to me that the Court of Appeal should have been guided by the fact that when the appeal was heard the law was changed. The requirement on the part of the Utah company to obtain a licence from the registrar in British Columbia ceased to exist. The forum to determine the question whether a licence should be granted or not was the Minister of Finance for the Dominion, and I fail to see what jurisdiction the courts would have for interfering with the express statutory power which is given to him to grant or refuse.

I think the appeal should be allowed with costs, payable to the defendant Matthew by the plaintiff and the judgment of the trial judge restored.

The defendant Garrett did not appear on the appeal, and a curious result would happen if the judgment were held to be in force as against him, while the decision of the court is that the action should be dismissed on the grounds stated. The nearest authority I can find is *Smith* v. *Cropper* (1885), 10 App. Cas. 253, in which a

case of an analogous character came up before the House of Lords. It was a patent action. The patent had been declared valid. One or other of the defendants failed to appeal. The appellants succeeded and the patent was declared void. The Lords decided that it would be an anomaly to have a judgment declaring the patent valid as against one defendant, and invalid against the other defendant, and the rest of the world.

I think, in this case, the judgment of the Appellate Court must be set aside in toto both as regards Matthew and Garrett.

Garrett is not entitled to costs as he did not appear in the Court of Appeal or in this court.

Appeal allowed.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. Co.

Nova Scotia Supreme Court, Harris, C.J., and Russell, Longley and Mellish, JJ. January 14, 1919.

CARRIERS (§ II H—140)—RIOTOUS OR DISORDERLY CONDUCT OF PASSENGER—EJECTION FROM TRAIN.

Riotous or disorderly conduct, or the use of indecent or profane language in a railway passenger coach, works a forfeiture of a passenger's right to be carried as such, and he may for such conduct be ejected from the train, unless he is through drunkenness or other cause bereft of all intelligence and is put off and left on a track or other dangerous place, under such circumstances that the conductor ought to have known that putting him off was equivalent to putting him to death.

PROXIMATE CAUSE (§ III—46)—EJECTED PASSENGER—KILLED AT DIFFERENT PLACE SEVERAL HOURS LATER—LIABILITY OF RAILWAY COMPANY.

A railway company is not liable for the death of a passenger, who is ejected from the train at a proper stopping place, for drunkenness and riotous conduct, if at the time he is put off the train he is capable of taking care of himself, although subsequently he wanders on to the track and several hours later is killed by another train at a place where those in charge of the latter train could not see him in time to prevent the accident.

Statement.

APPEAL from the judgment of Drysdale, J., in favour of defendant in an action claiming damages for negligence causing the death of a passenger ejected from one of the defendant company's trains. Affirmed by equally divided court.

W. A. Henry, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—Stanley L. Dunn was a passenger on an excursion train operated by the defendant company. The train was run for the purpose of conveying passengers to and from the exhibition in Halifax, and on September 14, 1917, the train, consisting of an engine and 15 passenger cars, left Halifax between 10 and 11 o'clock at night for Kentville.

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. CO.

Harris, C.J.

Dunn had become intoxicated during the day but he went over to Dartmouth in the afternoon to visit his brother, who lived at Woodside. He left Woodside about 7 p.m. to take a bus or car running to Dartmouth. His brother says he was drunk but he allowed him to go from his house alone knowing that he had to take the bus to Dartmouth, ferry to Halifax, and then some conveyance to the railway station at North St. Whether he had anything to drink after leaving Dartmouth does not appear, but he was found on the train intoxicated, and on the train he was walking about from one car to another, and about the particular car in which he happened at the time to be. After leaving Windsor and before reaching Hantsport he staggered into the lap of a young lady 16 years of age, recovered himself and went a little further along in the car to a seat where an aged couple were sitting. He put his hand on the old gentleman sitting next to the aisle and told him to wake up, and then reached over and grabbed the old lady by the hair and gave her a shake and coarsely told her to wake up. The conductor went and took him to a seat and remonstrated with him and tried to persuade him to remain quiet. He said he wanted to go into another car to see a young lady, and the conductor agreed that he should go on his promise not to annoy passengers. The conductor followed him and when Dunn was trying to cross from that car to the next the train lurched and some passengers caught him and prevented him from falling off. The conductor, thinking he might fall off and get killed if left to himself, pulled him back into the same car from which he had started and put him in a seat. He got very abusive and resisted the conductor. The conductor seems to have treated Dunn with a great deal of patience and discretion, but asserted his authority and insisted that Dunn should remain in his seat. He grabbed the conductor by the throat and in the scuffle which followed the window of the car was broken and he became abusive and cursed and swore at the conductor. The conductor says that he was unable to pacify him and decided to put him off at Hantsport station at which the train was just then stopping. When the train stopped the conductor removed him from the train by getting behind him and pushing. There is no suggestion that any excessive force was used or any injury done to Dunn in his removal from the train. The evidence shews that Dunn was put off the rear end of the ninth car from the engine, that the train ran

a considerable distance past the station house, and this brought the car in question opposite a part of the platform. The train was running in a westerly direction and the whole length of the platform was about 325 ft., of which about 235 ft. was made of planks, and about 90 ft. was built up with ashes with a squared piece of timber along the track side and on the opposite side, about a foot high. These figures are from scaling the plan produced. The evidence shews, I think, conclusively that he was put off on this part of the platform covered with ashes. Some of the witnesses called on behalf of the plaintiff speak of it as being on the ground, but a careful perusal of their evidence convinces me that they were evidently referring to the absence of planks with which the platforms are usually covered.

He was removed from the train about 1 o'clock in the morning, and there was no light in the station house, and no one in charge of it. He was found dead about 7 o'clock the next morning and had evidently been struck by an engine or train going from Kentville in the direction of Windsor, at a point distant about 1,100 or 1,200 ft. to the westward from the point where he had been put out of the train.

There is evidence that the train from which the deceased was ejected was pulled by 2 engines and that 1 of these engines returned from Kentville to Windsor, passing through Hantsport about 3.15 a.m., some two hours after deceased was put off the train. Although he was not found till after seven the next morning, it seems to be probable that the deceased was run over and killed by this engine, but there is no suggestion of negligence in the operation of the engine.

After being put off the train, the deceased tried to get on again but was prevented by the train hands, and at least two of them say that as the train pulled out he was seen going at right angles to the train in the direction of the town and in the direction of an hotel near the station. What happened after that until he was killed is shrouded in mystery. Before leaving the facts I must refer to the evidence as to the condition of the deceased at the time he was ejected from the train. I have already referred to his visit to his brother at Woodside at 7 o'clock that evening, and it seems clear that the brother must have considered him quite capable of looking after himself. He was walking about the train before he reached

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. CO.

Harris, C.J.

Hantsport, staggering but still able to walk about, notwithstanding the swaying of the moving train, on what we all know to be not one of the best tracks. There is evidence that he fell down after being ejected from the train, but this fall was said to be due to his having tripped over the timbers on the side of the platform. He got up without assistance and when told that he could not get on the train, asked for his cap, which had been left in the car, and it was brought out to him.

I quote what the witnesses called for the plaintiff say as to his condition. Irvin Morse says in his direct examination:—

Q. In what condition was he? A. He was asleep the first time I seen him.

Q. On the journey out did he wake up? A. Yes.

Q. In what condition was he? A. In bad shape; he was intoxicated.

Q. Just drunk or very drunk? A. Very drunk.

Q. Could he walk straight? A. No.

Q. Staggering? A. Yes.

Q. Troublesome on the train? A. No, not when I seen him.

Q. Was he walking up and down in the train? A. Yes, he was.

Q. Was he annoying passengers? A. The only time I seen him he was talking to some fellow in the seat, they were in a kind of argument but nothing serious.

Q. What happened when he was put off? A. He was left there alone; standing or trying to stand.

Q. Was he staggering? A. Yes, he was so.

Q. Did you express any opinion at the time from what you saw? What did you see? A. I saw him standing there or staggering, and the last time I seen him he was making towards the train; I suppose the intention was to get back on again.

Q. Say anything about his cap when he was put off? A. Yes, he said, "I want my cap."

Q. Was it given to him? A. I believe it was; the conductor came in and got his cap for him.

Cross-examined by Mr. Henry:—

Q. You didn't get off the train at the place where Dunn was put off? A. I was not on the ground but on the very lower step.

Q. When he was having this argument he was sitting down? A. Standing up.

Q. Was the man standing up also? A. No, sitting in the seat.

Q. He was bending over him I suppose? A. Yes, he was standing as straight as he could stand; hold of the side of the seat.

Q. I suppose a big train like that, the motion of the train is pretty rough itself? A. Some.

Q. Perfectly sober men stagger along, moving along the aisles of the train? A. They will.

Q. You didn't see him fall down at any time while walking along? A. No.

Re-examined by Mr. Terrell:—

Q. You say sober men in the aisles of a train stagger; was he acting like a sober man? A. No.

Q. Was he a very drunken man? A. He was so.

Q. Did he get any more sober as he went along? A. No.

Bruce Graves says:—

Q. Was he drunk or sober? A. Pretty drunk, I thought.

Q. Able to look after himself? A. In a manner he was.

Q. Coming out from Halifax how had this man been behaving? A. He was quite noisy, but not real noisy; making more or less disturbance; not any great trouble but like any drunken man would.

Q. When he was on the ground how was he? A. Staggering around; lurching around on the ground.

Q. Did you hear this young man ask for his cap, after he had been put off the train? A. He called for his cap.

Q. Was Dunn at any time interfering with other passengers? A. Nothing serious; talking to them.

Q. Didn't see him lay his hands on anyone? A. Nothing I remember of.

I have quoted all the evidence of the plaintiff's witnesses on this point because it is the most favourable to the contention of the plaintiff that he was in a helpless condition and so drunk that he should not have been put off the train. It certainly shews him to have been in an intoxicated condition but I think it also shews that he was far from being unable to take care of himself. There was no paralysis of his physical faculties. His attack on the conductor; his ability to walk about the moving train; his asking for his cap; his arguing with passengers and with the conductor; in fact, his whole conduct on the train indicates that while he was intoxicated he was quite able to take care of himself and the conductor had no reason to think otherwise. The probabilities all are that he was in much the same condition as when his brother allowed him to leave Woodside alone that evening. The questions put to the jury and their answers are as follows:

1. Was the deceased killed by an engine or train of the defendant company? A. Yes.

2. If so, in what direction was such engine or train moving when it struck the deceased? A. East.

3. Had the conduct of the deceased on the excursion train between Halifax and Hantsport been such as to interfere with the comfort or endanger the safety of other passengers on the said train? A. Not sufficient to eject him from the train.

4. Did he use vulgar, offensive, obscene or blasphemous language in the hearing of his fellow passengers? A. No.

5. Did the deceased during his journey from Halifax to Hantsport conduct himself in a disorderly manner? A. Yes.

6. Was there negligence on the part of the defendant company in connection with the death of the deceased and that caused such death. If so,

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. Co.

Harris, C.J.

in what did such negligence consist? A. (a) Yes. (b) In putting a drunken man off the train at a late hour at night in an unfit place.

7. Was the deceased ejected from the train in question at a usual stopping place for trains of the defendant company? A. No.

8. Was the deceased at the time he was ejected in a fit state as regards sobriety to take care of himself? A. No.

9. Under the circumstances was the place where the deceased was ejected from the train a proper place for that purpose? A. No.

10. In what amount do you assess the damages and how do you apportion such damages between the father and mother? A. Damages, $2,000; father, $1,000; mother, $1,000.

On these findings the trial judge entered judgment for the defendant company, dismissing the action. I quote his decision in full:—

To recover in an action of this kind it is settled law that the negligence alleged and proved must be the proximate cause of the accident or injury. Here, according to the proof and findings, Dunn was ejected or put off an up-train, or train going west, and was run down hours later by a down train, or train going east, with no evidence as to the cause of the accident except marks on the track, indicating that a train going east had run over the man. The jury has found the defendant company's negligence to be in putting Dunn off the up-train at Hantsport.

This is not connected with the accident and may have had no connection with it. I am obliged to hold that the negligence found does not establish a case upon which plaintiff can recover. For all that appears, such negligence may not have in any manner contributed to the accident, and I direct judgment for the defendant company. *Wakelin* v. *London & S.W.R. Co.* (1886), 12 App. Cas. 41, is, I think, a conclusive authority against plaintiff.

The plaintiff has appealed and asks for a judgment in his favour, and the defendant has moved against the findings of the jury. I think the judgment of the trial judge should be affirmed.

The sole question, I think, is as to whether the judgment should be affirmed or whether there should be a new trial, and after giving the matter careful consideration, I am of opinion that the judgment should be affirmed.

The jury has found that the deceased conducted himself in a disorderly manner on the train, and he had assaulted passengers and was cursing and swearing, and there is no doubt that the conductor was not only justified in ejecting him, but it was his duty to do so to protect the other passengers. It seems clear that if the deceased had again assaulted the old lady, or any other passenger on the train, the company would probably have been held liable in damages for failure to take the necessary precautions or to use the proper means to prevent such injuries. The Supreme

Court of Canada has expressly held that such liability exists. See *Canadian Pacific R. Co.* v. *Blain* (1903), 34 Can. S.C.R. 74.

While a drunken man, in common with every other passenger on a train, has rights, he also has obligations—the obligation to so conduct himself as not to be a nuisance or offensive to other passengers, and the rule is well established that "riotous or disorderly conduct or the use of indecent or profane language in a railway coach works a forfeiture of a passenger's right to be carried as such, and he may for such misconduct be ejected from the carrier's vehicle."

In *Vinton* v. *Middlesex Railway Co.* (1865), 11 Allen (Mass.) 304, at p. 306, Bigelow, C.J., said:—

> It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles and to expel or exclude therefrom any persons whose conduct or condition was such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness or other misconduct had been committed to the inconvenience or annoyance of other passengers before exercising his authority to exclude or expel the offender.

Here, there were the overt acts and the disorderly conduct, and it was clearly the right and duty of the conductor to eject the deceased. If we look at the circumstances, it is difficult to see what other course was open to him. He had a train of 15 cars well filled with passengers and he was obliged to pass from one car to the other, and to get off at stations to see to the safety of other passengers—there was danger of the deceased assaulting other passengers and there was also danger of his falling off the train if he attempted to pass from one car to the other while the train was moving and the conductor seems to have done what he could to keep the deceased quiet and to save him from getting killed, and I do not see what other course he had open to him under the circumstances—he could not stand as a guard over the deceased.

I do not wish to be understood as saying that if a man is so drunk as to be bereft of all intelligence, and is put off a train and left on a track or other dangerous place and is almost immediately killed, under such circumstances that, as it was expressed in one

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. Co.

Harris, C.J.

case: "The conductor ought to have known that putting him off was equivalent to putting him to death," there would not be a question to be tried by the jury as to whether his death was not the natural and proximate result of his expulsion. But that is not this case. Here he was not in that helpless condition; he was not put off in a dangerous place; he was not killed at that place; there were no trains passing for two hours and there is, in my opinion, no evidence of negligence fit to be submitted to a jury.

The facts here are very like those in *Railway Co.* v. *Valleley* (1877), 32 Ohio St. 345, where Ashburn, J., in delivering the judgment of the court said:—

> But, if the propriety of the expulsion were doubtful, either because deceased's conduct did not justify it, or because his condition rendered it unsafe and dangerous in its consequences, still we must find that the death was the natural and proximate cause of the expulsion before defendants can be made liable. How can this be said in the present case? Admit that the vicinity of a railroad track is dangerous to passers-by. Admit that putting him off, as was done, was placing him in circumstances of danger; they were no more dangerous to him than they were to every man whose business or pleasure takes him in the neighbourhood of railroads. There was no unusual or extraordinary circumstance of danger in the whole transaction, if the man was able to take care of himself, and this he was. The mere putting him off, therefore, was in no way connected with his death, except as he himself connected it, by reason of his intoxication; and for this he alone is responsible. The expulsion is not in any way the occasion of the catastrophe, either as a proximate or other cause, unless it is in some way attached to or linked with the drunkenness. If this is the state of the case he must have been so drunk at the time he was struck as to be unable to avoid the accident, which shews the intoxication to have been the proximate cause; and whether it be the proximate cause, or a cause for which alone he is responsible, in either case, the responsibility cannot be fastened upon the defendant. At what particular hour of the night or following morning he was run over, the evidence leaves in doubt. It has been said, and it is clearly shewn by the record, that when he was expelled he was not so drunk as to be in any sense incapable. What occurred between this time and when he was picked up in a dying condition cannot be known. If, during this period, he lapsed into insensibility or incapacity for self protection, it must be from some reason not apparent in the testimony. Whether he obtained more liquor, or whether a drunken stupor came upon him, such as arises in the last stages of inebriety, no one can tell. It is sufficient to say that, in our opinion, he was not in that condition that relieved the conductor from the imperative necessity of doing as he did, and this we cannot consider as in any way being the cause of his death.

In *Delahanty* v. *Michigan Central R. Co.* (1905), 10 O.L.R. 388, a passenger travelling from Detroit to Buffalo on defendant company's train, who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly

acts, amongst others of molesting fellow passengers. He was put off the train at 10.30 p.m. at Bridgeburg, a station near the Canadian end of the International railway bridge crossing the Niagara River and about a mile distant from his destination. He immediately followed the train on foot and after a scuffle with the bridge guard proceeded to cross the bridge, and shortly after jumped or fell off the bridge into the river and was drowned. It was held by the Court of Appeal for Ontario that the defendants were justified in putting him off the train, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of someone at Bridgeburg. Held, also, that there was no evidence of any negligence on the part of the defendants to be submitted to a jury. Maclennan, J.A., said (p. 392):—

It is impossible to say that his death was the natural or probable result of his being removed from the train.

In *McClelland* v. *Louisville, New Albany and Chicago R. Co.* (1883), 94 Ind. 276, a drunken passenger upon a railway train was, owing solely to his condition, carried past his destination and then, failing to comprehend his liability to pay further fare, or to get off the train, he was removed lawfully from the train by the conductor and assistants and placed a short distance from the track. Subsequently he wandered upon the track where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident. Held that the railway company was not liable. The court said (p. 279):—

Under the circumstances, the conductor of the passenger train had the right to put deceased off the train, and place him far enough to one side so as to be out of danger from passing trains, without some intervening agency. The conductor could not be expected or required to place a guard over him to prevent his getting upon the track; and his afterwards getting upon the track and lying down there, could not be the natural and necessary or usual result of his having been left by the side of the road, or his death the proximate result of his having been so left. He was bound to be left on one side or the other of the road, and if he afterwards wandered upon the track it was his own folly, resulting from his unfortunate condition, for which the defendant ought not to be held responsible.

In my opinion, the trial judge should have withdrawn the case from the jury, and plaintiff failed to make out a case of negligence or to shew that the death of the deceased was the natural or probable result of his being removed from the train. I would dismiss the appeal and the action, both with costs.

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. CO.

Russell, J.

RUSSELL, J.:—I think that every one of the findings of the jury is warranted by the evidence with the exception of the fourth and the seventh. As to these findings I think they do not prevent a judgment from being entered for the plaintiff. The deceased was not shewn to have used any blasphemous language, and he seems to have used very little that was offensive until the conductor proceeded to eject him from the train. The place where he was ejected was, in a sense, an unusual place, being the cinder platform at which it is not usual for passengers to alight. I think the action is warranted by the fact that it was a wholly improper proceeding to drop a helpless drunkard at 1.30 at night amid the darkened railway station and darkened houses where it would be highly probable that he would fall down and lie prostrate in a drunken stupor upon the rails or sleepers along or over which a train or a locomotive might be expected to pass at any hour of the night. He should either have been placed in a baggage car, or otherwise kept out of danger until the arrival of the train at Kentville where he could be put in a place of safety. I do not think the *Wakelin* case stands in the way of a recovery by plaintiff. The circumstantial evidence proves beyond a reasonable doubt that the tragedy was due to the passage of the train and the connection between that event and the negligent ejection of the deceased is sufficiently close to constitute the relation of effect and proximate cause.

Longley, J.

LONGLEY, J.:—This is an action for putting a person off the train. It appears from the reading of the evidence that the deceased was violating the rules connected with railways. The occasion was one on which the train started from Halifax at 10 or 11 o'clock at night in conveying 13 carloads of passengers home. The following is a copy of the by-law:—

> Any person in or upon a carriage, station or platform of a company or elsewhere upon the company's premises in a state of intoxication, or fighting or guilty of other disorderly conduct is guilty of an offence under this by-law. In addition to the liability to fine, any such person may be summarily ejected . . . or, in the case of a moving train, may be removed . . . at any usual stopping place.

The evidence is conclusive that the deceased was under the influence of liquor, was using profane language, was assaulting persons in the train and behaving otherwise in an entirely improper manner. The conductor found it impossible to stand by him and prevent him assaulting other people owing to the length of the

train, and the deceased getting into a most violent and profane course, when the cars arrived at Hantsport station the conductor put him out. Hantsport station is one of the stations situated in a town duly incorporated and not more than 100 yards from the main thoroughfare of the town. The jury have found, contrary to the facts of this case, which were proved beyond question. The judge, Drysdale, who tried this case, thus sums up his opinion of the finding and makes the judgment for the defendant (cited in judgment of Harris, C.J. page 56.).

Longley, J.

This is about the course that any person in trying the cause would have taken. The findings of the jury are necessarily untrue and perverse. The party was creating a difficulty on the train and was put off properly at a station in a town, and I think there is no occasion to find any fault with the defendants whatever, and no evidence exists that the defendant company's train ran over him at all.

MELLISH, J.:—This is an action for negligence resulting in the death of one Stanley Dunn by being run over on the defendant's railway track near Hantsport. The deceased resided at Nictaux Falls, near Middleton, on defendant's line. The action was tried before Drysdale, J., with a jury. The questions submitted to the jury and their answers are as follows:—(See judgment of Harris, C.J.)

Mellish, J.

Notwithstanding these findings the trial judge directed judgment for the defendant company.

Following are his reasons:—(See judgment of Harris, C.J. p. 56.)

From this judgment plaintiff has appealed to this court.

On the hearing of this appeal the defendant moved to have the 3rd, 4th, 6th, 7th, 8th, and 9th findings of the jury set aside as perverse, unreasonable, against the law and evidence and for judgment.

In my opinion, the judgment of Drysdale, J., cannot be sustained. It is not, in effect, as I first thought, merely a judgment that there was no case to go to the jury, for the judge states:—

> I am obliged to hold that the negligence found does not establish a case upon which the plaintiff can recover. For all that appears such negligence may not have in any manner contributed to the accident.

In the face of the finding of the jury in answer to question No. 6, as it appears in the order for judgment, I am at a loss to understand this language of the judge, unless in making up his decision he had before him question No. 6 in the form in which it

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. Co.

Mellish, J.

is printed on p. 52 of the case. A reference to the original papers shews that the words "and that caused such death" have been erroneously omitted from this question, which is correctly printed in the order for judgment. In view of the findings of the jury, I regret to be unable to agree with the trial judge, and think judgment should have been given for the plaintiff. In my opinion, there was evidence to support the findings and the *Wakelin* case is, I think, not applicable. Plaintiff has appealed from this judgment but defendant moves to set aside certain findings of the jury as above indicated and for judgment. It, therefore, becomes necessary to further consider the evidence.

In view of the answer to q. 5, I think the answers to the 3rd and 4th questions immaterial. In regard to the answer to q. 3, viz., that the conduct of the deceased in reference to other passengers was "not sufficient to have ejected him from the train" it may, however, be noted as will hereafter appear, that the conductor appears to have been of the same opinion.

Q. 6 and answer are vital. And the 7th, 8th and 9th are also important. I think the answers to these questions, *i.e.*, the 6th, 7th, 8th and 9th, can be supported on the evidence.

In September of 1917, deceased visited Halifax apparently on an excursion ticket. On his return, he boarded the defendant's train at Halifax—a special which left Halifax between 10 and 11 o'clock, p.m. He was presumably quite intoxicated when he boarded the train. On the return journey he was apparently, when first seen by any of the witnesses, sitting asleep beside a middle-aged woman who had gone from Nictaux to Halifax with him. After a time he was seen standing up in one of the cars with his cap on the floor under his feet. The cap was put on his head by a friend, Ivan Morse, who resided near the deceased at Nictaux. This witness would lead one to believe the deceased was then very drunk—so drunk that he did not fully recognize the witness when the latter addressed him and put his hat on. He was awake some short time before he was put off the train by the conductor at Hantsport. The night was dark; no moonlight or street or station lights, but it was fine. This witness states that he was on the ground when deceased was put off and that there was no station or platform where he was put off, and that he was left staggering on the ground. When last seen by this witness deceased was making

towards the train as if to get back on again after it had started. Bruce Graves, a passenger and practical stranger to deceased, thought he was pretty drunk when put off the train, but able to take care of himself "in a manner." This witness further states that there was no platform where deceased was put off but that it was "on the ground or where the switch run out; on the sleepers or rails." A reference to the plan put in evidence will shew that this switch line joins the main line about 100 ft. east of the cinder platform on which defendant's witnesses allege deceased was put off—on the same side of the main line. This witness' recognition of the sleepers and rails of this switch line is very significant.

Deceased was helped by the brakeman from one car to another apparently before the conductor came on the scene.

The conductor states that he was having trouble with the deceased who was acting in a disorderly way and that finally the deceased promised he would be quiet provided he were allowed to go and see a lady on the train, presumably the lady he had been sitting with. To this the conductor assented and the deceased started for the car where the lady was sitting, followed by the conductor. As he left the vestibule of the car, however, as the conductor complains, "he did not carry out what he had promised; he had staggered and pretty near fell off the train." The conductor then revoked his permission and drew the deceased back from the vestibule of the second car to which the deceased had crossed when an altercation arose between them and a scuffle in which a window was broken by the conductor throwing the deceased against it and he was then put off the train by the conductor who instructed the brakeman to see that he did not get on the train again when it started. A jury would be quite justified in disbelieving that the conductor really considered the deceased's inability to stand as a violation of his promise, and in coming to the conclusion that the real reason for the conductor's concluding not to allow the deceased to return to the lady was that when the deceased "staggered" as above stated the conductor determined to put him off as he, the conductor, was then convinced that he was too drunk to take care of himself on a moving train and might meet with some accident for which the conductor or company would be responsible and that he would escape that responsibility by invoking the rule which he may have thought allowed him to put the man off regardless of his

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. Co.

Mellish, J.

condition. It is quite a reasonable inference from the conductor's conduct that the deceased was put off the train not from any particular consideration for the comfort of the passengers drunk or sober.

It is well to keep one's promise, especially to a drunken man. Speaking of this promise in his direct examination the conductor says:—

> I did allow him to go on the understanding he was not to annoy the other passengers. He started to go back in the train. As he went out of the door of the car he just got on the platform and the train took a lurch and I thought he was going to fall overboard and he started to go headlong over with the jar of the train, and some passengers on the adjoining platform caught him and stopped him and he recovered his balance. I concluded then he was not in a fit condition to be on the train; he would fall overboard or something.

I think it not unreasonable to conclude that the conductor at this time—when he came to this conclusion—decided to put the man off regardless of his condition and that he did not come to such decision later on as he would have us believe. It surely was a question, at least for the jury. I have the less hesitation in suggesting the above as the idea which the conductor had of his rights, because that was the view, apparently, taken by the judge who tried the case. (See charge to jury, where the trial judge instructs the jury that he does not think it makes very much difference in law whether or not at the time he was ejected deceased was in a fit state as regards sobriety to take care of himself.) The man's condition when put off the train was apparently such as to lead the company to believe after investigating the facts that the deceased had met his death by "lying down" on the railway track while in a state of intoxication, and while in that position being run over by an engine or train. Defendant set up a different theory on the trial and called a witness to prove in theory that the man was killed while walking on the track—all this was peculiarly for the jury. And in this connection the evidence of the conductor and brakeman that deceased was seen by them after the train from which he had been ejected again started, walking away from the track towards the town of Hantsport merits careful consideration. No one else appears to have noticed this action on the part of the deceased and a jury might, I think, very well have discredited the story on a consideration of all the circumstances. I do not say that it was necessary to discredit it in order to arrive at the conclusion

they did. But the story itself, I think, bears strong marks of inherent improbability. The station near which the man was put off is on one side of the track referred to in the evidence as the "southern" side and the town is on the same side as the station. On the same side of the track as the station, and between the station and the track, runs a platform built up on the Halifax end of cinders and on the other end of wood or planks, in all about 334 ft. long and extending on either side of the station. It is claimed by these witnesses that the deceased was put off on the cinder platform from a car some distance from the Halifax end of the train; that after the train started deceased ran toward the train as if trying to get on again; that in making this attempt he fell off the platform which was 2 ft. high and 7 or 8 ft. wide on the opposite side from the train and was, thereafter, seen picking himself up and proceeding away from the track to the town of Hantsport; all this on a dark night with no lights except what were about the train itself. Some of the conductor's evidence on this point does not appear very spontaneous. In his direct examination we have the following:—

Q. Did you leave him and go aboard again? A. I started to go on the train, and he asked for his hat or cap; I stepped back in the car, and I don't remember whether the cap or hat was handed by a passenger or I picked it up; I stepped out and handed him the hat. When I was going out, as near as I recollect, I pulled the signal for the train to start.

Q. Where was he when the train started? A. On the ash extension to the platform.

Q. Did you watch him while the train pulled away? A. As far as I could see him.

Q. Was he still standing on the ground? A. The last I seen him he started to walk towards the town.

Q. Away from the train? A. Yes.

Q. At the place where he was standing when you left him there is I understand—what? A. A place built out and the outside portion is timbered to keep the ashes or ballast away from the track on the outside, to keep it up straight, and it is filled up between with ballast or ashes.

Q. How does that compare in height with the platform? A. Practically the same.

Q. The point at which he left the train was the point where this so-called ash extension existed? A. Yes.

Q. And he was standing on the ashes or moving in the direction of the town? A. Yes.

Q. In order to get to the town which way would he have to go? A. Southward.

Q. And it would take him away from the railway? A. Yes.

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. CO.

Mellish, J.

Q. When you left this man at the station at Hantsport, was he able to walk? A. Yes.

Q. You saw him walking towards the town? A. Yes.

Q. Steadily or staggering? A. Staggering some.

Q. Did he fall down any time after the train started? A. He fell down when he ran towards the train; he fell so his hands touched the ground.

Q. And subsequently you saw him start off in the direction of the town? A. Yes.

Q. And he walked without falling down? A. Yes, I could not see him very far.

It will be noted that until pressed by his counsel this witness would leave the impression that deceased was not likely to fall down, and when he does admit the fall it is a comparatively trivial one; he fell "so his hands touched the ground" when he ran towards the train. One would scarcely infer from this testimony that the deceased fell off the platform which was two feet high on the side furthest from the train toward which he was running. But the brakeman is more specific. In his direct evidence, he says:—

I got off the seventh car at Hantsport. I got on the ground and went along the platform to see if any people were getting off; I had a light; I came up to the platform of the station, and as I came to the platform, the wooden platform, that would be to the west of the station, the train started and I whipped back along the platform to catch my rear car again, and the conductor spoke to me to look out that the man didn't get on the train; I saw the man on the platform; he was on the ash extension to the east of the station at this time, pretty well to the east end of it; I went right down then; I had to run to the east end of the platform there, on the ash extension; I was not on the train; I ran to the east end of the ash extension, and when the train started, it was going then, this man made a start for the train, running straight parallel with the train up the ash extension, and blundered over the platform on the opposite side of the platform, on the south side, down on his hands and knees; he got up and started to the south towards the town.

Q. Is there any doubt in your mind as to whether this man was killed or injured by the train in which you were? A. I can't see how anybody could catch on as the train was going and being in the position he was.

Q. Where this man was put off there was an ash extension to the wooden platform; how wide was that? A. Same width as the platform at the station; I should think between seven and eight feet.

Q. How is that platform at the rail side of the station; what forms the rail edge of the platform? A. Timber face and timber to the back part of the platform.

Q. Both back and front? A. Yes, timbered on top of one another and ash filling.

Q. How high would that timbering be above the track approximately? A. I should think from the top of the rail it would be close on to 2 ft. level with the plank platform.

Q. Is the ash extension the same height as the wooden platform? A. Until you come to the end where it slopes off.

Q. On the side opposite, on the south side, there is also timber? A. Yes.

Q. And a drop down to the ground level? A. Yes.

Q. Was it on that side you saw him stumble and fall? A. On the south side.

Q. Where there was a difference of level between the ground and the top of the platform? A. Where I saw him was right where the slope starts off to decline from the level of the platform.

Q. There was an inequality of ground there? A. Yes, two feet.

Q. That would cause him to stumble? A. He blundered over the platform.

Q. Off the platform on to the ground? A. Yes.

Q. With a difference of level of somewhere in the neighbourhood of two feet? A. I should think so.

I think a jury would be justified in finding, notwithstanding this evidence of the conductor and brakeman, that the deceased did not go toward the town but "blundered" along the track in the direction in which the train was moving and fell or lay down on the track as suggested by the company, because he was helplessly drunk near where his body was found and subsequently run over by the next passing engine or train. Deceased was apparently struck a little west of the farm crossing westward of the station. This crossing, I suppose, had the usual fences coming close to the track.

But, as before intimated, I do not wish to be understood as expressing the opinion that defendant would escape liability even if the evidence of the conductor and brakeman on this point, as to deceased's going toward the town, is believed. I think there was evidence to justify the jury in answering the 6th, 8th and 9th questions as they have answered them. Having regard to the evidence I do not think the jury intended to say anything in answer to the 7th question more than they intended to say in answer to the 9th question, viz., that the deceased was not put off on the platform but on the ground beyond the platform and nearer Halifax.

Even assuming deceased were put off on the platform, I think the answer to the 6th question justifiable. I doubt if it was a fit place to allow even a sober passenger who was an apparent stranger to alight in the dark considering its height and the fact that it was apparently unguarded by a rail or otherwise.

From the conductor's evidence one would naturally infer that the man fell down because he was too drunk to stand, and defendant's counsel apparently thought in examining the brakeman that some inequality in the surface might also have been a contributory

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. CO.

Mellish, J.

cause. But the brakeman gives such an "inequality" as would lead to the fall of the soberest person.

This is the witness who, if I understand the evidence, positively denied the presence of policemen on the train at the time until confronted by one of them in court, a circumstance to be considered by the jury in valuing his testimony.

One naturally asks why the conductor did not see the man fall off the platform—not at all a trivial circumstance? The jury apparently would answer it by saying "because the man was not on the platform when he fell, but on the ground east of the platform," and I think such an answer justified by the evidence. It will be noted that the brakeman puts the deceased to the extreme east of the platform where the ground begins to slope down at the end of the platform, as I understand it. The conductor says he saw the man fall, and, if the fall was from the platform, an accident which unforeseen in the dark might very well cause the most serious injury to the most sober person, especially if running at the time—why does the conductor not mention it? Is he hiding a neglect of duty in not at least reporting so serious a matter? Or is the conductor's version of the matter the right one, that the man fell when running toward the train, apparently because he was too drunk to stand and for no other reason? Although, as we are told, in a fighting mood, deceased was put off the train with apparent ease by the conductor—I should think a most difficult thing to imagine unless the man was helplessly drunk. It is said that deceased shewed intelligence in asking for his cap when put off, and in fairly well holding his "point" apparently when arguing with the conductor. The defendant's witness who deposes to the deceased's ability in argument also states that he was "quite drunk." It will also be noted that this witness saw the deceased upon what he took to be the "ground" when he was put off. It must have been very dark, one would think, if the deceased was then actually standing upon the cinder platform timbered in on each side and only 7 or 8 ft. wide, 2 ft. above the ground. But to return to the evidence of the deceased's mental capacity. Too much weight must not be attached to the fact that the deceased asked for his cap. A short time before he had his cap under his feet. It is perhaps more remarkable that he had to ask for his cap. As a matter of law I think he was entitled to get it without asking for it. Any one

standing about would naturally suggest that he should have his cap under the circumstances. I cannot come to the conclusion that it was any strong evidence of his mental capacity that he asked for it on coming into the presumably colder air. A monkey accustomed to wear a cap on going out would almost mechanically, I suppose, make the same request—not in words of course. Deceased did, I admit, exhibit some animal and perhaps human intelligence in quarrelling with and resisting the conductor when the latter dragged him back into the car in violation of his promise—for which exhibition of intelligence, having in view his former conduct, if we are to believe the conductor, he was put off the train. Whatever his capacity, it was for a jury, and I think there was evidence to justify a jury in finding that the deceased was helplessly drunk and in such an apparent condition when put off that he was likely to remain about the track and fall helplessly upon it and be run over, that he did so remain and fall, and that his being put off in that condition was, under the circumstances, a direct cause of his being so run over and killed.

Assuming that by-law 15 has any application where intoxicated people are knowingly carried for reward, as to which there may be some question, it still remains to consider its effect and meaning. It does not, I think, authorize the commission of a crime or legalize what would otherwise be criminal neglect. The fact that a "usual stopping place" and "near a dwelling house" are mentioned as the places for removal, indicates that it is intended that the person removed shall have a reasonable opportunity of obtaining accommodation and also, I think, impliedly at least, indicates that he should be in a condition capable of availing himself of such opportunity. I doubt if the company had power to pass any by-law providing what would or would not be negligence in dealing with passengers. (Dom. Railway Act, 1888, c. 29, s. 214.)

Under s. 283 any railway constable is empowered to arrest an offender against the by-laws and take him before a justice for any local jurisdiction within which the railway passes.

I emphatically disagree with the view suggested in the charge to the jury that the by-law set up in the defence authorizes the ejection of a passenger regardless of his condition in respect to sobriety.

N. S.

S. C.

DUNN, ADMINISTRATOR v. DOMINION ATLANTIC R. Co.

Mellish, J.

It is only right to say that I did not understand Mr. Henry as pressing his argument to that length before this court. I have no doubt he said all that could be said in favour of the quite legitimate contention that considering all the facts and circumstances and the powers and duties of the conductor there was no evidence to justify the jury in making the findings as reasonable men, but I am unable to come to that conclusion. In the view I have taken of the case, the conduct of the deceased on the train may not be very material except as evidence of his condition. I do not think the case should be dealt with without a due consideration of the duties, difficulties and responsibilities of conductors and the rights of the travelling public, fastidious and otherwise. We should also consider the fact that this was a special train, apparently intended to carry holiday makers, some more or less intoxicated, with special policemen; and that on such a train the conventions and etiquette of a drawing room car are not to be expected. But these matters should be considered, of course, solely with reference to the points at issue in this case. These questions I conceive to be: assuming the misconduct of the deceased as disclosed by the evidence as well as that found by the jury, was he in fact removed for such misconduct, and, if so, was such removal, made as it was, and considering all the conditions, justifiable? As I have the misfortune to disagree with some of my brethren I have thought it proper to deal with the evidence at some length.

I would allow the appeal and dismiss the application to set aside the findings with costs.

Appeal dismissed, the court being equally divided.

CAN.

S. C.

GRIERSON v. CITY OF EDMONTON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. May 2, 1919.

1. APPEAL (§ II A—35)—ASSESSMENT OF PROPERTY—DISTRICT COURT JUDGMENT—JURISDICTION OF SUPREME COURT OF CANADA TO HEAR—SUPREME COURT ACT, s. 41.

The Supreme Court of Canada has jurisdiction under s. 41 of the Supreme Court Act, to hear an appeal from a District Court Judge of Alberta, in matters concerning the assessment of property under the provisions of the charter of the City of Edmonton, 3 Geo. V. c. 23 (Alta.). [*Pearce* v. *City of Calgary* (1915), 32 D.L.R. 790, 54 Can. S.C.R. 7, followed.]

2. TAXES (§) III B 2—125)—ESTIMATING VALUE OF PROPERTY FOR—FUTURE PROSPECTS—PRESENT VALUE OF TO BE TAKEN INTO ACCOUNT—GROSS ONLY—VALUATION OF PROPERTY IN VICINITY.

Where prospects of future sales or future profitable exploitations of land are considered in estimating the value of such land for taxation purposes under s. 321 of the charter of the City of Edmonton (Alta.), it is the present value of such prospects only that are to be taken into account.

The value at which lands in the immediate vicinity have been assessed is an important factor in determining the assessment value in question, but this does not apply where such lands have been grossly overvalued by the assessors.

[*Fraser* v. *Fraserville*, 34 D.L.R. 211; [1917] A.C. 187, followed.]

CAN.

S. C.

GRIERSON v. CITY OF EDMONTON.

APPEAL from the decision of Taylor, J., of the District Court of the District of Edmonton, in the Province of Alberta, maintaining, with a slight reduction in valuation, the assessment for taxation purposes, of land belonging to the appellant. Reversed.

Statement.

G. F. Henderson, K.C., for appellant; *E. Lafleur*, K.C., for respondent.

FITZPATRICK, C.J.:—I adhere to the opinion expressed in *Pearce* v. *Calgary* 54 Can. S.C.R. 1 (1915), 9 W.W.R. 668, with respect to appeals in assessment cases.

Fitzpatrick, C.J.

Speaking generally, the intrinsic value of a piece of property must necessarily be the price which it will command in the open market, and the local judge sitting in appeal with his knowledge and experience in ascertaining the price of real estate within his jurisdiction would, under normal conditions, be in a better position to judge of the value of such property than I can assume to be. But when, as in this case, the property has, by reason of exceptional conditions of a temporary nature, no marketable value and the judge has, misconstruing the statute, proceeded on a wrong basis in fixing the value for assessment purposes, then it is for us to endeavour, applying the statute to the evidence, to ascertain the fair actual value for assessment purposes as distinguished from the intrinsic value. It is important to bear in mind that the statute provides that, in estimating its value, regard may be had to the situation of the land, the purposes for which it is used or could or would be used if sold in the next succeeding twelve months. So that it is not the absolute value of the land that is to be ascertained, and the assessment being only for the current year, the limitation of the statute is a very proper one. The question, therefore, is, having regard to their location, present productive qualities and the uses to which they may be put within the next

CAN.

S. C.

GRIERSON v. CITY OF EDMONTON.

Fitzpatrick, C.J.

twelve months, what is the fair actual value for assessment purposes of the two parcels of land in question in the condition in which they were?

If the true value is, having regard to the considerations I have just mentioned, that given by the appellant's witnesses, then the difference between that value and the assessed value is certainly gross, if that word has any meaning. The County Judge, in my opinion, proceeded upon a false basis when, in the absence of proof of any intention to subdivide, he assessed the value on the assumption that, if subdivided, the property would be salable within the next twelve months at the figure he fixes. The judge also erred in applying the principle of equalization having regard to the Swift and Burns properties, both of which are exceptional by reason of their situation and the uses to which their owners were in a position to put them. My attention was not drawn to anything in the statute which justifies the refusal to accept evidence of values on the basis of farm lands, that being the only use to which, at the present time, the appellant's properties could reasonably be put.

I can find nothing in the evidence that justifies the assessment of the lands in question at a higher figure than that given by the appellant's witnesses. I am, therefore, of the opinion that the land comprised in roll 2081 should be assessed at $475 an acre, $75,525, and that comprised in roll 1503 at $625 per acre, $95,317.50. There is no evidence of the general selling price of property in the appellant's neighbourhood at the time the assessment was made, and there is no evidence that, if subdivided, they would realize more in the then condition of the real estate market or within the next twelve months than the appellant's witnesses would allow.

I would allow the appeal with costs.

Davies, J.

DAVIES, J.:—I think the judge erred in adopting as the sole standard by which he should determine the amount for which the appellant's lands should be assessed, the amount for which other lands in the city, whether in the immediate vicinity of those in question or not, were assessed at. The value at which the lands in the *immediate vicinity* of those in question had been assessed was, no doubt, under the statute, an important factor to be considered when determining the assessment value in question. But that does not apply in cases where the values of the lands in ques-

tion have been grossly overvalued by the assessors. The object and purpose of introducing this factor of equalization in the assessments as a guide was as far as possible to obtain uniformity in the valuation. But that equalization rule cannot be resorted to as the proper test or standard where there has been in the assessment a gross overvaluation in fact of particular lands beyond their "fair actual value."

S. 321 of the charter of the City of Edmonton is as follows:—

Land shall be assessed at its fair actual value. In estimating its value regard shall be had to its situation and the purpose for which it is used or if sold by the present owner it could and would probably be used in the next succeeding twelve months. In case the value at which any specified land has been assessed appears to be more or less than its true value the amount of the assessment shall nevertheless not be varied on appeal, unless the difference be gross, if the value at which it is assessed bears a fair and just proportion to the value at which lands in the immediate vicinity of the land in question are assessed.

The question then before us is reduced to the simple one whether there has been such a gross overvaluation, looking to the situation of the land and the purpose for which it is used or, if sold by the present "owner, it could and would probably be used in the next succeeding twelve months."

After careful consideration of the evidence, I cannot, acting on the rules the statute lays down for determining the fair actual value, resist the conclusion that the land has not been assessed at its fair actual value, but that it has been grossly overvalued.

The question difficult of solution on our part is, assuming "a gross overvaluation in the assessment value," what is the "fair actual value" of the lands? We have to be guided by the opinions of the witnesses, of course. Applying the statutory rules as above stated, these opinions, as might be expected, greatly differ. Had we the power to refer the case back to the judge who heard the appeal from the assessors in order that he might determine on proper principles the valuation at which the lands should be assessed, I would gladly do so. Not having that power, I have carefully considered the different valuations made by the witnesses called on both sides and have reached the conclusion that the fair actual acreage valuation of the learned judge should be reduced one-half, that is, the lands south of the Grand Trunk Pacific Railway to $1,000 per acre, and those north of the track to $575 per acre. Costs must follow the result.

CAN.

S. C.

GRIERSON v. CITY OF EDMONTON.

Idington, J.

IDINGTON, J.:—I think the respective assessments appealed against of the lands in question are, even as reduced by the local courts, still grossly in excess of the actual values thereof, and should be reduced as follows:—

The assessment of the land comprised in roll 2081 should be reduced to $475 an acre and fixed at $75,525, and the assessment of the land comprised in roll 1503 should be reduced to $625 per acre and fixed at $95,317.50.

I retain the views I expressed in the somewhat analogous case of *Pearce* v. *Calgary*, 54 Can. S.C.R. 1, 9 W.W.R. 668.

The appeal should be allowed accordingly with costs.

Duff, J.

DUFF, J.:—The judge seems to have proceeded upon an erroneous principle. His reading of the statute apparently led him to the conclusion that in applying the Act the governing consideration is supplied by the ratio generally prevailing (as regards the assessment roll for the particular year) between the assessed value and the actual value of assessed properties in Edmonton. This, I think, is a misconception due seemingly to the neglect of the condition upon which the comparison of ratios is to be considered, namely: that the departure in the assessed value from the actual value in the case arising for decision shall not, in the language of the statute, be "gross." The evidence conclusively shews that this condition is not satisfied in the present case where the difference, in my view, is equivalent to considerably more than 100% of the actual value of the property assessed.

The cardinal error in the valuation appealed from arises from a failure to observe the fundamental principle that where prospects of future sales or future profitable exploitations are considered in estimating value it is the present value of such prospects only that are to be taken into account. (See judgment of the Judicial Committee in *Fraser* v. *Fraserville*, 34 D.L.R. 211, [1917] A.C. 187). I should reduce the assessment to an amount arrived at by valuing 152.5 acres at $625 an acre and 159 acres at $475 an acre.

Anglin, J.

ANGLIN, J.:—The dominant provision for the assessment of land made by the charter of the City of Edmonton is that "land shall be assessed at its fair actual value." In cases, however, where the difference between the assessed value and the fair actual value is not "gross," the assessment is not to be varied on appeal if it bears a fair and just proportion to the value at which lands in the vicinity of the land in question are assessed.

The charter further provides in regard to the assessment of land that

> in estimating its value regard *may* be had to its situation and the purpose for which it is used or if sold by the present owner it could and would probably be used in the next succeeding twelve months.

The word *may* was substituted by amendment for the word *shall*, which appeared in the original section. I do not regard this change as entitling the assessor to take into account any prospective use which might be made of the land after twelve months had expired. He was formerly obliged to take into account its prospective use during the next succeeding twelve months. He is now not obliged but permitted to do so. The fair, if not the necessary, implication is that he may not take into account possibilities beyond the period so limited.

The judgment of the District Judge makes it reasonably clear that in dealing with the assessment of the appellant's lands he did not take into consideration their fair actual value based on their situation, their present use and any prospective use to which they might be put within the next succeeding 12 months, or whether the difference between the fair actual value and the assessed value was gross or slight. Assigning as his reasons that

> the evidence given here is that the value of this land is almost the same as the lots surrounding it after making provision for subdivision and there has also been no evidence to shew that this land is assessed higher in proportion to its situation than any other part of the city,

the judge dismissed the owner's appeal, subject to making a slight reduction as to a portion of the lands in question.

On the evidence in the record it is abundantly clear that there was no likelihood whatever—indeed it may be said that there was no possibility of the land here in question being used for anything else than farm or market garden purposes during the twelve months succeeding the assessment. Yet the assessment was obviously based upon the prospective value of the land for purposes of subdivision into building lots, and all the evidence offered in support of it was based on the assumption that it was properly so treated. The only evidence in the record as to the value of the property viewed as farm lands or as available for market garden purposes was that given on behalf of the appellant. In my opinion the assessment was grossly excessive and should be reduced to the maximum figures deposed to by the appellant's witnesses—$500 an acre for

CAN.

S. C.

GRIERSON v. CITY OF EDMONTON.

Anglin, J.

the land north of the right-of-way and $700 an acre for the land south of the right-of-way. These are the prices given by the witness Kenwood, who appears to have viewed the matter sensibly and equitably.

The appellant is entitled to his costs of the appeal.

Appeal allowed.

ALTA.

S. C.

THOMAS v. BOARD OF TRUSTEES FOR W. CALGARY SCHOOL DISTRICT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. January 10, 1919.

SEARCH AND SEIZURE (§ I—3)—MALICIOUS ISSUE OF SEARCH WARRANT—BOARD OF SCHOOL TRUSTEES NOT SPECIFICALLY CHARGED—LIABILITY FOR.

The Board of Trustees for a school district may be held liable, although not specifically charged with the malicious issue, without reasonable and probable cause, of a search warrant, the search and seizure although technically the act of the police authorities being substantially the act of the Board, the police acting as its agents for the purpose of vindicating a supposed civil right.

Statement.

APPEAL by the defendant from a judgment of McCarthy, J. in an action for damages, for injury to grain unlawfully seized and held by defendants. Varied.

Robert Ure, for appellant; *C. A. Wright*, for respondent.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the defendant Board of Trustees from a judgment of McCarthy, J., whereby he gave the plaintiffs judgment for $337 damages against them for illegal seizure of a quantity of grain.

The Board had attempted to seize grain in stook and certain other chattels for taxes levied in respect of a large number of separate lots in which the land upon which the grain had been grown had been subdivided. The plaintiff was not the owner of the land and had not been assessed in respect of any of the lots. He had merely rented the land for the season for the purpose of cropping it. The seizure was made under the statute giving the school authorities power to seize for taxes any goods found upon the land assessed. The obligation of proving the legality of the various seizures made (and there was a very large number of them) lay upon the defendant Board. In my opinion, they failed to shew that any of the seizures were legal. The task of proving this was, in the circumstances, practically impossible.

Subsequent to the seizures the plaintiff, in some way, obtained possession of the grain and threshed it. He then removed the seed to a granary or warehouse in Calgary. Then the defendant Board swore out a search warrant under the Criminal Code, alleging suspicion of theft, and had it seized and put under lock and key so that the plaintiff was deprived of access to it. After this action was begun, the plaintiff obtained, *ex parte*, an injunction order which restrained the defendants from further dealing with the grain. The police authorities apparently relinquished possession of the grain in consequence of this order. They could, no doubt, quite properly do so when they learned of it, because it would be clearly suggestive of a mere civil dispute.

It was for damage resulting to the grain from lack of proper care during the short period of this seizure, in consequence of which it was heated and to some extent spoiled, that judgment was given.

The only doubtful point in the case is the question whether the defendant Board can be held liable without being specifically charged, as it has not been, with the malicious issue, without reasonable and probable cause, of a search warrant. The seizure was, of course, technically the act of the police authorities. But substantially I think it was the act of the Board. In effect it treated the police as its agents for the purpose of vindicating a supposed civil right and making its original alleged seizure continuous and effective. In all the circumstances, I think, it ought to be treated as the act of the Board, and that the Board should be liable for the consequences.

But with much respect, I think the trial judge went too far in accepting, without any discount, the plaintiff's estimate of his loss. He stated his grain was worth $1.15 a bushel before the seizure. Whether this was in the bin, without cost of marketing or at an elevator, is not clear. Then it is by no means clear, either, that there would have been no heating but for the seizure. The grain was cut green. After 2 weeks it was threshed and there had been some rain. The plaintiff said he first noticed the heating after the seizure. But we cannot be at all sure that plaintiff could have prevented the heating entirely, even if there had been no seizure. No doubt some substantial mitigation of the heating could have been made but that there would have been absolutely none at all, except for the seizure, cannot, I think, be safely assumed.

ALTA.

S. C.

THOMAS v. BOARD OF TRUSTEES FOR W. CALGARY SCHOOL DISTRICT.

Stuart, J.

It is seldom safe to accept a party's own estimate of his damage without careful scrutiny and examination.

For this reason I think there should be a reduction of the judgment to an amount which it would be safe to find that the plaintiff suffered. This I would put at no more than $100, and I think the judgment should be reduced to that amount.

I think there should be no costs of the appeal and that the costs of the trial should stand as already directed. This also disposes of the question raised by the counterclaim as to which there should be no costs.

Judgment varied.

B. C.

C. A.

REX v. FONG SOON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips, and Eberts, JJ.A. January 15, 1919.

STATUTES (§ II A—96)—CHINESE IMMIGRATION ACT—CONSTRUCTION OF—ORIGINAL ENTRY—DEPARTURE FROM CANADA FOR SHORT PERIOD—RE-ENTRY.

Section 27 (a) of the Chinese Immigration Act, R.S.C. 1906, c. 95, as amended by 7 & 8 Edw. VII. c. 14, s. 6, has relation to the original act of landing. A Chinaman who has regularly landed and paid the tax and been granted the certificate to which he is entitled is not liable under the provisions for re-entry (ss. 20 & 21, c. 95) for an isolated and, perhaps inadvertent, act of departure from Canada for a short time, without giving notice thereof.

Statement.

APPEAL by way of a case stated from a conviction of a County Court Judge, under s. 27 of the Chinese Immigration Act, R.S.C. 1906, c. 95, as amended by c. 14, s. 6, Stats. 7 & 8 Edw. VII. Conviction quashed.

The stated case reads as follows:—

The defendant, Fong Soon, was tried before me at the City of New Westminster, on the 16th day of October, A.D. 1918, exercising criminal jurisdiction under the provisions of part 18, of the Criminal Code relating to speedy trial of indictable offences for that he, on or about the 21st day of May, A.D. 1918, being a person of Chinese origin, did land in Canada, without payment of the tax payable under the Chinese Immigration Act and amending Acts, contrary to the form of the statute in such case made and provided and against the peace of Our Lord the King his Crown and Dignity.

2. The defendant was regularly admitted into Canada on the 12th day of August, 1901, having complied with s. 6 of the Chinese Immigration Act, 63 and 64, Viet. 1900, and having received a certificate under s. 13 of the same Act, and resided in Canada from that date, until about the 1st of May, 1918, when he went to Blaine, Washington, U.S.A., where he remained until the 21st day of May, 1918, when he returned to Canada and was arrested on the 21st day of May, 1918, and was charged with the offences hereinbefore set out.

3. The accused did not give notice of his intention to leave Canada as required by s. 20 of the Chinese Immigration Act, 3 Edw. VII, c. 8.

4. It was contended by counsel for the defence that the accused was not guilty of an infraction of s. 27 of the Chinese Immigration Act, as amended by s. 5, c. 14, 7-8 Edw. VII, but having acquired domicile in Canada, he was at liberty to leave and return to Canada at will.

5. I convicted the accused under s. 27 of the Act as amended aforesaid and fined him $100.

6. Upon application of counsel for the accused, I reserve the following questions for the opinion of the Court of Appeal.

Statement.

(1) Did the accused having been regularly admitted into Canada on the 12th day of August, 1901, and remaining in Canada until on or about the 1st day of May, 1918, when without complying with s. 20 of the Chinese Immigration Act, he went to the United States at Blaine, Washington, and returned therefrom on or about the 21st day of May, 1918, commit an offence under s. 27 of the Chinese Immigration Act as amended by s. 5 ,c. 14, 7-8 Edw. VII.

(2) Should the accused have been charged with an offence under s. 30 of the Chinese Immigration Act, instead of s. 27 aforesaid.

(3) Attached hereto is a transcript of the evidence taken at the trial, together with my reasons for judgment.

R. L. Maitland, for appellant; *R. L. Reid*, K.C., for respondent.

MACDONALD, C.J.A.:—The accused, a person of Chinese origin, who had previously been duly admitted into Canada, went to the State of Washington, and returned after an absence of 3 weeks. He came overland, not by ship. He was convicted, under s. 27 (*a*) of c. 95, R.S.C., being the Chinese Immigration Act, as amended by s. 5, c. 14, 7 & 8 Edw. VII. (1908), of the offence therein specified. He had not availed himself of the privilege granted by s. 20 of the principal Act.

Macdonald, C.J.A.

If, on the true construction of the said Act, as so amended, it ought to be held that the accused on his return from the State of Washington *landed* in Canada, then I think he was rightly convicted. The section is a penal one, and must be strictly construed, and the words "lands in Canada" are open, I think, to the interpretations respectively of "lands in Canada from a ship" and "arrives in Canada by any other means of conveyance." The word "lands" is used popularly in many senses, and among others in the sense of "arrives." This will be seen by consulting any standard dictionary. No doubt it must clearly appear in a case of this kind that parliament meant in s. 27 that "lands" should include enters or arrives in Canada from a place outside Canada, before the accused can be properly convicted of having landed in Canada without complying with the Act.

Now, looking at the whole Act and considering its object, I have come to the conclusion that "lands" is not to be restricted

B. C.

C. A.

REX
v.
FONG SOON.

Macdonald, C.J.A.

in its meaning to the landing from a ship, but includes entering in any other way. The Act is clearly aimed at the restriction of Chinese immigration into Canada by any means of conveyance. S. 24, for instance, is direction against every "master or conductor of any vessel or *vehicle* who *lands* or allows to be landed" etc. There "lands" includes departure from a train, as well as from a ship.

Then as to the effect of ss. 20 and 21 of the Act. S. 20 enables the person desiring to depart temporarily from Canada to register, and having done so, to return to Canada within a year, exempt from the exactions provided for in the Act. The meaning and intent of these sections are not doubtful, and they afford ample protection to a person in the situation of the accused desiring to leave Canada for a period less than one year. To limit the meaning of "lands" to entry by water would be to create an anomaly under ss. 20 and 21 clearly not intended by parliament.

I would, therefore, answer the first question in the affirmative.

As to the second question under said s. 27, the accused being already convicted, it is purely academic and ought not to have been submitted. I would, therefore, make no answer to it, even if my answer to the first question did not make it unnecessary to do so.

Martin, J.A.

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

Galliher, J.A.

GALLIHER, J.A.:—The appellant Fong Soon, being a person of Chinese origin, entered Canada in 1901 and duly paid the head tax imposed by the Chinese Immigration Act then in force. In May, 1918, he went to Blaine in the State of Washington, one of the United States of America, without complying with the provisions of s. 20 of the Chinese Immigration Act, being c. 95 of R.S.C. After remaining in Blaine for less than a month he re-entered Canada.

By c. 14 of the Statutes of Canada, 1908, s. 27 of the Consolidated Act of 1906 was repealed by s. 5 and a new s. 27 substituted therefor.

Fong Soon was arrested under this latter section and convicted by Howay, Co.J., and fined $100.

The matter comes before us by way of a case stated, and the short point is—Was he properly convicted under said amended s. 27?

It is urged that the appellant should have been charged under s. 30 for having violated the provisions of s. 20, in that he did not report out upon leaving Canada. In my view the leaving of Canada without reporting out under s. 20 does not constitute an offence.

Ss. 20 and 21 must be read together, and when so read I construe them as enabling and not penal sections.

The effect of registering under s. 20 is that providing he returns to Canada within 12 months he is entitled to free entry under s. 21.

The effect of his not so registering is that he becomes subject to the provisions of s. 27.

I would answer the first question in the affirmative, and the second question in the negative.

McPHILLIPS, J.A.:—The conviction as stated was made under s. 27 of the Chinese Immigration Act, c. 14, 7-8 Edw. VII. (1908), by an amendment to the Chinese Immigration Act, c. 95 of R.S.C. 1906. It was attempted, but, in my opinion, with deference, ineffectually attempted, to justify the conviction under the above quoted s. 27 (*a*), by counsel for the Crown. The gravamen of the charge was laid really and founded upon the fact that the accused went out of Canada without complying with ss. 20 and 21, which make provision for re-entry after leaving Canada. The first cogent observation that can be made to this submission is this; that the court is well entitled to take judicial notice of the fact that it would have been futile for the accused to have given any notice in pursuance of those sections of the Act, as the United States inhibits the entry of all Chinese, and it is fair to assume that, in accordance with true international relations, the Canadian authorities would not have given any heed to any such notice, received any fee or made any entry in connection therewith. This being the situation, it only the more is impressed upon one that ss. 20 and 21 have relation to Chinese returning to their own country. It is true they may go elsewhere out of Canada—to any country that will admit them—but, in practice, the departure from Canada may be said to be invariably to China. In my opinion, this is a directory provision, and does not go the length of depriving the regularly admitted Chinese of the *status*

McPhillips, J.A.

B. C.
C. A.
REX
v.
FONG SOON.
McPhillips, J.A.

acquired by due compliance with the Act, which is the admitted position of the accused; further, he has been a resident of Canada now for 17 years. It is indeed a great invasion of right, and would affront one in the application of the rule of natural justice, the preservation of true international relations and the observance of international law, to affect this acquired *status*, unless there is intractable statute law in the way of according the right of re-entry to Canada in the circumstances present in this case. I do not find any such statute law, or that the accused has been rightly convicted and subject to a fine and liable to deportation. The accused has not contravened s. 27 (*a*) by going into the United States, a country to which he was not entitled to go, and in returning therefrom, he does not land or attempt to land in Canada without payment of the tax payable under the Act, within the purview of the statute. He, 17 years ago, landed in Canada, and complied with the then existing statute law, and fulfilled all the requirements of the law, and was granted the certificate which is *prima facie* evidence that he complied with the requirements of the Act, and there has been no contestation or adjudication of any invalidity in this certificate (see s. 8, c. 95, R.S.C. 1906).

It is clear and plain that the landing or the attempt to land in Canada without payment of the tax referred to in s. 27 (*a*) above quoted has relation to the original act of landing—and as to that, the accused regularly landed, paid the tax, and was in due course granted the certificate called for, and to which he was entitled under the Act. If it was the intention of parliament to cover a case such as the facts here establish, the language should be clear and unambiguous. The most that the counsel for the Crown could submit was that, as provisions were made for re-entry (ss. 20 and 21, c. 95, R.S.C. 1906), non-compliance therewith inferentially resulted in the deprivation of right to re-enter—provisions which, in my opinion, are only directory in their nature, and not extensive enough in their terms to destroy the certificate held. The accused regularly landed in Canada and was rightly entitled to be in Canada, and when this certificate has added thereto 17 years of residence in Canada, an isolated and perhaps inadvertent act of departure from Canada, without giving a notice thereof, should not be held to be a forfeiture of the rights acquired save, as previously stated—there is found intractable statute law

so declaring. (See *Newcastle* v. *Morris* (1870), L.R. 4, H.L. 661—the Lord Chancellor at p. 664). It is not the province of the court to legislate, and where parliament has halted in so legislating, the hiatus is not to be supplied by the court. I would answer the first question in the negative. I express no opinion with respect to the second question—it is not a necessary question or one, with all deference to the judge, which can rightly be submitted. The stated case is to be confined to questions of law affecting the conviction, not relative to any other information or charge which might have been capable of being laid.

The conviction should, in my opinion, be quashed.

EBERTS, J.A., would allow the appeal. Eberts, J.A.

Appeal allowed.

BENSON v. McKONE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A. January 17, 1919.

CONTRACTS (§ II D—145)—SYNDICATE AGREEMENT TO PURCHASE LAND—PARTICULAR CLAUSE—CONSTRUCTION OF.

A syndicate agreement contained the following clause:—The said Stephen Benson shall notify the other parties hereto of all sums required to meet the obligations of the syndicate, and in the event of any of the parties hereto failing to pay his share within 30 days after having been notified thereof, the interest of the party so failing, as aforesaid, in the land so purchased, shall, at the expiration of the 30 days forthwith cease, and the property so purchased shall thereupon become vested in the remaining members of the syndicate freed and discharged from any claim or interest in the same of the party so failing as aforesaid.

The court *held* that this clause did not exclude all other remedies, and that the plaintiff had a perfect right to look to the defendants for their respective shares of the amount disbursed by him for taxes.

APPEAL from a County Court Judge in an action to recover from the defendants a sum alleged to be due by them, under the terms of an agreement, as their share of taxes paid by the plaintiff. Judgment varied. Statement.

H. F. Maulson, K.C., for appellant, defendant; *A. E. Hoskin*, K.C., for respondent, plaintiff.

PERDUE, C.J.M.:—The only question before the court on this appeal is that relating to recouping the plaintiff for the money he has paid on account of taxes on the land. By the syndicate agreement, the parties are equally liable for the payment, to be made on the land. The taxes were a necessary payment for which the plaintiff was responsible, and which was necessary for the preservation of the property. Each of the other members of the Perdue, C.J.M.

MAN.

C. A.

BENSON v. MCKONE.

Perdue, C.J.M.

syndicate should repay him one-sixth of the amount he disbursed. Wemyss has paid his share. This suit was brought against the other four for the balance, and judgment was entered against them for $167.45, making them jointly and severally liable for the whole amount. Three of the defendants appeal, the fourth raising no objection against the judgment. I agree that the provision of the agreement for forfeiture of the interest of a party who neglects to pay his share is not exclusive, but is merely additional to the relief that would be implied by law. I am of opinion that the plaintiff should have sued each party for the sum for which such party was liable, and not have joined the four together so that each might be made responsible for the shares of the other three. Wemyss is not a party to this suit and he cannot be made a party at this stage. The question of contribution as between the parties to the agreement is almost certain to arise at a later stage. Then the question whether the transaction is a partnership or not, and the question of the liabilities of the parties as between themselves can be determined. So far as the present appeal is concerned, I agree with the conclusion arrived at by my brother Fullerton.

Cameron, J.A.

CAMERON, J.A.:—This action is brought in the County Court of Neepawa by the plaintiff against the defendants Norman, McKone, Rowe, and Johnston to recover the sum of $167.45, alleged to be due by them under the terms of an agreement in writing as their share of the sum of $252.77, taxes paid by the plaintiff pursuant thereto on certain lands. The sum of $167.45 is arrived at by deducting from the whole amount the plaintiff's share and that of Wemyss, who paid his share before action and is not a party to the action. The County Court Judge gave judgment for the plaintiff for $168.80 and costs. The defendants, other than Norman, appeal.

The six parties named joined in purchasing the property for the purpose of disposing of the same, and, at the suggestion of Mr. Wemyss, entered into the written agreement in question providing that the parties should have an equal interest in the property and be equally responsible for payments thereon, and that the agreement for sale of the same should be taken in the name of the plaintiff, who should hold the same in trust for the other parties subject to the terms of the agreement. It was further provided that:—

The said Stephen Benson shall notify the other parties hereto of all sums required to meet the obligations of the syndicate, and in the event of any of the parties hereto failing to pay his share within 30 days after having been notified thereof the interest of the party so failing as aforesaid in the land so purchased shall at the expiration of the 30 days forthwith cease and the property so purchased shall thereupon become vested in the remaining members of the syndicate freed and discharged from any claim or interest in the same of the party so failing as aforesaid.

The agreement for purchase was accordingly entered into between the vendors and the plaintiff, who covenanted to pay the unpaid instalments and the taxes. The plaintiff was threatened with an action for the taxes and paid them.

It was argued that there is no right of action here inasmuch as the agreement in the above provision as to forfeiture gives the exclusive remedy. I cannot agree with this. The wording of the clause obviously leaves the exercise of the right there given to the trustee. It is a cumulative remedy merely. It was further urged that the right to sue has not yet arisen as the trust is not fully performed, but I think there can be no question on this point. The plaintiff has paid and is entitled to be reimbursed. Nor can I see that effect must be given to the payment by Wemyss as being a release such as would release his co-obligors. There is no evidence of any such release. Neither a mere payment by Wemyss nor a covenant not to sue by the plaintiff would effect such a discharge.

This syndicate, as it is called, was an association of six individuals for the purpose of this one adventure—the purchase and sale of the real estate mentioned.

There may also be a partnership in some cases touching interests in lands or in a single tract of land, which will be governed by the ordinary rules applicable to partnership in trade or commerce. Story on Partnership, 7th ed., par. 82.

In *Darby* v. *Darby* (1856), 3 Drew 495, 61 E.R. 992, where two purchased land on a joint speculation with their joint moneys for the purpose of laying it out into building lots and re-selling it at a profit; in the circumstances of the case, Kindersley, V.C., laid stress upon the fact that the real estate was bought for the very purpose of re-selling it, and that there was a partnership, with the result that the share of one of the partners was held personal estate. This decision is cited by Story, par. 82, and was held by the Court of Appeal in *Re Hulton*; *Hulton* v. *Lister* (1890) 62 L.T. 200, as stating the law. That was also a case where lands

MAN.

C. A.

BENSON v. MCKONE.

Cameron, J.A.

were bought and sold to builders on joint speculation. It was held that the parties were partners.

The subject came before our Supreme Court in *Manitoba Mortgage Co.* v. *Bank of Montreal* (1889), 17 Can. S.C.R. 692. There it was held that one of the members of an association or partnership of three, who were engaged in buying and selling lands, was authorized to endorse a cheque, the proceeds of the sale of mortgages acquired in the sale of partnership lands, which cheque was payable to the three parties. Strong, J., says, p. 694, "There was undoubtedly a partnership for the purpose of land speculations between Ross, Kennedy and McMillan," and says that it is well established that lands so acquired are personalty, citing *Darby* v. *Darby, supra*. Patterson, J., says, p. 698, "They (Ross, Kennedy and McMillan) were co-partners to all intents and purposes," citing Lindley, on Partnership, 5th ed., p. 49. The original passage has been altered to some extent in the 7th edition. I quote from it at pp. 67 and 68:—

> If persons who are not partners in other business share the profits and loss, or the profits, of one particular transaction or adventure, they became partners as to that transaction or adventure but not as to anything else . . . In all such cases as these, the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships.

In this present case, there are facts corroboratory of a partnership. The land in question was acquired with the intention of disposing of it and for no other purpose, as in *Darby* v. *Darby*. The parties gave a joint note for the amount of the first instalment of purchase-money, and on one occasion paid their respective shares of the taxes. In my opinion, the association of these 6 persons for the purposes mentioned constituted them a partnership for this transaction.

Supplementary to this partnership, and for the purpose of convenience in carrying it on and working out its objects, the written agreement above referred to was entered into, declaring the objects of the partnership and the respective interests of the partners, and providing, in order to simplify and facilitate its business, that one of them, the plaintiff as trustee, should take the agreement for purchase in his name and make all necessary payments thereon, which the other parties agree to repay to the extent of their respective interests.

The question then remains, what is the effect of the legal

position of the parties in respect of the payment made by the plaintiff. As to the rights and obligations of the parties outside of this we have nothing to do.

If one partner has been compelled to pay more than his share of a partnership debt . . . he is entitled to be indemnified by his co-partners as far as may be necessary to place all on an equality; Lindley on Partnership, 444; The Partnership Act, s. 24, (1).

It is true the plaintiff appears as the owner of the property to whom it is assessed.

But, however, the legal title may stand at law . . . the real estate belonging to the partnership will, in equity, be treated as belonging to the partnership. Story, Partnership, par. 92.

The position would have been the same had the agreement for purchase been taken in the name of all the parties and the property been assessed to the plaintiff alone, or if the property had been assessed to all of them and action threatened or taken against him only.

Looking at the matter as one dealing with the relations of trustee and beneficiaries, there is no question that a trustee has a right in similar circumstances to be indemnified by his *cestui que trust*. The subject is dealt with by Lindley, p. 436.

A trustee is clearly entitled to be indemnified out of the trust property against all costs, charges and expenses properly incurred and against all losses sustained by him, in the execution of his trust: and if the trust property is not sufficient for the purpose of indemnifying him in respect of such matters, his *cestui que trust*, if under no disability, is personally liable to indemnify him.

See *Hardoon* v. *Belilios*, [1901], A.C. 118, and other cases referred to in Lindley at p. 436; also *Deering* v. *Winchelsea* (1787), 2 Bos. & Pul. 270, 126 E.R. 1276, White & Tudor's Leading Cases, vol. 2, 555.

Trustees acting with the sanction of their *cestuis que trust*, and not exceeding their powers, may call upon their *cestuis que trust* personally to reimburse them for any necessary outlay. This right arises wherever the relation of trustee and *cestui que trust* is established. Lewin on Trusts, 12th ed. 799.

And the right to indemnity may be exercised before actual loss. Ib.; *Phene* v. *Gillan* (1845), 5 Hare 1, 67 E.R. 803.

But it seems to me that we must look at this transaction as one in which the original relations between the partners have been declared by the written document which creates, as an addition to the terms of the partnership, a trustee for the purpose of promptly and conveniently carrying out its operations. It follows that the plaintiff and the other five members were and are liable as co-partners for the taxes which the plaintiff ultimately advanced on his own and their behalf.

MAN.

C. A.

BENSON v. McKONE.

Cameron, J.A.

In this case all the co-partners are parties to the action with the exception of Wemyss, and his absence from the record is pleaded as a defence which is really a plea in abatement and not now a proper plea under the King's Bench Act, under which no action shall be defeated by non-joinder of parties, and any such defect may be remedied by the court with or without an application therefor. Rule 220 (2). It is the fact also that this action is brought upon the written instrument; but with the facts before us there can be no difficulty in amending the pleadings to accord with the facts or in adding a proper party.

I think, therefore, Wemyss should be made a party to the action. His payment does not appear to be an absolute release, and even if it were:—

The discharge or release of one co-obligor to the obligee will not avail him as a discharge from his liability for contribution to the other co-obligors. Corpus Juris, XIII, 823.

Each is entitled to contribute in proportion to his share of the common debt. Ib. 825.

While there was a remedy at law for contribution in certain cases, nevertheless the usual remedy was in equity, and one of the reasons for that had its origin in the fact that formerly if several persons had to contribute a certain sum, the share which each had to pay was the total amount divided by the number of contributors; and no allowance was made in the event of the inability of some of them to pay their shares. But in equity, in the absence of agreement to the contrary, those who could pay were compellable not only to contribute their own shares, ascertained as above, but also to make good the shares of those who were unable to furnish their contributions. This rule also now prevails in all divisions of the High Court. For example, if A., B., C., and D. are liable to a debt, A. can compel B. and C. to contribute one-third each, if D. can contribute nothing; and this, as between A., B., and C., is evidently only fair and just. Lindley on Partnership, p. 439.

At first I was under the impression that inability to pay in such cases referred to bankruptcy, but such is not the case and for good and equitable reasons.

Those who can pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution. *Lowe* v. *Dixon* (1885), 16 Q.B.D. 455 at 458.

We are confronted with the difficulty of working out such a remedy under the County Court Act, but it seems to me that the provision made in s. 57 (6) of the Act is ample in this case.

I have no doubt that the plaintiff in this action as framed has a right to recover against the defendants. The defect in the action can be cured by adding Wemyss as defendant. But if the judgment stands as it is, it would leave anyone of the defendants who paid it with the right to recover from his co-defendants, and also with the further right to recover from the other parties any deficiency caused by the inability of one or more of them to pay his or their shares. And if the whole amount were recovered from one of the remaining defendants, that would mean still another action.

But, in my opinion, the liabilities of the parties to this agreement *inter se* are to be determined by their relationship as co-partners, who, in such a case as this where a common obligation has been paid by one of them, must be placed on an equal footing.

I submit as a just and equitable solution of the difficulty that the present judgment should be set aside, that Wemyss be made a party defendant and that, as authorized by r. 196 of the King's Bench Act, judgment be entered for the plaintiff against each of the defendants severally for $42.13 and interest at 4% and costs, excepting Wemyss, who has already paid his share, and that, on its being shown to the satisfaction of the County Court Judge after the lapse of such a time as shall seem to him reasonable, that any one or more of the defendants is or are unable to pay the judgment or judgments against him or them, the plaintiff shall have liberty to apply on notice to the said County Court Judge to have the said judgment or judgments increased by his or their proportionate share of the amount or amounts so left unpaid, and to order or direct the defendant Wemyss to pay his like proportionate share thereof, with the object that the plaintiff and the defendants who are able to pay shall share equally the loss so occasioned.

I do not think there should be any costs of this appeal.

I should refer to *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60, which was cited as an authority that there was no right of contribution. There it was held that one tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution. It was stated in this case that "Tenants in common are not partners, and it has been so held: one of them is not an agent for another." Brett, M.R., at p. 65.

MAN.

C. A.

BENSON
v.
MCKONE.

Cameron, J.A.

And it was accordingly held that the cost of the repairs there made was a voluntary payment. But even if the parties here are co-tenants the circumstances are entirely different, and the case comes directly within the rule laid down by Cotton, L.J., in the *Leigh* case, at p. 66:—

> When two persons are under a common obligation, one of them can recover from the other the amount expended in discharge or fulfilment of the common obligation,

which, he went on to say, was not the position of affairs before him.

Fullerton, J.A.

FULLERTON, J.A.:—Sometime prior to February 5, 1912, the plaintiff, the defendants and one other, formed a syndicate to purchase certain property in a subdivision known as Transcona Heights. A syndicate agreement was executed by all the parties, which provides that each of the parties shall have an equal interest in the property and be equally responsible for the payments to be made. The agreement further provides that the agreement for sale of the land shall be taken in the name of the plaintiff, who shall hold the property in trust for the other parties to the agreement.

In June, 1917, the municipality of Transcona threatened to sue the plaintiff for taxes, and he paid the sum of $252.77 in settlement.

One of the members of the syndicate paid his one-sixth share, amounting to the sum of $42.66, and this action is brought against the 4 members of the syndicate who declined to pay. The County Court Judge who tried the action gave judgment against the 4 defendants for $167.45, the amount claimed. Three of the defendants, namely, McKone, Rowe and Johnston, appeal.

The first point taken by the defendant's counsel is that, under the terms of the syndicate agreement, the remedy for the failure of any member to pay his share of payments was specifically fixed, and that all other remedies were excluded. The provision of the agreement upon which this contention is based reads as follows:—

(See judgment of Cameron, J.A.)

It could never have been the intention of the parties that the clause above quoted should exclude all other remedies. By the second clause of the agreement each of the parties agrees to be equally responsible for the payments to be made thereon.

MAN.

C. A.

BENSON v. MCKONE.

Fullerton, J.A.

Moreover, if the interpretation contended for by the appellants were to prevail, 5 members of the syndicate could unload their obligations on the shoulders of the plaintiff by simply declining to comply with the demand for payment.

I think the plaintiff had a perfect right, under the agreement, to look to the defendants for their respective shares of the amount disbursed by him for taxes. The only difficulty that presents itself to me is the question of joint or several liability. Are the defendants jointly indebted to the plaintiff for the full amount of the four shares or liable only for their proportionate share?

I think the intention of the parties was that each should be liable for one-sixth of all payments required to be made under the terms of the agreement.

I would allow the appeal with costs and direct that separate judgments should be entered against the three defendants respectively for the sum of $42.66, together with one-fourth of the costs of the action in the County Court.

Appeal allowed.

FLETCHER v. WADE.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. January 15, 1919.

MANDAMUS (§ I D—30)—COURT OF REVISION—JUDICIAL BODY—WHEN MANDAMUS WILL LIE.

The Court of Revision (B.C.) is a judicial body and the Court of Appeal (B.C.) cannot review its proceedings in the sense of inquiring into the correctness of the courts' conclusions. If a mandamus will lie at all to the Court of Revision it will only lie when it is made to appear that the court has refused to hear and determine the complaint.

[*The Queen* v. *Dayman* (1857), 7 El. & Bl. 673, followed.]

Statement.

APPEAL by plaintiff from an order of Gregory, J., Reversed.

Joseph Martin, K.C., and *McGeer*, for appellant; *E. P. Davis*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question for decision is: Did the Court of Revision hear and adjudicate upon the respondent's complaint? The judge from whose decision this appeal is taken thought not, and made an order *nisi* that a prerogative writ of mandamus should issue against the members of the Court of Revision for the Municipality of Point Grey, directing them to hear and adjudicate upon the said complaint. I think the order ought not to stand.

B. C.

C. A.

FLETCHER v. WADE.

Macdonald, C.J.A.

The Court of Revision is a judicial body, and this court cannot review its proceedings in the sense of inquiring into the correctness of the court's conclusions. If mandamus will lie at all to a Court of Revision (which, in the result, I do not need to determine) it will only lie when it is made to appear that the court has not heard and determined the complaint: when it has either expressly or virtually declined jurisdiction. If the Court of Revision in good faith entertained the respondent's appeal and adjudicated upon it, there can be no inquiry here as to the correctness of its decision. We cannot sit as a Court of Appeal to review its proceedings.

In *The Queen* v. *Dayman*, 7 El. & Bl. 673, 119 E.R. 1395, 26 L.J. M.C., 128 at 131, Lord Campbell, C.J., said:—

> Now, how could we have granted a mandamus to a magistrate to hear and determine a matter which he has already determined on issue joined by the parties? The Court of Queen's Bench does not sit, like the Roman patricians, to give advice, but to decide and determine matters in controversy. The court cannot express an opinion which one person might adopt out of deference to them, and another refuse to be bound by and overrule.

Again, in *Ex parte Lewis* (1888), 21 Q.B.D. 191, at p. 195, Wills, J., said:—

> But this was a mistake on the part of the magistrate, for nothing can be clearer or more settled than that, if the justices have really and *bonâ fide* exercised their discretion, and brought their minds to bear upon the question whether they ought to grant the summons or not, this court is no court of appeal from the justices and has no jurisdiction to compel them to exercise their judgment in a particular way.

And he refers to *Reg.* v. *Adamson* (1875), 1 Q.B.D. 201, where the court thought the justices had virtually refused to act upon the evidence submitted to them and had refused the summons on extraneous grounds. He also refers to *Reg.* v. *Ingham* (1849), 14 Q.B., 396, 117 E.R. 156.

Mere irregularity in the proceedings does not entitle the court to direct a writ of mandamus to issue against justices: *Reg.* v. *Justices of Yorkshire* (1885), 53 L.T. 728, where Smith, J., said:—

> I know of no case where a mandamus to justices to hear and determine a case has been granted on the ground that they have not heard all the evidence tendered before them.

On the facts, it is clear to me that the Court of Revision entertained the complaint. That complaint was that the assessment of the complainant's lands was at an over-valuation. Mr. Wade, who appeared in person, attempted to examine the municipality's

assessor. The court objected, and an adjournment was taken to consider the matter. On the adjourned hearing, the court withdrew the objection and assented to the assessor being sworn and examined by Mr. Wade. He was not sworn owing to failure to find a testament, but the matter did not go off on that circumstance. Objection was also taken to the lack of a stenographer. Mr. Wade's counsel before us, however, conceded that no point could be founded upon that. There was some doubt in Mr. Wade's mind when he withdrew from the room as to whether his application for a further adjournment would be considered or not. He was told, however, by the chairman of the court that his case would be considered "from every angle." After Mr. Wade's retirement, the court continued the examination of the assessor, and subsequently came to their decision to reduce Mr. Wade's assessment in part and to make some adjustments in respect of the classification of his lands. Members of the court have made affidavits and have been cross-examined upon them in these proceedings, and it appears, from their evidence, that they did consider the question of the actual value of Mr. Wade's lands. Their evidence upon this is not quite as definite as one could have desired, but the onus of proof is upon Mr. Wade to show that the conduct of the members of the Court of Revision amounted virtually to a refusal or neglect to hear and adjudicate upon his complaint. From the evidence aforesaid, I have come to the conclusion that the court did hear and adjudicate upon the complaint. It is not suggested that the members of the Court of Revision acted in bad faith, and as, in my opinion, they did not decline jurisdiction, the order directing the writ of mandamus to issue should not have been made, and it ought to be set aside.

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

GALLIHER, J.A.:—I agree in the reasons for judgment of the Chief Justice. Galliher, J.A.

MCPHILLIPS, J.A.:—I agree that the appeal should be allowed. McPhillips, J.A.

EBERTS, J.A., would allow the appeal. Eberts, J.A.

Appeal allowed.

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Manitoba King's Bench, Mathers, C.J.K.B. January 6, 1919.

MUNICIPAL CORPORATIONS (§ II G—225)—NEGLIGENCE OF CONSTABLE IN DRIVING MOTOR AMBULANCE IN CARRYING INJURED PERSON TO HOSPITAL—DAMAGES—LIABILITY OF CITY—LIABILITY OF BOARD OF POLICE COMMISSIONERS—LIABILITY OF INDIVIDUAL MEMBERS OF BOARD.

The City of Winnipeg is not liable under the charter of incorporation for the negligent acts of a police constable appointed by the Board of Police Commissioners, over whom it has no right of discharge or control. The city having purchased and delivered a motor ambulance to the police department, and having no control or power to issue orders to, or discipline, or dismiss for misconduct the constable driver of such motor is not liable as owner for the negligence of such driver under the Motor Vehicles Act (Man.), although technically the owner of such ambulance.

The possession of an ambulance is essential to the proper and efficient performance by the police of an important part of their public duty, and in driving it to convey an injured person to a hospital a constable is discharging his public duty as a policeman. The Board of Police Commissioners is an agency of the state, appointed by the state to perform a public duty and cannot be held liable for anything done in the discharge of such public duty.

[*Winterbottom* v. *City of London* (1901), 1 O.L.R. 549, affirmed 2 O.L.R. 105, followed.]

The Chief of Police has no power to authorize a speed in excess of that allowed by law, and the Board is not liable for the acts of a constable acting under such illegal order, given by him on his own responsibility and without authority derived from them.

The Board of Police Commissioners is created by statute, a bare administrative agency, without property out of which any judgment recovered against it can be realized, and a judgment would be absolutely futile; also being unable to own anything it cannot be held liable as owner under the Motor Vehicles Act.

The individual members of the Board cannot be held liable for an act which they did not sanction either individually or as a Board.

Statement.

ACTION by the widow and infant children, against the City of Winnipeg, the Board of Police Commissioners of the city, and the members of the Board individually, for the death of the husband, who was killed instantly by being struck by the police motor ambulance, driven by a member of the police force, at an excessive rate of speed, while taking an injured person to a hospital. Action dismissed.

T. A. Hunt, K.C., and *Jules Preudhomme*, for the City of Winnipeg; *I. Pitblado*, K.C., and *E. R. Siddall*, for the Police Commission, and members of same in their individual capacity.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an action brought by the widow and infant children of the late F. W. Bowles, against the City of Winnipeg, the Board of Police Commissioners of the city, and the members of the Board individually, tried before me with a jury on the 12th, 13th, 14th and 15th June last.

The late Mr. Bowles was killed on July 26, 1915, at the inter-

section of Sargent Ave. and Sherbrooke St. in this city, by being struck by the police motor ambulance, driven by a member of the police force named Fogg. The ambulance was being used at the time to convey to the hospital a child whose foot had been badly crushed under the wheel of a street car. It was proceeding north along Sherbrooke St. in the direction of the hospital at a high rate of speed. The deceased was riding a bicycle in a westerly direction along the north side of Sargent Ave. and while crossing Sherbrooke St. was hit by the motor ambulance and instantly killed.

At the conclusion of the plaintiff's evidence, the defendants moved for a non-suit. With the concurrence of all parties, I directed the trial to proceed, reserving to the defendants the right to renew the motion after an answer had been obtained to certain questions which I proposed to put to the jury. Evidence was then given by the defendants at the conclusion of which I left the following eleven questions to the jury and they returned answers to the first, second, third, ninth, tenth and eleventh. The questions asked and the answers given are as follows:—

1. Was there any negligence on the part of Fogg which caused or helped to cause the collision? A. Yes.

2. If so, what was the negligence? (Answer fully.) A. Approaching and crossing the intersection of Sargent Ave. and Sherbrooke St. at an excessive rate of speed; also failure on Fogg's part to apply brakes sooner.

3. Was there any negligence on the part of Bowles which caused or helped to cause the collision? A. No.

4. If so, what was the negligence? (Answer fully.)

5. Notwithstanding the negligence (if any) of Bowles could Fogg, by the exercise of reasonable care, have prevented the collision?

6. If so, what should Fogg have done which he did not do, or did which he should not have done?

7. Was the rate of speed of the motor ambulance reasonable (*a*) on reaching the south side of Sargent Ave. (*b*) at the time of the accident?

8. If unreasonable, did the rate of speed incapacitate Fogg from controlling the ambulance so as to avoid the collision?

9. What negligence really caused the collision? A. Excessive speed.

10. If the court should, upon your answers, think the plaintiff entitled to damages, what sum do you propose as damages? A. $12,000.

11. How should such damages be apportioned between the widow and children? A. Widow, $5,000; each child $3,500.

The motion for judgment on behalf of the plaintiffs pursuant to these findings and for a non-suit on behalf of the defendants stood over until October 17, when both motions were argued together.

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

The case made by the statement of claim is that the city operated, or caused the police ambulance to be operated, or in the alternative, that the Board of Police Commissioners operated it with the knowledge and consent of the city, the owner, in connection with the city's police department, or that the members of the Board as individuals, without authority as police commissioners, operated the ambulance or caused it to be operated. It is then alleged that Fogg, by whom the ambulance was driven, was a servant of the city or that the Board of Police Commissioners employed Fogg as chauffeur for the ambulance with the knowledge and consent of the city, or that the individual members of the Board, without authority as police commissioners, employed Fogg as chauffeur to operate it. It is then charged that the death of Bowles was caused by the negligence of Fogg either as the servant of the city or of the Board or of the individual members of the Board while in the course of his employment.

Separate defences were made by the city, the Board of Police Commissioners and the individual members of the Board. Each of the defendants denies ownership or operation of the ambulance or that Fogg was their servant or under their control. Both the city and the Board plead not guilty by statute, the city citing the Winnipeg Charter, 1 & 2 Edw. VII., c. 77, s. 856, as amended by 1 Geo. V., c. 72, s. 26, and the Board citing the same, with the additional sections of the charter 856 to 872.

The Board denies that Fogg was, at the time of the accident, in its employ, but says that he was a constable appointed pursuant to the provisions of the city charter, and was at the time performing his duty as constable, and denies responsibility for any act or negligence on his part. The Board further alleges that it is a statutory body entrusted with the performance of a public duty and created for the purpose of administering the general law of the land for the benefit of the public, and that if it ran and operated a police ambulance, it did so in the performance of such public duty and for the benefit of the public and not otherwise, and it is not responsible for the negligence of any one employed by it to operate such ambulance. It further alleges that the statute creating it has provided no fund out of which damages could be paid by it, nor has it any power or authority to collect or create such a fund.

The defence set up by the individuals is to the same effect as that relied upon by the Board. In addition they allege that if the ambulance was operated at all it was by the authority of the Board of Police Commissioners as such and not by or on the authority of the individual defendants or any of them, and that none of them were in any personal capacity a party to, concerned in or connected with the operation of the said police ambulance. On behalf of three members of the Board, viz., the senior County Court Judge, the police magistrate and the mayor of the city, it is pointed out that they are not voluntary, but are *ex officio* members of the Board by virtue of s. 856 of the Winnipeg Charter, and are not for that reason liable for the accident.

The constitution, powers and duties of the Board of Police Commissioners, and the duties of the police and of the city with respect thereto, are dealt with in ss. 856 to 872 of the Winnipeg Charter. S. 856 provides that there shall be a Board of Commissioners of Police for the city and that such Board shall consist of the mayor and two aldermen appointed by resolution of the council, the senior County Court Judge of the County Court of Winnipeg, and the police magistrate of the city, and that

such commissioners shall have the sole charge and control of the police department of the city, the persons therein employed, and generally in all matters connected therewith; and for that purpose and for all other purposes connected with the good government of the police force of the city they may pass by-laws relating thereto.

The following other sections are material, and I quote them in full:—

836. The police force shall consist of a chief of police and as many constables and other officers and assistants as the board from time to time deem necessary.

864. The members of such police force shall be appointed by and hold their offices at the pleasure of the Board, and shall take and subscribe to the following oath:—

I, A.B., do swear that I will well and truly serve His Majesty the King in the office of police constable for the City of Winnipeg, with no favors or affection, malice or ill-will, and that I will to the best of my power cause the peace to be kept and preserved, and will prevent all offences against the persons and properties of His Majesty's subjects, and will to the best of my skill and knowledge discharge all the duties thereof faithfully and according to law. So help me God.

865. The Board shall from time to time make such regulations as they may deem expedient for the government of the force and for preventing neglect or abuse and for rendering the force efficient in the discharge of all its duties.

866. The constables shall obey all lawful directions, and be subject to the

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

government of the chief of police, and shall be charged with the special duty of preserving the peace, preventing robberies and other felonies and misdemeanors, and apprehending offenders, and shall have, generally, all the powers and privileges and be liable to all the duties and responsibilities which belong by law to constables duly appointed.

869. The Board shall cause a pay list of all men employed to be made out monthly, or oftener if required, and the said list, when certified to by the said Board or a majority of them, shall be taken or forwarded to the comptroller who shall, upon being satisfied as to the correctness of the same, instruct the treasurer to pay the same under his signature.

870. The Board shall, before incurring any expenditure of money in connection with the police department, other than the employment of men, submit and furnish to the council an estimate of the sum or sums required and the purpose or purposes to which the same is intended to be devoted, and the council shall thereupon provide the same in the hands of the treasurer and notify the comptroller; and the Board thereafter may draw on account of and apply the same or any part thereof for the purposes mentioned in the estimates.

The so-called motor ambulance was acquired in 1911, and the method of its purchase was as follows:—On April 7, 1911, the Board of Police Commissioners decided to request the Board of Control of the city to call for tenders for a "50 and 60 horse-power police automobile patrol and ambulance combined," and this request was communicated to the Board of Control through its secretary by letter on April 12, 1911. Pursuant to this request tenders were called. On May 9, 1911, the Board of Control was notified that the Board of Police Commissioners recommended the acceptance of the tender of Breen Automobile Co. for the "Speedwell Police Patrol and Ambulance" for the sum of $5,950. On the same day the Board of Control sent a recommendation to the council that "in accordance with the recommendation of the Board of Police Commissioners the tender of the Breen Co. for the Speedwell Police Patrol and Ambulance Automobile be accepted," which the council, also on the same day, adopted.

The Board of Police Commissioners on June 9, 1911, passed its estimates for the ensuing fiscal year and on June 12 sent the same to the Board of Control. These estimates included an item for "police patrol (auto) $5,950." The machine was supplied on or about October 11, 1911. Breen's account for $5,950 was passed by the Board of Police Commissioners on October 13, and was paid by the city's cheque on November 7, 1911. The city has a garage adjoining the central police station in which all the automobiles owned by the city are kept, and the new police patrol and ambulance was and has always been kept in the same place. It has always been used and controlled exclusively by the police.

Fogg was first appointed to the force and sworn as a constable in 1910. In February, 1914, the Chief of Police transferred him to the motor patrol and ambulance as chauffeur and the transfer was subsequently confirmed by the Board of Police Commissioners. From that time until August, 1915, Fogg's special duty was driving this ambulance.

It was conceded that according to well settled principles of law none of the defendants can be held liable for anything done by the police *qua* police.

Municipal government as it exists in Canada is of a dual or composite character. A municipality is entrusted with certain powers of government for the benefit of the inhabitants in their local or corporate limits as distinct from the interest of the public at large. It also is given certain powers to be used for the benefit of the community at large as a convenient method of exercising some of the functions of government. In the former case civil responsibility attaches to the municipality, its servants and agents, just as in the case of any other corporate body. In the latter case the officers elected or appointed by the municipality are not regarded as servants or agents of the municipality appointing them, but as public officers acting in the public interest, for whose conduct civil responsibility does not attach to the municipality. Dillon, 5th ed., par. 1655; *McSorley* v. *St. John* (1881), 6 Can. S.C.R. 531; *McCleave* v. *Moncton* (1902), 32 Can. S.C.R. 106; *Garbutt* v. *City of Winnipeg* (1908), 18 Man. L.R. 345; *Nettleton* v. *Prescott* (1910), 21 O.L.R. 561, and cases collected in note 27 Anno. Cases, 1280, 28 Anno. Cases 471.

This principle of law is recognized and applied by both the Canadian and the United States courts, but in the application of the principle there has been some divergence. For example, in the United States the operation of a fire brigade and water works are placed in the latter category while by the Canadian courts they are placed in the former: *Hesketh* v. *City of Toronto* (1898), 25 A.R. (Ont.) 449; *Shaw* v. *City of Winnipeg* (1909), 19 Man. L.R. 234.

According to both systems it is well settled that police officers fall within the latter class and that neither the municipality nor the commissioners of police, where the administration of the force is committed to such a body, is liable for the acts of its police *qua*

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

police: Dillon, par. 1656; *Wishart* v. *City of Brandon* (1887), 4 Man. L.R. 453; *McCleave* v. *Moncton*, *supra*.

But it is contended that either or both may be held liable for the negligent act of a policeman within the scope of his employment but outside the scope of his duties *qua* a policeman.

It will not be denied, I think, that an employee who ordinarily bears the character of a police constable may be authorized to perform duties of a local or corporate character having no relation to his public police duties, that might just as appropriately be performed by a person who was not a police constable, and if in the performance of that duty damage was occasioned to another by the employee's negligence, the municipality could not escape liability because of the mere fact that the offender happened to be a police officer.

Before taking up the question, common to all the defendants, of whether or not the operation of a police ambulance for the purpose for which this one was acquired and used was or was not an essential part of the public duty of a police force, I propose to deal with two points concerning the liability of the city alone. The first is, was Fogg the agent or servant of the city upon any view of the circumstances, and secondly, is the city liable as "owner" under s. 63A of the Motor Vehicles Act?

First as to the question of agency. It is clear that no liability can be fastened upon the city unless it can be held responsible for the acts or conduct of Fogg, and it cannot be held responsible for his acts or conduct unless he were an officer, servant or agent of the city.

> When it is sought to render a municipal corporation liable for the acts of servants or agents a cardinal inquiry is, whether they are the servants or agents of the corporation. Dillon on Corporations, 5th ed. vol. 4, par. 1655.

Lord Herschell, in *Baumwoll* v. *Furness*, [1893] A.C. 8, at 16, lays it down as an indisputable proposition of law

> that a liability by reason of a wrong or a tort can only be established by proving either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority.

If any further authority were required for such a well-known principle of law, it will be found in *McGregor* v. *Township of Harwich* (1899), 29 Can. S.C.R. 443. That case turned on the entire absence of evidence by whom the obstruction was placed on the road; but the Chief Justice said that even if it had been

shewn that it had been placed there by authority of the pathmaster he would want to consider how far the municipality could be held liable for the acts of such a statutory officer.

A servant is a person subject to the command of his master as to the manner in which he shall do his work, *per* Bramwell, L.J., in *Yewens* v. *Noakes* (1880), 6 Q.B.D. 530, at 532,

and in *Quarman* v. *Burnett* (1840), 6 M. & W. 499, 151 E.R. 509, Baron Parke said, p. 509, that the person liable for the acts of a wrongdoer as master is

he who selected him as his servant from the knowledge of or belief in his skill and care and who could remove him for misconduct and whose orders he was bound to receive and obey.

In Beven on Negligence, 3rd ed., vol. 1, at 327, it is said that the test in this class of cases is the same as in ordinary cases where the matter in dispute is whether the relation is that of employer and employed, who "has put the agent in his place to do that class of acts?" To arrive at the answer to this, four questions are to be answered: (1) Between whom is the employment for service made? (2) By whom is payment of wages made? (3) Who has the power to discharge? (4) And, most important of all, whose orders is the employed bound to obey?

The fact is that Fogg was not employed by the city, neither was he bound to obey any orders emanating from the city, nor had it any power to discharge him. It appropriated the money required to pay his wages, but it did not fix the rate. Tested by any of the recognized rules for determining whether or not the relationship of principal and agent or master and servant subsisted between the city and Fogg, the answer must be, he was not the agent or servant of the city.

As stated by Boyd, C., speaking with reference to similar legislation to ours, in *Kelly* v. *Barton* (1895), 26 O.R. 608, at 623:

Police constables are not the agents of the corporation, but are independently appointed by the board of police commissioners.

It was argued, however, that the operation of an ambulance is not the duty of a police department nor was the city obliged by law to operate one; that no matter what form the transaction respecting the purchase and operation of this ambulance assumed it was in substance the voluntary purchase of such a vehicle by the city and the delegation to the police of the duty of operating it on the city's behalf and as the city's agents. Counsel for the plaintiff put the case in this way: He said that the city had voluntarily undertaken to do, for the benefit of the municipality, that which it had power to do but which it was not bound by law to do;

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

that it had delegated to the police the doing of that which might just as well have been delegated to the fire brigade or the street commissioner. From this premise, he argued that the city was liable upon the principle upon which *Hesketh* v. *Toronto*, 25 A.R. (Ont.) 449, *Shaw* v. *Winnipeg*, 19 Man. L.R. 234, were decided, or that the police commissioners were the "statutory agents" of the city according to the *ratio decidendi* of *Young* v. *Gravenhurst* (1910), 22 O.L.R. 291, affirmed (1911), 24 O.L.R. 467, and *Scott* v. *Hydro-Electric Commission of Hamilton* (1914), 7 O.W.N. 385.

I do not think the circumstances attending the purchase and operation of this ambulance upon any fair construction sustain the premises upon which plaintiff's counsel based his argument. I have, heretofore, stated these circumstances and need not here repeat them. They shew that the decision to operate a motor patrol and ambulance as part of the police equipment was taken by the police commissioners and not by the city and that all the city did was to comply with the request of the commissioners to advertise for tenders for a patrol and ambulance and to appropriate the money required to pay for the vehicle selected by the commissioners. The police commissioners and not the city decided to operate a police ambulance, using for that purpose their own employees independently appointed and controlled by them.

In *Maxmilian* v. *City of New York* (1875), 62 N.Y. 160, an attempt was made to hold the City of New York liable for the negligence of the driver of an ambulance owned by it but operated by the commissioners of charities, a body in many respects similar to the Board of Police Commissioners. The action failed on the ground that the driver was not the agent or servant of the city, as will appear by the following extract from the judgment, p. 169:—

> The driver, the negligent actor, was the servant of the commissioners . . . He was appointed by them and put in charge of property of the defendant which was under their especial control. He was under their control only, liable to direction and removal by them only. He received his compensation directly from them, at a rate fixed by them. . . . He could have but one superior liable for his negligent acts. The defendant was not that superior; for he was not its servant by immediate appointment, nor was he its sub-servant; for the commissioners though appointed by the defendant in obedience to the statute were selected to perform a public service not peculiarly local or corporate, because that mode of selection was deemed expedient by the legislature in the distribution of the powers of government and are independent of the defendant in the tenure of their office and the manner of discharging their duties, are not to be regarded as servants or agents of the defendant for whose

acts or negligence it is liable, but as public or state officers with the powers and duties conferred upon them by statute.

Maxmilian v. *New York*, *supra*, was decided by a very eminent judge and the law, as declared by him, has been accepted and followed both in the United States and Canada. Reference may also be made to *Moir* v. *City of Halifax* (1893), 25 N.S.R. 241.

No doubt the city might have acquired an ambulance on its own behalf and caused it to be operated by its own servants, or it might have requested the Board of Police Commissioners or the members of the police force or the officers of any other city department to operate it, retaining the right of control over them as to the manner in which it should be used. Even then I am far from convinced, for reasons hereinafter stated, that the city would be liable for the negligence of the driver. But it is sufficient to say that nothing of that kind was done.

In *Hesketh* v. *Toronto*, *supra*, and *Shaw* v. *Winnipeg*, *supra*, the circumstances were very different. In the former the city undertook to establish and maintain a fire department and in the latter a waterworks department, in both cases to be operated by officials directly appointed and controlled by the city. Whether or not the action could have been sustained even had the work undertaken been for the benefit of the public generally and not of a local or corporate character may be open to question. Upon the question of in which category the operation of this ambulance naturally falls, I shall have something to say presently, but in the meantime I desire to point out that there is nothing in either *Hesketh* v. *Toronto* or in *Shaw* v. *Winnipeg* pointing to the conclusion that Fogg should be regarded as the servant of the city.

The cases of *Young* v. *Gravenhurst*, *supra*, and *Scott* v. *Hydro-Electric Commission of Hamilton*, *supra*, are also clearly distinguishable. In each of these cases the municipality had under the authority of a statute created a commission for the purpose of operating an electric plant owned by the municipality. The effect of the statute was to permit the council, instead of acting itself, to authorize, by by-law, commissioners to act for the corporation. Commissioners were appointed as a convenient method of operating the electric plant belonging to the corporation. The council was at perfect liberty to operate the works through its own officers had it deemed that course advisable. It chose to commit

MAN.

K. B.

BOWLES
v.
CITY OF
WINNIPEG.

Mathers,
C.J.K.B.

that duty to commissioners elected by the corporation at large. The operation of an electric plant for the purpose of selling light and power to the citizens is an enterprise of a purely local and corporate character, and in no sense is it one of the government agencies of the state discharging duties imposed for the general public benefit. It seems to me there was no escape from the conclusion that under these circumstances the commissioners were agents of the corporation.

The city is in a very different position with respect to the police commissioners. The statute gives the city no option in the matter. As to three out of the five constituting the Board it has no choice. The legislature has said who these three members shall be. It is only in the event of the office of County Court Judge or police magistrate being vacant that the city has any voice in the selection of any of these three, and then only during the vacancy. It is not at liberty to dispense with the Board and manage the police through its own officers. The city's police force must be appointed, managed and controlled by commissioners of police, not because the city wills it, but because the legislature says it is to be so. In the cases mentioned the commissioners were selected and elected by the inhabitants, those constituting the corporation. In the case of the police commissioners the city has no discretion either as to their constitution or duties, both of which are prescribed by statute. Their authority is not derived from the corporation and they are not subject to its control. It would be going a long way beyond the principles of the two cases relied upon to hold that the police commissioners were the statutory agents of the city.

It is said that the city might at any time have resumed possession of the ambulance and placed it in control of some other department. Assuming that it had that right, what conclusion does it lead to? Not surely that the police were agents of the city, but only this, that the city might have taken it out of the possession of those who were not its agents and over whom it had no control and have placed it in charge of those over whom it had control.

In *Mack* v. *Lake Winnipeg Shipping Co.* (1915), 24 D.L.R. 128, 25 Man. L.R. 364, a verdict was rendered against both the City of Winnipeg and the company because the plaintiff's horses were frightened and caused to bolt by the negligent operation by

the city of a steam wagon which it had hired from the company, together with the services of the company's engineer. The Court of Appeal set aside the verdict against the company on the ground that the wagon was at the time under the direction and control of the city and not of the company.

I come, therefore, to the conclusion that neither the police commissioners nor Fogg were the agents or servants of the city for whose acts the city is responsible upon the principle of *respondeat superior*.

The next ground upon which it was contended that the city is liable is under s. 63A of the Motor Vehicles Act, introduced in 1915 by c. 41, s. 14. This section is as follows:—

63A. In all cases when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at the time shall be liable for such loss, damage or injury, if it was caused by his negligence or wilful act, and the owner thereof shall also be liable to the same extent as the driver unless at the time of the injury the motor vehicle had been stolen from him or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

This section makes the owner liable for the negligence or wilful act of the driver unless the motor had been stolen or wrongfully got out of the possession of the owner or of any person entrusted by him with its care. Under it the question of agency is immaterial. It makes the owner responsible for the negligence or wilful act of the driver whether the driver was or was not his servant acting within the scope of his employment. But the word "owner" does not always mean the person in whom the legal title is vested. As said by Meredith, C.J.O., in *Wynne* v. *Dalby* (1913), 16 D.L.R. 710, at 714, 30 O.L.R. 67:—

The word "owner" is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve.

The purpose which the legislature had in view when, in 1915, it introduced s. 63A into the Motor Vehicles Act may be gathered from the attendant circumstances.

The Ontario Motor Vehicles Act, 2 Geo. V. c. 48, s. 19 (R.S.O. 1914, c. 207, s. 19), provided that

the owner of a motor vehicle shall be responsible for a violation of this Act, or for any regulation prescribed by the Lieutenant-Governor in Council.

In December, 1913, it was held by the Appellate Division of the High Court of Justice of Ontario in *Wynne* v. *Dalby* (1913), 13 D.L.R. 569, 29 O.L.R. 62, that the word "owner" as used in the

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

section quoted did not include an automobile manufacturing company which had delivered to a purchaser an automobile, receiving only a part of the purchase price upon an agreement that the title-ownership should not pass from the company until the balance of the price was paid in full, with the right to resume possession at any time if default were made in paying the purchase money or if for any cause the vendor had reason to feel insecure. While the car was in the possession of the purchaser and before payment the plaintiff was injured through the negligence of the driver employed by the purchaser. The plaintiff sued the driver and subsequently added as defendants the purchaser and the manufacturing company. It was sought to hold the company liable as "owner" under the Act. Kelly, J., p. 573, before whom the action was tried with a jury, dismissed the action against the company upon the ground that it was not an "owner" within the meaning of the Act.

> The legislators (he said) intended to reach the person who, having the control and management of the motor vehicle and having an interest such as that of a *bonâ fide* purchaser, is concerned in securing a proper driver or operator and who should under the intention of the Act be responsible for the acts of the person to whom, as servant, employee or agent, he intrusts its operation.

This decision was unanimously affirmed by the Appellate Division, consisting of Meredith, C.J.O., Magee, Hodgins, JJ.A., and Sutherland, J. The Chief Justice, in delivering the judgment of the court, said, p. 715:—

> The purpose of s. 19 was, I think, to avoid any question being raised as to whether a servant of the owner, who was driving a motor vehicle when the violation of the Act or regulation took place, was acting within the scope of his employment and to render the person having the dominion over the vehicle and in that sense the owner of it, answerable for any violation in the commission of which the vehicle was the instrument, by whomsoever it might be driven, and I do not think that it can have been intended to fix the very serious responsibility which the section imposes upon one who, like the respondent (the company), at the time the accident happened, had neither the possession of, nor the dominion over the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in land is the owner of the land.

In *Cillis* v. *Oakley* (1914), 20 D.L.R. 550, 31 O.L.R. 603, it was held by Mulock, C.J.Ex., Clute and Sutherland, JJ., Riddell and Leitch, JJ., dissenting, that s. 19 of the Ontario Act, as it then stood, did not make the owner of a car liable for the negligent driving of a person who had stolen the car from the owner, follow-

ing *Wynne* v. *Dalby*, *supra*. All doubt was set at rest that same year by the legislature adding to s. 19 the following words:—

> Unless at the time of such violation the motor vehicle was in the possession of a person not being in the employ of the owner who had stolen it from the owner.

In 1914 the case of *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471, was decided, affirming a decision of the Manitoba Court of Appeal (17 D.L.R. 150). The defendant's chauffeur had, contrary to instructions, taken the defendant's car out of a garage where it had been placed by his master's instructions, and while driving it injured the plaintiff. Both courts held that the plaintiff could not recover against the defendant, because at the time of the accident the chauffeur was not engaged in the performance of any act appertaining to the course of his employment. Several of the Judges of the Court of Appeal drew attention to the absence from the Manitoba Motor Vehicles Act of any provision similar to that in the Ontario Act affecting the liability of an owner. In the Supreme Court, Idington and Brodeur, JJ., expressed regret that the law compelled them to decide as they did. And the former expressed the hope that the law would be amended.

The word, "owner," as used in the Merchant Shipping Act, 1854, has been frequently held not to mean the registered owner if he has parted with possession and control of the ship, but has been restrained to the person who either by himself or his master or other authorized agent manages and controls her: *Meiklereid* v. *West* (1876), 1 Q.B.D. 428; *Hughes* v. *Sutherland* (1881), 7 Q.B.D. 160; *The Lemington* (1874), 2 Asp. M.L.C. 475, 32 T.L.R. 69; *The Hopper No. 66*, [1908] A.C. 126.

It was after attention had been thus drawn to the defect in the Manitoba law and after the term "owner" had received the judicial interpretation given it in *Wynne* v. *Dalby*, *supra*, and in the other cases cited, that s. 63A was added to the Motor Vehicles Act in April, 1915. It can scarcely be doubted that the purpose was the same as that ascribed to the Ontario Legislature in enacting the Ontario provision, and that it was not intended that the word "owner" as used in our Act should have any more comprehensive meaning than the same word has in the Ontario Act. The object was to make it impossible for an owner to escape liability upon the ground upon which *Halparin* v. *Bulling*, *supra*, was

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

decided. It was not intended to comprehend a person or corporation who, though technically the owner, had "neither the possession nor the dominion over the vehicle" nor any control over the driver.

The defect in the law pointed out in *Halparin* v. *Bulling* is fully covered by such a construction of the Act. It makes an owner responsible for the "negligence or wilful act" of the driver who is under his control, subject to his directions, and liable to be disciplined or dismissed for disobedience. If the Act also made liable a person who was only technically owner, but who had not the possession of or control over the machine, who did not appoint the driver or prescribe his duties, who had no control over him or power to issue orders to or discipline or dismiss him for misconduct, it would have done much more than remedy the defect pointed out in *Halparin* v. *Bulling*, and would have imposed an almost intolerable hardship upon motor car owners.

Having in mind the defect in the law which s. 63A was intended to remedy and the interpretation which had already been put upon the term "owner" as used in similar Ontario legislation, and in the Merchants Shipping Act, I am of opinion that the legislature did not intend to comprehend within the term "owner" a person or corporation whose relationship to the motor vehicle was that of the city to this motor ambulance.

As to the Board of Police Commissioners it is claimed that Fogg was their employee and that they are liable as a Board for his negligence and in any event they are liable under the Motor Vehicles Act as owners. On the other hand, counsel for the Board argues that a non-suit should be entered with respect to them because: (1) The Board is an agency of the state appointed by the state to perform a public duty and cannot be held liable for anything done in the discharge of such public duty. (2) The relation of master and servant did not subsist between the Board and Fogg, the driver, and the principle of *respondeat superior* does not apply. (3) The Board has no property and there is no fund out of which damages could be paid. The statute provides no means of realizing a judgment against the Board, thus indicating an intention that the Board should not be liable.

The Board is by statute placed in

sole charge and control of the police department of the city, the persons therein

employed, and generally all matters connected therewith. The police force shall consist of a chief of police and as many constables and other officers and assistants as the Board from time to time deem necessary to be appointed by and hold their offices at the pleasure of the Board. The Board shall make such regulations as they may deem expedient for the government of the force and for preventing neglect or abuse and for rendering the force efficient in the discharge of its duties.

The constables shall obey all lawful directions and be subject to the government of the chief of police and shall be charged with the special duty of preserving the peace, preventing robberies and other felonies and misdemeanours and apprehending offenders and shall have generally all the powers and privileges and be liable to all the duties and responsibilities which belong by law to constables duly appointed.

It will be noted that the "police force" consists not of constables alone, but as many "other officers and assistants" as the Board deems necessary. The contention of the plaintiff is that although the Board is not responsible for the acts of a constable acting as a constable, it is responsible for his acts in any other capacity, and is of course responsible for the members of the force who are not constables although necessary for the efficient administration of the whole force. It was not indicated exactly where the line should be drawn between acts performed as a constable and acts performed in another capacity. In other words, when is a constable not a constable? This vehicle was a patrol and ambulance combined. It is admitted that the operation of a patrol is a proper part of a policeman's duty. Is it to be said that the driver is acting *qua* policeman if he has a prisoner for a passenger, but not so if the passenger is a person accidentally injured on the street? Is the line to be drawn at acts which a constable alone can legally do? Clearly not, because a great part of the work ordinarily done by a constable could as legally be done by a person not a constable. For example, it has been held that a municipal corporation is not liable for a trespass committed by police constables while searching in a river for the body of a drowned person: *Gillmor* v. *Salt Lake City* (1907), 12 L.R.A. 537; nor for negligently shooting at a dog at large contrary to a by-law: *Moss* v. *Augusta* (1894), 20 S.E.R. 653; *Culver* v. *City of Streator* (1889), 130 Ill. 238; *Gibney* v. *Town of Yorkton* (1915), 31 W.L.R. 523; nor for injury due to the negligence of a constable appointed to enforce a pound by-law while driving a cow to the pound: *Givens* v. *City of Paris* (1893), 24 S.W.R. 974. Surely if the enforcement of a by-law

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

against dogs or cattle running at large; in searching for the body of a drowned person, a policeman is acting *qua* policeman, it can hardly be said that he was acting otherwise in conveying a person accidentally injured on the street to an hospital.

In *Winterbottom* v. *City of London* (1901), 1 O.L.R. 549, affirmed in appeal, 2 O.L.R. 105, it was held that the defendants were not liable for the negligence of the driver of a horse-drawn police patrol. The defendants in that case occupied a position similar to, and had practically the same powers and duties and responsibilities as, police commissioners under our Act. The driver in that case was a constable who had been duly sworn as such, but who had been assigned to the special duty of driving the patrol, just as in the case of Fogg. The argument was made in that case that the operation of a patrol was no part of the duty of the commissioners and the principle of *Hesketh* v. *Toronto* was invoked, but without success.

It is worthy of note that the *Hesketh* case, on which the plaintiff relied, was decided by Burton, C.J.O., Osler, Maclennan, Moss and Lister, JJ.A., and the *Winterbottom* case by Armour, C.J.O., Osler, Maclennan, Moss and Lister, JJ.A.

It may be, as was contended, that the commissioners were under no legal duty to operate an ambulance; but neither can they be compelled by any legal process that I know of to appoint or maintain an adequate or any number of police constables nor to equip them with truncheons or to supply the force with a police patrol, or any of the other aids to efficiency which a well-equipped police force at the present day possesses. But whether the duty was or was not imposed by law, it will not be denied that the operation of an ambulance for the purpose for which this one was used, namely, to take from the streets to an hospital or their homes persons in need of that mode of conveyance either from accident or sudden illness is a proper police function, and in my opinion the Board was, in acquiring and operating this ambulance, acting well within its implied authority. The taking charge of and caring for people accidentally injured upon the streets of the city has always been regarded as one of the functions of the police, and it is a duty which the police have uniformly performed. It is of great public importance that persons injured on the streets and in need of hospital or medical or surgical aid should receive it

as expeditiously as possible. Formerly, the police were in the habit of hiring a cab or of impressing a passing vehicle when called upon to discharge that duty, but it is obvious that their efficiency in that respect is promoted by having placed at their disposal a vehicle designed for the purpose. I think, therefore, that the possession of an ambulance was essential to the proper and efficient performance by the police of an important part of their public duty and in driving it on the occasion in question Fogg was discharging his public duty as a policeman.

It is next sought to hold the commissioners liable upon the ground that they had sanctioned the driving of this ambulance at a speed in excess of that allowed by law. It appears that the chief of police from time to time issued general orders relating to the use of patrol and ambulance vehicles. One, No. 360, dated October 14, 1911, states the uses to which the ambulance is to be put and the duty of chauffeurs. Another, No. 765, dated February 25, 1914, said that

> The ambulance wagon may be driven in cases of great emergency, namely, taking persons seriously injured to the hospital, at a speed of 25 miles an hour.

These orders were issued by the chief of police upon his own responsibility. There is no evidence that they were ever laid before the Board or that the Board was aware of their existence. Indeed, the evidence shews the contrary to be the fact. The chief of police had, of course, no power to authorize a speed in excess of that allowed by law. Those in charge of the ambulance, as well as Fogg, on this occasion believed, and I think rightly, that the case was one of great emergency within the meaning of this general order, but that circumstance would afford them no defence. The statute makes all constables subject to the government of the chief of police and in driving at the excessive speed attained at the time of the accident Fogg was not performing a duty imposed on him by the Board, but was acting pursuant to the orders of the chief of police. He was at the time under the immediate control of a sergeant of police, who occupied a seat beside him and to whose orders he was bound to conform. This brings the case within the principle of *Stanbury* v. *Exeter*, [1905] 2 K.B. 838. On this ground also I think the Board was not liable.

But there is still another ground upon which I think a judgment cannot be recovered against the Board. It has been created

MAN.

K. B.

BOWLES v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

by the statute a bare administrative agency without property, assets or funds out of which any judgment recovered against it could be realized, and it has no means of levying any taxes or rates or of acquiring any property or creating any fund for the discharge of a judgment. A judgment against it would be absolutely futile. It could not be compelled to place a sum in its estimates to pay the judgment, and even if it did so, there is no power by which the city could be compelled to provide the money. This phase of the case is referred to in *Winterbottom* v. *London Police Commissioners*, *supra*, at p. 555, and is made one of the grounds of the judgment of the Court of Appeal in *Bainbridge* v. *The Postmaster-General*, [1906] 1 K.B. 178. It was sought to fasten liability upon the postmaster-general in his official capacity for the default of a subordinate of the telegraph department over which he presided. Collins, M.R., at p. 190, says:—

> There is no provision in the sections of this Act, providing for any fund out of which damages should be paid by the postmaster-general. The revenue of the country cannot be reached by an action against an official unless there is some provision to be found in the legislation to enable this to be done.

And Mathew, L.J., by whom the only other judgment was delivered, said, at p. 194:—

> Further, if the postmaster-general is to be placed in a position of liability, whether official or personal, some provision would have been made to protect him from charges due to the defaults of the subordinate officers of the post office. There is not a provision to that effect.

It is not a case of pleading poverty as a defence, as appeared to be the case in *Wheeler* v. *Commissioners of Public Works*, [1903] 2 Ir. 202, so much relied upon by the plaintiff. Besides, in that case, the commissioners had a valuable property vested in them, viz., St. Stephen's Green, Dublin, and had the right to receive gifts. There are some expressions in the judgments which would indicate that they thought it a matter of indifference whether or not a body such as the defendants had or had not been provided with the means of payment. If a clear intention appeared that they should be liable for damages, I agree that the fact that no means of payment had been provided would not entitle them to immunity. But the inference to be drawn from the absence in the Act of any provision for payment is that it was not intended that there should be any liability.

As to the Motor Vehicle Act, the legislature created the Board of Police Commissioners without capacity to own anything, and

it is not to be presumed that, by this Act, it was intended to comprehend within the term "owner" a body from whom it had withheld the right to be an owner or to take away from it the immunity from liability which it previously enjoyed.

It only remains to consider the case of the individual defendants. The basis of the claim against them is that they did something which as a Board they had no authority to do. I have already indicated my opinion to be to the contrary. There is no evidence that individually they did anything; all they did was as a Board. If either individually or as a Board they had authorized Fogg to drive this ambulance at a speed of 25 miles per hour, they would have made themselves parties to the act. But they did not do so. The order allowing that speed was promulgated by the chief of police on his own responsibility, not as a servant of the commissioners or in pursuance of any authority derived from them, but in assumed discharge of his public duty under the statute as the governing officer of the force. The members of the Board are not the same from year to year. There is nothing to shew that the individual defendants were members of the Board when the order of February 25, 1914, was issued. The individual defendants might have sanctioned something that was done before they became members of the Board, but the onus was upon the plaintiff to shew that they had done so.

It is contended that they are culpable if they did not know that such an order had been issued. In other words, that they are estopped from denying knowledge of what the chief of police had done. If the chief of police were the servant of the Board and had issued this order within the scope of his authority as such servant (which for reasons already given I think he was not), the Board would probably not be heard to deny responsibility for his act. Whatever the relationship between the chief of police and the Board, there is no pretence that he was the servant of the individual members so as to make them vicariously liable. They could only be held liable if it were shewn that they individually associated themselves with the act complained of. There is not a tittle of evidence that all or any of them did anything of the kind.

I can see no ground whatever upon which any liability can attach to the individual defendants.

For these reasons the action must be dismissed as against all the defendants with costs if costs are asked for.

Action dismissed.

ALTA.

S. C.

MEDICINE HAT GRAIN Co. v. NORRIS COMMISSION Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. January, 9, 1919.

BROKERS (§ I—2)—GRAIN EXCHANGE—MARGIN TRANSACTIONS—CRIMINAL CODE, SEC. 231—SET-OFF AGAINST LEGAL TRANSACTION.

One who knowingly is a party to and acquiesces in a transaction inhibited under s. 231 of the Criminal Code cannot set-off an amount owing under such transaction from a member of a company against an amount due to such company from a legal transaction.

Statement.

APPEAL by plaintiff from the trial judgment in an action for the balance of an account. Reversed.

I. C. Rand, for appellant; *A. H. Clarke*, K.C., and *Hugh Phillips*, K.C., for respondents.

Harvey, C.J.

HARVEY, C.J.:—In June, 1914, one Ginther and one Finlay formed a partnership under the name of "F. M. Ginther Land Company," for carrying on a real estate and insurance and commission agency. During that year Finlay took no active part in the business. In the fall or winter they conceived the idea of carrying on farming operations on a considerable scale during the following season, for which they needed to obtain outside capital. They approached one, Yuill, who declined to advance money as an ordinary loan, but agreed to make an advance to a partnership in which he was to be a silent partner. In pursuance of the arrangement an agreement was entered into between the three parties on March 5, 1915, which declared Ginther and Finlay to be general partners, and Yuill a special partner, under the provisions of the Partnership Act, the term to commence on the date of the agreement and end on December 1 following. The name of the partnership was declared to be The Medicine Hat Wheat Co. The lands on which the farming operations were to be carried on were specified as those which Ginther had in the meantime leased for the year 1915. Those lands comprised 5,000 acres at a rental of $10,000 with an option of another thousand at a corresponding rental. Provision was made for division of the proceeds of the operations and other matters.

A certificate of the partnership was duly filed as provided by the Partnership Ordinance. The general partners were, of course, to have charge of the operations, and as they already had an office for their other business, it was used as the office for the Wheat Co. The defendants carry on business as grain commission brokers at Winnipeg, and have a branch at Calgary, which in 1914-15 was under the management of one, Roenisch.

The plaintiffs purchased some 5 or 6,000 bushels of seed wheat through the defendant's Calgary office, and during the season Roenisch kept the prospective crop in view with the hope of handling the sale of it in the fall. In August he visited Medicine Hat and saw Ginther and Finlay in the office of F. M. Ginther Land Co., and later in the month he advised them that he thought he could sell some August wheat at $1 a bushel. A contract of sale was made for the sale of 10,000 bushels which quantity was shipped on or before the last day of August. It realized more than $1 a bushel. In September, 13,000 bushels were sold through the defendants, but at a lower price. During October, the plaintiffs shipped and sold through the defendants about 35,000 bushels, and in November between 5 and 10,000 more.

This action is for a balance of about $15,000 claimed to be still owing in respect of the sales.

It is admitted that the amount claimed is a balance due on the adjustment of all the sales, but the defendants claim that they are entitled to hold it and set it off against amounts due them in connection with speculations in futures by Ginther on which he made many losses.

They claim that their whole dealings were with F. M. Ginther Land Co., and that Ginther's speculations were on behalf of the land company and that, therefore, the right of set-off exists. The evidence is most voluminous, the appeal book comprising over 2,000 pages, and the argument before us lasted a week. The larger portion of the evidence and of the argument was directed to the question of whether the defendants were actually dealing with the Ginther Land Co., and whether there was in fact a legal partnership under the name of the Medicine Hat Wheat Company. Apparently the same argument was pressed at the trial, for the trial judge, McCarthy, J., dismissed the action upon the ground that the defendants were dealing with F. M. Ginther Land Co. as principals, and that, therefore, they and not the plaintiffs were the parties entitled to sue. He did not dispose of the defendant's claim of set-off in their favour, but, on the contrary, expressed a doubt as to whether they could maintain it, and declared that the dismissal of the action was to be without prejudice to any action brought by the proper parties.

In the view I take of the case, the first thing to be determined

ALTA.

S. C.

MEDICINE HAT GRAIN CO. v. NORRIS COMMISSION CO.

Harvey, C.J.

is the validity of the defendant's claim of set-off, because there is no room to doubt that as between Ginther, Finlay and Yuill whatever interest there is in the proceeds of the grain belongs to them in their association under the name, The Medicine Hat Wheat Co., and before the defence was delivered they gave the defendants particulars of the names of the persons represented by that name. If, therefore, the defendants could not maintain their set-off against F. M. Ginther Land Co., they have no claim to retain any of these moneys, and the persons who are really entitled to them would be entitled to maintain an action for and receive them, regardless of whether they were known in any way to the defendants.

In *Beamish* v. *Richardson & Sons* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, a majority of the Supreme Court of Canada held that the respondents in that appeal, also grain brokers of Winnipeg, as these defendants are, could not recover for losses sustained while acting as agents for the appellant in speculating in futures for his benefit. S. 231 of the Criminal Code which is set up in answer to the defendant's claim of set-off declares:—

(The judge here cited the section.)

Now, if Ginther either on his own or on other's behalf, was doing what the section prohibits and the defendants were knowingly assisting in it, it seems quite clear that the transactions were illegal, and while the court would not assist Ginther to recover back any moneys he had paid, on the other hand it will not assist the defendants to recover, by action, set-off or otherwise, compensation for any losses suffered by them.

It is urged that the section in question was aimed at bucket shops, as the preamble to the original Act showed, as is pointed out by one of the judges in the Supreme Court. That may well be, but it by no means follows that even if all the business carried on in bucket shops was intended to be prohibited, the same thing was not intended to be prohibited if carried on in an office in which other clearly legitimate business is carried on. The point, however, is not one which is open for argument in this court. We are bound by the judgment of the Supreme Court of Canada, an appeal from which was refused by the Privy Council (see 50 Can. S.C.R. p. vii), although the decision was only that of a bare majority of the court and reversed the judgments in the courts of Manitoba,

in which only one of 4 judges took the same view as the majority there. The decision of the House of Lords in *Universal Stock Exchange* v. *Strachan*, [1896] A.C. 166, leads to much the same result even without the section of our Code.

It becomes necessary then to consider the facts with sufficient detail to determine whether s. 231 applies as is contended.

In the fall of 1915, soon after the shipping of the grain commenced, Ginther came to Calgary and spent most of his time here for the purpose of looking after the selling of the grain, Finlay on his part looking after the shipping.

As I have already indicated, about 65,000 bushels of wheat was sold through the defendant in apparently a legitimate way, each car being shipped and sold and an adjustment made in respect of each. In many cases advances were made by the defendants upon shipment and before sale, but not in all cases. The plaintiffs sold some of their grain otherwise than through the defendants, but it appears that the greater portion of the sales were made through them. Sometimes the statement of adjustment of the disposition of the proceeds of the car showed a balance due defendants by reason of the advance having been too much, and sometimes a balance due plaintiffs for which in some cases a cheque was issued, and in others credit was stated to be given to plaintiffs' account.

In the meantime, Ginther had been buying and selling on margins. As early as September 28, he bought 30,000 bushels of October wheat and 40,000 bushels of December wheat, and the notice of confirmation states that:—

> These transactions are made subject to the rules and customs of the exchange at the place of contract, and the right is reserved to close the transactions when the margins are exhausted without giving further notice.

This seems to contemplate, if not an intention, at least a possibility that the buyer will not obtain any grain under the contract. It is urged by counsel for the defendants that there was a real and enforceable contract for actual wheat for every purchase or sale that was made, but it may be observed that the statute contemplates such contracts, and declares illegal the making of them for the purpose of gain, without the *bonâ fide* intention of performing them in the ordinary way.

For some time the defendants kept only one account for both the margin transactions and the sales of the grain from the farm,

ALTA.

S. C.

MEDICINE HAT GRAIN CO. v. NORRIS COMMISSION CO.

Harvey, C.J.

but the transactions were not confused and settlements were made on them separately. Generally in the beginning a profit was made on the speculations in margins, and cheques were given from time to time to Ginther for the profits represented by the differences in the prices of purchases and sales without any pretence of any actual grain being received or delivered. Ginther was not a witness at the trial, but a portion of his examination for discovery was put in evidence by the defendants, including the following:—

Q. I believe in October a separate account was opened with you known as the option account? A. I don't know about that: I told them to keep the two separate.

The evidence shows that a separate option account was opened, and from it we find that on October 20, he had bought 169,000 bushels and sold 76,000 bushels of October wheat, 180,000 and 180,000 of November wheat, and 575,000 and 582,000 of December wheat, thus leaving him short 7,000 bushels of October and December each. The transactions continued, and the amounts and balances varied from day to day. On November 5, when practically all the grain from the farm had been shipped and a few car loads only remained unadjusted, Ginther was 522,000 bushels short, or, in other words, had sold that many more bushels than he had bought. On November 12, he began selling May wheat, the first transaction being one of 125,000 bushels, the result of which was that his total was 415,000 bushels short. Two days later that was increased to 439,000 bushels. There were also some transactions in oats, which it does not seem important to consider in detail.

On November 11, Mr. Yuill's solicitor called on Mr. Roenisch and inquired why the plaintiffs were not receiving the proceeds of the grain more quickly. Roenisch declined to recognise his right to the information asked for, but told him he would give Ginther all information. He did, however, state that Ginther was short. About the middle of November, defendant's Winnipeg manager came to Calgary and finding the condition of the accounts, he proceeded forthwith to buy grain to cover Ginther's shortages, and charged up the losses and held all balances for grain actually sold through the defendant's office.

Ginther's total option transactions covered nearly 2¼ million

bushels of wheat. It appears to me absurd to suggest that he intended actually to receive or deliver the grain represented by the contracts. That his purpose was gain is equally clear. His acts were therefore in direct violation of the section of the Code. That Roenisch could have had any doubt of Ginther's real purpose seems to me equally incredible.

It is contended that the defendants were justified in supposing that Ginther would protect all his contracts by the grain he had at his disposal or which he could obtain. If his transactions had been small, one might accept such a view, but being of the magnitude that they were, it seems impossible. Roenisch knew the quantity of grain available and never could have thought that in November Ginther could actually supply or intend to supply over half a million bushels of wheat, or that at a later date, when he sold 125,000 bushels of May wheat, he could have intended to deliver the actual wheat. As Halsbury, L.J., said, in *Universal Stock Exchange* v. *Strachan*, *supra*, at p. 171:—

> One does not adequately discuss that question (of sufficiency of the evidence) by taking each part of the case by itself and dissecting the case and disposing of this or that piece of the evidence as if it were to be looked at alone. The whole transaction has to be looked at.

One has to consider in this case the magnitude of the option transactions, the adjustment of the transactions from time to time without any actual delivery or receipt of grain, the knowledge of the defendant's manager of the condition and quantity of the actual crop of grain, the separation of the accounts, and many other details, and I find myself quite unable to conclude that Roenisch could have had any doubt of Ginther's actual intentions or that he was not actually a party to and assisting in his illegal acts. The knowledge of Roenisch is, of course, the knowledge of the defendants, but there is indeed one letter passing between him and his head office which indicates that even the head office manager had a pretty fair notion of the sort of business Ginther was doing. It is dated October 23, 1915, and is addressed to Norris Commission Co., Calgary, and from the Winnipeg manager. On the preceding day, Ginther had sold 95,000 bushels of November wheat and bought 110,000 of December, and on that day he had bought 100,000 and sold 80,000 bushels of November wheat, and had sold 100,000 bushels of December wheat. The letter is as follows:—

ALTA.

S. C.

MEDICINE HAT GRAIN CO. v. NORRIS COMMISSION CO.

Harvey, C.J.

We received several big orders from you last night and this morning and commenced to get worried about these orders for fear you would not get sufficient margins. We therefore wired you as follows: "Wire immediately who you are making these big trades for, also what margins you are collecting."

We then received your reply: " Ginther trading most large orders last four cars in advance balance 4,000."

To this we replied: "How much Ginther got open now; remember you are playing with fire. Its fine if secure, rotten if otherwise."

We now have your wire reading: "Ginther short 65 November and December just got two more bladings safe as church."

We are certainly pleased to note this account is in such good shape as it certainly looks like an attractive one. Nevertheless, as we understand it, Ginther has not much in the way of liquid assets back of him and we want you to realize how serious a matter it is to handle trades of the size Ginther is trading in unless absolutely secured all the time.

It is to be noted that the writer is not worried over the nature of Ginther's transactions but over the financial risk the defendants may be incurring.

I am of opinion then, for the reasons stated, that the facts of this case bring it flatly within the decision of *Beamish* v. *Richardson*, and that, therefore, the claim by the defendants in respect of the losses incurred by reason of Ginther's trading cannot be maintained even against him or the Land Co., and, therefore, certainly not against the plaintiffs.

The defendants then have no standing to question the effect of the agreement between Ginther, Finlay and Yuill in associating themselves under the name, The Medicine Hat Wheat Co. They are the plaintiffs while suing under that name. They are the persons entitled to receive the proceeds of the grain, and, therefore, they are entitled to judgment for the amount of the balance unaccounted for. That amount was $15,751.27 when the action was begun on December 15, 1915.

I would, therefore, allow the appeal with costs and direct judgment in favour of the plaintiffs for $15,751.27 with legal interest from December 15, 1915, and costs.

Stuart, J.
Beck, J.
Hyndman, J.

STUART and BECK, JJ., concurred with Harvey, C.J.

HYNDMAN, J.:—I concur in the result arrived at by the Chief Justice, the case being a parallel one to *Beamish* v. *Richardson*, 16 D.L.R. 855, 49 Can. S.C.R. 595, where a majority of the court held that the transactions were prohibited by s. 231 of the Criminal Code, and, therefore, illegal.

I wish to add, however, that my view is more in accordance

ALTA.

S. C.

with the reasons and conclusions of Duff, J., rather than the majority judgment.

Hyndman J.

The decision, however, being binding on this court, the appeal should be allowed with costs.

Appeal allowed.

B. C.

C. A.

Re VANCOUVER INCORPORATION ACT, 1900. CHANDLER v. CITY OF VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. January 19, 1919.

STATUTES (§ II A—96)—VANCOUVER INCORPORATION ACT—CONSTRUCTION—"JUDGE OF THE SUPREME COURT"—JUDGE ACTING AS "PERSONA DESIGNATA."

Section 127 of the Vancouver Incorporation Act, 1900, provides that any person interested may apply to "any Judge of the Supreme Court," and on production of certain specified evidence the judge, "after at least 10 days' service on the corporation of a rule to shew cause," may quash the by-law for illegality. On an application under this section a judge acts *persona designata* and not judicially.

Statement.

APPEAL by the plaintiff from the judgment and order of Gregory, J. Affirmed.

Robert Cassidy, K.C., for appellant; *Harper*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Pursuant to s. 127 of the said Act, Morrison, J., on the application of the appellant, Chandler, made an order calling upon the respondent (the City of Vancouver) to shew cause why the said by-law should not be quashed for illegality. The by-law is one affecting the operation of "jitneys" in the streets of the City of Vancouver. The order was made returnable on July 19, 1918, and on that date was moved absolute before Gregory, J., who enlarged the motion, after objection taken on behalf of the respondent to the judge's jurisdiction to deal with the matter, but without prejudice to the said objection. The matter came on again for argument before the same judge on August 2, when the said objection was renewed, it being contended on behalf of the respondent that Morrison, J., who made the order *nisi*, was acting *persona designata* under said s. 127, and that, therefore, no other judge had jurisdiction in relation to it. Gregory, J., adopted this view of the law and dismissed the motion and set aside the order *nisi*, with costs to be paid by the appellant to the respondent. From that order this appeal was taken.

S. 127 provides that any person interested may apply to

B. C.

C. A.

RE VANCOUVER INCORPORATION ACT, 1900.

CHANDLER v. CITY OF VANCOUVER.

Macdonald, C.J.A.

"any Judge of the Supreme Court," and on production of certain specified evidence the judge "after at least 10 days' service on the corporation of a rule to shew cause," may quash the by-law for illegality. There are two conflicting opinions upon the construction of this section. The one expressed by Morrison, J., on an application made to him, between the date of the rule *nisi* and its return date, to stay proceedings under the by-law. He held that the judge mentioned in the said section acts judicially and not *persona designata*. This conflicts of course with the view held by Gregory, J., when he subsequently dealt with the matter as above stated. In my opinion, this case cannot be distinguished from *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. The section there under construction is, so far as it affects the question before the court, the same as our s. 127. The Manitoba section uses the words "summons or rule to shew cause," while ours uses the words "rule to shew cause" only. This is a distinction without a difference.

In the argument before us much stress was laid upon this expression "rule to shew cause." It was contended that the use of these words indicated that the proceedings were to be taken in court; that a "rule to shew cause" has had for a long time a well-defined signification in legal proceedings, and hence an intention on the part of the legislature ought to be inferred to make the proceeding under said s. 127 a judicial one. On the argument I was much struck with the force of that contention, because in construing statutes one has to look at the whole Act when construing a particular section to find whether or not the section must be modified by reference to the whole where either of two constructions is open for adoption. It would not follow that because the Supreme Court of Canada came to the conclusion, as that court did in *C.P.R.* v. *Little Seminary of St. Thérèse* (1889), 16 Can. S.C.R. 606, that on the construction of the Act there in question the expression "judge" must be read as meaning judge *persona designata*, that a like construction should be given to the statute here in question. The use, therefore, of the words "rule to shew cause" might have a very intimate bearing upon the question. I find, however, that the same court in *St. Hilaire* v. *Lambert* (1909), 42 Can. S.C.R. 264, on a motion to quash an appeal from the Supreme Court of Alberta, had to construe words

of similar import. The appeal was from an order made under s. 57 of the Liquor License Ordinance in force in that province. That ordinance gave power to a judge to cancel a liquor license on an application made by "originating summons." It was argued that the use of the words "originating summons" indicated that the legislature intended the proceedings to be judicial proceedings because an originating summons was process provided for by the Rules of Court made under the Judicature Ordinance. This contention, however, was not acceded to. The Chief Justice, announcing the decision of the court, said, p. 266:—

The majority of the court are of opinion that this case comes within the principle decided in *C.P.R.* v. *Little Seminary of St. Thérèse*, and that we are without jurisdiction.

There remains to consider the propriety of the order dismissing the motion and setting the rule *nisi* aside. It was suggested that the proper disposition of the matter by Gregory, J., would have been to adjourn it before Morrison, J. I do not agree with this. The proceedings were wrongly taken in the Supreme Court. It was, therefore, I think, the duty of Gregory, J., to dispose of the matter before him in the only way in which, in my opinion, he could have properly disposed of it, that is to say, by dismissing the motion and setting the rule aside. Had the matter been adjourned to be heard by Morrison, J., I think that judge could only have dealt with the matter in the way I have suggested. He could not then have treated the proceedings as proceedings before him *persona designata*. The proceedings being in court, and wrongly in court, the only course, in my opinion, open to the judge was the one he pursued.

The appeal should, therefore, be dismissed with costs.

MARTIN, J.A., allowed the appeal. Martin, J.A.

MCPHILLIPS, J.A.:—I am of the opinion that the judge, Gregory, J., arrived at the right conclusion. McPhillips, J.A.

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

Appeal dismissed.

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION Co. v. CITY OF CALGARY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. January 9, 1919.

CONTRACTS (§ V—376)—SPECIFIED WORKS—TIME SPECIFIED FOR COMPLETION—EXTRA WORK REQUESTED AND CONSENTED TO—NEW CONTRACT—LIQUIDATED DAMAGE CLAUSE—ANNULMENT.

Where, in a contract with a corporation for the execution of certain specified works, it is provided that the works shall be completed by a certain day, the corporation requesting the contractor to do work outside the contract which necessarily delays the commencement of the work comprised in the contract, and the contractor acceding to this request, creats a contract the effect of which is to annul the clause as to liquidated damages altogether.

[*Dodd* v. *Churton*, [1897] 1 Q.B. 562, followed See *Reimer* v. *Rosen*, 45 D.L.R. 1, annotated.]

Statement.

APPEAL by the City of Calgary and cross appeal by plaintiff company from a judgment of Ives, J., in an action on a contract to do certain work. Affirmed by an equally divided court.

C. J. Ford, for appellant; *H. P. O. Savary*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—I am unable to accept the view that, because the defendants requested the plaintiffs to do additional work, equivalent to about 6% of the work provided for in the contract they, thereby, waived, or in other words showed their intention to abandon, the benefit of the clause of the contract providing for completion and for payment of damages in default. This additional portion of sewer was either extra work within the terms of the contract, which the city could require the contractor to perform under the terms of the contract, or it was not. If the former, then by the clear terms of the contract it, with all the rest of the work, must be completed within the period specified or such extended time as may be granted. If the latter, then the contractor was under no obligation to perform it, and his undertaking to do so was part of an independent contract, which he, voluntarily, entered into, without protecting himself against the term of the original contract. I cannot see why, in principle, it should affect the terms of the first contract any more than if it had been between him and some stranger to the city. In this respect, it was not the act of the city which caused the delay, but his own act in voluntarily undertaking something involving more work. It may be that this additional work should not be considered as an extra within the ordinary meaning of the terms of the contract, but, I think, perhaps if it were important to determine the matter definitely, it ought to be deemed an extra because the parties to the contract apparently treated it as such,

and it was competent to them to put any construction they saw fit upon the words.

In *Dodd* v. *Churton*, [1897] 1 Q.B. 562, extra work which the owner was authorized to require had caused delay in the completion. The question was, whether, on the proper construction of the agreement, this extra work was required to be done within the time set for completion. It was held that it was not, and that the consequence was that the damages for non-completion, within the time, could not be recovered. It is apparent that the present case does not fall within that decision which is dealing with something clearly an extra within the meaning of the contract and not within the period prescribed for completion, for if the additional portion of sewer was an extra, then by the terms of par. 13 of the contract, it is expressly provided that it is to be completed within the time specified, and the case falls within *Jones* v. *St. John's College* (1870), L.R. 6 Q.B. 115, mentioned in *Dodd* v. *Churton*, and in which it was held that, where the contractor had agreed to complete the work, including extras, within the time specified, he was bound and in default became liable to the damages provided in that case, which, as in this, was a definite sum per day during which default continued. I think, therefore, the plaintiffs are not free from the liability for damages for non-completion within the prescribed time.

The trial judge was of opinion that the $25 a day provided by the contract, was a penalty and not liquidated damages, and, therefore, not recoverable. I cannot accept this view. Most of the cases referred to us on the argument provide for damages by a fixed amount per day or week in the event of default. In the *St. John's College* case the amount was £3 per day upon a contract of £2,340 in amount, covering a period of 8 months during which the work was to be done. There was no suggestion that it was not proper liquidated damages. In the present case 11 months are given for doing the work, the contract price for which is nearly $175,000, more than 15 times the amount in that case, though the sum specified for damages is less than twice as much.

The principles applicable to determine whether such a payment is to be considered a penalty or as liquidated damages, have been discussed in many cases, the latest in the House of Lords being *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79.

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

Harvey, C.J

In that case the Court of Appeal had held that a sum of £5 agreed to be paid upon the sale of every tire sold in violation of the agreement, was a penalty. The House of Lords reversed this, holding it to be liquidated damages.

I cannot see that this case falls within any of the rules there laid down for deciding the amount to be a penalty, but it clearly does fall within the one Lord Dunedin, at p. 87, says is one for guidance in determining whether it is liquidated damages. He says:—

It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

It is apparent that the damages for the failure to complete a trunk sewer for the purpose of carrying off the general sewage of the city within a time specified, could neither before, nor after, the time be precisely estimated in money. Its measure would more likely be in the lives or health of the citizens affected.

In my opinion, therefore, the sum of $25 a day should be treated as liquidated damages.

The contract called for completion on July 1, 1912. Although the contractor had not notified the engineer of the cause of any delay as contemplated by clause 11 of the contract, the engineer did, as authorized by that clause, extend the time for 2 months. I can see no force in the argument that, because he did not make this extension earlier, the city is to be prejudiced or that it is material that, in his opinion at the time when he formally gave notice of the extension, the work could not be completed within the time as extended. The fact of the additional work was within the engineer's knowledge, and, perhaps, he was bound to give a reasonable extension without notice, but if so, and if he had given it at the time the additional work was required, 1 month would seem to have been more than a proportionate extension. He gave, in fact, double that, and the defendants make no contention that there was any liability on the contractor for default in completion, until after the 1st of September, 1912.

The trial judge held that the work was completed on July 5, 1913. He finds this, as against the evidence of the engineer, that the work was not completed then. It seems to me that the

contract itself has determined the evidence upon which that fact must be ascertained. Par. 18 provides that:—

> The date of the completion of the work shall be established by the certificate of completion of the work to be given the contractor by the engineer.

The fact that this paragraph is dealing with the obligation of the contractor to maintain the work in repair for a year after completion cannot, in my opinion, render this method of proof any less applicable. When the sewer is completed it is surely completed in respect to whatever obligations exist, and until then it is not completed.

There is no suggestion that the engineer withheld his certificate improperly, or that he was not perfectly honest in the opinion that the work had not been completed, and his opinion of completion is the one the contract provides is to be taken.

Although the engineer states that the work was not completed to his satisfaction until October 1, 1915, when it was put into use for the main purpose for which it was constructed, yet he did, on January 12, 1914, give a certificate for the purpose of showing the amount due the contractors on December 31, 1913, which certificate is stated to be a final one and deals with all moneys payable under the contract.

I am of opinion that this should be treated as a certificate of completion, and the city does not seriously contend otherwise.

In my opinion, therefore, the period during which the damages are payable extends from September 1, 1912, to December 31, 1913, or 486 days.

If the certificate of the engineer is to be the determining evidence of completion the fact that the city used part of the sewer long before it was fully completed can have no bearing on the case, but, in any event, I should hesitate to conclude that, because a man put a load of coal in the basement of his house under construction, he would be, thereby, estopped from denying its completion at that stage. This sewer was a trunk sewer to convey the general sewage, and could not be used for the main purpose for which it was being constructed until finally completed, and it seems to me clear that the damages prescribed are for the purpose of compelling, and are damages for default in, the final completion.

I think the city's appeal as to the two items for restoring pavement and for shortage of 17½ ft. of sewer should fail. There

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

is not sufficient evidence to establish the first as something for which the contractor was liable, and there is not sufficient evidence to show that the 17½ ft. shortage is not a part of the main portion.

There is no need to consider the question of interest because the damages which are payable to the city will wipe out the whole of this balance due the plaintiffs, and there will be no interest payable.

Harvey, C.J.

I would allow the city's appeal, with costs, and direct that judgment be entered for it in its counterclaim for $12,150 damages, with costs. The amount recovered by the plaintiffs should be set-off against this, and the city should have judgment against the defendants by counterclaim for the balance.

For convenience of taxation I would apportion the costs of the trial between the claim and counterclaim in equal shares.

Stuart, J.

STUART, J.:—I do not think the mere occurrence of the expression "while the works are in hand," in clause 7 of the contract, should be considered as sufficient to deprive the engineer of the right to exercise the power given him under that clause to "increase . . . . the dimensions," at the very beginning and before any actual work had been done. It would be a much more serious thing to alter dimensions after the work had started than before. For the purpose of construing this clause and the power of the engineer under it, I think the work should be treated as having been "in hand" forthwith after the signing and delivery of the contract. Clearly the addition of 700 ft. in the length of the sewer was an "increase in its dimensions." For this reason I think the 700 ft. was an extra within the meaning of the contract. But if I am in error in this, then I think the view of the Chief Justice is at any rate sound. In other respects, I concur in the opinion of the Chief Justice.

Beck, J.

BECK, J.:—There is a counterclaim by the City of Calgary against the plaintiff and Janse Bros. Limited, M. Janse and the U.S. Fidelity Co.

The case was tried by Ives, J., without a jury. He gave judgment for the plaintiff for $9,288.10 with costs and dismissed the counterclaim without costs.

The appeal is by the City of Calgary. There is a cross-appeal by the plaintiff company directed to the question of the date from which and the rate at which interest should be allowed to the plaintiff company.

The more important questions arise under the counterclaim. The first is one of penalty or liquidated damages for delay. The plaintiff company entered into an agreement with the city, dated July 31, 1911, for the construction of a main trunk sewer from the east side of the Elbow River near 9th Avenue to a point in East Calgary 12,000 ft. distant.

I extract some of the provisions of the contract upon the construction and effect of which the questions raised in this appeal turn.

Par. 2, in part:—

The work is to be commenced immediately after the contract is signed and is to be carried on with such dispatch that the whole is rendered up complete in first-class order not later than the 1st July, 1912.

Par. 4, in part:—

The engineer shall in all cases determine the amounts of work to be done hereunder which are to be paid for under this contract or in connection with said improvements, and he shall decide all questions which may arise relative to the interpretation and execution of the contract or to said works on the part of the contractors, and his estimates, directions and decisions shall be final and conclusive and unimpeachable for any cause.

It was provided that the obligation of the contracting company included (par. 5, in part):

the keeping of the same in repair and in good working order necessitated by any poor or defective work or materials or any neglect, act or omission on the part of the contractor in failing to fulfil any of the conditions of this contract upon him binding until the final percentages are paid.

Par. 5, in part:—

The whole work comprehended and included in this contract to be completed according to plans and specifications for the sum of $172,654, according to the following schedule of prices: An average price of $14.32 per lineal foot for 72-inch pipe including excavation, constructing and back fill for a total length of 12,000 ft.; an average price of $4.07 per lineal foot for manholes; an average price of $3. per c. yd. for solid rock excavation in open trench; an average price of $6 per c. yd. for solid rock excavation in tunnel. The city engineer shall determine the amounts to be paid per foot or per cubic yard as the work progresses provided, however, that the total amount to be paid under this contract shall not exceed the said sum of $172,634.

Par. 6, in part:—

The work embraced in this contract shall be commenced on each part of the work as the engineer may direct and the work shall be carried on continuously until the final completion.

Par. 7:—

No part of the work shall be altered from that shewn on the drawings or described in the specifications without the express sanction of the engineer, in writing; but should it be deemed expedient by the engineer at any time while the works are in hand, to increase, alter, change or diminish the dimensions,

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

Beck, J.

quality of material, or work, or alter the situation of levels, or vary the form of dimensions of any part of the said work, he shall have full power to do so, and to order and direct any such increase, diminution or alteration to be made, and that without in any way vitiating or affecting this contract; and the contractor shall, in pursuance of such order and directions as he may receive in writing, but not otherwise, execute the works thereby ordered and directed and in conformity therewith, and the difference in expense occasioned by any such increase, diminution, change or alteration so ordered and directed, shall be added to or deducted from the amount of this contract, and the engineer shall ascertain the amount of such additions or deductions, and in ascertaining such amount the engineer shall take into account the cost price including carriage if necessary to the contractor of any material not necessary or required in the works consequent upon such increase, diminution, change or alteration; but if any extra, additional or different works be proceeded with or executed by the contractor without previous orders given in writing, no charge for the same will be allowed.

Par. 8 provided at length that the contractor should be responsible for all defects though discovered only after completion, and though payment has been made for the defective work and provided that no certificate of the engineer shall annul the contractor's obligation in this respect.

Par. 11 contained the usual provision for the city taking over the work on notice in case of delay in progress, concluding with the following:—

But in the event of delay to the works by reason of strikes or combinations on the part of workmen employed, or by extra work, or by any act or omission of the corporation, such additional time as may be deemed fair and reasonable shall be allowed by the corporation, provided that the contractor notify the engineer in writing within 24 hours of the cause of such delay otherwise he shall have no claim.

Par. 12, bearing the caption or marginal note "penalty," upon which much argument was expended, is as follows:—

The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of $25 per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of a failure to complete said work as herein agreed, and is no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties.

Par. 13, as to extra work, etc., is also important, and is as follows:—

It is also agreed and understood that any extra work, changes, alterations, increases or diminutions in connection with the works, included in this contract

or the works of said trunk sewer, or arising out of or in connection with this contract is not to affect the condition of this contract or lengthen the delay within which the works under this contract are to be completed, to wit., on or before July 1, 1912, but any such extra work or changes, alterations, increases or diminutions shall be considered as if originally in this contract and be completed also within said first of July, 1912, the whole subject to the provisions of clause 11.

Par. 14:—

No charge shall be made by the contractor for hindrances or delays from any cause during the progress of any portion of the work embraced in this contract unless as hereinbefore mentioned and notice given by him as specified.

"Conditions and specifications" attached and maps and plans on file in the engineer's office were made part of the contract.

The attached specifications deal with the following subjects: general, shoring, etc., pumping, protection of work, water and sewer pipe, tunnel under C.P.R., classification, gravel, excavation, back filling, material for concrete, cement, sand, gravel, proportions, mixing, consistency, forms, invert, placing concrete, manholes, manhole covers, cleaning out, under drains, grades, blasting, inlets to sewer, fair wage, maintenance bond, *extra work*, cleaning up.

The clause as to extra work reads as follows:—

It shall be at the discretion of the engineer to order special re-inforcing of the sewer in the event of the foundation being on quick-sand or material of unsoundness; also to order that the proportions of the ingredients of the concrete be varied to suit special circumstances. But if such is necessary from circumstances other than bad material or quality of cement or bad mixing, an allowance will be made as an extra to the contractor but the same shall be delivered to the contractor in writing before going into effect.

By counterclaim the city claimed against the plaintiff company and its sureties, the other defendants by counterclaim $23,077.08 made up as follows:—

"To liquidated damages from September 1, 1912, to October 1, 1915, at $25 per day, $28,125; balance of contract moneys deducted therefrom, as per final estimate of accounts and certificate of the city engineer, between Janse Mitchell Construction Co. and the City of Calgary, dated November 30, 1917, $5,047.92; balance due the City of Calgary, $23,077.08."

In the course of the defence to the counterclaim the contracting company set up that the city itself repeatedly made default in the performance of the covenants on its part to be performed and neglected, and failed to pay the contracting com-

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

Beck, J.

pany moneys owing to it under the contract and (thereby?) and by requesting and consenting to variations in the construction of the works, and by adding these to work not mentioned in the contract, waived the completion of the work within the time fixed by the contract, and that on January 12, 1914, the engineer of the city gave the contracting company a certificate of the final completion of the works, and subsequently on March 24, 1914, issued a certificate stating that the contracting company had completed and stating that the city had accepted the works and certified the amount owing by the city to the contracting company under the contract, and did not at any time prior to the commencement of this action certify that the city was entitled to any deduction from the amount owing to the contracting company by reason of the alleged delay in completion and the defendants by counterclaim (the contracting company and its sureties) asserted that the whole of the works was completed and rendered up to the city in first-class condition on or about July 10, 1913.

Much argument was, as I have said, directed to the question whether the so-called "penalty" clause makes the $25 a day of delay in completion a penalty or liquidated damages. In view of the conclusion I draw from the conduct of the parties, it is unnecessary for me to decide this question, for I think the entire "penalty clause" was waived, as also the provision as to the date of completion.

The contract, it will be remembered, is dated July 31, 1911. The contracting company were "just getting on to the work" when on August 9, 1911, the city engineer wrote the company a letter as follows:—

> It having been decided to extend the trunk sewer to station 127, which is 700 ft. past the lower end as originally intended, you are authorized to proceed with this work. The price for same will be rated in accordance with the schedule of prices to base estimates attached to your contract and the work to be carried out in accordance with the specifications attached to that contract.

It is explained in the evidence that the line of the proposed sewer had been laid off in stations of a hundred ft. from a manhole at the Elbow River and running eastward. Work was actually commenced at station 127.

The schedule of prices referred to in the engineer's letter appears attached to the contract, and is headed "Price schedule

to base progress monthly estimates on"; at the foot are the words, "Schedule of Prices. Agreed to, Jas. T. Child (engineer), 31-7-11," that is, July 31. But it is evident that the original contract had been concluded before this memorandum was attached, and although it is true that in this so-called schedule of prices appears the item: "Tunnel excavation, lin. ft. 2,000 $14,000," evidently referring to the additional 700 ft., this extension was not in contemplation of the parties as forming part of the subject-matter of the contract at the moment of signature.

There is a dispute over the question whether this additional 700 ft. was "extra work" within that or other like terms of the contract, and the determination of this question has an important bearing upon some of the larger questions involved. I think I have quoted all the parts of the contract which make explicit reference to extra work.

On the construction of the contract as a whole, having regard to quantity, situation and character of this 700 ft. with relation to the work as originally contemplated, I am of opinion that this 700 ft., though of course extra work in one and a not improper sense, was not "extra work" within the meaning of those words as used in the contract. My reasons, briefly summarised, are as follows:—

1. The contract throughout, except in the passages I have quoted, refers to the work as originally contemplated and as an entire contract for that work for a lump sum.

2. The contract price is a lump sum, notwithstanding the reference to schedule of prices stated in the contract and in the subsequently attached memorandum; for these sums are clearly indicated to serve the purpose only of a basis for the monthly progress certificates.

3. The price was obviously fixed with direct and special reference to the length of the sewer; increase in that respect making it impossible, but that the cost of the work would be proportionately increased, and consequently the contract-price increased, as of course and necessarily, calling for an extension of time for completion, the right to an extension of time is admitted by the city engineer. Work of such a character, requested under such circumstances by the corporation surely does not come within the provisions of par. 11 relating to delays arising, amongst

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

Beck, J.

other things, from "extra work" requiring amongst other things that, in order to entitle the contracting company as of right to additional time, it should notify the engineer in writing within 24 hours of the cause of such delay, otherwise it shall have no claim.

4. If the additional 700 ft. is not extra work within the meaning of par. 11, this strengthens the view that on the proper interpretation of par. 7, that work is not extra work within par. 7. It may well be contended that work was not requested by the engineer "while the work was in hand," and that it does not fairly come within the intent of the words "to increase, alter, change, or diminish the *dimensions* quality of material or work or alteration of levels or vary the form of *dimensions* of any part of the work." The word *dimensions* in relation to such a work as a long sewer seems to lead the mind primarily to the idea of an increase in the height or breadth of the sewer rather than to a substantial increase in its length.

5. The attached specifications being part of the contract must, like every other part, be looked at to assist in the interpretation of any particular word or expression. The paragraph of the specifications (quoted) under the heading "Extra work," evidently does not contemplate any increase in the "dimensions" of length.

There are numerous decisions, the majority of which are to be found noted in Hudson on Building Contracts, 4th ed., illustrating the distinction between extras within and extras without the terms of the contract:—

> Extras may either be of a character contemplated by the contract and therefore *within* the conditions of the contract relating to the power of ordering them, or, on the other hand, may be outside the contract so as not to come within the extra clause at all. (Hudson, p. 435).
>
> What are extras to the contract, as distinguished from works independent of the contract, depend upon the nature of the work and the terms of the contract (Ib. 436).
>
> If the work is outside the contract (1) the terms of the contract such as conditions as to written orders, forfeiture, valuation and certificate by the architect, do not apply to the work; and (2) the basis for calculating the price to be paid for the work is a fair value in the opinion of a jury or an arbitrator and not of the certifier or valuer under the contract (Ib. 437).

To come now to the effect upon the clause providing for the payment of "liquidated damages" in the event of the work not being completed by a named date:—

Any failure by the building owner to allow the contractor the whole contract time within which to execute the works will put an end to the contractor's obligation to complete by the contract date, and relieve him of any obligation to pay the liquidated damages provided by the contract (Hudson, p. 521).

that is, ... contractor's obligation will be to complete within a reasonable time and in default of his doing so to pay, not the "liquidated damages," but such damages as the building owner proves he has sustained by reason of the unnecessary delay. See *Thornhill-Neats* (1860), 8 C.B.N.S. 831; 141 E.R. 1392; *Kerr Engine Co.* v. *French River Tug Co.* (1894), 21 A.R. 160, affirmed (1895), 24 Can. S.C.R. 703.

Liquidated damages stipulated for at a rate for each day or week of delay in completing the works, must begin to run from some definite date. It follows, therefore, that if there is no date in the contract, or if the date in the contract has for some reason ceased to be the proper date for the completion of the works, *e.g.*, from failure of the building owner to allow the builder the contract time for the execution of the works, and there is no provision in the contract under which the date can be substituted (*e.g.*, an extension of time clause giving power to extend the time for the *kind of delay* which has been caused by the building owner), and there is, therefore, no date from which liquidated damages can be calculated, all right to recover liquidated damages is gone (*Ib.* 523).

In *Dodd* v. *Churton*, [1897] 1 Q.B. 562, the head note is as follows:

Where in a contract for the execution of specified works it is provided that the works shall be completed by a certain day, and, in default of such completion, the contractor shall be liable to pay liquidated damages, and there is also a provision that other work may be ordered by way of addition to the contract, and additional work is ordered which necessarily delays the completion of the works, the contractor is exonerated from liability to pay the liquidated damages, unless by the terms of the contract he has agreed that, whatever additional work may be ordered he will nevertheless complete the works within the time originally limited.

The corporation requesting the contractor to do work outside the contract which necessarily delayed the commencement of the work comprised in the contract, and the contractor acceding to this request, to my mind created a contract, the effect of which was to annul the clause as to liquidated damages altogether and constituted a stronger case in that sense than the case in the decision to which I just referred.

My conclusion, therefore, is: (1) that the 700 ft. addition to sewer was not "extra work" within the meaning of the contract,

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

Beck, J.

but work quite outside it; and (2) that the arrangement for the making of this 700 ft. addition annulled the "liquidated damages" clause; this view being much fortified by the fact that the addition was contemplated by the parties to be done, as in fact it was before the commencement of the work comprised in the contract. Had this additional work been wholly unconnected with the original work, had it been an entirely independent work, it might perhaps have been rightly argued that the contractor must be taken to have undertaken the new work without any reference at all to the original work and, therefore, that the liquidated damages clause would be unaffected, but where, as here, the new work necessarily interfered with the performance of the original contract it must, in my opinion, in accordance with the principles established by a long line of English and colonial decisions, be taken to have the effect of annulling that clause. The evidence being to the effect that not only was it not intended and understood by both parties that, notwithstanding the additional 700, the whole sewer was to be completed within the time originally fixed, but that the contrary was intended and understood between them.

There is another ground upon which the waiver of the liquidated damages clause might, in my opinion, well have been rested. It is probably not sufficiently pointed to as a matter of pleading, but it appears quite clearly in the evidence, and there seems no reason to suppose that any evidence in answer could have been produced.

Before the completion of the sewer—which, as I pointed out, was commenced at its lower extremity—the city caused a number of latteral sewers to be connected with this main sewer, and thus to a considerable partial extent utilized it for the very purpose for which it was constructed. It seems to me to be quite a matter of course that the liquidated damages, being the damages estimated in advance for failure to complete, the situation obviously contemplated was that the sewer would not be used at all until final completion, and that, therefore, the liquidated damages were fixed to meet the case only of failure to complete so as to permit of the sewer being used for the purpose for which it was constructed, and to cover a loss from inability (whether from absence of right or physical inability to do so) to use the sewer as a completed work. The

liquidated damages are not severable. The city might have declined to make use of the sewer partially and have insisted upon exacting the full amount of liquidated damages for delay until ultimate substantial completion. If it chose to make use of the sewer before completion it was getting in part that for which the liquidated damages represented damages on the supposition that it was getting no use whatever of the sewer.

In a case decided by myself, *Watts* v. *McLeay* (1911), 19 W.L.R. 916, at p. 929, I said:—

> I hold as a matter of law, that, once the owner has seen fit to take possession of a building, although this may have no bearing on the question of completion or non-completion of the building, it prevents the owner from claiming so-called liquidated damages for non-completion. The owner may, if he sees fit, decline to take possession, or, in other words to take the benefit of the building in an unfinished condition and insist upon the payment of liquidated damages until the perfect (substantial) completion of the building; but, if the owner chooses to take possession it must be looked upon as an election to make use of the building to such an extent as it can then be made use of in substitution for the payment of the liquidated damages,

leaving, of course, the owner at liberty to prove his actual damage arising from failure to complete within the stated time or within a reasonable time according to the circumstances. This view seems to be inconsistent with the decision in a Nova Scotia case, *Horton* v. *Tobin* (1887), 20 M.S.R. 169, in which the Court was divided. I nevertheless adhere to the view I have expressed.

The date of the completion of the sewer is another question to be dealt with. The trial judge found the date of completion to be July 5, 1913. The city contends that the true date is October 1, 1915.

In the case to which I have already referred *Watts* v. *McLeay*, *supra*, I said as to completion, p. 920:—

> It seems to me that the question of completion or non-completion, in any particular case, must depend upon the term of the contract and the facts and circumstances of the particular case; and that, where there is honesty and a *bonâ fide* intention to complete the contract, there is completion if the contract is completed in all essential and material respects and there exist only slight imperfections in the work or slight deviations from the specifications which can be easily cured and corrected at an expense trifling as compared with the amount of the contract price; in other words, completion with such trifling imperfections or omissions if not wilfully made, is completion in the sense contemplated by such contracts as these; and, so far as the rights of the contractor depend only upon the question of completion he would, in such cases, be entitled to recover.

This view has been confirmed by the later decision of the English Court of Appeal in *H. Dakin & Co.* v. *Lee*, [1916] 1 K.B. 566.

ALTA.

S. C.

JANSE MITCHELL CONSTRUCTION CO. v. CITY OF CALGARY.

Beck, J.

Upon the question of substantial completion the right to hold back a certain precentage of the contract price is an important consideration, as I indicated in the former case cited.

There is a certificate of the city engineer headed "Progress estimate as per contract, subject to final verification." The estimate is stated to cover the period from June 5 to July 4, 1913. An examination of this certificate in the light of the evidence shows both that it does not purport to be a final certificate, and also that the work was not substantially completed on that date. The next certificate is dated January 12, 1914, and purports to be an estimate up to December 31, 1913, and to be a "final" estimate. The contract does not make the certificate of the architect a condition precedent to recovery. Although this certificate was not actually issued until January, 1914, the evidence in my opinion, shows that the sewer was substantially completed soon after the certificate of July, 1913—I think the correct date is July 13. In this connection it is important to note that the contractor undertook the obligation to keep the sewer in good repair and maintain in a state of efficiency for 1 year after the completion of the whole works, and that in a work of such a character, deficiencies, such as leakage of water from the outside—the bottom and the sides—into the tunnel from accidental defects in construction might very easily, as in fact they did, disclose themselves immediately after the substantial completion of the sewer. Furthermore, the clause as to the terms of payment after providing for the retention of 20% for 33 days provided for the retention of 5% for 1 year to be applied in payment of the expense of repairing and maintaining the works or doing any unfinished work.

I would, therefore, find the date of final substantial completion was July 13, 1913, and hold that interest ought to be allowed from the 16th of the following month, inasmuch as the city was entitled to retain 20% of the estimate for 33 days after completion and other adjustments also might occupy some time. As to the rate of interest it is as much in our discretion as in that of the trial judge. There can be little question but that the plaintiff, during the period of the transaction in question and doubtless ever since, would have to pay to a bank interest equivalent to 8%. I would, therefore, allow interest at that rate.

Strictly speaking, the city in a properly framed counterclaim would be entitled to claim damages for some portion of the delay in completion from July 31, 1912, to July 13, 1913, but counsel for the city admits in his factum, quite rightly it would seem, that to prove actual damages suffered would, owing to the circumstances, the nature and class of the work, be almost impossible. So that it seems to me no reference should be made to ascertain any possible actual damages, no evidence of any damage being before us.

There is an item of $995.49 which the city claims should be charged against the plaintiff. This was for repair of pavement on a street under which the sewer was constructed. There is practically no evidence produced by the city in support of this claim. Janse admits that conditions arose making it obligatory on his company to repair, but he says the company did repair in 1912 when the repair first became evident, and that when the city engineer again in 1913 called attention to the need of further repair the city did the necessary repairs and presented a bill which in fact has been charged against the company. The claim of $995.49 appears to be for work at the same locality done in 1914. It is quite clear that it covers much work going much beyond mere repair and far more than the plaintiff company was ever at any time liable to do. The trial judge disallowed the item. I think his findings should stand.

The other items, made the subject-matter of appeal, were dealt with during the argument.

The trial judge, after dealing with various items of the plaintiff company's claim, allowed him items which made a total of approximately $9,000, but I am not quite sure of the exact sum, for the formal judgment included the interest upon it from January 12, 1914, except upon 5% of it which the city was entitled to retain under the maintenance clause for 1 year from, the trial judge put it, July 3, 1913. The exact amount of principal can easily be ascertained. Upon that sum I would allow interest at 8% per annum from August 16, 1913, less interest for 1 year of 5% of the principal.

With this variation I would affirm the judgment of the trial judge, and this means dismissing the appeal of the city and allowing the defendant's motion by way of cross-appeal.

ALTA.

S. C.

Hyndman, J.

The plaintiff company should have its costs of the appeals.

HYNDMAN, J., concurred with Beck, J.

Appeal dismissed by an equally divided Court.

ONT.

S. C.

A. J. REACH Co. v. CROSLAND.
(Annotated).

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. October 22, 1918.

EASEMENTS (§ IV—45)—RIGHT OF WAY—TAX-SALE—EFFECT.

A right of way appurtenant is extinguished upon a sale and conveyance of the servient tenement for arrears of taxes. Confirmation of the sale and validation thereof by statute has the effect of curing any defect in the method of assessment.

TAXES (§ I E—45)—RIGHT OF WAY—"LAND."

A right of way appurtenant is not assessable as a separate interest in land, nor covered by an assessment of the dominant tenement; it is included in the "land" itself upon an assessment of the servient tenement.

Statement.

APPEAL by defendants from the judgment of Mulock, C.J.Ex., in favour of plaintiffs, in an action for a declaration that the defendants were not entitled to a right of way over a strip of land owned by the plaintiffs, being the southerly 10 feet of the plaintiffs' lot fronting on Macdonald avenue, in the city of Toronto, and for further relief. The defendants were the owners of land fronting on the north side of Rideau avenue, which intersects Macdonald avenue; the defendants' land extending northward to the southerly limit of the plaintiffs' land. The strip extended easterly from Macdonald avenue to the defendants' land. Affirmed.

The following is the judgment appealed from:—

Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—The plaintiff company are the owners of certain lands situate on the east side of Macdonald avenue, in the city of Toronto, a street intersected by Rideau avenue, and the defendant Elizabeth Crosland owns certain other lands situate on the north side of Rideau avenue and extending northward to the southerly limit of the plaintiffs' land. She and her husband, the other defendant, claim to be entitled by prescription to a right of way, between Elizabeth Crosland's land and Macdonald avenue, over a certain strip of land owned by the plaintiffs, being the southerly 10 feet of their land and extending easterly from Macdonald avenue to the defendants' land.

The plaintiffs contend that the defendants are not so entitled,

and ask for a declaration to that effect and for further relief. Amongst other things, the plaintiffs allege that the strip of land over which the defendants claim such right was sold for arrears of taxes and purchased by the Municipality of the City of Toronto on the 24th April, 1901; that, by a tax-deed bearing date the 1st October, 1902, the Mayor and Treasurer of the City of Toronto sold and conveyed the said strip to the said city corporation; and that the effect of the sale and conveyance was to extinguish whatever right of way over the strip of land the defendants may have possessed.

The defendants' counsel argued that the alleged easement was not assessable for taxes; and that, by the tax-deed, the city corporation acquired the land subject to the defendants' right of way. Assuming that, at the time of the tax-sale, the defendants were entitled to a right of way appurtenant to their lands over the 10-foot strip, the question is, whether it was extinguished by the tax-sale and conveyance to the city corporation.

The statute (an Act respecting the City of Toronto) 3 Edw. VII. c. 86, s. 8, declares that "all sales of land within the said city, up to and including the one held in the year 1902, and purporting to be made for arrears of taxes in respect of the lands so sold are hereby validated and confirmed, notwithstanding any irregularity in the assessment," etc.

The statute (an Act respecting the City of Toronto) 7 Edw. VII. c. 95, s. 9, declares that "all sales of lands within the Municipality of the City of Toronto, made prior to the 31st day of December, 1904, purporting to be made by the corporation of the said city for arrears of taxes in respect of lands so sold are hereby validated and confirmed, and all deeds of lands so sold executed by the mayor and treasurer and clerk of the said corporation purporting to convey the said lands so sold to the purchaser thereof or his assigns, or to the said corporation, shall have the effect of vesting the lands so sold and conveyed and the same are hereby vested in the purchaser or his assigns, and his and their heirs and assigns, or in the corporation and its assigns, as the case may be, in fee simple, free and clear of and from all right, title and interest whatsoever of the owners thereof at the time of such sale or their assigns and of all charges and encumbrances thereon except taxes accrued after those for non-payment whereof the said lands were sold."

ONT.

S. C.

A. J. REACH CO. v. CROSLAND.

At the sale of land for taxes in 1901, the strip of land in question was purchased by the Corporation of the City of Toronto; and the mayor and treasurer of the said city, by deed bearing date the 1st October, 1902, did "grant, bargain and sell unto the Corporation of the City of Toronto, its successors and assigns," the strip of land in question.

By deed bearing date the 15th June, 1909, made in pursuance of the Act respecting Short Forms of Conveyances, the Corporation of the City of Toronto, in consideration of $225, did grant unto one John G. Kent, in fee simple, the strip in question; and the plaintiffs derived title thereto through a subsequent purchaser from the said John G. Kent. Thus the plaintiffs are now entitled to whatever passed to the Corporation of the City of Toronto by the deed of the 1st October, 1902, or to John G. Kent by the deed to him of the 15th June, 1909.

The Assessment Act in force at the time of the tax sale and conveyance was R.S.O. 1897, c. 224; and s. 7 enacts that, subject to certain exemptions enumerated therein, all property in the province shall be liable to taxation. A right of way appurtenant is not one of the exemptions, and therefore is an interest in land not entitled to escape taxation, and must be assessed as a separate interest in land or be included in the assessment of land. Whatever is assessable under the provisions of the Assessment Act is salable for arrears of taxes; but a right of way appurtenant cannot be transferred by tax-deed apart from the dominant tenement. It exists solely for the benefit of the dominant tenement, and apart therefrom has no existence. Thus, not being salable as a separate interest, it is not as such assessable. Nor is it covered by an assessment of the dominant tenement. By s. 149 of the Assessment Act, taxes are made a special lien on the land taxed, not on any other land. A right of way appurtenant is not physically part of the dominant tenement, but an easement which proceeds out of other land. The taxes in respect of the dominant tenement do not become a lien on the servient tenement or any interest therein. Therefore, assessment of the dominant tenement does not constitute assessment also of an easement appurtenant thereto.

There remains but one other possible means, for taxation purposes, of reaching such an interest in land, namely, by assessment

of the servient tenement; and, in my opinion, the assessment of the servient tenement creates a charge on every interest in the land itself. Clause 8 of s. 2 of the Municipal Act, R.S.O. 1897, c. 223, thus defines "land": "'Land,' 'Lands,' 'Real Estate,' 'Real Property,' shall include lands, tenements and hereditaments, and any interest or estate therein, or right or easement affecting the same."

In *Tomlinson* v. *Hill* (1855), 5 Gr. 231, the plaintiff sought to establish a claim for dower in lands acquired by the defendant through a sale and conveyance for taxes. In dismissing the claim, the late Chancellor Blake said: "The only question is, whether the conveyance so executed is a bar to the plaintiff's claim. It is quite clear, I think, that the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament."

In *Soper* v. *City of Windsor* (1914), 22 D.L.R. 478, 32 O.L.R. 352, *Tomlinson* v. *Hill* was considered and approved, and the reasoning in that case was considered as not confined to a mere claim for dower, but as applicable to every claim for any interest in the land sold for taxes.

In *Re Hunt and Bell* (1915), 24 D.L.R. 590, 34 O.L.R. 256, land was conveyed to a purchaser by deed which contained covenants by the purchaser to observe certain building restrictions. Subsequently the land was sold for taxes, and the question was, whether the conveyance for arrears of taxes extinguished the covenant. Garrow, J.A., in delivering the judgment of the Court, said: "My opinion is, that the sale and conveyance for taxes had the effect of conveying to the purchaser the land free from any claim under the covenant"; and he quotes with approval *Tomlinson* v. *Hill*.

Applying the reasoning of these cases to the present one, I am of opinion that the taxes assessed against the strip of land in question became a charge upon that land and every interest in it, including any right of way to which the defendants may have been entitled; and that the sale and conveyance of the strip of land for taxes extinguished that right.

ONT.

S. C.

A. J. REACH CO. v. CROSLAND.

Having reached this conclusion, it is unnecessary for me to consider whether the defendants had acquired the right of way claimed.

For these reasons, I think the plaintiffs are entitled to the relief claimed.,

J. H. Cooke for appellants; *G. W. Morley*, for respondents.

The judgment of the court was delivered (orally) by

Mulock, C.J.Ex.

Meredith, C.J.O.

MEREDITH, C.J.O.:—Mr. Cooke has argued this case very fairly, and presented it from every aspect favourable to his client, but we do not see that there is any reason for disturbing the judgment that was pronounced by the Chief Justice of the Exchequer.

It may be that Mr. Cooke is right, and that the proper way to assess is to assess the dominant tenement for the added value given to it by the right to the easement which appertains to it, and that the owner of the soil over which the easement exists should be assessed for a sum less by what has been assessed in respect of the dominant tenement. Assuming that, the difficulty here is that that course has not been followed; the land itself has been assessed, that assessment has been confirmed, and there is a provision in the statute making it binding notwithstanding that no notice of the assessment has been given to the parties affected. Then, in addition to that, an Act has been passed declaring the sale and conveyance made in pursuance of it to be valid.* This is fatal to the appellants' case, and the appeal must be dismissed.

Appeal dismissed.

*See the Ontario statutes 3 Edw. VII. c. 86, s. 8, and 7 Edw. VII. c. 95, s. 9, referred to in the judgment of MULOCK, C.J. Ex.

Annotation.

ANNOTATION

The Easement of Way, How Arising or Lost.

Ordinarily a right of way is a mere personal license: *Naegele* v. *Oke* (1916), 31 D.L.R. 501, 37 O.L.R. 61. In order that there may be a true easement it is necessary that there should be a dominant and a servient tenement, and that the easement should be connected with, and for the enjoyment of, the dominant tenement: *Rangeley* v. *Midland R. Co.* (1868), 3 Ch. App. 310. Where an easement is claimed by prescription, the owner of the dominant tenement in substance admits that the property of the servient tenement is in another, and that the right claimed is being asserted over the property of another; and therefore where the claimant to the easement has been asserting title to the property over which he claims the easement, and exercises rights of ownership thereon as his own property, he cannot claim an easement in respect of the exercise of such rights: *Att'y-Gen'l of S. Nigeria* v. *Holt*, [1915] A.C. 599 at 617, 618; *Lyell* v. *Hothfield*, [1914] 3 K.B. 911.

Annotation.

An incorporeal right cannot be appurtenant to an incorporeal right. It is said that there are exceptions to this rule, and that there is nothing incongruous in the owner of a several fishery, which is an incorporeal hereditament, having a right of way over the land adjoining for the purpose of exercising his right: *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401. See Armour on Real Property, p. 20.

A right of way "appurtenant" must be appurtenant to some particular parcel of land, and should refer in the grant to the dominant tenement: *Miller* v. *Tipling* (1918), 43 D.L.R. 469, 43 O.L.R. 88.

A way in the rear of a house held to be included amongst "easements or privileges appertaining" to the land and to pass as such: *Ennis* v. *Bell* (1918), 40 D.L.R. 3, 52 N.S.R. 31.

The general words "ways, rights, privileges and appurtenances," in deeds of land, do not include the inchoate enjoyment of a prescriptive right of way until the statutory period has run: *McLean* v. *McRae* (1917), 33 D.L.R. 128, 50 N.S.R. 536.

A right of way will not pass by implication as appurtenant to land under the general words of "ways, easements and appurtenances" where the strip over which the way is claimed had not been in use as a way *de facto* to the land conveyed: *Peters* v. *Sinclair* (P.C.) (1914), 18 D.L.R. 754, affirming (1913), 13 D.L.R. 468, 48 Can. S.C.R. 57.

A way of necessity does not arise merely to afford greater convenience of access; nor will it, in the circumstances, pass as an "appurtenant" on the principle of non-derogation from the grant: *Fullerton* v. *Randall* (1918), 44 D.L.R. 356.

An agreement by an owner of land granting a privilege, to an adjoining owner, for a term of years, to draw water from a spring on his land, is a personal license by the grantor, not an easement, and does not run with the land: *Naegele* v. *Oke* (1916), 31 D.L.R. 501, 37 O.L.R. 61.

A conveyance of land for mining purposes does not confer upon the grantee the right to carry on the excavations in derogation of a right to a passageway for cattle reserved in the deed: *Canada Cement Co.* v. *Fitzgerald* (1916), 29 D.L.R. 703, 53 Can. S.C.R. 263.

A right to go on abutting land to draw water from a well there situate may be the subject of an easement created by a partition agreement and evidenced by indicating the well and path to same running from the house on the adjoining lands on the plan accompanying the partition deeds; and such easement will be binding on parties subsequently acquiring the parcel on which the well is situate with notice of such plan and partition agreement: *Publicover* v. *Power* (1914), 20 D.L.R. 310.

Where adjoining owners construct their buildings according to a party-wall plan, and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is thereby created, independently of any grant or deed, to the stairways and passageways necessary for the proper use of his building, and it is co-extensive with and as durable as the easement of the party-wall: *Smith* v. *Curry* (1917), 36 D.L.R. 400; 42 D.L.R. 225.

An easement by prescription in a way, not appurtenant nor essential to the beneficial enjoyment of a dominant tenement, can be acquired only by an uninterrupted use for the full period of twenty years: *Salter* v. *Everson* (1913), 11 D.L.R. 832.

Annotation.

The doctrine of lost grant as applied to easements was not superseded by the Limitations Act (R.S.O. 1914, c. 75, and previous Acts), but before it can be applied there must be affirmative proof that a burden was imposed on the servient tenement of the right claimed; the evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case and where established non-user not amounting to abandonment does not destroy it: *Watson* v. *Jackson* (1914), 19 D.L.R. 733, 31 O.L.R. 481, referring to *Tilbury* v. *Silva* (1890), 45 Ch.D. 98, and *Re Cockburn*, (1896), 27 O.R. 450.

An easement by way of lost grant may be acquired by long user of a highway for carrying a stream across it for milling purposes, though the right could not be sustained as a prescription at common law, or under the Limitations Act (R.S.O. 1914, c. 75, s. 34), for want of continuity of user: *Abell* v. *Village of Woodbridge* (1917), 37 D.L.R. 352, 39 O.L.R. 382. This decision was reversed by the Appellate Division, Middleton, J., dissenting: see 15 O.W.N. 363.

It has been decided that the Statute of Limitations does not apply to easements: *Mykel* v. *Doyle*, 45 U.C.Q.B. 65 (followed in *Ihde* v. *Starr* (1909), 19 O.L.R. 471, 21 O.L.R. 407); *McKay* v. *Bruce* (1891), 20 O.R. 709; *Bell* v. *Golding* (1896), 23 A.R. (Ont.) 485 at p. 489. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an intention to abandon, and an abandonment of, the right.

Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment: *Jones* v. *Township of Tuckersmith* (1915), 23 D.L.R. 569, 33 O.L.R. 634 (reversed by Supreme Court of Canada: See memo 12 O.W.N. 368, 13 O.W.N. 383); *Publicover* v. *Power*, 20 D.L.R. 310, referring to *Ward* v. *Ward*, 7 Ex. 838; *James* v. *Stevenson*, [1893] A.C. 162 at p. 168. And so where there was continuous non-user and non-claim of a right of way accompanied by adverse obstruction by the erection of buildings upon the land over which the right was alleged to exist for eleven years, it was held that the owner of the dominant tenement had abandoned his right: *Bell* v. *Golding*, *supra*. Whether the acts done are done by the owner of the servient tenement acquiesced in by the owner of the dominant tenement, or by the owner of the dominant tenement himself, makes no difference. The abandonment may be presumed in either case if the facts are sufficient: *Bell* v. *Golding*, *supra*. And the owner of the dominant tenement may so use it as to prevent him from successfully maintaining an action to assert his right, in which case the servient tenement is discharged from the burden of the easement: *Anderson* v. *Connelly*, 22 T.L.R. 743.

An easement may also, of course, be released by conveyance. And if the dominant tenement is mortgaged, the mortgagor may release the right as far as he and those claiming under him are concerned, but the right will still subsist in the mortgagee. On payment of the mortgage and reconveyance of the land the right of the mortgagee disappears, and the easement is completely extinguished: *Poulton* v. *Moore*, [1915] 1 K.B. 400. See Armour on Real Property, p. 530.

An easement of way ceases upon the union and servient tenements: *Blackadar* v. *Hart* (1917), 35 D.L.R. 489; *Rosaire* v. *Grand Trunk R. Co.* (1912), 42 Que. S.C. 517. An easement also comes to an end when the purposes

for which it has been acquired or the means by which it is exercised become unlawful: *Wilson* v. *Smith* (1915), 22 D.L.R. 909. **Annotation.**

The fact that a highway intervenes between the dominant and the servient estate is not a bar to the existence of a right of way as an easement: *Petipas* v. *Myette* (1913), 11 D.L.R. 483, 47 N.S.R. 270.

No such unity of possession is created by a lease of a dominant estate to the owner of a servient estate as to render s. 36 of the Limitations Act, 10 Edw. VII. c. 34 (Ont.), applicable to an action by the dominant owner to establish his right to use a prescriptive right of way, the use of which he reserved in such lease: *Thomson* v. *Maxwell* (1912), 3 D.L.R. 661.

The owner of the servient tenement of a servitude of passage liberates it by the extinctive prescription resulting from his possession for thirty years with no use of the right by the owners of the dominant tenement: *Hamelin* v. *Pepin* (1912), 42 Que. S.C. 276; *Goldstein* v. *Allard* (1912), 42 Que. S.C. 255.

Re HOMAN AND CITY OF TORONTO.

Ontario Supreme Court, Meredith, C.J.C.P. October 19, 1918. **ONT.**

S. C.

MUNICIPAL CORPORATIONS (§ II A—30)—POWERS—"CHARITABLE" AID—CATHOLIC ARMY HUTS—BUDGET.

The powers conferred on municipal corporations by s. 398 (5) of the Municipal Act (R.S.O. 1914, c. 192), to grant "aid to any charitable institution or out-of-door relief to the resident poor," does not extend to a grant for the purpose of creating army huts to serve as chapels for Catholic soldiers and to supply the latter with their devotional aids, the huts also to serve as recreation places for all soldiers; a resolution purporting the granting of such aid is therefore *ultra vires*. Nor has a municipal council the power to require or authorize the raising of funds in one year to be paid out or expended in the next or future years.

MOTION by Albert William Homan for an order quashing a resolution of the Municipal Council of the City of Toronto, authorising payment out of the municipal funds of a sum of $15,000 to a company incorporated under the Canadian Companies Act, under the name of "Catholic Army Huts," for the purpose of erecting, equipping, and conducting "Catholic Army Huts for Canadian soldiers, which shall serve the twofold purpose of chapels for Catholic soldiers and recreation huts for all soldiers, irrespective of creed, and to supply Catholic chaplains in the Canadian Overseas Forces and in the Canadian Militia with rosaries, medals, prayer-books, and similar devotional aids for distribution to Catholic soldiers." Granted. **Statement.**

T. R. Ferguson, for the applicant.

Irving S. Fairty, for the city corporation.

MEREDITH, C.J.C.P.:—Further consideration of the question involved in this matter has failed to enable me to discover any means by which the gift in question in it can be upheld; and also failed to enable the respondents to give any substantial answer **Meredith, C.J.C.P.**

ONT.

S. C.

RE HOMAN AND CITY OF TORONTO.

Meredith, C.J.C.P.

to the objection to the gift suggested upon the argument of the case.

It must therefore be adjudged, for the reasons given during the argument, that the gift is invalid because it was not within the power of the municipal body, which made it, to make it.

It was so *ultra vires*, in the first place, because the council of the year 1918 had no power to require, or authorise, the raising of the money, and payment of it, in the year 1919; and according to the terms of the gift it could be "raised in the taxes of 1919," and necessarily could be paid out of moneys so raised only.

For obvious reasons, the municipal council of each year is required, speaking generally, to live within its means—that is, is so required by law, whatever may happen in fact. It cannot, again speaking generally, create debts to be paid in future years without the assent of the ratepayers to the creation of such a debt. It cannot dispense the bounty the dispensing of which belongs to a future council.

That the gift is bad on this ground is hardly disputable; and hardly has been denied.

So too it seems to me to be invalid on the ground upon which the applicant attacked it; that is: that no municipal council has power to make such a gift.

The powers of municipal councils are circumscribed, territorially and otherwise. Unless power to make such a gift has been conferred by statute, there is no such power. There is no contention to the contrary; but it is said that such power is so conferred; that that part of the Municipal Act (R.S.O. 1914, ch. 192) which is in these words—"398. By-laws may be passed by the councils of all municipalities: . . . 5. For granting aid to any charitable institution or out-of-door relief to the resident poor"—confers it.

I cannot think that any one, even a lawyer familiar with the law of England respecting charities, could consider that these words cover the gift in question, the purpose of which is to enable those to whom the gift is made: "to erect, equip, and conduct Catholic Army Huts for Canadian soldiers, which shall serve the twofold purpose of chapels for Catholic soldiers and recreation huts for all soldiers, irrespective of creed, and to supply Catholic chaplains in the Canadian Overseas Forces and in the Canadian

Militia with rosaries, medals, prayer-books, and similar devotional aids for distribution to Catholic soldiers.''

Having regard to the local, and other circumscribed, powers of municipal councils, to the fact that the power is given alike to all such councils, great and small, and to the association of the latter words of the clause with the former without the intervention of even a comma, it seems to me that the popular meaning of the word ''charity'' in connection with pecuniary aid, is the meaning which the Legislature meant to convey and has conveyed by the words used; whether confined to charity within its territorial confines or not need not now be considered. Certain it is, in my mind, that the words used were not intended to cover and do not cover housing comforts and religious comforts or services to be given anywhere, without limit as to space or time.

And that the words are not wide enough to cover such a gift as this, subsequent legislation in the years 1915, 1916, 1917, and 1918,* has made more abundantly plain. If Mr. Fairty is right in his contention, all this subsequent legislation is waste paper; and municipal councils have been asleep in regard to their widespread ''charitable'' power until this day.

Mr. Fairty relies also upon the Act of 1915: but there is nothing in it that covers the purposes of the donors of this gift: he admits that there is nothing in the later enactments.

It is not needful to consider whether, even in the broad interpretation of the word ''charity,'' as applied chiefly to bequests and devises, in the Courts of England, all the purposes of the donees should be considered charitable; and all must be, else the inseparable gift must fail.

The resolution must be quashed: if allowed to stand, it might be acted upon though invalid: and, as the respondents refused to rescind it after its invalidity was pointed out to them, the applicant must have his costs of this application if he asks for them.

Motion granted.

***See 5 Geo. V. ch. 37; 6 Geo. V. ch. 40; 7 Geo. V. ch. 41; 8 Geo. V. ch. 34—all Acts relating to Grants by Municipal Corporations for Patriotic Purposes.**

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Hyndman, JJ. January 10, 1919.

CONSPIRACY (§ II B—15)—TRADE UNION—"SCABS"—STRIKE—LIABILITY—PARTIES.

Held, affirming the judgment of Simmons, J., 41 D.L.R. 719, by an equal division of court, that the members of an unincorporated association constituting the local of a trade union are individually liable for the damages and loss of wages resulting to non-union workers, whom they refused to take in as members and coerced their dismissal from employment under threat of strike. (Status of the association as party defendant discussed; Industrial Disputes Investigation Act, 1907, and Trade Union Act, R.S.C. 1906, c. 125, considered.)

Statement.

APPEAL from the judgment of Simmons, J., 41 D.L.R. 719, at a trial without a jury. Affirmed by an equal division of the Court.

H. Ostlund, and *A. M. Sinclair*, for appellant.

E. V. Robertson, for respondent.

Harvey, C.J.

HARVEY, C.J.:—I would dismiss the appeal with costs.

Without determining definitely whether this Local Union might have successfully contended that an action would not lie against it in its own name if it had taken the objection at the proper time, though, on this point, I am disposed to agree with the view expressed by my brother Beck. I think it is not open to it to raise the objection now after it has defended in its own name without objection.

This was the view adopted by Meredith, J. (now C.J.) in *Krug* v. *Berlin Union* (1903), 5 O.L.R. 463, and it seems to me to be the correct one.

The facts, as found by the trial judge, appear to establish that the members of the union in combination in their association as an organized union, determined to force the employer of the plaintiffs to discharge them by a strike, if necessary, and proceeded to put the intention into effect. The employers, however, on the threat of the strike, did discharge them, rather than submit to the inconvenience and loss of an actual strike.

I am of opinion that, because of our different legislation affecting trades unions and industrial disputes, the authorities in the English courts, or even our own earlier authorities, are not wholly applicable.

There is an able discussion of the effect of *Quinn* v. *Leathem*, [1901] A.C. 495, and other earlier trades-union cases, by Dicey, the learned text writer, in the Law Quarterly Review, vol. 18, at

p. 1, which is referred to, with approval, by Sir Frederick Pollock, in his work on Contracts, 9th ed. (1912), at p. 346.

All the decisions up to October 15, 1918, are fully considered in *Pratt* v. *British Medical Assn.* (1918), 35 T.L.R. 14.

I am by no means satisfied that the attempt to intimidate, made by the union in this case, by a combination of its members which could make it very effective and which, of course, would be quite different from the act of any single individual, does not bring the case within the principles of *Quinn* v. *Leathem*.

Without regard to our own special legislation, but having regard to our Industrial Disputes Investigation Act, 1907, which prohibits strikes except under certain conditions, the right of action, in my opinion, clearly exists.

If the employer had waited until a strike had actually taken place and then dismissed the plaintiffs, the defendants would, by unlawful means, have accomplished their purpose. It seems to me that the threat to do something unlawful to accomplish a purpose is, in itself, adopting an unlawful means for gaining the object.

The plaintiffs, having suffered damage by such unlawful acts, are entitled to maintain an action.

Stuart, J.

STUART, J.:—The general nature of this case is that the two plaintiffs are seeking damages from the defendants for having been deprived of employment as coal miners through the action of the defendants. They also ask for a declaration that they are entitled to membership in the defendant trade union and for an order compelling their admission thereto.

Before venturing upon a discussion of the grave legal problems raised it is, as always, very desirable to state the precise facts.

The two plaintiffs are Welshmen. They had been coal miners in Wales, and the plaintiff Williams had there been a member of the trade union. It does not clearly appear whether Rees had there been a member or not. Williams came to Canada and worked in the Fernie mines where he had also been a member of a union. In October, 1915, he came to the Drumheller coal district and went to work at a mine at a place called Wayne which was owned and operated by a company called the Rose Deer Mining Co. He left for a time and worked in the Lethbridge district, and there he was a member of the union, but returned in July, 1916,

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION NO. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

to Wayne. The plaintiff Rees came to the Edmonton district where he worked as a miner for some time, but there were no unions there, at least in the mines at which he worked, and he had not there been a member of a union. In August, 1916, Rees also came to Wayne and obtained employment in the Rose Deer Co.'s mine. When the two plaintiffs began to work in this mine there was no union in existence there. In the autumn of 1916 a union was organized. This was called Local Union No. 1562 of the United Mine Workers of America. This organization is international in its scope, but covers only the United States and Canada, and has its headquarters at Indianapolis, Indiana, U.S.A. It is not incorporated. It has a constitution, however, laying down by-laws and rules. It provides for district unions, sub-district unions, and for local unions. Eastern British Columbia and the Province of Alberta formed a territory called District 18, and for this district there is a set of officers consisting of a president, vice-president, secretary-treasurer and international board member. The executive board of the district consists of these officers and four board members elected by the local unions in the four sub-districts into which the district was divided. The Drumheller district apparently came within the territory of sub-district No. 3. The officers above mentioned are elected by the district at large by ballot of the members. At all material times one Thomas Biggs was president, presumably thus elected, of District No. 18. He was not shewn to be a member of the defendant Local Union No. 1562, and is not one of the individual defendants.

One George A. Tupper was the managing director of the Rose Deer Mining Co. After the organization of the defendant union the company entered into an agreement with the members of the union with reference to a scale of wages and some other matters. In January, 1917, trouble arose between the company and the men which may best be described by quoting the testimony of Tupper with regard thereto as follows:—

Q. What happened as a result of those difficulties you had with the union, Mr. Tupper? A. Things was getting quiet at that time and we decided to lay off one shift, and there was some trouble with the box-car men and the machine men and several unreasonable demands were made, and finally it came we decided we would pay off everybody. The union had not done as they agreed to do with us, and it was a source of annoyance to me all the time, because the other mines they were right along side of us and they were not organized and they were getting by with a far cheaper rate than we were,

and we were in difficulty all the time and so as the union agreed they said all the mines would be organized and they had not done it, and we were having so much trouble, I decided we would try and do without the union, and we paid everybody off and cleaned the camp off practically.

Q. Did you stop production for some time? A. Oh, yes, we did not do anything for some little time. I do not just remember.

Q. What did you do after you closed down for some time? How long did you remain closed down? A. I think somewhere around three weeks, if I remember correctly.

During the 3 weeks during which the mine was closed down most of the men departed and sought employment elsewhere. Tupper, upon cross-examination, gave these answers referring to this occurrence:—

Q. It was you who decided to do away with the union? A. To deal with the union.

Q. To do away with the union? A. Well, I guess it would be, yes.

It should be added that Young, one of the defendants, admitted that the union had "sent an ultimatum" to the company in January and stated also that Tupper had told them that he did not want a union until the whole Drumheller field was organized into unions. It should also be added that Tupper's testimony was that the men had not lived up to the agreement they had made with him the fall before. From all this it is fairly clear to my mind that there were disputes between the men and the company, and that Tupper, the company's manager, determined upon "a lock-out" as a means of destroying the union. Within 3 weeks he began to negotiate with the 12 or 15 men who had remained in Wayne to secure their return to work, and, thereafter, he increased his operations as men could be secured. It seems also fairly clear to my mind that he had disregarded the law in locking-out the men without having recourse to the procedure provided in the Industrial Disputes Investigation Act, while the men also in several small stikes which Tupper said took place in January had probably also done the same thing.

But it is for the coercion of Tupper into dismissing the two plaintiffs, the next fall, the same Tupper who practically confessed that in January he had locked the men out in order to break up their union that this action is brought. This deserves to be remembered.

Now among the 15 or 16 men who had never left Wayne and who returned to work were the two plaintiffs. The defendants tried at the trial to suggest that these men had petitioned to be

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

re-employed as non-union men for the purpose of injuring unionism. But their testimony simply was that their numbers were so small that they could not afford to pay the salary of one man called the check weigh man whom the men, under the Mines Act, were at liberty to employ for the purposes of weighing and keeping track of each man's output, and Tupper's testimony was that he asked the men to sign a paper dispensing with the services of this official in order to protect the company from liability for a breach of the Act. This document disappeared in some mysterious way and was not produced at the trial.

About March 8th, 1917, the plaintiff Williams received an anonymous letter signed "Welshman," which charged Williams and the others with "trying to kill the union," that it was "our" intention to re-establish the union and to spend all kinds of money to do so, invited Williams "and the others" to consider in what position they would then stand, suggested that they ought to "shudder at the thought of being placed in the list of scabs that sold out the union and union men for the sake of full employment at good wages for the summer time without any further consideration." It declared that they "were all a disgrace to the country they were born in," that they would not have been allowed to act in this way in Wales, and that if they did "it would mean an ordeal to go through that is only fit for scabs and beings that is not good enough to associate with man, angels, beasts or devils." The writer intimated that a list of their names was to be published in every local union in District 18, and also in some of the journals of the united mine workers. He suggests that they either "throw down the company and ask for the union again or quit right away" so as to save themselves from "everlasting disgrace." He suggested that their parents would be ashamed of them and disclaim them for their "dastardly action at Wayne," and charged them with throwing down the best agreement ever got in that part of the country, that they were "fools" so anxious to work that they could not see any further than their own selfishness, and stated that "we do intend to isolate you from the association of men that are worthy citizens for a country like this, and you will be known the world over as the 'scabs of Wayne.'" An answer was requested to box 96, Drumheller, which is some 7 or 8 miles from Wayne. *Hinc illal lachrymæ.* This, it will be

observed was in March. Several months passed. Gradually more men were gathered by the company as workmen, until, in July, 1917, there were between 75 and 100 men employed. Then there was a strike again, and, as Tupper said, "We had to recognize the union, we thought it better business." He said they were "advised very strongly by the coal commissioners, Armstrong and Harrison, that under present labour conditions they would be foolish to buck the union as the organization was getting strong and men were scarce, and under the conditions we decided it was the *best business* to recognize the union again."

Apparently, so far as the union was concerned, Tupper was prepared to destroy it and throw men out of employment or to recognize and accept it just according to what he thought was "the best business." He, of course, is not a party to this action, but he is the party alleged to have been "coerced."

With regard to the anonymous letter, all through March, April, May and June nothing is heard about it so far as the evidence discloses.

It is to be noted that there was throughout no suggestion that any member of the defendant union either wrote the letter or had anything to do with it. The only suggestion made by the plaintiffs is that it was written by Biggs, the president of District No. 18. It was written upon paper with the letterhead "Red Deer Valley Local, Drumheller 1746. Robert Wood, president. —. Hopkins, financial secretary." The plaintiffs on the argument urged that there was sufficient in the evidence to shew that Biggs was the author. If we accept that conclusion for the moment as correct, it means that there is nothing to connect any of the defendants with it, at least in the way of responsibility for it. Biggs was not under their control in any way except that no doubt if he stood for re-election to his office in future they would form a very small part of those upon whose votes he must depend for election. The letter was admitted in evidence, but it could not have been upon the ground that any of the defendants, either individually or collectively, were responsible for it. The *fact* that Williams had received an anonymous letter containing very abusive language was perhaps admissible as part of the history of the events leading up to the trouble and as part of the *res gestæ*, but it will, in my opinion, lead our judgment astray if we

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

entertain for a moment the thought that any of the defendants were responsible for the letter. There is not a tittle of evidence to shew that they, or any of them, were.

Well, in July, when apparently the union was resuscitated and its recognition by the company, the employer, was obtained, both the plaintiffs were invited to join it. Practically all the men working for the company had joined, including those 13 or 14 who, together with the two plaintiffs, had returned to work in February without a union. The plaintiff Williams refused to join the union until, as he said, "this anonymous letter was cleared up." This was about August. He was asked a second time to join by the president of the local union, Gray, and he gave the same reply and also gave Gray a copy of the letter "to take back to the local to shew them the reason I wanted that cleared up first." He said he offered to meet Biggs at a meeting of the local union to go into the matter, but that he was refused and was told to tell Biggs about it. He also said that he did tell Biggs about it, but that Biggs "refused to let them do it," that is, presumably refused to let them have the matter investigated at a meeting.

The plaintiff Rees testified that he had been shewn the anonymous letter by Williams a day or so after its receipt, that his feelings were very much hurt, and that though he was asked to join the reorganized union, he had refused for the same reason as Williams.

The two plaintiffs, whose employment was on piece work only, and, therefore, subject to termination at any time at the will of their employer without notice, continued to work at the company's mine until October when they each received a letter from Tupper. That sent to Williams was as follows:—

Oct. 1, 1917.

I have been advised by the union that you can be no longer employed in this mine, as the union object and say they will tie the mine up. Try and make some arrangements with the union to continue work.

Tupper said he sent this letter in consequence of an interview he had had with a committee of the men, consisting of Young, Stefanucci, and one Rose (not a defendant), who asked him if he wanted to operate his mine with these two men (*i.e.*, alone) or without them. He stated, "I couldn't say what words they used, but I know what words they used was enough to tell me. I think

they gave, I believe, 24 hours or the mine would be shut down. Other men would walk out or something to that effect. If I did not get those two men out of there the mine would be closed I took it."

The two plaintiffs then ceased work for about 2 weeks when the plaintiff Williams received from Biggs a conciliatory letter dated October 9, in which reference in a general way was made to the trouble existing, but it contained no specific reference to the anonymous letter. Biggs, however, did use the following language:—

> This day it was brought to me that there is quite an agitation in Wayne on account of you two not coming forward to sign for the union, and it was put up to me by an inward feeling in this way, "Can't I do something to heal this breach that seems to be getting deeper and broader?" Well, I decided to write you and try and bridge it over and, so far as I am concerned, I have forgotten all about it and only regret that such a thing ever happened, and by apologizing I hope to have found two friends. I shall have no hard feelings existing in my mind and sincerely hope you both will assist in harmonizing all things that has a semblance of discord as it appears to each of us.

There is nothing disclosed which Biggs could have to apologize for unless it was the obnoxious letter, and this with a comparison of the handwriting (if we are ourselves entitled to make such a comparison, as to which there has been, I think, a difference of opinion in the court in previous cases) rather indicates the real authorship of the letter, although in view of what subsequently happened it is perhaps better not to express any more definite opinion.

When Williams received this he shewed it to Tupper who, so Williams said, thought everything would be satisfactory and told him to go back to work, which both he and Rees did. They had worked only 2 days when, according to Williams, a pit boss came and told them they had to lay off again because the miners were going to quit. So they both quit work again. Williams then went to defendant Young, who was then secretary of the union, and asked him what the matter was, to which he got the reply "nothing only you would not join before and the men won't let you join now, if you go to work the men will walk out." The experience of Rees was practically the same.

I have for the moment omitted any reference to some other testimony shewing directly what pressure was brought to bear on Tupper and the company to dismiss the men, because there is a

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

question of admissibility involved and this is connected with the wider question of the parties to the action. What happened subsequently was that the two plaintiffs went to Calgary and took the matter up with Biggs, and one, Brown, who was secretary for District 18. There was, or was to have been, a convention in Calgary at which the plaintiffs expected to bring their case up. But, for some reason or other, they were unable to do this. Biggs got Brown to write a letter to the defendant union requesting that the plaintiffs be allowed to join. This letter was dated November 13. The new secretary of the union, one Redpath, wrote a reply to Brown. This was not produced, and Williams who had seen it in Brown's possession and had read it, was allowed to give evidence of its contents, because the defendant union had been given notice to produce it, although it was not shewn to be in their possession or control. Brown, who supposedly had it, was not their official, was not a party to the suit, nor was the larger organization of which he was an official, and he was not called as a witness. I, therefore, doubt the admissibility of the secondary evidence. At any rate, the reply was a refusal, and according to Williams applied to him and Rees the epithet "traitor," but of course the treason alleged was not to the King but to trades-unionism. Just exactly what was happening during November and December is not clear. The matter seems to have been in some form before the local union, but it appears that not until December 21 did the plaintiffs make any written application to join the union. This was considered by the union after a week or so, and then the decision was that they would not receive them, but would not object any longer to their working at the mine. This was communicated in a letter dated January 6, 1918.

There had, however, been some other events of some significance. Williams had, at some time, laid an information for criminal libel in respect of the anonymous letter against Biggs with, as he said, the approval of the crown prosecutor at Calgary. The preliminary hearing of this took place some time before the plaintiffs made their written application of December 21. Just when this information was laid is not clearly disclosed.

From the evidence of Williams, it seems natural that he did it not only after Biggs had written his apology of October 9, but also after Biggs had instructed Brown to write the letter

of November 13, expressing a strong desire that the men be admitted to the local union, that they should "give these men another chance as all men make mistakes."

I think it is proper to refer to these occurrences because it is possible that in the consideration of the law the questions of intention and of malice may become material.

After the letter of January 6, the plaintiffs went back to work at the mine. They do not seem to have been directly interfered with thereafter, but they told in the evidence of having thereafter been called "scabs" by some unidentified individual workmen, and of having been turned out of a boarding-house because the landlady had said the other men objected. The landlady was not called as a witness, and this surely must be treated as hearsay and therefore inadmissible. They also complained that they were discriminated against by the men operating the machines in the mine.

Finally, on January 21, 1918, the plaintiffs began this action. In the statement of claim it is alleged that the defendant local union 1562 is a body corporate, that the defendant Albert Young was a check weigh man and the other individual defendants miners and all members of the local union, that by the constitution of the local union it is provided that membership therein shall be open to individuals of any race, colour or creed; that prior to October 14, 1917, the plaintiffs had made application for admission as members in the local union in accordance with the constitution and by-laws, and that the local union wrongfully, and in violation of the constitution and by-laws, refused to accept the plaintiffs as members whereby they had suffered damage, that they again made application on December 21 and were again wrongfully refused; that prior to October, 1917, the plaintiffs had been employed as coal miners by the Rose Deer Coal Mining Co., and had, while in such employment, earned $8.50 a day on an average, that the individual defendants, of which there are 6, while members of the local union about October, 1917, did

wrongfully and maliciously conspire together and combined with each other and with other persons unknown to the plaintiffs to injure the plaintiffs by depriving them of their employment and to induce the dismissal of the plaintiffs from the employment of the company, and in pursuance of conspiracy and such combination did intimidate the said employer by objecting to the continued employment of the plaintiffs and by threatening to tie up the mine by going on strike in the event of their demand not being acceded to and did succeed in

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

having the plaintiffs, without other justification or excuse, discharged from the employment of the said company, whereby the plaintiffs suffered damage. It is further alleged that the defendant, the local union, in October, 1917, did wrongfully and maliciously and unlawfully with intent to deprive the plaintiffs of their employment as coal miners with the company, notify the company that the plaintiffs could no longer be employed by the company and that the local union objected to their further employment and did wrongfully and, in restraint of the continued exercise of their trade as coal miners, intimidate the company by threatening a general strike and to tie up the production of the mining property of the company and did, thereby, succeed in inducing, without other cause, the dismissal of the plaintiffs whereby they suffered damage.

The plaintiffs, therefore, claimed general damages of $1,000 against the local union for wrongful refusal to admit them as members, a declaration that they are entitled to be members, and an order compelling their acceptance as such, general damages of $1,000 against both the union and the individual defendants for the other wrongs alleged, and special damage against all the defendants for $871.25, being the wages they could have earned during the suspension of their employment. The union and the individual defendants joined in one defence which denied the alleged corporate character of the union, and also specifically denied in detail all the allegations of the statement of claim. They also, as an alternative defence, alleged that the plaintiffs, while members of the union, had violated its constitution and by-laws, and by their acts caused the union to become disorganized and defunct, and that their conduct at all times was opposed to the best interests of the union. They also alleged that, whatever had been done by them, was done solely with intent to further the legitimate objects of the organization with which they were connected, and not to injure the plaintiffs.

The case was tried by Simmons, J., without a jury, and he gave judgment for each of the plaintiffs against each of the defendants, including the union, for $100 general damages, and for $435.62 as damages for loss of wages (41 D.L.R. 719). He did not deal at all, apparently, with the claim for admission to the union, and this part of the action is practically dropped as there is no cross-appeal.

We are here face to face with one of the serious problems of law connected with trades unionism.

In the view I take of the case it is unnecessary to spend time in considering one matter much discussed upon the argument,

namely, the status of the local union as a party to the action. I am inclined to the view that, in consequence of what occurred, in consequence of the union, without protest having appeared by its solicitor, and defended the action, and in consequence of such things as the use of a stamp which the union officials referred to in their evidence as a seal, the union ought not to be heard now, nor at the end of the trial, to say that they could not be sued. But I do not express any final opinion upon the matter.

Assuming the decision of this point to fall against the contention of the union, I confess I find myself unable to see how it can, in the circumstances of this case, be of any assistance to the plaintiffs. Granting that the union can be sued as a party to the action on some such principle as was applied in the *Taff Vale R. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, then, in my opinion, it must be considered as an entity of some kind for all purposes. It seems to me that the court ought not to treat it as such an entity in one breath for the purpose of saying it can be sued, and then in the next breath, for the purpose of applying the principles of law invoked in the case, dissolve it into its parts and look thenceforth at the parts and not at the whole. If the union is to be made liable for damages and its funds attached by a judgment then, surely, it must, beyond all question, be for some act done by it *as such entity* and not for the individual acts of the persons who, together, constitute the entity. Whatever kind of a legal conception we entertain in regard to it, whatever legal character we ascribe to it in order to make it a "suable" party, if I may use the expression, I think that conception and that character must be adhered to throughout. Otherwise, we wander in a fog and play fast and loose with legal principles.

A partnership is liable, of course, for the acts of its individual members. But this is on the pure principle of agency. The trial judge treated the union as the agent of the men. However that may be, I do not think each member of the union could be called the agent of the union.

This being so what is the position? The local union is sued for damages. It must surely be for some act of the union as such. What is charged against the union? It is not charged with conspiracy. In par. 7 of the statement of claim which alone

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

contains a charge against the union no mention is made of either a conspiracy or a combination of any kind. And even if the union, as a legal entity of some kind, were charged with conspiracy it seems to me to be clear that it would have to be charged that this single legal entity had conspired or combined with some other person or persons. A single person cannot be guilty of a conspiracy with himself. But as I say there is no suggestion at all in the statement of claim that this legal entity, the local union, had combined or conspired either with itself or with anyone else. How then, I feel obliged to ask myself, can combination and conspiracy be made in this case an element of legal liability on the part of the union?

There was much discussion about what was called a representative action. Here again, I think, one may assume, though I am not yet prepared to admit, that all the individual members of the union could be properly represented in an action against them *as individuals*, by the union of which they were members, that is, that, for the mere purposes of the style of cause, the name of the union could be inserted as a defendant as representing all its individual members. Still, even in that case, the persons who are really defendants are the individuals and not, by any means, this legal entity, the union, which merely is chosen to *represent* them. As I have always understood the idea of a representative action some few individual members of a class are selected to represent that whole class but these, so selected, are themselves also charged with the wrong. Even if we were to extend the idea of representation so as to justify the insertion of the name of such an organization as that in question here as representative of its members, it is impossible to say that the general body or entity thus selected is a portion or part of the class which it represents. But taking it as properly representative, as to which I wish to reserve my opinion because the point is certainly quite new, then the allegations made, upon which legal liability is grounded, must be taken as allegations of acts on the part of the individuals so represented. Now, in these allegations, as set forth in par. 7 of the claim, there is no charge of conspiracy or combination at all. Neither can I assent to any suggestion that this is what is substantially charged. So far from this being so, the plaintiffs have, in the first place, singled out six individual

members of the union, and have definitely charged them personally with a combination and conspiracy in the first part of their claim. They, then, proceed to charge the union as a definite single legal entity, as a corporation in fact, but not in words alleging any combination or conspiracy, with doing certain acts which are claimed to make the union, as such, legally liable in damages. To proceed to treat this latter claim as alleging a combination or conspiracy, either by the union itself as such, when there is no one outside of its own members suggested with whom it could have conspired, or by all the individual members among themselves, when already six of them have been specifically and separately so charged, seems to me to be going beyond all reasonable limits in the interpretation of the language used by the parties in their pleadings. I know of no class of action in which it is more to be desired that parties should be precise in their allegations of fact as a basis of liability than these actions where trades unions are concerned with all their inevitable suggestion of economic, industrial and political conflict. The court must carefully keep away from all such conflict and deal only with legal rights and legal wrongs, and to enable it to do so properly the precise facts, upon which these rights and wrongs are based, must be not only proven but plainly and definitely asserted by accurate pleading.

It is true that an application was made at the close of the evidence to have an amendment allowed shewing that the six individual defendants were being sued as representative of all the members of the union. I do not understand the amendment to have been allowed. Certainly, it was, in my opinion, unjust to allow it at that stage. Up to that moment there was no suggestion that anyone, but the six individual defendants, were being charged with a conspiracy and combination. But the purpose of the proposed amendment was just exactly to put the case in such a shape that all the individual members of the union would be so charged and would, perhaps, be liable to individual judgments binding each of them, rendered upon the ground of conspiracy. No opportunity of any notice of this change of the basis of attack would have been given. Indeed it amounted to adding a whole class of persons individually as defendants who, up to that time, were not defendants at all.

I am, therefore, of opinion that no element of combination

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION NO. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

or conspiracy can be invoked in this case as against the union in order to establish legal liability, and that, unless it can be shewn to be liable without such an element, it cannot be held to be liable at all. I may add that, if it were otherwise, it would seem to me that upon a charge of tort against a joint stock company, the case against it otherwise failing, might be buttressed by a suggestion that the shareholders had conspired and combined to do the act, even where they had not been made personal defendants and had not been so charged.

When we proceed to examine what it was that the union did, I think there is some danger of confusion. The union, as such, neither struck nor threatened to strike simply because the union, as such, was not employed by the mining company and was not, as such union, being paid for any work. I am not aware that the principle of collective bargaining has become so generally agreed to that it is safe for the court to make decisions just as if it were admitted, although even if it were, it still might be doubtful, unless the matter went so far as a single joint payment by the company to the union for the work done by its members, the union could properly be treated as an employee. Certainly, only a person who is an employee can quit work. In this case the employees were the individuals; each of them received his pay separately for what he separately did, and it was, therefore, only those individuals who could strike.

I am aware that the union has the funds, which are the most convenient source from which a judgment for damages could be satisfied, but I am unable to see how this furnishes any justification for passing quietly through a mist where legal principles are no longer discernable so as to reach the fund.

First, then, as to the evidence with regard to admissibility of which, as against the union, there is no dispute. This consists of certain extracts from the minute book of the union, which are as follows:—

Moved and seconded, that pit committee interview manager Tupper re a couple of non-union men employed at his mine; that one week's time will be allowed for the management of the R.D.C. Co. to investigate the matter of Bill Rees and Bill Williams; that the report of the R.D. pit committee be accepted; report given by R.D.P. Co. that a special meeting of the R.D. miners had been held and the matter of Bill Rees and Bill Williams satisfactorily arranged; that those two non-union men who worked at Rose Deer mine be advised to keep away. Carried.

Moved and seconded, that Tom Biggs' letter be placed on file; that application for membership for Williams and Rees be laid over for a week; that secretary take all evidence to lawyer in the case of T. Biggs and that case of Williams and Rees be left over until that case is settled; that letter from secretary E. Brown be left over for a week; that the communication from Ed. Brown, District 18, in regard Williams and Rees be accepted and left on unfinished business. Carried.

Moved and seconded, president ask the members if they have anything against these men, that we accept these men as members. Carried.

Moved and seconded, that we do not object Williams and Rees to work here if they get the work but we do not accept them in the union. Carried.

It is unfortunate that the dates of these motions were not more specifically ascertained, but we must take the evidence as it stands before us.

Then there is the evidence of Tupper, already quoted, which, of course, is subject to the question whether the men who came to him were authorized by the union to say what they did.

Then the defendant, Young, was examined for discovery. So far as appears this examination was of himself, in his character of an individual defendant. I am quite unable to see how this evidence could be used against the union. Even if the rules as to examination of officers of corporations for discovery could, with propriety, be stretched to cover a legal entity, so uncertain and vague in its nature as this union, there would still be the objection that he was examined apparently solely on his own behalf. This was apparently the view of the trial judge.

Now, Young stated in his evidence that, so far as he could remember, there was no definite action taken by the union in October in regard to admitting the plaintiffs to the union, or referring to any application of theirs to be admitted. He said the matter was probably talked about among the men. The minutes above quoted do not shew that the matter was ever brought directly before any meeting of the union until the occasion of a written application which was shewn otherwise to have been made late in December. For myself, I doubt very much, particularly in view of the action taken against Biggs, whether the plaintiffs ever made any serious attempt to secure re-admission to the union in October. The fact probably is that they were aware of the general attitude of the men and felt it would be useless to press the matter. But I can discover no evidence to justify one in inferring, with any certainty, that the union did, in October, refuse to admit the men to membership.

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

Young also stated that, on one occasion, he and Stefanucci, as the pit committee of the union, interviewed Tupper at the wishes of the union, and intimated that if he wanted to operate his mine with those two men he was at liberty to do so; he said that he supposed this meant that "our men would take a holiday anyhow if those two men were working"; that Tupper was told that the men would not work; that he and Stefanucci had been authorized by the union to convey this information to Tupper; that Tupper told them he would see that these two men would not work and to go back and tell the other men to go to their work. Young also stated that they had another interview with Tupper after the plaintiffs had received the letter of October 9 from Biggs containing the apology. He said:—

> I guess the same thing must have happened, the men must have decided that these men could work if they wanted to, but they would not work with them. We were sent as a committee to interview the manager and the same thing took place and he dismissed them again.

Now, even assuming these facts to be properly proven, my opinion is that, aside from any effect which the provisions of the Industrial Disputes Investigation Act, 6 & 7 Edw. VII., c. 20, may have, there can be no liability attaching to the union. The most that can be said is, it seems to me, that the union, through its officials, conveyed to the employer an intimation that the employees, the workmen, had decided to, or would strike if the plaintiffs were continued in their employment. This is, as it appears to one, exactly what Allen, the defendant, did in *Allen* v. *Flood*, [1898] A.C. 1. So far as malicious intention goes, the purpose in that case seems to have been much more open to question than the purpose here. The workmen there objected to the employment of the plaintiffs, not because they were not members of the union, for they belonged to a different trade altogether, not because of anything they were then doing, but solely because, at a previous time, when working for other employers, they had encroached upon a field of work which the men of Allen's union were determined to keep exclusively to themselves. Allen was not himself employed. He could not, therefore, strike any more than the union here could strike. I do not propose to quote at length from the ruling judgments in *Allen* v. *Flood*, but there are certainly several expressions in those judgments which actually refer to just such a case as we have here, of an attempt

to attach liability to the men themselves or their union. See pp. 130 and 148 for example. I should like, however, to quote these words of Lord Herschell, p. 142:—

I think it (individual liberty) is never in greater danger than when a tribunal is urged to restrict liberty of action, because the manner in which it has been exercised in a particular instance may be distasteful.

In *Perrault* v. *Gauthier* (1898), 28 Can. S.C.R. 241, which, although a case from Quebec, was avowedly decided by the Supreme Court of Canada, upon the principles of English law, that court held that the members of a trade union who had actually struck because their employer was employing a non-union man, and for the purpose of inducing him to dispense with his services, were not liable to that man in damages. It seems to me that it is surely, at least, as serious a thing actually to do an act for such a purpose as it is to convey an intimation that another party intends or has decided to do it.

With respect to *Quinn* v. *Leathem*, [1901] A.C. 495, the element in that case which led the House of Lords to hold the defendant liable was clearly that of conspiracy and combination, and for the reasons I have already given that element is not present in this case, so far as the defendant union is concerned.

It is, however, to be observed that neither in England (*Allen* v. *Flood*), nor in Ireland (*Quinn* v. *Leathem*), was there any such statutory law as that contained in our Act of 1907 above referred to, while there has been cited to us no Canadian case, and I have myself found none, in which the facts occurred subsequently to the passing of that Act. The provisions of that Act, however, raise considerations which seem to me to be very serious. Both *Allen* v. *Flood* and *Perrault* v. *Gauthier* were decided upon the principle that there is nothing illegal, either in stopping work, that is, in striking, or in communicating an intention on the part of other persons to do so. But s. 56 of our statute (6-7 Edw. VII., c. 20 (Can.)) says, in part:—

It shall be unlawful for any employer to declare or cause a lockout, or for an employee to go on strike on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act.

A "dispute" is defined in the interpretation clause as

Any dispute or difference between an employer and one or more of his employees as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

or employees (not involving any such violation thereof as constitutes an indictable offence); and, without limiting the general nature of the above definition, includes all matters relating to (4) claims on the part of an employer or any employee as to whether and if so under what circumstances preference of employment should or should not be given to one class over another of persons being or not being members of labor or other organizations, British subjects or aliens.

A strike is defined as

The cessation of work by a body of employees acting in combination or a concerted refusal or a refusal under a common understanding of any number of employees to continue to work for an employer in consequence of a dispute done as a means of compelling their employer or to aid other employees in compelling their employer to accept terms of employment.

By s. 58 an employer declaring a lockout contrary to the Act is liable to a fine, and by s. 59 any employee who goes on strike contrary to the Act is also liable to a fine. This means that by Canadian law it is a penal offence for either employers or employees who are within the Acts to omit to secure a Board of Conciliation and wait for its decision before declaring a lockout or going on strike.

It is a great pity that, for some reason or other, both sides seem to disobey this law with impunity.

But the present question is, did what occurred here take this case out of the principle of the decisions in *Allen* v. *Flood* and *Perrault* v. *Gauthier*? There is no doubt that, if the workmen had actually gone on strike before waiting for the report of a Board, very strong reasons would have existed for saying that they had, by doing an illegal act in order to force their employer to discharge the plaintiffs, made themselves civilly liable in damages to the plaintiffs, but I prefer to say no more on that question, because such a case is not before us. The men did not go on strike. But even aside from Young's evidence there would seem to be, no doubt, some ground for the suggestion that the workmen had threatened to do so. Tupper's evidence as to what was said to him, taken with the second resolution quoted above from the minute book, furnishes, no doubt, very good reasons for believing that an intimation of such an intention was conveyed to him.

But after much careful consideration, I have come to the conclusion that the court ought not to hold the union, as such, even if properly sued, liable upon this ground.

In the first place, this exact ground was apparently not presented at the trial, as it is not mentioned by the trial judge.

It is not mentioned in the respondents' factum. It was not directly raised on the arguments before us, because only a vague reference was made to it by someone. I am not sure that it was by the respondents' counsel at all.

In the second place, there is the clear inadmissibility of Young's evidence which leaves the exact nature of the communication made by the union somewhat vague. We have no means of knowing whether the second resolution was connected with the second notice given by the pit boss to the plaintiffs or not. If it was connected only with the first intimation testified to by Tupper, it is to be observed that the plaintiffs went back to work after that, and it was on account of the second one suggested by what the pit boss said that the final dismissal took place, for which damages are claimed.

In the third place, I do not think that an intention to commit an illegal act was made sufficiently clear. The right to strike has not been entirely abolished. It is only postponed. No time limit is definitely shewn to have been mentioned to Tupper, for he was very vague and uncertain in his memory of what was said. There is no evidence of authority to give the 24 hours time referred to by him, and an intention to disregard the terms of the statute was by no means clearly indicated to him. What was said to him could, not unreasonably, be interpreted as nothing more than a "claim" in the words of the interpretation clause, that is, as merely the creation of the dispute and nothing more. The men said they would not work there if the plaintiffs were retained.

In the fourth place, as I have already said, it was the employees, the persons who were employed, who jointly, no doubt, and by concert decided to strike if anyone did. The union, in my view, was nothing more than the organization or body which by its officers conveyed to Tupper the information that the men had made such a decision, if such a decision was made at all. Certainly no mention of a cessation of work is made in the extracts from the minute book.

I am quite well aware that some of these considerations can be brushed brusquely aside as a rough and ready method of saddling possible liability upon the union, but I confess I am unable to keep my mind and eyes upon the steps by which the union is reached. Doubtless, it is largely because no one can define what kind of a legal entity the union is.

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION NO. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Stuart, J.

For these reasons I think the appeal of the union should be allowed with costs; the judgment entered against it should be set aside, and the action dismissed as against it with costs.

It remains to consider the case of the individual defendants. These 6 men are charged with a combination and conspiracy. Aside from this allegation their case comes directly, in my opinion, within the decisions in *Allen* v. *Flood*, and *Perrault* v. *Gauthier*, subject again, of course, to the possible effect of our statute. This latter cannot, in my opinion, for the first 3 of the 4 reasons given above in the case of the union itself, be invoked even against these individual defendants.

With respect to the matter of conspiracy or combination, there does not, in fact, appear to be any evidence at all against the defendants, Stefanucci, Gerew, Marcelli, Loranzo, and Karmuckle, that they took part in any way whatever in the matter. Whether they were present when any concerted arrangement or combination was made or not, or had anything to do with it in a meeting or otherwise, is not suggested anywhere in the evidence. I cannot assent to the contention that every member of the union is individually liable for whatever the other members may have done quite apart from him, and with no evidence at all of his connection or participation therein, unless, of course, the union were (what it is not) in itself an unlawful association with unlawful objects, in which case it might be otherwise.

With regard to Young, finally, I cannot find anything he did which would bring him within the decision of *Quinn* v. *Leathem*. The evidence is altogether too vague, in my opinion, to rest anything upon in the way of conspiracy. Anything he is actually shewn to have done falls far short of the things done by the defendants in that case.

I, therefore, also think the appeal of the individual defendants should be allowed with costs, the judgment below set aside, and the action dismissed with costs.

I have not considered it necessary to spend time pointing out the very obvious distinctions between this case and a number of those cited by the respondents. In some of them actual contractual rights were interfered with. Here the plaintiffs were not injured in respect of any contractual right at all. In other cases the employer, not the discharged workman, was the plaintiff, and *Quinn* v. *Leathem* is itself an example.

In conclusion I think it worth observing that the conduct of the plaintiffs themselves from the point of view of union men was not altogether free from criticism. They were union men. They were twice asked to re-join the union. The members of the union at first were quite willing to think no more about the past. But the plaintiffs had received an anonymous letter, very scurrilous it is true, but as it turned out they had no reason to blame any of the members of the local union for it. Perhaps they believed some of them had something to do with it, although they do not say even that in their evidence. They no doubt exercised a right to stay out of the union till it was cleared up. But if they had treated the anonymous letter as worth just what anonymous letters always are worth, there would have been no trouble. For some reason or other, even after they got an apology from the author, and were content to join the union, they, or one of them, laid a criminal information against the author. I think they, being union men themselves and, therefore, apparently believing in the principles of the union, had themselves largely to blame for all the trouble.

Of course, the general failure to enforce the Industrial Disputes Investigation Act was also to blame. That Act seems to have been disregarded by both the employer and the employees in their previous relations.

Beck, J.

BECK, J.:—This is an appeal from the judgment of Simmons, J., at a trial without a jury.

The reasons for judgment led me to suppose that the judge intended to give judgment against the individual defendants only and not against the union by name. Upon asking him, I find I was correct, and that there is a mistake in the formal judgment in this respect.

I think the judge has sufficiently stated the facts, and that his findings of fact are correct. I think, too, that his conclusion of law is also correct, that the individual defendants are liable. I think the Industrial Disputes Act (c. 20, 1907) makes inapplicable to some extent a number of English decisions (the more important of which are discussed by Dicey in 18 L.Q.R. 1-5; approved by Pollock, Torts, 9th ed., 347). On the other hand, for reasons which I shall discuss at some length, I think the union under its adopted name is also liable.

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Beck, J.

The individual defendants were held liable because of their membership in the union and of their acts in that capacity, and the damages awarded against them were awarded solely in respect of acts done as representing the union. Under these circumstances I think the plaintiffs should have their option or be put to their election, to take judgment either against the individual defendants alone or the union alone.

I now proceed to give my reasons why it is my opinion that the plaintiffs are entitled to judgment against the union, although, as the fact is, the union is not registered.

In connection with this question, it seems to me to be convenient to consider what is the practice and procedure of this court, as disclosed by its Rules of Practice and Procedure, in regard to representative or class actions. In the first place, it is to be noted that it is not open to question the validity of any of these rules; for they have been, in effect, confirmed by statute, 1908, c. 4, s. 5.

Again, although our rules are very largely based upon the English rules, not only do they contain many modifications of and differences from the English rules, but in their totality constitute an environment of tradition methods and machinery differentiating to a marked degree the practical operation, in this court, of rules expressed much in the same form as the English rules. This court, like its predecessors in the territory over which it exercises jurisdiction, was never other than a court administering a single body of law which included, as a part of that law, principles recognized and enforced by the former Court of Chancery in England. The important bearing of this fact—with consequences extending beyond mere matters of practice and procedure and producing in matters of substantive law consequences somewhat different than would be drawn by the English Courts—is pointed to in a recent case from Ceylon before the Judicial Committee of the Privy Council, *John* v. *Dodwell & Co.*, [1918] A.C. 563, where, after a reference to a proposition laid down in an English case, it is said, p. 571:—

> It is, in the view their Lordships take, unnecessary to consider how far the principle of this dictum would extend in circumstances such as those of the present case or what is the true view of the scope of the ratification which this action implies *by the English common law.* For under principles which have always obtained in Ceylon, law and equity have been administered by the

same courts as aspects of a single system, and it could never have been difficult etc.

Then the effect of a Prescription Act is considered and the following observations are made, p. 573:—

> Courts of Equity in this country ignored the analogy (of the Statute of Limitations which "did not apply to any jurisdiction of Courts of Equity which was not strictly concurrent with the jurisdiction of the Courts of Common Law over causes of action which were within it") in cases of trust, to which it did not apply. The Prescription Ordinance of Ceylon governs the whole jurisdiction which is general, including law and equity in one system, and therefore, the ordinance is operative in the present case to bar the claim to the extent of the two earlier cheques, unless the cause of action can be shewn to have arisen later than their dates because of discovery for the first time of a concealed fraud.

Then their Lordships go to the local law of Ceylon for the purpose of ascertaining whether, in the circumstances of the case, a cause of action existed with respect to the two earlier cheques which was not barred by the statute. They held that "according to the law of Ceylon" the plaintiffs could not recover in respect of these cheques.

Furthermore, one of our rules (No 3) expressly declares that:—

> As to all matters not provided for in these rules the practice as far as may be, shall be regulated by analogy thereto.

Still, again, it is quite fully recognized, as I have more than once remarked, that every Superior Court is the master of its own practice.

Hence, no decisions of the English Courts with reference to practice and procedure have any binding effect upon this court or upon any of its judges, though they may be useful as furnishing reasons for one view or another or as disclosing, as a matter of history, the earlier practice and the purpose of any English rule corresponding more or less to some particular rule in force in this jurisdiction.

Coming to our rules which have a bearing on the question of a representative or class action, we have first the common general rule:—

> 20. Where numerous persons have a common interest in the subject-matter of an intended action, one or more of such persons may sue or be sued, or may be authorized by a judge to defend in such action on behalf of or for the benefit of all persons interested; and one or more of such persons may, by order of a judge, be substituted for the person or persons previously acting.

The first sentence of this rule agrees in its wording with English O. 16, r. 9, except that the English rule has "the *same* interest" and owns "a common interest."

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Beck, J.

Then r. 31 (2) provides *inter alia* that in case a class is interested in any proceedings the court or judge may appoint someone to represent all, and that the judgment or order shall be binding upon the persons so represented. English O 16, r. 32 (b) appears to cover such a case.

Then there is r. 35 which, it is to be noted, is of much wider application than the corresponding English rule (O. 16, r. 40) being, unlike the latter, unrestricted. It provides a mode for making a judgment binding upon any person interested in the subject matter of the action who was not a necessary party with a provision (r. 36) for his showing cause why he should not be bound.

In *Taff Vale R. Co.* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426, it was held that a *registered* trade union may be sued in tort in its registered name.

Lord Lindley said, p. 443:—

> If the trade union could not be sued in this case in its registered name, some of its members (namely its executive committee) could be sued on behalf of themselves and the other members of the society . . . If the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union . . . This question is not a question of substance, but of mere form.

Linaker v. *Pilcher* (1901), 70 L.J.K.B. 396, was an action of tort brought against the trustees of a trade union as representative of the union and a judgment for damages and costs having been given, Mathew, J., after argument, in a considered judgment, made a declaration that the trustees were entitled to be indemnified out of the funds of the union.

Lord MacNaghten in *Bedford* v. *Ellis*, [1901] A.C. 1, at 10, indicates by a citation of decisions of Lord Eldon the history of the rule as to representative parties and, differing from the Court of Appeal, doubts "whether it is accurate to say that we have advanced a long way since the days of Lord Eldon."

Undoubtedly, in this jurisdiction, we have advanced a long way, and I see no reason why, under the procedure provided by our rules, a judgment for the payment of money obtained against representatives of a class, whether that class be organized as an association or not, should not be enforced in a proper case, not merely against funds held by or for the benefit of the class, but

by process against individual members of the class not originally parties to the action, but brought in by service of the judgment, unless they show that, under the circumstances of the case, it would be inequitable to issue such process against them. See remarks of Meredith, C.J., in *Metallic Roofing Co.* v. *Local Union* (1905), 10 O.L.R. 108, at 116.

The foregoing is one, but not necessarily the only way, in which a trade union can be sued and its funds reached and, as I think, its individuals in proper cases.

It was in part, perhaps, the plan intended to be adopted at least by amendment in the present case. Six individuals, besides the union, were made defendants. These 6 individuals were members of the union at the time the matters complained of took place, and at the time of the commencement of the action. At the time the matters complained of, one of them, Young, was secretary; he and another, Stefanucci, were members of a committee of the union, called the mining pit committee. There was a third member of this committee, though it is not clear that he is one of the persons named as defendants. The union, as a body, instructed the committee to act in relation to the things complained of, and the committee did so. It was not made clear, perhaps, that the other individual defendants were members of the union at the time the action was brought. Nevertheless, I think, that the union was sufficiently represented, especially in view of the facts that one, Redpath, the then present financial secretary, was put forward and examined for discovery as one to be examined as representing the union, and his depositions used at the trial; that one Hart, the then present recording secretary, was examined as a witness at the trial, producing the minutes; that no exception was taken by interlocutory application or otherwise that the union was not sufficiently represented, and finally that the union itself was sued and appeared, by the same solicitor as the individual defendants, and contested the plaintiffs' action throughout. In an action against persons as representatives of an unincorporated body, it is not essential that the parties selected should be the members of the executive or of the board of trustees or management, but only that the parties selected, as defendants, should be such as fairly to represent the members as a body, subject to this that the society, or some member, may apply for the naming

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Beck, J.

of substituted or additional persons. It is said that the individuals were sued as individuals and not as representatives of the union. Perhaps this was so, but during the course of the case counsel for the plaintiffs asked an amendment for the purpose of making this clear. I think it ought to have been granted in such a way, if counsel so requested, as to make the claim against them in both capacities. I disagree with the dictum that I think was cited during the argument, that it is necessary in such a case to state in the style of cause that the defendants are sued in a representative capacity. I think it quite sufficient to make the intention clear in the body of the statement of claim. However, so far as the present case is concerned, all this is of no importance, in my opinion, so far as the liability of the union is concerned, because the union is itself also sued, and, as I think, effectively.

Upon this question we were referred to many English and other authorities on either side; but it is important to observe that the English legislation in regard to trade unions differs somewhat in its course, character and extent from that of Canada.

The Trade Unions Act (now R.S.C. 1906 c. 125) appears to have been passed first in 1872 (35 Vict. c. 30). It became c. 135, R.S.C. 1886. The provisions of the original Act that the purpose of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, ultimately found its way into the Criminal Code in somewhat different form.

S. 497 (a) of the Code, following a definition of a conspiracy in restraint of trade, says, that the purposes of a trade union are not, by reason merely that they are in restrain of trade, unlawful within the meaning of the last preceding section. See also s. 590.

The Trade Unions Act, s. 2, interprets the expression as follows:

> 2. In this Act, unless the context otherwise requires, "trade union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

It is true that s. 5 declares that the Act shall not apply to any trade union not registered under the Act; the definition, however, obviously applies equally to registered and unregistered unions.

Trade unions have, as I have made it appear, been recognized by the law of Canada since at least 1872. Registration does not change their character. By registration they do not become corporations, though, for convenience, registered unions have been called quasi-corporations. The procedure provided by s. 18 is, I think, only permissive. In any case, it applies only to registered unions.

Lord Johnston, in the Scotch case of *Mackendrick* v. *National Union of Dock Labourers* (1910), 48 Sc. L.R. 17 (noted in Ap. T. of Greenwood's Trade Unions (1911), seems to express the full effect of registration when he says:—

> The registration is voluntary. I do not find that this registration confers any privileges on the union. What it does is rather to place it under regulations intended mainly for the protection of its own members. If it imposes any restrictions, they are incidental merely. It certainly does not incorporate the union or give it the status of a registered company or even of a friendly society. As I read it, its object and effect was to secure to the workman that if he does join a registered trade union he may rely on its affairs, and, in particular, its finance, being conducted with some claim to regularity and soundness.

The Industrial Disputes Investigation Act 1907 (c. 20) also recognizes and defines "trade union" as any organization of employees formed for the purpose of regulating relations between employers and employees. Obviously, this is not restricted to registered trade unions.

In my opinion, in view of the course of our Canadian legislation, and the simplification of our practice and procedure, the provision for its development by analogy and the development of remedial methods of giving effect to substantive law and the rights and obligations arising therefrom, a power which, as I believe, is inherent in the court, a trade union, even though unregistered, being a body capable of identification by reason of the name it has chosen, and the constitution it has adopted and the statutory definition of a trade union, is a body which has acquired such a visible unity and such effective unity of external action that there is no reason, in principle or common sense, why the individuals composing it should not be capable of being sued under the comprehensive name which they have chosen for themselves. It is a matter not of substantive law but of practice and procedure. To repeat words I have already quoted: "It is a question not of substance but of mere form."

ALTA.

S. C.

WILLIAMS AND REES v. LOCAL UNION No. 1562 OF THE UNITED MINE WORKERS OF AMERICA.

Beck, J.

I believe my brother judges accept the opinion I expressed some time ago as follows:—

That every superior court is the master of its own practice is a proposition laid down by Tindal, C.J., in *Scales* v. *Cheese* (1844), 12 M. & W. 685, 152 E.R. 1374, and adopting this, I think that, without any statutory rules of practice, the court can, should a case arise, even though the law be fixed as to the substantial rights of the parties, award such remedies, though they be new, as may appear to be necessary to work out justice between the parties. (The Development of the Law, 36 Can. Law Times, p. 382.)

In the Province of Ontario, the practice and procedure of the courts is perhaps only midway towards a simplification, adaptation and invention of remedies as compared with the practice and procedure in England and in this province respectively. There it has been held that a trade union unregistered cannot be sued under the name of the union, but only by means of representative members. *Metallic Roofing Co.* v. *Local Union* (1903), 5 O.L.R. 424 (1905), 9 O.L.R. 171.

Nevertheless, in *Krug Furniture Co.* v. *Berlin Union, &c.* (1903), 5 O.L.R. 463, it was held by Meredith, J., that an unregistered trade union having been sued and having defended the action, it was too late at the trial to take the objection that it could not be sued under the name of the union. The observations of the judge on p. 468 are to the point of the question I have discussed.

If a judgment can be obtained against a union in its adopted name, under such circumstances, what substantial reason can be urged against its being sued in that name?

There can, in my opinion, be no reason why an unregistered trade union cannot be made capable of being so sued by mere rule of court, just in the same way as partnerships have been in that manner authorized to sue and be sued under the firm name. This being so, I think a decision of the court itself fixing and declaring its own practice is as effective as a formal rule, especially in view of the rules as to analogy which I have already quoted.

For the reasons I have given, my opinion is that in this jurisdiction a trade union, though unregistered, can be sued under the name of the union—some proper officer, of course, being served—and that a judgment obtained against the union in such an action can be enforced not only against the funds of the union, but also by appropriate subsequent proceedings against such

of the individual members of the union as fail to show that they ought to be relieved of liability.

It is, however, not necessary, as is apparent, to go so far in the present case, but merely to adopt the view of Meredith, J., already quoted.

In the result, I would give the plaintiffs one month, or such longer time as a judge on application, on notice to the defendants may see fit to give, within which to elect whether they will take judgment (1) against the individual defendants in their individual capacity, or (2) against the individual defendants as representing the union, or (3) against the union by name; the judgment, in any case, to be for the damages and costs as fixed and directed by the trial judge, and in default of election, the judgment to stand as a judgment against the individual defendants as individuals.

Beck, J.

I would give to the plaintiff the costs of the appeal. In view, however, of the differences of opinion among the members of the court, I concur with the Chief Justice in dismissing the appeal, with costs.

HYNDMAN, J.:—It seems clear to me, after a careful perusal of the evidence, that the one and only ground of dispute between the plaintiffs and defendants was with respect to the plaintiffs, firstly, refusing to become members of the union, and secondly, working and being permitted to work in the same mine with them, as non-union men. I fail to find, on a fair examination of the record, anything which would justify the conclusion that the defendants' action was with the object of injuring the plaintiffs in their trade or business. There seems no ground upon which it can be said that the defendants were maliciously inclined against the plaintiffs, unless the dispute itself is evidence of malice, and I do not think it can be held to be such. If the facts are as I conceive them to be, then the situation is exactly the same in principle as *Allen* v. *Flood*, [1898] A.C. 1, and neither the union itself nor any of the defendants are liable in damages. The defendants' sole object was to advance the interests of unionism as they understand it, and not for the purpose of injuring the plaintiffs.

Hyndman, J.

I cannot see what possible bearing the Industrial Disputes Act can have in the case. The consequences to the employers would be the same as though such a statute did not exist, and the defendants themselves are the only persons who would incur

ALTA.

S. C.

Hyndman, J.

any extra liability or disadvantages, inasmuch as if they had struck they *might* be prosecuted and found guilty of a criminal offence, but it seems to me that "threatening to strike" is not a criminal offence.

I would allow the appeal, with costs.

Appeal dismissed.

IMP.

P. C.

MINISTER OF JUSTICE FOR CANADA v. CITY OF LEVIS.

Judicial Committee of the Privy Council, Lords Sumner, Parmoor and Wrenbury. November 25, 1918.

1. TAXES (§ I F—90)—EXEMPTION—CROWN—SPECIAL ASSESSMENT—WATER CHARGE—B.N.A. ACT—MUNICIPAL ACT.
   A special tax or assessment imposed by a municipality for the use of water from its water supply is not within the exemption of the Crown from "taxation" within the meaning of s. 125 of the B.N.A. Act and art. 5729 of the Quebec Cities and Towns Act, 1909.
2. MUNICIPAL CORPORATIONS (§ II H—265)—DUTY AS TO WATER SUPPLY—ASSESSMENT FOR—CROWN.
   Apart from any statutory duty under the Cities and Towns Act (Que., 1909) and any by-laws passed in pursuance thereof, there is an implied obligation on the part of a municipal corporation, arising from necessity, to give a water supply to buildings of the Dominion government, so long as the latter is willing, in consideration of such supply, to make fair and reasonable payment; it is subject to a special charge imposed by the municipality for the use of such supply.
3. MANDAMUS (§ I D—31)—TO COMPEL CITY TO SUPPLY WATER.
   The duty of a municipal corporation to supply water from its water supply is enforceable by mandamus; the remedy will be refused when the party seeking it refuses to pay the assessments therefor.

Statement.

APPEAL from a judgment of the Superior Court of Quebec in review, 51 Que. S.C. 267, affirming the judgment of the Superior Court dismissing the appellant's petition for an order of mandamus. Affirmed.

The judgment of the Board was delivered by

Lord Parmoor.

LORD PARMOOR:—This is an appeal by special leave, by an Order in Council of November 27, 1917, from a judgment of the Superior Court of Quebec in review (51 Que. S.C. 267), affirming a judgment of the Superior Court of Quebec, which dismissed a petition of the appellant for an order of mandamus against the respondents. The City of Levis, in pursuance of powers which it possessed, constructed a system of waterworks and drainage in 1904 at a cost of about $500,000. The council of the city had authority, originally, by ss. 396 and 398 (3) of the Cities and Towns Act, 1903, and afterwards under the Cities and Towns Act, 1909, arts. 5651 and 5653 (3), to impose by by-law a special

IMP.

P. C.

MINISTER OF JUSTICE FOR CANADA v. CITY OF LEVIS.

Lord Parmoor.

tax with the object of meeting the interest on the sums expended in construction of waterworks, etc., and of establishing a sinking fund, and in addition to establish a rate for water. By art. 5655 it was provided that both the special tax and the water rate, as well as all other taxes due for water, or for meters, were to be levied in accordance with the rules and in the manner prescribed for general taxes. On January 14, 1904, the council of the city provided by by-law for the imposition and levy of a special annual tax not exceeding $17,000 on the assessed value of every house, shop, or other like building, to meet the interest on the sums expended on the construction of waterworks, etc. On January 3, 1907, the council of the city made a further by-law imposing an annual tax of 12½% on properties of the annual value of $50 and upwards, and of 7½% on properties of the annual assessed value of less than $50, appearing on the assessment roll. The said by-law contains a provision that the taxes thereby imposed shall be payable before any water has been supplied at the office of the city treasurer in two instalments on October 1 and April 1; or at such other times, and in such other manner, as the council shall think right to fix and declare.

The Government of Canada is the owner of a building situate at the corner of Commercial St. and the Avenue Laurier within the area served by the respondents' system of waterworks and drainage. The building was erected in or about the year 1906, and in the first instance was occupied as a post office. In 1907, an agreement was made between the Government of Canada and the respondents by which it was provided that the government would pay the sum of $250 per annum in respect of the water supply to the post office, but would not make any payment in respect of drainage. Subsequently, further portions of the building were occupied for the purpose of an office of customs, and an office of inland revenue, and a question arose as to the additional payment which should be made by the Government of Canada for the supply of water to these offices. Ultimately the respondents offered to supply water to the new offices for an inclusive sum of $50 a year, in addition to the agreed sum of $250 a year for supply to the post office, making a total charge of $300 a year, but the government, without admitting any liability to pay, insisted that

IMP.
P. C.
MINISTER OF JUSTICE FOR CANADA v. CITY OF LEVIS.
Lord Parmoor.

the sum of $35 a year would be a fair sum to charge for the water supply to the whole building. Their Lordships see no reason to question the finding in the Superior Court, confirmed by the judgment of the Superior Court in review, that $300 did not constitute an excessive demand. No arrangement was made as to the sum which the Government of Canada should pay for the supply of water to the government building, and on or about February 16, 1916, in default of the acceptance by the government of the arrangement proposed by the respondents, the respondents cut off the water supply from the government building. The express power given by art. 5661 of the Cities and Towns Act, 1909, is:—

> If any person . . . refuses or neglects to pay the rate lawfully imposed for the water supplied to him . . . the municipality may cut off the water and discontinue the supply as long as the person is in default.

By letter of June 22, 1916, the respondents offered to supply the whole of the government building with water and drainage on terms that the government should pay the arrears, then unpaid, of the sum of $250 a year and interest, and that the question of payment for the water supply and drainage for the whole of the building should be agreed within four months, or, in default of agreement, that the respondents should be entitled to cease to afford a water supply from the system of waterworks. This offer was not accepted by the government. The appellant in July, 1916, presented a petition for a writ of mandamus to order the respondents to supply water to the whole of the building and at the same time deposited in court the sum of $250 to answer the charge for the supply of water to April 30, 1916. The appellant claims that he is entitled to an order for a mandamus on the ground that the respondents are under a legal obligation to supply the government building with water without exacting any annual tax in respect thereof or any payment at all, or (alternatively) any payment other than such as the parties may agree, or in default of agreement such as may be a fair payment having regard to the quantity of water from time to time consumed, and that the respondents had no right to cut off the water supply as the appellant had not refused or neglected to pay any rate lawfully imposed on him. The respondents do not claim to be entitled to impose on the Government of Canada any tax, in respect of a supply of water or drainage to the government building, or any

portion thereof. They admit that the government is free from all liability to taxation, but claim that the water supplied is in the nature of a merchantable commodity, and that, though the government is free from all taxation, it is not entitled to claim a supply of water without payment, or to continue to receive it without payment, but that it is bound, if and so long as it requires a supply of that commodity, to pay therefor a fair and reasonable sum.

The first question which arises for the decision of their Lordships is whether the Government of Canada is entitled to demand a supply of water from the waterworks of the respondents without payment. S. 125 of the B.N.A. Act, 1867, relates only to exemption from liability to taxation, and the respondents do not claim to impose any charge in the nature of a tax. The appellant bases his claim for exemption of payment for water supplied to government buildings on art. 5729 of the Cities and Towns Act, 1909. This article exempts from taxation the property of the federal and provincial governments of Canada and also certain other property, held and occupied for the purpose of religion, education, or charity. The proprietors or occupiers of property of the latter class are, however, taxable for any special tax or assessment made for the purpose of works required for the opening and maintenance of streets, watercourses and public lighting under the by-laws, as well as for the payment for the use of water. It was argued that the expression of this special liability to pay for the use of water, in the specified instances, gave rise to the implication that there was no liability on the Government of Canada to pay for the use of water as supplied to government buildings. The language of the article does not justify any such inference. The article places a limitation on the general exemption as applied to certain specified properties. In respect of these properties a special tax or assessment is imposed in respect of works required for the opening and maintenance of streets, watercourses, etc., under the by-laws as well as for the payment of water, but the respondents do not claim to impose any tax or assessment on the Government of Canada for the payment of a water supply. The article does not in any way affect the question of the liability of the Government of Canada to make some payment for the water which the respondents supply to the muni-

IMP.

P. C.

MINISTER OF JUSTICE FOR CANADA v. CITY OF LEVIS.

Lord Parmoor.

cipality. Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price. The Chief Justice states in his judgment that this obligation has been recognized throughout the whole Dominion, and the correspondence which has passed between the Government of Canada and the respondents in the present case, indicates that the main contention which has arisen is not a claim to have water supplied without payment, but as to the amount which, under the conditions, would be a fair and reasonable price.

The question remains to be considered whether the appellant is entitled to the order for mandamus which he claims in his petition. There is no article which in terms imposes upon the respondents an obligation to give a water supply to any of the houses or other buildings within the area of supply, and there is an absence of any general provision either as to the method or system of supply, or as to the quality of the water. The appellant, however, relies on an implication to be inferred both from the articles, and from the conditions which apply where water is supplied from statutory waterworks, that all owners or occupiers of houses or other buildings within the area of supply are entitled to demand a supply of water from the respondents. In all cases in which the owners or occupiers of houses or other buildings, within the area of supply, are so entitled, it is specially provided by art. 5657 that the water supplied shall be introduced into houses or other buildings by and at the expense of the municipality.

In the case of the owners or occupiers of taxable property, there is a general obligation imposed upon all such owners or occupiers to pay the special tax imposed, although not availing themselves of the water from the waterworks (art. 5652). It is a reasonable implication that, in return for this liability, the owners or occupiers of taxable property should have the right to demand a water supply, in respect of such property. There are, moreover, provisions in the by-laws which define the conditions attached

to such right. Art. 43 of the by-law of January 3, 1907, provides that taxes imposed under the by-law shall be payable before any water has been supplied at the offices of the city treasurer. Art. 47 of the same by-law directs that in every case of non-payment of taxes, charges or compensation, imposed by this by-law, within 30 days of their accruing due, the council or their authorized officer may discontinue the supply of water in any building, for which such charges or compensation are due, or to any person who makes default in payment of the said taxes, charges, or compensation. It is further provided that the discontinuance of the supply of water shall not prevent the liability of the owner or occupier to pay the taxes, charges or compensation, and that the supply of water to a person in default shall not be renewed, until all arrears have been paid. These articles are clearly framed on the basis of an obligation to supply, and their Lordships cannot doubt that this obligation is imposed on the municipality in respect of taxable properties within the area of supply, although no monopoly of supply, which would prevent any owner or occupier from providing an independent supply, has been vested in the respondents. These articles, however, do not apply to the Crown, or to any person requiring a supply of water who is not the owner or occupier of taxable property, and the respondents cannot rely upon them to justify their action in cutting off the water supply from the government building.

In the case of the Crown, no implication of an obligation upon the respondents to give a water supply can be based on liability to water taxation, since the Crown is admittedly not liable to such taxation. The respondents, moreover, have not the monopoly of water supply, so that the implication of an obligation cannot be supported on the ground that the Government of Canada has been deprived of the right to supply water to the government building. It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred, by statute, a position of great and special advantage, and

IMP.
P. C.
MINISTER OF JUSTICE FOR CANADA v. CITY OF LEVIS.
Lord Parmoor.

they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class, who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are, therefore, of opinion that there is an implied obligation on the respondents to give a water supply to the government building provided that, and so long as, the Government of Canada is willing, in consideration of such supply, to make a fair and reasonable payment. The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties. The question, therefore, arises whether the respondents have made any such default in their obligation to supply water to the government building as would entitle the appellant to an order for a mandamus.

The facts shew that the respondents have not refused to supply water provided that the Crown is willing to pay a reasonable amount. An arrangement was made in 1906 under which the respondents supplied water to a portion of the government building used as a post office in consideration of an annual payment of $250. This arrangement remained in force over a series of years, but an additional payment was subsequently claimed, when the rest of the building was used as an office of customs and inland revenue. After negotiation, the respondents offered to supply the whole building for an annual payment of $300, but Mr. P. Hearson Gregory, writing on behalf of the government, declared that the proposed charge was absolutely absurd and repeated a former offer, without prejudice, that a flat rate be entered into, for the whole of the service of the building, at $35 per annum, as a sum in every way fair for the amount of water consumed. The Superior Court of Quebec, and the Superior Court in review, have found that the sum claimed by the respondents, and which the Crown was not willing to pay on the ground that it was absolutely absurd, was not excessive having regard to all the conditions, and the charges imposed on the owners or occupiers of taxable property. The result is that at the time when the petition was presented for an order for mandamus the respondents were not in default, since

IMP.

P. C.

MINISTER OF JUSTICE FOR CANADA v. CITY OF LEVIS.

Lord Parmoor.

the Government of Canada at that time was not willing to pay a price for the supply of water which had by a concurrent finding of two courts been held not to be excessive. The respondents were therefore no longer bound to supply a commodity for which the appellant as their customer was no longer willing to pay, and equally they were entitled to discontinue the supply, not as an exercise of an express power to cut it off, but as an implied correlative right, arising because the appellant was no longer prepared to perform his reciprocal obligation. Their Lordships concur in the judgment of the Superior Court of Quebec, confirmed by the judgment of the Superior Court in review, that the order for a mandamus should under these circumstances be discharged.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

O'BRIEN v. KNUDSON.

YUKON

T. C.

Yukon Territorial Court, Black, Judge pro tempore. December 31, 1918.

MORTGAGE (§ I E—20)—PERSONAL LIABILITY—TRUSTEES—BENEVOLENT SOCIETY—MISTAKE.

Where trustees of an unincorporated benevolent society, in their capacity as such, execute a mortgage of the society's property containing the usual personal covenant to pay the mortgage debt, they cannot escape personal liability on the ground that they had entered into such covenant in mistake of its legal effect.

[*Watling* v. *Lewis*, [1911] 1 Ch. 414, followed.]

ACTION for foreclosure of mortgage and enforcement of personal covenant therein. Statement.

J. P. Smith and *C. B. Black*, for plaintiff; *J. A. Fraser*, for defendants.

BLACK, J. *pro tem.*:—The action is brought by plaintiff as mortgagee for foreclosure or for sale of property described in two certain mortgages made by defendants Knudson, Strathie and Bossuyt, the one upon real estate being the land and premises situate in Dawson, Yukon Territory, occupied and known as the "Moose Hall"; the other being a chattel mortgage upon the furniture and other chattels belonging to said Lodge in and upon the said mortgaged premises. Both mortgages bear date March 20, 1916, and were given to secure payment of the sum of $8,000 borrowed from the plaintiff, with interest as therein provided, and are executed under the respective seals of the mortgagors. Black, J.

YUKON

T. C.

O'BRIEN v. KNUDSON.

Black, J.

The plaintiff also asks for judgment against the defendants Knudson, Strathie and Bossuyt on their personal covenant contained in the mortgages for payment of the mortgage debt. The said defendants Knudson, Strathie and Bossuyt were trustees of the said Moose Lodge at the time the mortgages were given, and were also the registered owners, in their own names, of the mortgaged lands and premises, and were as such trustees the custodians of the chattels so mortgaged.

The defendants Schink, Gleaves and Bossuyt were the trustees of the said Moose Lodge at the time the action was begun.

The land mortgage contains the following covenant by the mortgagors for payment of the mortgage debt:—

> Now we, the said P. A. Knudson, William Strathie and Charles Bossuyt, trustees as aforesaid for Dawson Lodge No. 1393, Loyal Order of Moose, being registered owners of an estate in fee simple in possession, subject, however, to such encumbrances, liens and interests as are by note endorsed hereon, in all those certain tracts of land situate in the Yukon Territory and more particularly described as follows: Lots numbered (1) and (2) in block lettered "L," in the Ladue estate, in the townsite of Dawson, in the Yukon Territory, as shewn on a plan of the said townsite by James Gibbon, D.L.S., and of record in the Department of the Interior as plan No. 8338, together with all buildings, erections and improvements thereon, do hereby, in consideration of the sum of $8,000 as aforesaid, lent to us by Anna Josephine O'Brien, of Dawson, in the Yukon Territory, married woman (hereinafter called the mortgagee), the receipt of which sum we do hereby acknowledge, covenant with the said Anna Josephine O'Brien, her executors, administrators and assigns.
>
> Firstly, that we will pay to the said mortgagee the above sum of $8,000 in manner and time following, that is to say, the sum of $8,000 to be paid on the 20th day of March, 1918.

with the usual covenant for the payment of interest.

The chattel mortgage contains similar covenants by the mortgagors.

The defendants by their defence deny the covenants and say that:—

> If they covenanted with the plaintiff as alleged, such covenant was put in the mortgage by mistake and was not the substance of the transaction between the plaintiff and the Loyal Order of Moose; that the said mortgage was intended only to operate as a mortgage on the property of the Loyal Order of Moose and not so as to attach any personal liability to the defendants, Knudson, Strathie and Bossuyt, and that the said mortgage was signed by the said defendants in the belief that it was only binding upon them in their capacity as trustees of the Loyal Order of Moose.

These defendants further allege that if they so covenanted with the plaintiff they were ignorant of the fact that such covenant was contained in the mortgage, and that it was understood and

agreed between the plaintiff and the defendants that there was no personal liability on the part of the mortgagors.

The defendants by their counterclaim ask for rectification of the mortgages so as to embody what was the actual agreement between the parties, as alleged, or for rescission of the personal covenants contained in the mortgages.

All the defences set up in the pleadings, excepting only that of mistake, were abandoned by the defendants' counsel on the argument. So that the only issue to be determined is whether or not, on the ground of mistake the defendants are entitled to rectification of the contract or rescission of the personal covenants for payment of the mortgage moneys and interest.

The facts, briefly stated, are as follows:—The Moose Lodge, an unincorporated body, known as "Dawson Lodge No. 1393 of the Loyal Order of Moose," required to raise the sum of $8,000, or thereabouts, for the purpose of paying off a then existing mortgage on their property in Dawson for $5,000, and certain other obligations amounting to, approximately, $3,000 for lodge fixtures and furniture, and arrangements were made with the plaintiff for the loan. A resolution authorizing the defendants Knudson, Strathie and Bossuyt, trustees, to borrow the money on behalf of the lodge was passed at a regular meeting of the lodge, duly convened, on the 17th day of March, 1916. The resolution is as follows:—

> Extract from minutes of regular meeting of Dawson Lodge No. 1393, Loyal Order of Moose, held on 17th March, 1916.
>
> Moved by Bro. Lobley, seconded by Bro. D. Cameron, that P. A. Knudson, William Strathie and Chas. Bossuyt, trustees of this lodge, be and they are hereby authorized to borrow on behalf of the lodge the sum of $8,000, and first to pay therefrom all principal moneys and interest due to Andrew Rystogi on a mortgage held by him against the lands and buildings of the lodge, and procure a discharge thereof, and from the remaining moneys, so far as the same will extend, to pay the outstanding indebtedness of the lodge. And the said trustees are hereby further authorized and empowered for the purpose of better securing repayment of the said sum of $8,000 with interest thereon at the rate of 12% per annum, to give, grant and execute upon the lands, buildings, goods and chattels of this lodge, such mortgages or other securities as may be necessary in the premises and to assign the insurance on said buildings and fixtures as further security. Carried.

This resolution must be taken as the basis of the agreement between the parties.

The defendants sought to shew that the plaintiff had agreed to loan the money on the security of the property only, and had

YUKON

T. C.

O'BRIEN v. KNUDSON.

Black, J.

agreed that there was to be no personal liability on the part of the mortgagors, and that the mortgages did not, therefore, express the true agreement had between the parties, thus constituting a "mistake" in law, entitling the defendants to rectification or rescission of the covenants referred to.

In order to succeed in establishing "mistake," as sought by the defendants, it would have to be shewn that the plaintiff had in view the idea of simply taking what would amount to merely a charge on the property and that alone, and that there was to be no liability on the part of the borrowers of the money to repay. This position is not borne out by the evidence.

In these cases, on the law of mistake, it is difficult to apply a principle because you have to rely upon the statements of the parties made often upon imperfect recollection of what took place. But I understand the law to be, that in order to obtain rectification there must be a mistake common to both parties, or if the mistake is only unilateral there must be fraud or misrepresentation amounting to fraud. *May* v. *Platt*, [1900] 1 Ch. 616. There it was held that, in the absence of fraud, vendors or purchasers of land cannot be put to their election to rescind or accept rectification on the ground of unilateral mistake; and the case of *Paget* v. *Marshall* (1884), 28 Ch. D. 255, relied upon by the defendants, does not, in my view, apply. There the evidence was that a mistake had been made in the preparation of the lease by including in the description of the property a portion of one of the buildings which the evidence shewed clearly was never intended to form part of the demised premises, and the lease could be rectified without violating what was actually and obviously intended when the contract was made. It is not claimed or suggested that the element of fraud or misrepresentation is found in the present case; on the contrary, counsel distinctly disclaimed any such contention. In order to sustain the defendants' counterclaim for rectification of the mortgages or the rescission of the personal covenants for payment, I must come to the conclusion that there was in fact an agreement—and that it was in the mind of the plaintiff Mrs. O'Brien—that she was to get no security beyond a charge on the property; that some agreement other than that expressed in the mortgages had been made, and that the minds of the parties were together in regard to it. I cannot from the evidence reach such a conclusion.

The resolution authorizing the borrowing is, as I have said, the basis of the agreement. The whole transaction appears to have been the loaning of money on the security of a mortgage to be given in the ordinary way without any agreement as to what the instrument should or should not contain. "Borrowing" implies repayment, and the giving and taking of the mortgage was, as expressed in the resolution, "to better secure" such repayment.

The defendants themselves say that they considered "the Moose" liable, and that they, the trustees, "were not to be liable any more than the rest of the Moose," which conflicts with the idea that the plaintiff had agreed to look solely to the property. The letter from the plaintiff Mrs. O'Brien to the defendant Bossuyt, put in in evidence on behalf of the defendants, written from Seattle on the 17th of November, 1917, asking for payment of $3,000 or $4,000 on account of the mortgage before the 20th of March, 1918, and stating that unless some such arrangement was made she would have to "insist on payment in full," and suggesting monthly payments of $300 or $400 as "an easier plan" for the lodge, seems to coincide with the evidence of all these defendants that there was a subsisting liability on the part of "the Moose," apart from the property itself, to pay the money; and, as between the parties, that liability in this instance is upon these defendants who borrowed the money on behalf of the unincorporated body, and signed the mortgages. *Harrison* v. *Timmins* (1838), 4 M. & W. 510, 150 E.R. 153, is the case of a corporation—an incorporated body, not an unincorporated body. There is a clear distinction. In the case just referred to it was held that the court had no power to order an execution to issue against defendant, a director of the company, on a contract for work and labour done for the company, there being no provision in the statutes creating the company making such director personally liable. Several other cases of the same character were cited by defendants, but they do not, in my view, meet the case of these defendants.

The evidence is that the mortgages were read over to the defendants, all being present, together with the plaintiff, in the office of C. W. C. Tabor, K.C., then acting as solicitor for the mortgagee. It is admitted that there was no misrepresentation. It is stated in the evidence that after the mortgages were so read

YUKON

T. C.

O'BRIEN v. KNUDSON.

Black, J.

over, and when in the act of signing, the defendant Knudson, who was the first to sign, asked Mr. Tabor "if there was any personal liability attached to the paper," to which Mr. Tabor replied, in effect, that there was no liability except as trustees. The evidence of O'Brien, secretary of the lodge, who was also present in Mr. Tabor's office when the mortgages were executed, is, that Mr. Tabor said "there was no personal liability, that they were simply signing as trustees." The evidence of the defendants Knudson, Strathie and Bossuyt is, that they understood that they were liable only as trustees.

The parties knew the contents of the documents, and the best that can be said is, that they misunderstood or were ignorant of the legal effect of their act.

A number of authorities were cited upon the question of personal liability of trustees in cases of this nature. I shall not enter upon a discussion of all these authorities; but I will refer to the recent case of *Watling* v. *Lewis*, [1911] 1 Ch. 414. Following the decision in this case, even if the evidence of the conversation alleged to have taken place at the time of the signing of the mortgages was admissible to vary this contract, and the very words of that conversation were written into the mortgage—even then these mortgagors would not be absolved and they must be held personally liable on their covenant to pay.

In the case referred to—*Watling* v. *Lewis*—I quote the head-note, as follows:—

P. and H. formerly carried on business in partnership and as such were entitled, as part of their partnership property, to certain freehold property which was subject to a mortgage created by them to secure £2,000 and interest. After the deaths of P. and H., disputes arose between their respective trustees as to P.'s share in the partnership property, and ultimately a compromise was made in pursuance of one of the terms of which a deed was entered into between the plaintiff, the present trustee of P.'s will, and the defendants, the present trustees of H.'s will. By that deed, the plaintiff, as trustee, granted and released unto the defendants P.'s share in the mortgaged premises subject to the mortgage, and the defendants "as such trustees, but not so as to create any personal liability on the part of them or either of them," thereby jointly and severally covenanted with the plaintiff that they or one of them, their or one of their heirs, executors, administrators, or assigns, would pay the principal sum of £2,000 then due in respect of the mortgage and all interest thenceforth to become due thereon, and would keep indemnified the plaintiff and his estate and effects and the estate and effects of P. from all claims and demands on account thereof.

Held, that the effect of the proviso in the covenant, if valid, would be not

YUKON

T. C.

O'BRIEN v. KNUDSON

Black, J.

merely to limit but to destroy the personal liability on the part of the defendants; that, inasmuch as there was a covenant to pay and indemnify, the proviso was repugnant to the covenant and had no effect, and that the defendants were therefore liable under the covenant as if the proviso had not been inserted in it.

There will be an order for sale of the mortgaged properties, and judgment against the defendants Knudson, Strathie and Bossuyt personally for the amount claimed, with costs.

The defendants' counterclaim for rectification or rescission will be dismissed, with costs.

Judgment for plaintiff.

CAN.

S. C.

COLONIAL REAL ESTATE Co. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 9, 1918.

BROKERS (§ II B—15)—REAL ESTATE—COMMISSIONS—PROCURING SALE—TIME—SALE BY OWNER.

Where by the terms of an agreement a broker is to effect a sale of land within a specified time, and does procure a purchaser within such time but the transaction falls through, he is not entitled to his commission, when after the expiration of the time limit the land is sold to such purchaser by the owner directly.

[*Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395, distinguished. See annotation 4 D.L.R. 531 on the sufficiency of brokers' services entitling them to commission.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1918), 27 Que. K.B. 433, reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs. Affirmed.

E. Lafleur, K.C., and *T. P. Butler*, K.C., for appellant; *H. Gerin-Lajoie*, K.C., and *J. H. Gerin-Lajoie*, for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—This was an action to recover a commission claimed by the plaintiffs, appellants, upon a sale made by the respondent Sisters of Charity to Mignault and Morin of a parcel of real estate in Montreal.

The action was maintained by the trial judge for the sum claimed, $3,951.76, and on appeal was dismissed by the Court of Appeal.

No material facts are in dispute. The question to be decided is whether, on these facts, the defendants, respondents, are liable to pay the plaintiffs the commission sued for.

Respondents, in September, 1912, gave the appellants an option to purchase the lands in question for $395,176, good until

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Davies, C.J.

Friday, September 13, 1912, noon, and on the same day, by a separate letter referring to the option, bound themselves to pay appellants a commission of 1% on the amount of the purchase-money if the sale was effected by them during the currency and on the terms of the option.

It is common ground that the time limit for carrying out the option was extended until November 12, 1912.

The plaintiffs accepted the option, and, at the time of accepting, paid the respondents $5,000 on account.

Afterwards, on the 11th and 12th November, within the time limit, the appellants, having secured a purchaser ready and willing to take the property on the terms provided in the option, attended with such purchaser, one Desjardins, at a notary's office to carry out the agreement of purchase. Respondents were present by their attorney. Desjardins was present and ready and willing to carry out the purchase, but was prevented from doing so by the claim set up by two third parties, Messrs. Mignault and Morin, to the effect that they, and not the purchaser Desjardins, had bought the property through the agency of the appellants and its sub-agent, one Rollit, and that they were entitled to a deed of the property for the sum of $395,176 instead of some $425,000 which Desjardins contended they had agreed to pay as the purchase-price from him to them.

The result of the dispute was the withdrawal of Desjardins from the purchase of the property.

Owing to the disputes between the two alleged purchasers, Desjardins on the one hand and Mignault and Morin on the other, each one claiming to be entitled as the purchaser through the appellants of the land and to receive a deed of the same for the consideration price of $395,176, the transaction was not completed. The respondents, defendants, were not responsible for this.

A few days afterwards, however, and after the time limit had expired, namely, on December 4, the defendants, respondents, agreed to accept the claim of Mignault and Morin to be the purchasers as opposed to the claim of Desjardins to be such and executed to them a deed of the property in question for the sum of $395,176, on the same conditions as those stipulated for in the option they had given to the plaintiffs, appellants, and at the

same time credited the said Mignault and Morin on the purchase-price with the $5,000 paid to them by the plaintiffs, appellants, on September 12 previously.

By accepting these parties as the purchasers, it is contended the defendants adopted the contract made by the plaintiffs, appellants, or their sub-agent with Mignault and Morin as purchasers, profited by the same, and could not deprive the appellants of their right to a commission on the sale, even though it was not completed until after the time stipulated for in the option and in the accessory obligation with respect to the commission.

The relation of Mignault and Morin as purchasers from the respondent defendants of the land in question was, it seems to me, brought about by the plaintiffs and by directly dealing with them even after the expiration of the stipulated delay for closing the transaction, the respondents waived the delay, adopted the contract negotiated for them by the plaintiffs within the stipulated time, and having done so and taken advantage of the plaintiffs' work as their agent, cannot be permitted to repudiate their liability to pay the commission.

The rule which should govern in cases of this kind has been laid down by the Judicial Committee of the Privy Council in the case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614, and has been followed in this court in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395.

That rule is that where an agent has brought the landowner into relation with an actual purchaser he is entitled to recover his commission although the owner has sold, behind the agent's back, on terms which he had advised them not to accept. Lord Atkinson, in delivering the judgment of their Lordships, said, in answer to the contention that the acts of an agent cannot be held to be the efficient cause of a sale which he has opposed:—

> The answer . . . is, that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective and, possibly, the most laborious and expensive part of his work, and that if the principal takes advantage of that work, and behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale. P. 401.

There can be no doubt in my judgment that the plaintiffs, appellants, brought the purchasers in this case, Mignault and

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Davies, C.J.

Morin, into direct relation with the respondent vendors and that the plaintiffs were the efficient cause of the actual sale or acceptance by the defendants, respondents, of Mignault and Morin as the purchasers. The knowledge that they had when so accepting of Mignault and Morin having been brought as purchasers into relations with them as vendors by plaintiffs; the adoption of the terms of sale contained in the option they had given the plaintiffs; the crediting on the purchase-price to Mignault and Morin of the $5,000 paid by the plaintiffs to them when the option was given and the commission agreement entered into; all combine to convince me that the respondents cannot be permitted to escape through the time limit from their liability to pay plaintiffs the stipulated commission sued for. They must be held to have clearly waived this time limit.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

Idington, J.

IDINGTON, J. (dissenting):—I would allow this appeal with costs here and below and restore the judgment of the trial judge.

Anglin, J.

ANGLIN, J.:—The material facts of this case and the relevant documents appear in the judgment delivered by Pelletier, J., in the Court of King's Bench, 27 Que. K.B. 433, and in the opinion of my brother Mignault, which I have had the advantage of reading. I fully concur in my learned brother's view that the question presented must be determined not by the principles of English law, but by those of the civil law which obtain in the Province of Quebec.

Although art. 1082 C.C. omits the first, or positive, clause of art. 1176 C.N.:—

> Lorsqu'une obligation est contractée sous la condition qu'un évènement arrivera dans un temps fixe, cette condition est censée défaillie lorsque le temps est expiré sans que l'évènement soit arrivé,

the reproduction of the second clause in these terms:—

> if there be no time fixed for the fulfilment of a condition it may always be fulfilled,

clearly implies the converse proposition, that, where a contract contains a stipulation as to the time for the fulfilment of a condition to which the obligation imposed is made subject, that condition cannot be fulfilled so as to render the obligation absolute after the time so fixed has elapsed. On the expiry of the delay, if the condition remain unperformed, the obligation entirely ceases.

Art. 1082, according to the codifiers' foot-note (first report, p. 71, No. 102), is based on Pothier (Bugnet) 209, 210 and 211, and 6 Toullier 623 *et seq.* The opening paragraphs of section 209 of Pothier read as follows:—

209. Lorsque la condition renferme un temps préfix, dans lequel elle doit être accomplie, comme si je me suis obligé de vous donner une certaine somme si un navire était cette année de retour dans les ports de France il faut que la chose arrive dans le temps préfix; et lorsque le temps est expiré sans que la chose soit arrivée, la condition est censée défaillie, et l'obligation contractée, sous cette condition, est entièrement évanouie.

Mais si la condition ne renferme aucun temps préfix dans lequel elle doive être accomplie, elle peut l'être en quelque temps que ce soit; et elle n'est pas censée la défaillie, jusquà' ce qu'il à soit devenu certain que la chose n'arrivera point.

Toullier deals with certain exceptions indicated by Pothier, not material to this case, which the codifiers did not adopt. In the codifiers' first report, p. 71, No. 102 (art. 1082 C.C.), art. 1178 C.N. would seem to be erroneously referred to instead of art. 1176 C.N. While the comment of the codifiers, at p. 20 of their report, does not explain the omission from art. 1082 of the first sentence of art. 1176 C.N., it must, I think, be assumed, in view of the reference to Pothier, that in their opinion it was unnecessary because of its obvious implication in the second sentence which they reproduced as art. 1082. The purview of that article is further evidenced by art. 1084, which is a reproduction of art. 1178 C.N. and presents the only case in which a condition is deemed to have been accomplished though actually not so. Art. 1083 C.C., which corresponds to art. 1177 C.N., throws further light upon the meaning of art. 1082 and the effect which it must have been intended to have. As to the operation of the last mentioned article—see *Letang* v. *Renaud* (1890), 19 Rev. Leg. (O.S.) 221.

I entertain no doubt whatever, for the reasons stated by my brother Mignault, and by Carroll and Pelletier, JJ., in the Court of King's Bench, that the failure of the plaintiff to bring about within the time stipulated the event on the happening of which, according to the terms of the contract, the defendants' obligation would arise amounted to the failure of a condition precedent with the result that the defendants were thereby entirely freed from any obligation to the plaintiff. *Deschamps* v. *Goold* (1897), 6 Que.

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Anglin, J.

Q.B. 367, is in point. I rest my judgment on this view of the case and add the references to English law which fol ow merely to indicate that, in my opinion, the result, if ruled by its principles, would be the same. The contrary view, if I may say so with respect, in the last analysis of it would appear to rest upon some misapprehension as to the scope and application of the equity doctrine that time, unless made so expressly or by necessary implication, is not to be deemed of the essence of contractual obligations.

Here, the stipulation as to the time for its fulfilment is made of the essence of the condition on which the defendants assumed an obligation to pay commission as distinctly as language could make it so. The promise which the plaintiff accepted was that the defendants would pay a commission of 1%

if said sale is effected during the currency of said option which expires on Friday the 13th instant at noon, and provided also this sale is completed, the deed signed and first payment of $100,000 duly paid to the Grey Nuns within 15 days after the acceptation (*sic*) of said option and not otherwise.

Terms more explicit and emphatic it would be difficult to indite. Where time is thus made of the essence of a contract, strict compliance with the stipulation is exacted under the English equity system as well as at common law. *Conventio vincit legem.* An extension of the time for completion and payment of the first instalment (which was reduced from $100,000 to $50,000) until November 11 was agreed to, but, as appears from the letter of the defendants' agent, St. Cyr, of September 11, "all other conditions (were) to remain the same."

Even if, upon a proper construction of it, time should not be regarded as having been expressly made of the essence of this contract, neither its character nor the nature of the relief sought admits of the application of the doctrine of equity which, under some circumstances, treats a term as to the time of performance as not of the essence of a contract. The contract before us would, under English law, create an ordinary common law obligation to pay money upon the happening of a stated event. The plaintiff's action, if brought in an English court, would be strictly a common law action to recover the money so contracted to be paid, and the common law rule as to the effect of the stipulation as to time would govern it. *Noble* v. *Edwardes* (1877), 5 Ch. D. 378, at 393. The case is not one in regard to which a court of equity would, before

the Judicature Act, have entertained a bill for specific performance, or to restrain proceedings at law, or for other equitable relief. It is, therefore, not one in which, under the Judicature Act, the equity view as to the effect of a stipulation as to time would control. *Stickney* v. *Keeble*, [1915] A.C. 386, at 417; *Reuter* v. *Sala* (1879), 4 C.P.D. 239, at p. 249. The equitable doctrine could not be invoked to take such a case out of the rule of the common law, which exacts performance of a condition within the delay allowed as the foundation of the right to enforce the obligation to which it is attached.

Having made a contract under which it would become entitled to a commission only upon the happening of a stated event within a definite period "and not otherwise," the plaintiff in effect agreed to forego all claim to commission unless that event should happen within the time stipulated. In order that an action on such contract should succeed the plaintiff must shew fulfilment of the condition according to its terms. *Alder* v. *Boyle* (1847), 4 C.B. 635, 136 E.R. 657; *Peacock* v. *Freeman* (1888), 4 T.L.R. 541. The authority of the case last cited, so far as relevant to that at bar, is not affected by a distinction in regard to it made by the Court of Appeal in *Skinner* v. *Andrews* (1910), 26 T.L.R. 340.

The plaintiffs cannot recover merely because, although the condition of the defendants' obligation is not fulfilled, they have derived a benefit from what it did. *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645. This case, in some aspects, closely resembles that at bar. The defendant had promised the plaintiff a commission of £5,000 in the event of his introducing a purchaser of the defendant's business. An accountant, introduced to the defendant by the plaintiff as a person likely to procure a purchaser of the business, eventually bought it himself. Construing the contract on which the plaintiff claimed as entitling him to a commission if his introduction brought about the sale, but also as meaning that if it failed to produce that result he should not be paid the commission (implying the term expressed in the "and not otherwise" of the contract in the present case) the Court of Appeal held that the plaintiff could not recover. As the Master of the Rolls put it, p. 646:—

> All that the plaintiff did under the contract was done upon the terms that he was not to be paid unless he was successful. The jury gave him £2,000 (upon a *quantum meruit*) though he failed, and so the verdict could not

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Anglin, J.

stand . . . To entitle a plaintiff to sue upon a *quantum meruit* the rule was that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done it was on the terms that he must pay for it.

Lopes, L.J., said, p. 646:—

As to the claim upon a *quantum meruit*, it could only arise upon a promise to be implied from a request by the defendant to the plaintiff to perform services for him, or upon the acceptance of services of the plaintiff so as to imply a promise by the defendant to pay for those services. Neither of these alternatives occurred here. Nothing was done outside the contract.

In *Lott* v. *Outhwaite* (1893), 10 T.L.R. 76, another authority for the latter view, Lindley, L.J., in rejecting a claim for *quantum meruit*, observed that "there could be no implied contract where there was an express one." See also *Green* v. *Mules* (1861), 30 L.J. C.P. 343.

The case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614, chiefly relied on by the appellant, is, in my opinion, clearly distinguishable as my brother Mignault points out. The agent's employment in that case was a general one. The contract was, as Lord Atkinson puts it at p. 626:—

that should the mine be eventually sold to a purchaser introduced by him, he (Burchell) would be entitled to a commission at the stipulated rate.

There was no such condition as in the case at bar that to entitle the agent to his commission the sale must be effected and carried out and part of the purchase-money paid within a fixed period—still less an agreement that unless all these things should happen within the time stipulated there should be no claim for commission—"and not otherwise."

The ground of Burchell's recovery was that the defendants had wrongfully deprived him of the benefit of his contract. The judgment proceeded, as my brother Mignault says, on the principle enunciated in art. 1184 C.C. as the citation by Lord Atkinson of *Inchbald* v. *Western Neilgherry Coffee Plantation Co.* (1864), 17 C.B.N.S. 733, 144 E.R. 293, in support of it shews. Here, on the contrary, the defendants put no obstacle whatever in the way of the plaintiff earning its commission. They were ready and willing, on the date fixed for completion and payment, to convey to the purchaser designated by the plaintiff. The failure to carry out the sale was not due to any fault of theirs or because of the intervention of Mignault and Morin as rival purchasers, as the appellant suggests, but solely and simply because Desjardins, the

plaintiff's nominee as purchaser under its option, refused to carry out the transaction. When that occurred, the time within which the plaintiff might fulfil the condition entitling it to a commission having expired, the defendants were freed from all obligation to it.

In the case at bar, the plaintiff was not "generally employed" to sell. Its employment was limited. Lord Watson, in *Toulmin* v. *Millar* (1887), 58 L.T. 96, clearly indicates the difference between a general employment and a limited mandate to sell according to stated terms and not otherwise. In order to entitle a plaintiff to recover for services rendered under such a limited mandate its terms must be fulfilled.

Stratton v. *Vachon* (1911), 44 Can. S.C.R. 395, was a case of general employment similar to that of Burchell.

When Mignault and Morin came to the defendants some time afterwards seeking to acquire their property on the terms on which they were willing to dispose of it, the defendants were at perfect liberty to sell to them. The mere fact that they had been prospective sub-purchasers from Desjardins in the event of a sale to him (procured for him by one Rollit, who had acted as a sub-agent for the plaintiff in procuring Desjardins himself to accept its option from the defendants) could not, after the expiry of that option, deprive the latter of the right to accept an offer from Mignault and Morin. *Sibbitt* v. *Carson* (1912), 5 D.L.R. 193, 26 O.L.R. 585, is in point and, in my opinion, was well decided.

Much is made of the fact that the defendants credited to Mignault and Morin on account of their purchase-money this $5,000 received from the plaintiff when it had written to St. Cyr taking up the option which it held. It might have been more prudent had this not been done. But the defendants had offered the $5,000 back to the plaintiff from whom they had received it, thus evidencing their understanding that the option and the incidental commission agreement were at an end. The plaintiff had refused to accept the money. It, in fact, belonged to Mignault and Morin. Under all the circumstances the crediting of this sum to Mignault and Morin on account of the purchase-price payable by them for the property affords no ground for holding that the defendants adopted and carried out a sale which the plaintiff had arranged. On the contrary, it is abundantly clear that all relations between the defendants and the plaintiff in con-

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Mignault, J.

nection with the sale of the property in question had been terminated and that the defendants sold it to Mignault and Morin as they might have sold it to any other purchaser who might offer to buy it.

In my opinion, the plaintiff has neither a legal nor a moral claim against the defendant for the commission for which it sues.

BRODEUR, J.:—I concur in the opinion of Mignault, J.

MIGNAULT, J.:—The question involved in this appeal is whether the appellants are entitled to a commission of $3,951.76 on a sale made by the respondent, on December 4, 1914, to Mignault and Morin, of a property on Sherbrooke St., Montreal, for the price of $395,176, the appellants claiming to be entitled to a commission of 1% under an agreement with the respondent. The Superior Court, Greenshields, J., maintained the appellants' action, but this judgment was reversed by the Court of King's Bench, Cross, J., dissenting. Hence the appeal to this court.

It is important to state at the outset that the appellants' action is based on a contract, and is not a claim of the nature of a *quantum meruit*. If this contract does not support the appellants' action, there seems no escape from the conclusion that their action was rightly dismissed by the judgment appealed from.

The contract is contained in two letters of Mr. Alfred St. Cyr, the respondent's agent, to the Colonial Real Estate Co. These letters are as follows:—

Montreal, September 3rd, 1912.

The Colonial Real Estate Company,

I hereby agree to give you the option of purchasing from the Grey Nuns that certain piece of land situated on the corner of Sherbrooke, St. Lawrence and Milton streets, in the City of Montreal, having a frontage of 166 feet on Sherbrooke St., 300 feet on St. Lawrence St., and 203 feet on Milton St., comprising a total area of about 49,397 feet, English measure, being lot No. 118 of the official plan and book of reference of St. Lawrence ward, in the said City of Montreal, for the price of $8 per superficial sq. foot, English measure; $100,000 payable cash on passing deed of sale and the balance, that is $295,176, payable within 5 years from date with interest at the rate of 5½% per annum, payable semi-annually. The purchaser to pay taxes from September 1, 1912, and proportion of insurance premiums from the same date.

Balance of the purchase-price payable at any time, by giving a three-months' written notice to that effect. The vendors declare that there is still a mortgage on the property of about $50,000, which the purchaser will assume. All buildings erected on grounds to be sold and all buildings to be erected shall be insured against loss by fire by companies and through insurance agencies approved by or chosen by the Grey Nuns. Said insurance to be not less than

80% of their value and the same to be transferred to the Grey Nuns to the extent of their interest. The sale to be made free of commission or expense to the Grey Nuns who, nevertheless, will supply to the purchaser their title deeds to said property. The purchase to be passed before our notary.

This option is good only until Friday the thirteenth instant at twelve o'clock noon and not later.

ALFRED ST. CYR,
Agent Grey Nuns.

The Colonial Real Estate Company. Montreal, September 3, 1912.

In reference to the option given you this day on behalf of the Grey Nuns for the purchase of their property, situated corner of Sherbrooke, St. Lawrence and Milton streets, I beg to inform you that the Grey Nuns bind themselves to give you a commission of 1%, that is to say, $3,951.76, on the total amount of the sale of said property, if said sale is effected during the currency of said option, which expires Friday the 13th instant at noon, and provided also that this sale is completed, the deed signed, and the first payment of $100,000 duly paid to the Grey Nuns within 15 days after the acceptation of said option and not otherwise.

ALFRED ST. CYR,
Agent Grey Nuns.

The terms of these letters can give rise to no difficulties of construction. The contract was a conditional one, the condition being the sale of the described property for the price of $395,176, "during the currency of the option . . . and not otherwise."

It is common ground between the parties that the term for the completion of the sale and the signing of the deed was extended to November 12, 1912, when it finally expired, and also that certain modifications were made as to the amount in cash which had to be paid on passing the deed of sale. These latter modifications, however, are not material for the decision of the case, the whole question being whether the appellants can claim a commission on a sale made by the respondents after the expiration of the option.

On September 12, the Colonial Real Estate Co. wrote to Mr. St. Cyr, on behalf of an unnamed client, the following letter:—

Mr. Alfred St. Cyr, September 12th, 1912.

On behalf of our client we hereby accept your option dated September 3, 1912, for that certain piece of land situate on the corner of Sherbrooke, St. Lawrence and Milton streets, being lot No. 118 of the official plan and book of reference of St. Lawrence ward, in the City of Montreal, said to contain 49,397 sq. feet for the price of $8 per square foot or a total price of $395,176, on the following conditions: $45,176 payable cash on passing of deed of sale, $50,000 in one year from date of passing deed, and the balance, that is, $300,000 payable within 5 years from that date with interest at the rate of 5½% per annum, payable semi-annually. Taxes, interest and insurance to be adjusted as from September 1, 1912.

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Mignault, J.

We enclose our cheque for $5,000 on account of the purchase-price.

As per your letter of the 3rd inst., it is distinctly understood that you will pay us a commission of 1% of the sale price, that is to say, $3,951.76, on the completion of sale.

THE COLONIAL REAL ESTATE COMPANY.

It appears that the appellants were then dealing with one Rollit, who had made them an offer, also on behalf of the unnamed clients, for this property, with a cheque for $5,000, and this was the sum which the appellants sent to the respondent. Rollit was to get one-half of the commission from the appellants.

Subsequently, at the request of the respondent, the appellants named, by a letter dated November 11, 1912, J. A. Desjardins as the purchaser they had obtained for the property. This gentleman, the proof shews, had made arrangements to sell the same property to Mignault and Morin for the sum of $425,000, thus making a clear profit of nearly $30,000. The respondent had nothing to do with this resale.

The respondent ordered notary Prud'homme to prepare a deed of sale of the property, and, on November 11, duly authorised representatives of the respondent went to the office of the notary to sign a deed of sale of the property which had already been prepared. However, as Mignault and Morin declined to execute their undertaking to buy the property from Desjardins for $425,000 Desjardins refused to sign the deed of sale and to make the cash payment required, and the whole transaction fell through. The option expired the next day without the appellants having obtained a purchaser for the property.

At this stage there can be no doubt that the conditional contract the respondent had made with the appellants could give the latter no right to a commission, the condition having failed.

And now because the respondent, on December 4, 1912, when it was free from any obligation towards the appellants or any one else, sold their property to Mignault and Morin for $395,176, on terms similar to those under which it was to be sold to Desjardins, the appellants, basing their action, as I have said, on the expired contract, and not on a *quantum meruit*, claim the commission of 1% from the respondent.

I am, without any hesitation whatever, of the opinion that, under the law of the Province of Quebec, the appellants' action cannot succeed. Nothing is more elementary than that a person

obliging himself to pay a sum of money upon the happening of a certain event, within a fixed term, is free from any obligation should the term expire before the happening of the event. In other words, a conditional obligation fails when the condition itself fails, and where a term is fixed during which the condition must be accomplished, the obligation is at an end if the condition be not fulfilled during the term. Art. 1082 of the Civil Code clearly implies this when it says:—

If there be no time fixed for the fulfilment of a condition, it may always be fulfilled; and it is not deemed to have failed until it has become certain that it will not be fulfilled.

This article, although negative in form, while art. 1176 C.N. is affirmative, makes it clear that where a term has been fixed, the condition cannot be accomplished after the expiration of this term. This rule is really elementary and seems to require no argument, but I will nevertheless quote from Pothier and Baudry-Lacantinerie to shew that there is no possible room for doubt. Pothier, vol. 2, Obligations, c. 3, No. 209, says:—

Lorsque la condition renferme un temps préfix, dans lequel elle doit être accomplie, comme "si je me suis obligé de vous donner une certaine somme si un tel navire était cette année de retour dans un port de France;" il faut que la chose arrive dans le temps préfix; et lorsque le temps est expiré sans que la chose soit arrivée, la condition est censée défaillie, et l'obligation contractée sous cette condition est entièrement évanouie.

Baudry-Lacantinerie, vol. 13, vbo., in his treatise on Obligations, No. 799, expresses the same opinion:—

Si les parties ont fixé un délai pour l'accomplissement de la condition et que l'évènement ne se produise qu'après l'expiration de ce délai, en réalité, par celà seul qu'il n'a pas lieu dans le temps assigné, l'évènement qui arrive n'est pas celui que les parties avaient en vue. Comme le dit excellemment Demolombe: "La fixation du temps forme, dans ce cas, l'un des éléments constitutifs et comme une partie intégrante de l'évènement lui-même" (Demolombe XXV., n. 339).

Il s'ensuit que les juges ne sont pas admis à proroger le délai. S'ils le prorogeaient, ils changeraient la condition et méconnaitraient la loi du contrat.

Reliance is placed by the appellants on the decision of the Judicial Committee of the Privy Council in the case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614. This decision was rendered in a case originating in Nova Scotia, and obviously is based upon the English law.

May I say, with all possible deference, that I would deprecate, on a question under the Quebec law, relying upon a decision, even of the Privy Council, rendered according to the rules of the Eng-

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Mignault, J.

lish law. It would first be necessary to shew that there is no difference between the two systems of law by referring to authorities binding under the French law, and this has not been done. Very earnestly, I am of the opinion that each system of law should be administered according to its own rules and by reference to authorities or judgments which are binding on it alone. What I have said also disposes of the decision of this court in the case of *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, an Alberta case, also relied on by the appellants.

I may, however, say that the decision of the Privy Council in the *Burchell* case has no application whatever to the present case. The head-note of the report says:—

> In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected:—
>
> *Held*, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

There was no conditional contract with the agent in the *Burchell* case. The referee had held that Burchell had a *continuing power of sale*, which their Lordships construed as meaning that his employment was "*a general employment.*" And they cite as applicable to such cases the rule laid down by Willes, J., p. 741, in *Inchbald* v. *Western Neilgherry Coffee Plantation Co.*, 17 C.B. (N.S.) 733, 144 E.R. 293:—

> I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

I could entirely concur in this rule, and base my opinion on art. 1084 of the Quebec Civil Code, but there is absolutely nothing in the present case which would justify this court in applying it to the respondent. There is no suggestion of any fraud or collusion chargeable against the respondent. It did what it could do to execute its obligation, and the transaction failed because the purchaser found by the appellants refused to sign the deed within the term.

Will it now be said that the respondent could not sell its property without incurring liability towards the appellants? Or for how long a time should it abstain from exercising its rights as an owner? And can it be contended that, assuming that the respond-

CAN.

S. C.

COLONIAL REAL ESTATE CO. v. SISTERS OF CHARITY OF THE GENERAL HOSPITAL OF MONTREAL.

Mignault, J.

ent could, after the term, sell its property, it should not, at any time, sell it to any purchaser with whom the appellants had dealt, unless it was prepared to pay to the appellants a commission to which the latter never had more than a conditional right, which right had come to an end on November 12, by the failure of the condition?

The Superior Court held that the respondent had adopted the appellants' contract and was, therefore, liable for the commission. With deference, I would say that it is immaterial whether it adopted it after the appellants' right had ceased to exist, provided it had done nothing to prevent the happening of the condition during the specified term.

It is also said that the respondent kept the $5,000 it had received from the appellants and afterwards, on December 4, credited it to Mignault and Morin, to whom it really belonged. The respondent, on November 25, tendered back this money to the appellants and the latter refused to accept it. What more could the respondent do?

I have carefully examined the Quebec decisions of which the counsel for the appellants has, since the argument, filed a list. None of these decisions support the contentions of the appellants. I may add that nothing in the record shews any extention of the delay beyond November 12, 1912, or any waiver whatever by the respondent.

For these reasons my opinion is that the appeal should be dismissed with costs. *Appeal dismissed.*

Re PORT ARTHUR WAGON Co.; SMYTH'S CASE.

CAN.

S. C.

Supreme Court of Canada, Davies, Idington, Anglin, and Brodeur, JJ., and Falconbridge, C.J. ad hoc. October 15, 1918.

COMPANIES (§ V F—255)—CONTRIBUTORIES—SUBSCRIPTION—RATIFICATION—CONDUCT.

Where one has subscribed for shares in a company to be formed, was allotted the shares and elected director, and as such executed a power of attorney authorizing the signing his name to the company's prospectus, acting in the belief that the shares had been issued to him for services rendered, will be estopped, by his conduct, from denying his liability as a shareholder or contributory; the fact that the company was incorporated at less capital stock than proposed and under a different name does not warrant his rescission of the subscription.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming, by an equal division of

CAN.

S. C.

RE PORT ARTHUR WAGON CO.; SMYTH'S CASE.

opinion, the judgment of Britton, J., who had ordered the name of Smyth to be struck off the list of contributories of the Port Arthur Wagon Co., where it had been placed by order of the Master-in-Ordinary. Reversed.

Davies, J.

DAVIES, J.:—There has been much conflict of judicial opinion upon this application to settle the name of W. R. Smyth upon the list of contributories of the insolvent company being wound up. The master-in-ordinary settled his name on the list of contributories. On appeal to a justice of the High Court, Britton, J., allowed the appeal and struck off Smyth's name. On further appeal to the Appellate Division the judgment of Britton, J., was affirmed on an equal division of the judges of that court; whereupon the present appeal to this court was taken.

I have given the facts of the case much consideration and have reached the conclusion that the appeal should be allowed with costs throughout and the judgment of the master-in-ordinary restored for the reasons stated by him, and those stated by Meredith, C.J., and Riddell, J., in the Second Appellate Division.

I think the power of attorney executed by Smyth to the Port Arthur Wagon Co., Ltd., to sign the prospectus of that company, dated September 23, 1910, and which was duly filed with the provincial secretary together with the prospectus as required by the provincial law, signed by Smyth and the other directors, conclusive as against Smyth, and that his attempted explanation as to why he signed was unsatisfactory.

I cannot think it reasonable or possible that after such a solemn and deliberate act, he can now be heard to say that he never was a shareholder or a director in the company.

Whatever might be said as to other branches of the case, this fact of the signing of the power of attorney to put his name as a shareholder and director to such an important official document as the prospectus of the company intended to be, and which was duly filed as by law required with the provincial secretary, is conclusive to my mind.

Idington, J.

IDINGTON, J.:—The numerous excuses given by, or on behalf of, respondent for relieving him from the position that the report of the learned master-in-ordinary had placed him in as a contributory, have been so well met and disposed of by the master-

in-ordinary and the Chief Justice of the Common Pleas (with each of whom, in all essential parts of their respective reasons for judgment, I agree) that it seems needless for me to reiterate same here.

I also agree with the greater part of the reasons assigned by Riddell, J., but cannot feel so charitably disposed as he seems, and hence inclined to accept at its face value, as he does, the respondent's story of how and why he felt qualified to act in discharge of a most grave and serious part of a director's duties when only qualified to do so by reason of something that did not take place for four months after his joining in such discharge of a director's duty.

I am afraid respondent has deceived himself. An argument is made that the appellant did not call the other alleged actor in such a comedy to contradict him.

One of those had, as shewn by the quotation Rose, J., gives, to all intents and purposes already sworn to what was quite inconsistent with the story in the sense in which it is now put forward.

The marvel is that the other, if present in court as alleged, was not called to corroborate respondent if he could be got to do so.

It is not necessary to assume that respondent manufactured the whole story. Having regard to his failure to respond to the demands made upon him for payment of calls made, upon the stock allotted to him, it was quite natural he should, when asked to act as director, make some such remark as he swears to, and equally well might Lindsay, hearing it, recall the fact that he was to give him some stock got for nothing and make the response alleged.

That any one concerned in such idle talk could have taken it seriously as the basis for qualifying a director to act, and yet the implementing of such a basis be delayed for 4 months, I cannot accept.

Much less can I understand why he should, for the many months thereafter, continue to submit, as previously, without response, to be dunned so persistently, if in fact he intended to repudiate acceptance of the allotment. That was a time for him to speak or forever afterwards be silent.

The case, as I view it, is that of a man who, having agreed to take stock, might have withdrawn from the consequences of that act at least up to the time when interpreted by those concerned

CAN.

S. C.

RE PORT ARTHUR WAGON CO.; SMYTH'S CASE.

Idington, J.

as a proposal still on foot and valid, and when they assented thereto, by the allotment they duly made, and by his election as director, and possibly including the time of his failure to repudiate either, but when all that is followed by an act as a director which involved possible serious consequences to himself and others, he was thereby inviting to join him and rely upon his representations, he should not be permitted, years afterwards, successfully to say that what he did rested, *not* upon the written record, but upon, and only attributable to, some idle persiflage.

It is idle to dwell upon the frame of the contract as it originally stood as being only between him and Cameron. Neither that sort of document, nor even articles of association, can be said to be in themselves, when standing alone, a contract with the company which is created later.

When the company has come into existence the subscription may be given vitality, or possibly be nullified by those becoming empowered under its charter to act in relation thereto.

The conduct of the parties concerned must ever remain as the true test of what measure of responsibility there may attach to any one claimed to have become legally liable to be placed on the list of contributories.

Indeed, as said long ago by Lord St. Leonards, in the case of *Spackman* v. *Evans*, L.R. 3 H.L. 171, at p. 208:—

> A man may become a contributory to a company by his acts, although he has not made himself legally a member of it.

I think possibly *Leeke's* case (1871), 6 Ch. App. 469, of all the many cases I have looked at, bears the most instructive resemblance, in its leading features, to this, in the way of supporting the line of thought I have adverted to.

The contributory there in question had never signed any application for shares, but had taken some little part in the initiatory steps towards the creation of the new company in which he was allotted shares, and his acceptance of the office of director, though evidenced only by a simple act of very minor importance, was held sufficient to bind him also in way of an acceptance of what had been allotted.

And curiously enough, in that case, there was also a discarded side-light story, as to the possibility of the shares having been paid up.

The case of *Robert* v. *Montreal Trust* (1918), 41 D.L.R. 173, 56 Can. S.C.R. 342, decided what some of us thought of men who subscribe and pay no heed to the consequences of their acts.

I do not feel called upon to express any opinion upon the validity or invalidity of the liquidator's transaction with Wiley. The proper time to have raised any contention, if ever founded, as to the status of the liquidator, was before or immediately after these proceedings had begun.

Idington, J.

I think this appeal should be allowed with costs throughout and the report of the master-in-ordinary be restored and confirmed.

ANGLIN, J.:—The question raised on this appeal is the liability of the respondent to be placed on the list of contributories of the Port Arthur Wagon Co., which is being wound up, in respect of 50 shares of preferred stock. The master held the respondent liable. On appeal, a judge of the high court division reversed this holding and removed his name from the list of contributories. This judgment was affirmed by an equally divided court of the appellate division.

Anglin, J.

The liquidator asserts the liability of the respondent on two grounds: (a) a subscription by him for the 50 shares duly accepted by allotment; (b) conduct estopping him from denying that he is the holder of these 50 shares.

(a) Britton, Riddell, Lennox and Rose, JJ., all agree that there was no subscription by the respondent for the shares allotted to him. The document relied on as a subscription is an agreement made in September, 1909, with Mr. (now Sir) Donald C. Cameron and other prospective subscribers, to take 50 shares in a projected company—"the Port Arthur Manufacturing Company . . . with a capital of $1,000,000, divided into 10,000 shares of $100 each."

The subscribers covenanted and agreed with each other to become incorporated. No other subscriptions to this agreement were obtained. It was not proceeded with. Another company, the Port Arthur Wagon Co., was incorporated in January, 1910, with a capital of $750,000. The respondent had nothing whatever to do with this incorporation. Long before it took place—indeed, very shortly after he had signed the September agreement—he learned that a representation made to him by the pro-

CAN.

S. C.

RE PORT ARTHUR WAGON CO.; SMYTH'S CASE.

Anglin, J.

moter, Lindsay, when his signature was obtained, that the Town of Port Arthur had passed a by-law giving a cash bonus of $100,000 to the projected company, was untrue and he at once notified Lindsay, who had secured his subscription, that he withdrew it on account of the misrepresentation and Lindsay acquiesced in his doing so. There was nobody else whom he could notify at that time. Lindsay had also told him that he had practically all the $1,000,000 capital subscribed, which was likewise an untrue statement.

The company incorporated decided to issue part of its stock as preference shares, and it is for 50 of these preferred shares that it is sought to hold the respondent as a contributory. As Riddell, J., says:—

> In my view, it cannot be successfully contended that a subscriber for shares in a proposed company with $1,000,000 can be compelled to take shares in a company with only $750,000, nor can a subscriber for shares be compelled to take "preferred shares"—and unless his conduct, subsequent to the allotment, bound him the respondent must be cleared of liability.

(b) The estoppel which is invoked against the respondent is rested on two grounds: (1) his neglect to answer numerous letters notifying him of the allotment of shares to him, demanding payment of calls, advising of meetings, etc. (2) The execution of a power of attorney authorizing the appending of his name as a director to a prospectus of the company now in liquidation.

(1) If the respondent had ever subscribed for the shares which it is sought to fasten upon him, a great deal might be made of his failure to answer letters of the company's secretary addressed to him, or to take other steps to repudiate liability. But I know of no ground on which a person who has never subscribed can be made liable in respect of shares, which a company has purported to allot to him, merely by inaction—by refusing or neglecting to reply to letters notifying him of calls, etc., or failing to take steps to have his name removed from the books of the company as a shareholder. No authority for such a proposition was cited and I venture to think none can be found.

(2) The matter of the power of attorney is not so easily disposed of. If the only shares in respect of which the respondent could have qualified as a director had been the 50 shares here in question, his signature to the power of attorney and action upon it which ensued might be taken to estop him from denying his

liability as a contributory. But he makes this explanation about the signing of the power of attorney: He had been elected a director of the company without his knowledge or assent. The company's secretary had written him stating that the company was obliged to issue a prospectus and that it was necessary that all the directors should sign it and assent to retain office. In answer to this letter he went to Mr. Lindsay's office and tells this story of what happened there:—

Q. Then do you recollect sending this power of attorney? A. I do.

Q. Was that signed in Mr. Lindsay's presence? A. Yes.

Q. Tell His Honour what took place then? A. Mr. Lindsay—Mr. Fox, I believe the gentleman who was here had written me regarding calling at his office that he wanted to see me particularly, and I think I wrote him to say that I would be in the city some day and would perhaps call on him. I don't remember exactly the circumstances, what I said in the letter. However, I called at the office. Mr. Lindsay and Mr. Fox were both there, and I told Mr. Lindsay there, and Mr. Fox as well, that I couldn't sign no prospectus, that I had no stock, had subscribed for no stock in this company; didn't understand why they should ask me to sign any prospectus. The reasons they gave me for asking me to sign a prospectus were that they had put my name in as a director—which was absolutely without my authority—that they put my name as a director for this company, and they were stuck regarding the prospectus because my name had been put in as a director, and asked me if I would sign this power of attorney, and I said "No, I will not sign it because I am not a shareholder." Then Mr. Lindsay said: "You are a shareholder of the company because I have given you some of my stock" for services that I had done for him in connection with introducing Mr. Price and Mr. Clair to Mr. Lindsay some time the previous winter, and he said that he placed to my credit, in my name, a certain number of shares fully paid up. I says: "Under those circumstances I will sign the prospectus on the condition—taking your word for it—that you have placed to my name 25 shares of stock in the company that you are asking me to sign the prospectus for."

Q. Did you ever attend a directors' meeting, Mr. Smyth? A. Never.

Q. Some time later you got a certificate shewing that you were the holder of 25 shares of stock? A. I did.

Q. Do you know who sent that? A. Mr. Lindsay sent me that. Certificate marked ex. No. 12.

Q. Did you see this prospectus that was signed Mr. Smyth. A. No.

Neither Lindsay nor Fox was called to contradict this story, although both were in court and heard it sworn to by Smyth. Fox gave other evidence in rebuttal. The stock certificate produced corroborated Smyth's statement as to the 25 shares given him by Lindsay. He was not discredited as a witness by the Master who heard his evidence. His statement is accepted by Riddell, J., as well as by Britton, Lennox and Rose, JJ. There is

CAN.

S. C.

RE PORT ARTHUR WAGON CO.; SMYTH'S CASE.

Anglin, J.

nothing to shew that he did anything whatever in respect of the 50 shares. His signature to the power of attorney, and the use of his name as a director, which he permitted, is fully explained by his understanding that he was the holder of the 25 shares given him by Lindsay. The fact that the certificate issued to him for 25 shares bears a date subsequent to that of the prospectus has no special significance. He acted on the assumption that Lindsay had transferred, or would transfer, the shares to him. Smyth did no act which he thought, or which anybody else who knew of the arrangement in regard to the 25 shares could reasonably think, was based upon his being also the holder of 50 shares of preferred stock. There was, therefore, as Rose, J., points out, nothing done by the respondent which amounted to a representation that he was the holder of 50 shares of the stock of the Port Arthur Wagon Co.—nothing which he knew, or should have known, was calculated to create that impression. The foundation for an estoppel is, therefore, lacking.

Morrisburgh and Ottawa Electric R. Co. v. *O'Connor* (1915), 23 D.L.R. 748, 34 O.L.R. 161, cited by Riddell, J., was not, as is that at bar, a case of no subscription by the allottee—it was a case of a voidable subscription not repudiated with reasonable promptitude, in that respect not unlike a case recently dealt with in this court: *Robert* v. *Montreal Trust Co.*, 41 D.L.R. 173.

For these reasons and those stated by Rose, J., I would dismiss this appeal.

Brodeur, J.

BRODEUR, J.:—We are called upon to decide whether the respondent, W. R. Smyth, should be placed on the list of contributories of the appellant company in liquidation.

There is a great divergence of opinion in the court below as to the liability of the respondent. The master-in-ordinary, who heard the evidence and whose findings are, therefore, entitled to a great deal of weight, and two judges of the appellate division have declared that he was liable, while the other three judges who dealt with the case stated that he was not.

The defence of Smyth was that he never subscribed nor applied for shares in the appellant company; and that any subscription which might have been obtained from him was obtained by fraud or misrepresentation. But the latter ground seems to have been abandoned, since there is no mention of it in his notice of appeal from the report of the master-in-ordinary.

Some other objections have been raised before this court and the appellate division, viz., the one concerning the validity of the sale of the assets to Wiley, but as the facts on which these grounds might be based have not been fully inquired into, it would be rather dangerous to pronounce upon them. I prefer to confine myself to the pleadings and to the facts which have been tried.

On September 24, 1909, Sir Douglas Cameron and the respondent Smyth signed the following document:—

We, the undersigned, do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of the first part of the Companies Act under the name of the Port Arthur Manufacturing Company, Limited, or such other name as the Secretary of State may give to the company, with a capital of one million dollars, divided into ten thousand shares of one hundred dollars each.

And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

In witness whereof we have signed.

D. C. Cameron (*a*), 1, Sept. 24th,	Toronto, Winnipeg, Man.
W. J. Lindsay	W. J. Lindsay as Vice-President.
W. R. Smyth (*s*), 50, Sept. 24th,	Rydal Bank, W. J. Lindsay.

As far as the signature of Smyth was concerned, it was obtained on the solicitations of a company promoter by the name of W. J. Lindsay, whose name appears on the above document as having witnessed the signature of the subscribers.

In the month of November, 1909, at the request of Lindsay, an application was made to the Secretary of State by the firm of solicitors, Starr, Spence & Cameron, and two of their students, for the incorporation of the company under the name of Port Arthur Wagon Company. The application stated that the amount of capital stock of the company would be $750,000. The application was granted and letters patent were issued on January 11, 1910.

The organization of the company was then proceeded with and a by-law was passed declaring that 3,000 shares of the capital stock of the company be issued as preferential shares of $100 each with cumulative dividend of 7% and priority over all the other shares of the capital stock of the company.

On March 22, 1910, at a meeting of the directors of the company, the allotment of preferred shares was made to different persons, namely, to Sir Douglas Cameron for 1 share and to

CAN.

S. C.

RE PORT ARTHUR WAGON CO; SMYTH'S CASE.

Brodeur, J.

W. R. Smyth for 50 shares, and Smyth was elected as one of the directors. A notice of allotment was given to the respondent. He was at the same time also informed of his election as director and was given notice of different meetings of directors which were called later on; but he does not seem to have ever attended any of these meetings.

He was called upon also several times to pay calls upon his stock.

At first he did not answer, but on October 19, 1911, he wrote stating:—

> It is impossible for me to accept your draft for reasons which I have several times explained to the company at their office, while I was in Toronto. I also explained my position to the Hon. Mr. Cameron of your city, who was then, I believe, president.

As to what those reasons were, the evidence is rather conflicting. The secretary of the company said that Smyth had never repudiated his subscription, and he added that Sir Douglas Cameron had reported at a meeting that he had met Smyth and that he was unable to take up drafts on account of losses he had got in a fire. On the other hand, Smyth states in his evidence that he told to his co-shareholders that his subscription had been obtained by fraud and misrepresentation and that he shoul l not be considered as a shareholder.

On the 29th August, 1910, he, however, as a director, gave to the secretary of the company a power of attorney to sign the prospectus of the company.

Now he says that when he was asked by Lindsay and the secretary of the company to give that power of attorney, he objected, stating that he was not a shareholder; but Lindsay answered that he had put some of his own shares in his name.

That story does not agree with what has been said by the secretary of the company, who claims that, to his knowledge, Mr. Smyth never repudiated his contract to take shares in the company.

In those circumstances should he be held liable for the 50 shares which he subscribed for on September 24, 1909?

He complains that the company incorporated is known as Port Arthur Wagon Co., and that his subscription was for a company called Port Arthur Manufacturing Co. It is true that the latter name was mentioned in the document which he signed, but

it is stated also in that document that his subscription could cover any other name that the Secretary of State might give. It is no wonder that the name "Port Arthur Manufacturing Company" would not be accepted by the Secretary of State, because it was too general; and it is no wonder, therefore, that the application, in order to meet that objection which would certainly be made to the name of the company, would have described it the "Port Arthur Wagon Company." Besides, in his evidence, Mr. Smyth admits himself that it would not be an objection which would have prevented him from carrying out his obligation.

It is likewise argued that the capital of the company is not $1,000,000, as stated in the subscription, but only $750,000. He could not, in my opinion, complain of that fact. If there were evidence to prove that with a capital of less than $1,000,000 the company could not carry out its work, that might be a very serious objection. But there is no such evidence.

He further says:—

I have subscribed for common shares and not for preferential shares, as were allotted to me.

I do not see how he can complain of that, because the preferential cumulative shares were far more advantageous than the ordinary shares.

He says that he had notified Lindsay that he could not carry out his contract. Well, Lindsay was not the company, and I think his duty was, when he received notice of his allotment, to formally notify the company that his subscription would not cover the allotment which had been made.

He accepted the position of director; he signed the prospectus; and it seems to me now that he is estopped from stating that he is not liable for the agreement which he signed.

For those reasons, I think that he has been properly put on the list of contributories and that the decision of the master-in-ordinary should be restored with costs of this court and of the courts below.

FALCONBRIDGE, C.J.:—For the reasons given in the court below by the Chief Justice of the Common Pleas and Riddell, J., I would allow this appeal.

Falconbridge, C.J.

Appeal allowed.

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 24, 1918.

CONSTITUTIONAL LAW (§ II A—154)—SEPARATE SCHOOLS—DE FACTO COMMISSION—VALIDATING STATUTE.

The Ontario statute, 7 Geo. V., c. 60, validating the expenditures and obligations of commissioners in reference to the management of the Roman Catholic Separate Schools of Ottawa, incurred under the Act of 5 Geo. V., c. 45, which was later held *ultra vires*, does not "prejudicially affect any rights or privileges with respect to denominational schools," within the meaning of s. 93 of the B.N.A. Act, and is *intra vires*; the acts of the commissioners, in the circumstances, must be regarded as those of a *de facto* body, with the right to be recouped of the moneys they had expended in the management of the schools.

[See annotation 24 D.L.R. 492 on constitutional guarantees and denominational privileges to schools.]

Statement.

APPEALS by the Attorney-General for Ontario and the defendants and cross-appeal by the plaintiffs from the judgment of Clute, J., 41 O.L.R. 594. Reversed.

McGregor Young, K.C., for the Attorney-General for Ontario.

G. F. Henderson, K.C., for the Quebec Bank.

N. A. Belcourt, K.C., and *J. H. Fraser*, for the plaintiffs.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This case is an aftermath of the cases of *Ottawa Separate Schools Trustees* v. *Ottawa Corporation* and *Ottawa Separate Schools Trustees* v. *Quebec Bank*, 32 D.L.R. 10, [1917] A.C. 76, in which it was held by the Judicial Committee of the Privy Council that the Act of the Legislature of Ontario, 5 Geo. V. ch. 45, by which the management of the Ottawa Separate Schools was committed to a Commission appointed by the Crown, was, as framed, *ultra vires*, the ground of the decision being that the Act prejudicially affected the right or privilege conferred by the Act of the Parliament of the late Province of Canada of 1863 (26 Vict. ch. 5) upon the supporters of the Roman Catholic Separate Schools in Ottawa to elect trustees for the management of the schools.

In the first of these actions the relief claimed was an injunction restraining the Corporation of Ottawa from paying to the Commission or to any one except the School Board and restraining the Commission from receiving all moneys theretofore or thereafter levied, received, or collected for the support of the Ottawa Separate Schools, and in the other action the relief claimed was an injunction order restraining the Quebec Bank from delivering

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Meredith, C.J.O.

over to the Commission or to any one but the School Board and restraining the Commission from receiving certain moneys deposited by the School Board with the Quebec Bank.

These actions had been dismissed by the trial Judge (24 D.L.R. 497, 34 O.L.R. 624), and his judgments had been affirmed by this Court (30 D.L.R. 770). Appeals from these decisions were allowed by the Judicial Committee (32 D.L.R. 10, [1917] A.C. 76) and the declaration as to the validity of the Act I have mentioned was made.

On the 10th February, 1916, an order was made by the First Divisional Court for the payment into Court by the Corporation of the City of Ottawa of all rates, taxes, or other moneys collected or received or then in its hands for or for the purposes of the Separate Schools of the City of Ottawa or in question in the first mentioned action (*Ottawa Separate School Trustees* v. *Corporation of Ottawa*), and on the 3rd April, 1916, after the dismissal of the plaintiffs' appeal by the Divisional Court, an order was made by that Court for the payment out of Court to the Commission of the money that had been paid in under the order of the previous 10th February, as well as any other rates, taxes, or other moneys then in the hands of the Corporation of Ottawa for the purposes of the Separate Schools of Ottawa, and the order of the 10th February, as to payment into Court of any moneys thereafter coming to the hands of the corporation for those purposes, was vacated.

The money in Court was at once paid to the Commission pursuant to the order of the 3rd April.

These two orders stand unreversed, except in so far as the allowance of the appeals from the judgment in the action may have affected them.

Although the order of the 3rd April, 1916, appears in the record of proceedings for the Privy Council, and it was apparently the intention of the School Board to appeal from that order, as appears from the order of my brother Hodgins of the 22nd April, 1916 (37 O.L.R. 25), allowing the security on the appeal to the Privy Council, no reference is made to it in the order in council of the 6th November, 1916, allowing the appeals.

The order in council, however, provides for liberty being reserved to the appellants to apply to the Supreme Court for

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Meredith, C.J.O.

relief in accordance with the declaration as to the invalidity of the Act. It is probable, I think, that this reservation was to enable the appellants to apply for relief in respect of the money that had been paid to the Commission under the order of the 3rd April, 1916.

In the reasons of my brother Hodgins for his order of the 22nd April, 1916, he says that if the appeal from the judgment in the action should be successful it would be followed by a direction for the return of the money or an account, if in fact it had been applied to the objects for which the appellants would be bound to expend it.

I shall refer to this aspect of the case further on, but I now proceed with the history of events.

The Commission took control of the schools on or about the 26th July, 1915, and handed it back to the School Board on the 1st November, 1916, after the decision of the Judicial Committee had been announced.

During the time the Commission was in control of the schools it received various sums which, but for its existence, would have been paid to the School Board, and the Commission expended in the conduct and management of the schools a large sum in excess of the sums so received. These additional moneys were provided by means of borrowings by the Commission, for which it remains liable to the lenders.

Shortly after the Commission passed out of existence, the School Board had the accounts of the expenditures made by the Commission audited, and the result of the audit was to shew that these accounts were satisfactory except as to a few small expenditures which the auditor thought to be open to question.

On the 12th April, 1917, an Act was passed by the Legislature of Ontario, intituled "An Act respecting the Roman Catholic Separate Schools of the City of Ottawa" (7 Geo. V. ch. 60). The preamble contains a recital of the Act authorising the appointment of the Commission and its appointment; that the Act had been declared *ultra vires*; that the trustees, prior to the appointment of the Commission, had neglected and failed to open, keep open, maintain and conduct the schools according to law and to provide qualified teachers for them; had threatened at various times to close the schools and had neglected and refused to discharge and

perform the duties imposed upon them by law, to the loss and damage of the supporters of the schools and to the serious prejudice of the children entitled to attend them; that by reason of this default and neglect it was necessary to provide special means for the education of the children entitled to attend the schools until the trustees should be willing to perform their lawful duties in respect to them and the Commissioners were appointed for that purpose; that the Commissioners entered into possession of the schools on the 26th July, 1915, and thereafter maintained and conducted them continuously until the Act was declared to be *ultra vires*, during the whole of which time the trustees were unwilling to conduct them according to law; that the Commissioners in carrying on the schools and meeting the obligations of the trustees disbursed $68,873.43, which at the date of their appointment stood to the credit of the trustees in the Quebec Bank at Ottawa, the further sum of $84,156.04 received out of Court pursuant to the order of the 3rd April, 1916, and the further sum of $71,944.08 received from other sources, all of which sums were, by law, applicable to the maintenance and conduct of the schools; that the Commissioners also incurred, in the maintenance, conduct, and management of the schools, a liability to the Bank of Ottawa for $71,891.16 and interest thereon, which still remains unpaid; and that the trustees had commenced actions against the Quebec Bank, the Bank of Ottawa, and the Commissioners, to recover the moneys so disbursed, and had refused to assume the said liability to the Bank of Ottawa; and that it was desirable to declare the rights of the parties.

The relevant provisions of the Act are as follows:—

"1. It is declared that the Commissioners disbursed the moneys and incurred the liability herein recited for payments and expenditures which were necessary to maintain and carry on the said schools and which should have been made by the Board in the proper conduct and management of the said schools but for its wrongful neglect and default as aforesaid.

"2. It is further declared that the said payments and expenditures shall be deemed for all purposes to have been made by the Commissioners for and on behalf and at the request of the Board and that the Commissioners are entitled to indemnity from the Board in respect thereof.

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Meredith,C.J.O.

"3. It is further declared that the said liability of $71.891.16 and interest thereon to the Bank of Ottawa, subject to the rights of third parties, if any, is a debt of the Board to the said bank and that the bank is entitled to set off the same against any other moneys of the Board in its hands.

"4. In default of payment of the said liability by the Board the same may be paid to the bank out of the Consolidated Revenue Fund of the Province and thereafter the said sum with proper interest thereon shall be a debt to His Majesty and may be recovered from the Board in any action brought for that purpose.

"5. This Act may be pleaded as a defence to any action now pending or that may hereafter be brought by the Board against any person or corporation in respect of any of the moneys received and disbursed by the Commission as aforesaid."

The actions referred to in the preamble are the actions the judgments in which are the subject of the present appeal, and the objects of them are correctly stated in the preamble.

The actions were tried before my brother Clute, and the judgment pronounced by him is dated the 14th January, 1918, and is one judgment in the three actions, which were consolidated by an order of my brother Middleton, dated the 19th March, 1917.

The questions raised are as to the right of the School Board to recover moneys standing at its credit in the Bank of Ottawa and the Quebec Bank which were paid over to the Commission and moneys received by the Commission from the Corporation of the City of Ottawa, being sums levied by the corporation for the support of separate schools, and the claim of the School Board is to recover from the banks the moneys at its credit with them and from the surviving members of the Commission and the executors of a deceased member (to whom I shall afterwards refer as "the Commission") the money received by it from the Corporation of Ottawa.

The defendants rely upon the statute 7 Geo. V. ch. 60 as a defence to the action, and claim that all these moneys were moneys expended by them in carrying on the schools, and that they ought therefore not to be required to repay them to the Board. The defendants the Bank of Ottawa counterclaim to recover from the School Board $71,891.16 borrowed by the Commissioners from the Bank of Ottawa and used by the Commission in carrying on the schools.

It should be mentioned that the sum claimed from the Commissioners is the sum paid into Court and afterwards paid out to the Commission under the order of the 3rd April, 1916, to which I have referred. All of the moneys which the School Board is seeking to recover were moneys which were applicable, and would, if they had come to its hands, have been applied, to the carrying on of the schools.

If the Act 7 Geo. V. ch. 60 is a valid enactment, the School Board's claims fail, and the counterclaiming defendants are entitled to succeed on their counterclaim. If it is not, the question is whether or not the defendants or any of them are liable for the repayment of school moneys which they received and expended in carrying on the schools, and whether or not the Commissioners are entitled to recover from the School Board the additional money expended by them for that purpose which they obtained by borrowing it from the Bank of Ottawa.

The contention of the School Board is that the members of the Commission are to be treated as wrongdoers and are not entitled to credit for the money they properly expended in carrying on the schools, and still less to be repaid the money which they borrowed and expended in that way.

The learned trial Judge held the Act of 7 Geo. V. ch. 60 to be *ultra vires*, but that, notwithstanding this, the Commissioners were entitled to credit against the sums they had received, the moneys they had properly expended in carrying on the schools, except a sum of $37,626.02, which he held to be a trust fund applicable only to meet debentures, which had been issued at maturity, but that they were not entitled to recover on their counterclaim. If the view of the trial Judge as to that sum is correct, all that it would mean would be that if the fund is restored by the Commission the amount required for that purpose would be added to the sum claimed by the counterclaim, and if the Commission is entitled to recover on the counterclaim no object would be gained by requiring the Bank of Ottawa to make good the trust fund and at the same time requiring the School Board to pay to the Commission an equal amount.

Unless the legislation in question violates the provisions of sec. 93 of the British North America Act, it is clearly valid legislation, it being competent for the Legislature to have enacted it

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Meredith, C.J.O.

under the powers conferred by sec. 92 of that Act (paras. 13, 14, and 16).

In my view, the legislation does not violate the provisions of sec. 93. Assuming that legislation which diverts from a Separate School, money which by law should be applied for carrying it on, would be invalid, I am unable to see how legislation which validates expenditures properly made in carrying on a school or a number of schools by a *de facto* body not lawfully created can be said to affect any such right or privilege as the section deals with, still less prejudicially to affect it within the meaning of the section.

The situation as disclosed on the evidence was that the School Board was conducting the schools under its charge in contravention and defiance of the law, and had brought about such a state of things, that the Legislature, in order to secure for the children of the supporters of separate schools in Ottawa the education to which they were by law entitled, found it necessary to intervene and to place the schools under the control and management of a Commission; the Commissioners appointed entered upon their duties and in good faith carried on the schools and expended the moneys in question in carrying them on; and what is argued is that, because the Commission, as it has been held, had no legal existence, the supporters of the schools are entitled, though they have enjoyed the benefit of that expenditure, to say that it was improperly made and that the Commissioners must pay the money out of their pockets, with the result that the schools will have been carried on while the Commission was in charge of them, free of expense to the supporters of the schools, and that the Commissioners must pay over to the School Board what will probably suffice to carry them on for a further period of a year or more.

It cannot, I think, be that the Legislature is powerless to prevent such a wrong from being perpetrated. While the School Board is a separate entity, it is a trustee for the supporters of the separate schools, and what is argued is that these supporters who have enjoyed the benefit of having their schools carried on are entitled to say to the Commissioners, "You have carried them on without authority and must lose all that you have expended in so doing." The Commission was the *de facto* trustee for the time being of the separate school supporters, and in all justice is entitled to be recouped the expenditure it has made for the benefit of its *cestuis que trust*.

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Meredith, C.J.O.

In my judgment, the case does not differ from that of an incorporated company whose affairs were managed by a board of directors not validly chosen, and in such a case I am aware of no principle of law which would prevent the *de facto* board from successfully claiming to be allowed against what had come to its hands of the company's money, the expenditures which it had properly made in carrying on the company's business and to be indemnified against any liability it had incurred in so doing.

If this be the correct view, why are the Commissioners to be held to be in a worse position than the *de facto* directors in the case I have suggested? I know of no reason.

If then this be the measure of the Commissioners' right, how can it be said that legislation which declares that right prejudicially affects any right or privilege of the supporters of the Ottawa Separate Schools?

True it is that if the legislation is effective the School Board is deprived of the right to have the accounts taken; but nothing substantial has been taken away in view of the result of the audit which the School Board had made, which, as I have said, shewed that the accounts were substantially correct and that only a few small items were open to question, and that as to these or indeed as to any item that was questioned by the School Board, the evidence at the trial made it clear that the accounts were correct.

If effect were given to the contention of the School Board, it would follow that if it had borrowed money for a legitimate purpose and had applied it to that purpose, but in consequence of the absence of some statutory formality the lender could not enforce his claim in the Courts, it would not be competent for the Legislature to enact that, notwithstanding the informality, the debt should be recoverable. Legislation of that character is not often passed by the Imperial Parliament, but in a new country like Canada it is sometimes necessary that it should be and it is passed.

I would for these reasons allow the appeals of the defendants with costs, reverse the judgment of the learned trial Judge, and substitute for it judgment dismissing the actions with costs and directing that judgment be entered for the Bank of Ottawa on their counterclaim with costs, and I would dismiss the appeal of the School Board with costs.

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

If I had reached a different conclusion as to the validity of the Act, I should nevertheless, for the reasons I have given, have been of opinion that the Commissioners are entitled to be recouped the money they have expended in carrying on the schools, and the result would be the same.

Appeal allowed; cross-appeal dismissed.

CAN.

S. C.

DINGLE v. WORLD NEWSPAPER Co. OF TORONTO.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 12, 1918.

LIBEL AND SLANDER (§ III A—99)—ACTION AGAINST NEWSPAPER—NOTICE—PLEADING.

Failure of the plaintiff in a libel action against a newspaper, in reply to a plea setting up want of notice as required by s. 8 (1) of the Libel and Slander Act (R.S.O. 1914, c. 71), to allege non-compliance with s. 15 (1) which disentitles the defendant from the benefit of such defence unless the name of the proprietor or publisher is stated in the paper, is not an admission of such compliance; where the plea alleges compliance, the same is not admitted by the absence of denial in the replication.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1918), 43 D.L.R. 463, 43 O.L.R. 218, affirming, by an equal division of opinion, the judgment at the trial by which the plaintiff's action was dismissed. Reversed.

The plaintiff brought action for an alleged libel published in the Toronto "World," having served the notice required by s. 8, (1), of the Libel and Slander Act on the city editor of the paper. The defendant company, claiming that this was not service on the defendant as the section required, pleaded want of notice, to which plea issue was joined. The trial judge dismissed the action on this ground and his judgment was affirmed by the Appellate Division. An appeal was taken to the Supreme Court of Canada, and when it came on for hearing, the question was raised by the court of there being no proof on the record that the requirements of s. 15 (1) had been complied with, and counsel for the respondents contended that it was admitted by the pleadings.

D. J. Coffey, for appellant; *Kenneth Mackenzie*, for respondents.

The judgment of the court was delivered by

Anglin, J.

ANGLIN, J.:—The plaintiff appeals from the judgment of the Appellate Division of the Supreme Court of Ontario, 43 D.L.R.

463, affirming, on an equal division of opinion, the judgment of Middleton, J., granting a motion by the defendant for the dismissal of this action on the ground of non-compliance by the plaintiff with sub-sec. 1 of s. 8 of the Libel and Slander Act (R.S.O., c. 71). The notice of the alleged libel complained of, addressed to "The Editor of the 'World,'" was delivered to the city editor of that newspaper. Middleton, J., held this insufficient, following *Burwell* v. *London Free Press Co* (1895), 27 O.R. 6, and *Benner* v. *Mail Printing Co.* (1911), 24 O.L.R. 507. By his appeal the plaintiff seeks to have these decisions overruled.

The defendant's motion was made under Ont. con. r. 222, upon admissions contained in the plaintiff's pleadings and examination for discovery disclosing the fact above stated.

S. 15 (1) of the Libel and Slander Act (R.S.O., c. 71) provided that:—

> No defendant shall be entitled to the benefit of ss. 8 and 14 of this Act unless the name of the proprietor and publisher and address of publication are stated either at the head of the editorials or on the front page of the newspaper.

We had occasion recently to consider a corresponding provision of the Alberta Libel Act in *Scown* v. *Herald Publishing Co.* (1918), 40 D.L.R. 373, 56 Can. S.C.R. 305. Nowhere in the material before the court does it appear that the defendant company complied with the requirements of sub-sec. 1 of s. 15. The newspaper itself, the production of a copy of which is made *primâ facie* evidence by sub-sec. 2, is not in the record.

To meet this difficulty, raised by the court itself, counsel for the defendant invoked par. 7 of his client's plea, which avers the plaintiff's neglect to give the notice prescribed by sub-sec. 1 of s. 8, and his failure in his reply to set up the defendant's non-compliance with sub-sec. 1 of s. 15. But assuming par. 7 of the statement of defence to be a good plea without an averment that the defendant had complied with sub-sec. 1 of s. 15, the absence from the reply of an allegation of non-compliance therewith is not an admission that it had in fact been complied with. Even if the defendant had expressly averred compliance with sub-sec. 1 of s. 15 in his statement of defence, the failure of the plaintiff in his reply to deny that allegation would not amount to an admission of its truth under the Ontario practice. Con. r. 144.

The appeal to this court is upon a case stated (Supreme Court Act, s. 73), on which it is our duty to give the judgment which

CAN.

S. C.

DINGLE v. WORLD NEWSPAPER CO. OF TORONTO.

Anglin, J.

the court whose decision is appealed against should have given (s. 51). We cannot, whether for the purpose of upholding or for that of impeaching the judgment appealed from, supplement the appeal case by admitting evidence that should have been placed before the provincial courts. *Red Mountain R. Co.* v. *Blue* (1907), 39 Can. S.C.R. 390.

On the ground, therefore, that compliance by it with sub-sec. 1 of s. 15 of the Libel and Slander Act is a fact which cannot be presumed in the defendant's favour on a motion made under con. r. 222, but must be established by it, and that the record contains no admission of that essential fact by the plaintiff such as that rule requires, the appeal must be allowed and the judgment dismissing the action set aside.

It should be unnecessary to add that, from the allowance of the plaintiff's appeal, no inference may be drawn as to the opinion of the court in regard to the soundness of the two decisions followed by Middleton, J.

Appeal allowed.

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 26, 1918.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION BOARD—VALIDITY OF PROCEEDINGS—FINALITY—REVIEW—JURISDICTION.

Where a municipal corporation, sued by a contractor for work done, pleads payment of the amount sued on to the Workmen's Compensation Board, after having been notified of the plaintiff's liability under the Workmen's Compensation Act and the assessment of the amount against him, the court has jurisdiction to inquire into the proceedings of the Board to ascertain whether the corporation brought itself within the protection of the Act. After a decision has been rendered and a valid assessment made by the Board, it is final and not subject to review by the courts; an assessment by an officer of the Board becomes valid when confirmed by the Board.

Statement.

APPEAL by plaintiff from the judgment of Clute, J., dismissing an action to recover $2,230.20, the balance alleged to be due to the plaintiff, a contractor, for work done for the Corporation of the City of Toronto, the defendants, under a contract. The defence was, that the defendants had paid the Workmen's Compensation Board the sum of $2,230.20, pursuant to the Board's order, that being a sum primarily due by the plaintiff to the Board, and that they were justified in charging that sum against the plaintiff, and so nothing was due to him. Affirmed.

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

The judgment appealed from is as follows:—

CLUTE, J.:—The plaintiff's claim is for $2,230.20, the balance due him upon a contract with the city.

This balance upon the contract is not denied, but the defendants plead that on September 26, 1916, the Workmen's Compensation Board notified the defendants that the plaintiff was indebted to it under the provisions of the Workmen's Compensation Act, 4 Geo. V., c. 25, as amended,* in the sum of $2,230.20, and had so notified the plaintiff; that the plaintiff did not pay the Board the amount so due; and that on September 26, 1916, the Board ordered the defendants to pay the said amount to the Board, at the same time deciding that the defendants were entitled to indemnity from the plaintiff in respect of the full amount of such payment; that the defendants paid the said sum of $2,230.20 to the Board, and were not liable to the plaintiff in respect thereof.

The defendants further plead that, by virtue of the Workmen's Compensation Act as amended, especially ss. 10, 60, and 98, this action is not maintainable and should be stayed. To this the plaintiff replies that he is not indebted to the Workmen's Compensation Board as alleged, and he denies that the said Board had decided, or had power or jurisdiction to decide, that the defendants were entitled to indemnity from the plaintiff as alleged in paragraph 5 of the statement of defence.

At the trial, the defendants' counsel admitted the amount due on the contract, and relied upon their defence.

Mr. Howard Spencer Rupert, the Secretary of the Commissioner of Works of the City of Toronto, was called and produced a letter dated December 20, 1916, as follows:—

To the Works Department,
City Hall, Toronto.

Re M. H. Murphy, Contractor.

Confirming conversation with you this morning, we beg to remind you that the assessment of this contractor, which, with added percentage to date for non-payment, is $2,230.20, remains unpaid. Under section 10, the city of course is responsible for payment of this amount with the usual right of indemnity by way of withholding balances to meet it.

Yours truly,
Workmen's Compensation Board,
N. B. Wormwith, solicitor.

*The amending Acts are: 5 Geo. V. c. 24; 6 Geo. V. c. 31; 7 Geo. V. c. 34.

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

And a further letter to the Works Department as follows:—

This contractor's assessment, which is, in accordance with our notice to you, $2,230.20, is still unpaid, and under section 10 of the Act 4 Geo. V. c. 25, as amended by 5 Geo. V. c. 24, we would ask you to kindly forward us your cheque for that amount so that the amount which has remained in abeyance for an unreasonable length of time may be cleaned up.

Workmen's Compensation Board,
N. B. Wormwith, solicitor.

Mr. Laver, the paying teller of the Treasury Department of the City of Toronto, produced a cheque dated January 3, payable to the Workmen's Compensation Board, for $2,230.20, which was duly paid. To the cheque was attached an account, dated the 22nd December, 1916, in which the Corporation of the City of Toronto were charged as indebted to the Workmen's Compensation Board, "Assessments to December 29, 1916, *re* M. H. Murphy as per H.O. letter No. 5826, $2,230.20." The cheque was remitted on January 5, 1917.

The plaintiff admitted in his examination for discovery (questions 19 and 20) that he had paid no part of this sum, but he said that he had paid the Board the initial estimate for 1915.

This completed the defence.

In reply the plaintiff was called. He denied that he was liable to the Workmen's Compensation Board, or that he ever received any order or judgment for this amount, or for any amount, or any notice.

Section 63 of the Workmen's Compensation Act provides:—

An order of the Board for the payment of compensation by an employer who is individually liable to pay the compensation or any other order of the Board for the payment of money made under the authority of this part, or a copy of any such order certified by the Secretary to be a true copy, may be filed with the clerk of any County or District Court and when so filed shall become an order of that court and may be enforced as a judgment of the court.

The plaintiff further stated that he had never received any notice of such filing with the court, or any notice of any kind of that having been done, or any notice that a certificate had been issued by the Board under s. 95, and stated that he had never been served with any attaching process either by the city corporation or the Board, or any notice whatever that the city corporation intended to pay over this amount to the Board; that he had never seen or authorized any such payment, and did not know of it until after it had been made; that he was arranging a settlement of the amount at the time; and correspondence on this subject was put in.

This correspondence begins with a letter of October 16, 1916, from the Board to the plaintiff, requiring the plaintiffs to attend at the Board's offices on October 19, with all books, papers, memoranda, or letters shewing the amount of work done and moneys expended for wages during the years 1915 and 1916; followed by a further letter from the Board to the plaintiff, dated October 23, 1916, that, "failing to receive payment of your assessment, which with added percentage to date is $2,230.20, we give you notice that we are filing with the clerk of the County Court of Toronto, the Board's certificate to the effect that this amount is still due and owing by you. This means that the certificate, when filed, becomes an order of the court, and may be enforced as a judgment. Unless your cheque for the amount as indicated is received by Saturday, November 4, we shall instruct the sheriff to make the regular levy upon your lands and chattels. Workmen's Compensation Board, *per* N. B. Wormwith, solicitor."

On November 2, 1916, the plaintiff's solicitor replied to this letter, stating that he was busy getting this matter into shape, but found it was heavier than at first appeared, and asked for a few days in order that he might present the matter as fully as he could. This request was complied with on November 6; and on November 13 the plaintiff's solicitor enclosed to the Board a declaration, petition, and schedule, and stated that he would be pleased to appear before the Board personally, for Mr. Murphy, at any time, and bring his books in order to substantiate the statements set forth in the petition.

The Board replied on November 16 that the matter should have their consideration, and on November 25 the Board further replied: "We have placed your declaration with the schedules before the Board; and, if Mr. Murphy will attend with all books, papers, memoranda, etc., to substantiate the statement set forth, it will then be determined whether it is necessary to have a formal hearing before the Board. Thursday of next week would be the most convenient for this purpose. Workmen's Compensation Board, *per* N. B. Wormwith, solicitor."

To this Mr. Hughes, the plaintiff's solicitor, replied, on November 27, that he would attend on the following Thursday, with books, etc.

ONT.
S. C.
MURPHY
v.
CITY OF
TORONTO.

The plaintiff states that he attended with the accounts shewing the amount paid out by him for wages, and saw Mr. Bastedo, the auditor to the Board, and the solicitor of the Board, and he made an affidavit; that he also attended on the Thursday following November 27, with his brother and solicitor, for 2½ hours, and he left the accounts with the Board. He swears that the wages for 1915 were $3,700 odd, and not more than $3,800; that for 1916 they were between $16,000 and $17,000; that the compensation should have been $1,100 or $1,200; and that he paid $456.75, which left the amount due by him at $800. He denied that any assessment had been made by the Board until March 30. Upon cross-examination, exhibit 6 (for identification) was submitted to him. This was put in subject to proper proof. It purports to contain a statement of the plaintiff's pay-roll for 1915 and 1916.

There was also a copy of a letter, dated September 30, 1916, purporting to have been written to the plaintiff. This was also marked for identification only—exhibit 7. He denied that he ever received either of these documents. He states that blank forms were sent to his place of residence while he was away in California.

No proof was given of the receipt by the defendants of exhibits 6 and 7 or of any assessment made by the Board for 1916 and 1917.

The solicitor for the Board, Norman B. Wormwith, was called, but he was not able to give any evidence in regard to the sending of these letters. This closed the evidence.

Mr. Fairty, for the defence, relied upon s. 60, sub-s. 4, and s. 10, sub-s. 5, of the Act, and contended that the Court had no jurisdiction to try the case.

I expressed the view that the question was, whether or not the defendants had brought themselves within the protection of the Act, and that this court had jurisdiction to make inquiry to ascertain that fact; that the present action was not one against the Board, but against the city corporation. They admitted liability unless protected by what had been done under the Act by the Board so as to justify the payment of the amount claimed by the Board out of any moneys due by the city to the plaintiff under his contract.

S. 60 provides:—

(1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.

The section further provides:—

(2) Without thereby limiting the generality of the provisions of sub-s. (1), it is declared that such exclusive jurisdiction shall extend to determining:

(*a*) Whether any industry . . . falls within . . . schedule 1 . . .

(*b*) Whether any industry . . . falls within . . . schedule 2 . . .

(*c*) Whether any part of any such industry constitutes a part, branch or department of an industry within the meaning of part 1.

Sub-section (3) gives the Board power to reconsider any matter dealt with by it; and sub-s. (4) (added by 7 Geo. V., c. 34, s. 10) declares that the decisions of the Board shall be upon the real merits and justice of the case, and it shall not be bound to follow strict legal precedent.

Section 60*a*. (added by 7 Geo. V., c. 34, s. 11) provides as follows:—

Every copy of or extract from an entry in any book or record of the Board, and of any document filed with the Board, certified by the Secretary of the Board to be a true copy or extract, shall be received in any court as *primâ facie* evidence of the matter so certified without proof of the Secretary's appointment, authority, or signature.

Under this clause, I suggested to counsel that, if there was any sufficient assessment or any action and decision of the Board upon the case, I would admit proof of the same. No such proof was tendered or offered, either under s. 60 or otherwise, and it was again insisted that the court had no jurisdiction.

S. 62 provides:—

(1) The Board may act upon the report of any of its officers and any inquiry which it shall be deemed necessary to make may be made by any one of the Commissioners or by an officer of the Board or some other person appointed to make the inquiry, and the Board may act upon his report as to the result of the inquiry.

(2) The person appointed to make the inquiry shall for the purposes of the inquiry have all the powers conferred upon the Board by s. 55.

S. 55 gives to the Board

the like powers as the Supreme Court for compelling the attendance of witnesses and of examining them under oath, and compelling the production of books, papers, documents and things.

The Act, as I read it, gives to the Board plenary power within

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

its jurisdiction, and to that extent its decision is not open to review, injunction, or prohibition. While the Board is not bound to follow strict legal precedents, but to decide according to the merits and justice of the case, the Act nevertheless requires that there shall be a decision of the Board. The informal procedure, as far as was disclosed by the evidence here, did not constitute the action and decision of the Board within the meaning of the Act.

There are certain things which I regard as requisite and necessary to be done by the Board, and certain action and decision to be taken by the Board, to constitute that binding act and decision which enables the Board to enforce its remedy by registration in the court, constituting there the judgment and decision of the Board, or by levying of the amount as taxes against the contractor.

The Board has jurisdiction to administer Part 1 of the Act, which applies to the very large number of industries referred to in schedules 1 and 2.

In schedule 1 the Board levies an assessment and collects a fund out of which compensation to the workmen is paid, the employers in this schedule not being individually liable to pay compensation, while as to employers in schedule 2 no accident fund is collected from them, and they are individually liable to pay compensation as each accident occurs.

The scale of compensation is fixed by the Act.

The Act provides that all employers in the industries in schedule 1 are required, without notice and subject to penalty in case of default, to prepare and transmit to the Board, not later than January 20 in each year, a statement of the amount of wages paid during the prior year and an estimate of the amount expected to be expended during the current year.*

Sections 45 to 67 refer to the Workmen's Compensation Board, which is a body corporate, consisting of three members, of whom two constitute a quorum. The Board has like powers as the Supreme Court for the compelling the attendance of witnesses and examining under oath and compelling the production of books, papers, and documents (s. 55, *supra*).

*See s. 78 of the principal Act, and amendments by 5 Geo. V. c. 24, s. 20; 6 Geo. V. c. 31, s. 7; and 7 Geo. V. c. 34, s. 13.

Section 57 provides that the sittings of the Board are to be held in Toronto, except where it is expedient to hold sittings elsewhere.

Section 58 provides that the Commissioners shall sit at such times and conduct their proceedings in such manner as they may deem most convenient for the proper discharge and speedy despatch of business.

By s. 59 (1), the Board has power to appoint a Secretary and other officers and clerks as the Board may deem necessary, and may prescribe their duties.

Sections 60 and 63 are quoted above.

Section 63 requires, as I understand it, that the order for the payment of compensation by the employer, who is individually liable to pay compensation, or any other order of the Board for the payment of money made under the authority of the Act, shall be a formal order of the Board of which a certified copy may be obtained.

Sections 78 to 83 provide for statements to be furnished by employers, who are to keep account of wages paid, and are subject to penalty in case of default; and the Board, or any member of it, or any officer or person authorized by it for that purpose, has the right to examine the books and accounts of the employers and make such inquiries as the Board may deem necessary for the purpose of ascertaining, if necessary, whether any statement furnished to the Board under the provisions of the Act is an accurate statement of the matters required to be stated there or of ascertaining the amount of the pay-roll of any employer (s. 79).

(2) Subject to a penalty not exceeding $500.

(3) Officers of the Board are authorized to require and take declarations as to any matter of such examination or inquiry. (Sub-s. (3) of s. 79 is added by 5 Geo. V., c. 24, s. 21.)

Section 80 provides that, if a statement is found to be inaccurate, the assessment shall be made on the true amount of the pay-roll as ascertained by such examination and inquiry; and, if the pay-roll is shewn to be inaccurate, the employer shall pay to the Board the difference, and by way of penalty a sum equal to such difference, from which (sub-s. (2)) he may be relieved if the inaccuracy in the statement was not intentional.

Sections 84 to 98 inclusive refer to assessments to be made

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

by the Board. The sums to be assessed may be either a percentage of the pay-rolls or a specific sum, as the Board may determine (s. 84, sub-s. (2)).

Such assessments may be levied provisionally upon the estimate of the pay-roll given by the employer or upon an estimate fixed by the Board, and, after the actual pay-roll has been ascertained, adjusted to the correct amount (s. 85 (1) as enacted by 5 Geo. V., c. 24, s. 23).

Section 86 (as amended by 5 Geo. V., c. 24, s. 24, and 7 Geo. V., c. 34, s. 15) provides:—

(1) The Board shall determine and fix the percentage, rate or sum for which the employer is assessed . . . and such employer shall pay to the Board the amount or provisional amount of his assessment within one month, or such other time as the Board may fix, *after notice of the assessment and of such amount has been given to him* . . .

(2) The notice may be sent by post to the employer and shall be deemed to have been given to him on the day on which the notice was posted.

Sub-s. 3 provides for the revision of the assessment where the assessment based upon the pay-roll is too low.

Sections 93 and 93*a*. (added by 5 Geo. V., c. 24, s. 27) provide a penalty for non-payment of the assessment; and s. 95 provides that the Board may collect the assessment through the municipal collectors as a tax.

Section 10 deals with the case of principals and contractors.

Sub-s. (3) (enacted by 5 Geo. V., c. 24, s. 5) provides that it shall be the duty of the principal to see that any sum which the contractor is liable to contribute to the accident fund is paid, and, if the principal fails to do so, he shall be personally liable to pay it to the Board as being entitled in respect of an assessment.

It is under this section and sub-section that the defendant was called upon to pay over the amount here in question.

Sub-s. (5) (enacted by 5 Geo. V., c. 24, s. 5) provides that the principal is entitled to be indemnified by the person who should have paid the sum, and all questions as to the right to and the amount of any such indemnity shall be determined by the Board.

The difficulty in the defendants' way, in answer to the plaintiff's claim, is, that no evidence was brought before me that the Board as such made an assessment or gave notice of such assessment being made, or became entitled to register the assessment so made in the court, nor was there any evidence that such regis-

tration had been made, nor were the defendants called upon by any official act of the Board to pay the amount alleged to be assessed against the employer.

It was urged before me that all this was unnecessary, inasmuch as anything the Board did was conclusive and binding, and there was no jurisdiction in this court to make inquiry in respect thereof.

I think this is a misapprehension of the position of the case. I heard the evidence, not in any way to review the action of the Board, but to be satisfied that the Board had acted and had made a decision, and of this no sufficient evidence was offered.

I do not suppose that it can be pretended that any action or decision of the Board is of greater force and virtue than that of a High Court having jurisdiction in the subject-matter, rendering a judgment from which no appeal had been taken; yet, in that case, if the judgment is relied upon, it must be proven; and a casual letter of a clerk would scarcely be evidence of such judgment having been given or entered. In short, I think proper proof should have been given of the decisive action taken by the Board.

Under the Act, evidence should have been given of the facts which rendered the employer liable to pay the amount in question to the Board; and, in default of payment by him, such evidence should have been offered to the defendants as would entitle them to pay the amount out of their indebtedness to the plaintiff. In both particulars there has been a failure in this regard.

I do not think the plaintiff is free from blame. Apparently, during his absence, the notices which were sent to him for information in respect to his liability, were disregarded, and there was no evidence given before me that satisfied me he had taken due pains to inform the Board as early and as fully as he might have done. The Act is intended for the benefit of a large class, and cannot be satisfactorily and expeditiously applied without prompt co-operation of employers.

I think it therefore reasonable and proper that the plaintiff should not have costs of this action. He is entitled to judgment for $2,230.20, but I direct that the entry of judgment be stayed for one month, to enable the parties, with the sanction of the Board, if that can be obtained, to ascertain and adjust the difference between them and the Board.

ONT.
S. C.
MURPHY
v.
CITY OF
TORONTO.

After the above judgment had been delivered, the defendants made a motion for leave to adduce further evidence.

The motion was heard by Clute, J., in the Weekly Court, Toronto.

December 26. CLUTE, J.:—Motion by the defendants for leave to adduce further evidence "that the Workmen's Compensation Board duly made an assessment on the plaintiff, and gave notice of the same to the plaintiff, and demanded payment from him of the amount of the said assessment, and, in default of payment by the plaintiff, duly required the amount of the said assessment from the defendants, and for an order extending the time for service of the third party notice upon the said Workmen's Compensation Board, as third parties in this action, and for stay of judgment and execution in this action until the issues between the defendants and the said Workmen's Compensation Board as third parties shall have been determined."

Judgment was given in this case on November 24 last, for the plaintiff for $2,230.20, with a stay for one month, to enable the parties, with the sanction of the Board, if that could be obtained, to ascertain and adjust the differences between them and the Board.

No adjustment was made, and this motion is now launched on the part of the defendants to open the case and to extend the time for giving notice to the Workmen's Compensation Board as third parties.

As pointed out in the judgment, I invited the defendants to produce the evidence now sought to be given, but without effect. In support of the present application, certain copies from the books of the Board are now produced, but the evidence as therein indicated is still incomplete to shew that the requirements of the Act by the Board have been complied with, so as to entitle them to recover from the plaintiff the amount said to be due to the Board, or to justify the defendants in paying over that amount to the Board as indebtedness of the defendants to the plaintiff.

Nevertheless, it is desirable that the facts of the case should be obtained, if they can be obtained, to shew that a valid assessment was made by the Board upon the plaintiff, and that, in default, the defendants properly paid over the amount due the plaintiff, to the Board. I allow the motion to that extent; the defendants

to pay to the plaintiff costs of this motion and the costs incident to the taking of such further evidence and further trial of the action, in any event of the cause. Both parties to expedite a further hearing of the case.

With respect to that portion of the motion to extend the time for service of the third party notice upon the Workmen's Compensation Board as third parties in this action, I think there is insuperable difficulty in the defendants' way.

The application is too late; the trial has taken place. I have carefully examined the authorities, and I find no cases where the defendant has been permitted at this stage of the case to give notice.

The plaintiff does not consent; but there still is a greater difficulty in this, viz., that the Workmen's Compensation Board is in a sense a branch of the Government. Their action within the purview of the statute is not open to review in this court, nor can they, I think, be brought before this court to answer any claim for anything done under the statute.

Upon both grounds, I refuse that part of the defendants' motion with costs.

The case was reopened, pursuant to the leave given by Clute, J.; and on February 4, 1918, further evidence was taken before the learned Judge.

March 9. CLUTE, J.:—The plaintiff claims $2,230.20 under a contract for the construction of certain public works in the city of Toronto.

The defendants admitted the amount, but alleged that it had been paid over, under the Workmen's Compensation Act, to the Board, under a demand from the Board for that amount, as due by the plaintiff to the Board under the Act.

The plaintiff replied that he was not indebted to the Board as alleged.

The case turns entirely upon whether or not this amount had in fact been assessed by the Board against the plaintiff under the Workmen's Compensation Act. There is no official record of an assessment having been made by the Board. The question is, whether what was done amounts to a valid assessment under the provisions of the Act.

ONT.
S. C.
MURPHY v. CITY OF TORONTO.

The Board is a body corporate, consisting of a Chairman, Vice-chairman, and another Commissioner (ss. 45, 46), of whom two constitute a quorum (s. 53). The Board has "the like powers as the Supreme Court" for compelling the attendance of witnesses and examining them under oath, and for the production of documents, etc. (s. 55). The Commissioners shall sit at such times and conduct their proceedings in such manner as may be most convenient for the proper discharge and speedy despatch of business (s. 58). The Board has power to appoint a Secretary and other officers and clerks (s. 59 (1)). It has exclusive jurisdiction to hear and determine all matters coming before it under Part 1 of the Act, and its decision is final and conclusive and not open to question or review in any court (s. 60 (1)); it has, however, express authority to rescind, alter, or amend its decisions (sub-s. (3)); and its decisions shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent (sub-s. (4), added by 7 Geo. V., c. 34, s. 10); and it may act upon the report of any of its officers, and any inquiry which it shall be deemed necessary to make shall be made by one of the Commissioners or one of the Board's officers, and the Board may act upon his report as to the result of the inquiry (s. 62 (1)). An order of the Board for payment of compensation by an employer (as in this case) or a copy thereof may be filed with the clerk of any County or District Court, and when so filed shall become an order of that court, and may be enforced as a judgment of the court (s. 63). Section 57 provides that the sittings of the Board are to be held in Toronto except where it is expedient to hold sittings elsewhere. The Act provides for an accident fund out of which compensation may be paid. One way of raising this sum is by assessment upon the amount of wages paid by employers, and that method was applicable to this case. For that purpose it is the duty of the employer to furnish a statement of the amount of wages earned by all his employees during the year or any part specified by the Board and the amount which he estimates he will expend for wages during the then current year (s. 78 (1), as amended by 5 Geo. V., c. 24, s. 20) And it is the duty of the employer to keep a careful and accurate account of all wages paid to his employees, which shall be produced to the Board and its officers when so required (s. 78 (1*a*), added by 6 Geo. V., c. 31, s. 7); and

a failure to furnish the same within the prescribed time subjects him to a penalty not exceeding $500 (4). If the employer fails to furnish such statement "the Board may base any assessment . . . on such sum as in its opinion is the probable amount of the pay-roll of the employer and the employer shall be bound thereby, but if it is afterwards ascertained that such amount is less than the actual amount of the pay-roll the employer shall be liable for the difference (3). This is the sub-section applicable to this case.

No pay-roll having been furnished by the plaintiff, Mr. Giles, an officer of the Board, made some inquiry and estimated the amount of the pay-roll at $60,000, additional to $15,000—the first estimate—making $75,000 as the sum upon which the rate of 3 per cent. should be levied, and on $10,000 for 1916.

The Board as such did not fix any sum as the probable amount of the pay-roll. The question of amount at this stage did not come before the Board and was not considered by it. The additional estimate of $60,000 was in fact made by Mr. Giles, and the assessment was made at 3 per cent. based on this amount added to the first estimate of $15,000, viz., $75,000, and the Board as such had nothing to do with it. This fully appears in the evidence of the Chairman of the Board. The Board in fact never acted or assumed to act under s. 78, sub-s. (3), which is its only authority to make an assessment based on such sum as in the *opinion of the Board* is the probable amount of the pay-roll. The opinion of the Board as to the proper amount was not had, and the amount was fixed solely on the opinion of Mr. Giles. The Board not having in any sense ascertained and fixed the probable amount of the pay-roll, it cannot be said in any sense to have made the assessment.

The amount suggested by Giles was passed through the hands of the various clerks, who then computed the amount of the assessment, and gave notice, as I find, to the plaintiff.

The Chairman of the Board was called, and his evidence is principally relied upon in support of the contention that a valid assessment binding upon the plaintiff was made by the Board.

Before referring to his evidence, it may be convenient to notice how the assessment is directed to be made under the Act, see ss. 84 to 98 inclusive. The Act provides (s. 84) that the

ONT.
S. C.
MURPHY
v.
CITY OF
TORONTO.

Board shall, before the day named by proclamation as mentioned in s. 3, make a provisional assessment on the employers in each class of such sum as in the opinion of the Board will be sufficient to meet the claims for compensation which will be payable by that class for the first year, etc. The sums to be so assessed may be either a percentage of the pay-rolls of the employers or a specific sum as the Board may determine. In this case the Board determined on a percentage of the pay-roll to raise the amount required, and 3 per cent., as I have stated, was the rate imposed. Section 85 (amended by 5 Geo. V., c. 24, s. 23) provides for subsequent assessments, which may be levied provisionally upon the estimate of the pay-roll given by the employer, or upon an estimate fixed by the Board, and, after the actual pay-roll has been ascertained, adjusted to the correct amount. Section 86 (amended by 5 Geo. V. c. 24, s. 24, and 7 Geo. V., c. 34, s. 15) provides that the Board shall determine and fix the percentage, rate or sum for which each employer is assessed, who shall pay to the Board the amount or provisional amount of his assessment within one month, or such other time as the Board may fix after notice of assessment. The notice is to be deemed to have been given to him on the day on which the notice is posted (sub-s. (2)).

It thus appears that the Board is to fix the rate and make the assessment, the assessment to be made upon the pay-roll furnished by the employer, and, if this is not given, the probable sum is to be estimated and fixed by the Board, and, after the actual pay-roll has been ascertained, adjusted to the correct amount. In the view I take of the Act, it means that there must be a sitting of the Board, and an official act as such to fix the rate, and, when no pay-roll is furnished, to fix the probable amount thereof as a basis on which to make the assessment, and that this cannot be delegated to other officers of the Board (s. 79 (3), added by 5 Geo. V., c. 24, s. 21). The Board may utilize the information obtained by such officers, may adopt the report, but there must be the official act of the Board in fixing the rate and the amount forming the basis of the assessment, and the assessment must be approved by an order of the Board.

It is contended that the evidence now offered is sufficient for that purpose. The Chairman of the Board, Mr. Samuel Price, was called and examined by the plaintiff's counsel.

[The learned judge set out portions of the testimony of Mr. Price.]

Accepting the evidence of the Chairman of the Board as to what was done in respect of this assessment, I take the facts to be as follows:—

The rate of 3 per cent. was duly fixed by the Board under its seal. No pay-roll having been received from the plaintiff, the officer of the Board for that purpose, Mr. Giles, took action. After some inquiries, he recommended an additional sum of $60,000 as the basis of assessment to be levied on Mr. Murphy. This was not considered by the Board, but the amount fixed by Mr. Giles as the pay-roll then passed through the hands of the various subordinate officers, who computed the amount and it was formally entered in the ledger as the assessment of the plaintiff, and a notice of the same sent to him.

This assessment was admittedly not made by the Board as an official act of theirs, but was ascertained by applying the rate of 3 per cent. duly fixed by the Board to what Mr. Giles considered should be the amount of the pay-roll in addition, namely, $60,000, added to what had already been assessed, $15,000.

The plaintiff then made application to have the matter opened, and on October 16 he was notified to attend on October 19 at the offices of the Board, with his books and papers, etc., shewing the amount of work done and money expended for wages during the years 1915 and 1916. There is a memorandum produced, exhibit 12, as follows:—

Re Firm 16769—M. H. Murphy.

His brother called to-day to repudiate the assessment levied on the estimated pay-roll of $75,000.

He stated that there were only the time-books of their foreman available, whereby an audit could be made.

His brother kept no wage-account, but he had some figures with him, which he stated represented an extract from the foreman's time-books, and that the total of the figures would be between $30,000 and $35,000.

Personally, I do not believe the statement, as it is not at all likely that a contractor taking work to such a large extent would not keep a proper account of the wages paid.

I recommend collecting the assessment as it stands, subject to refund upon the production of proper books of account.

WTG-CGH W.T.G.

Oct. 19, 1916.

Board confirms assessment.

S.P.

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

The initials "W. T. G." are those of Mr. Giles, and "S. P." of the Chairman of the Board.

In speaking of this confirmation, the witness was asked:—

Q. Was that when that was confirmed, on that date, October 19? A. I cannot be positive whether it was confirmed on that day or not, but it was about that time. I presume it was on that date from the fact that the report is dated then. I cannot be positive as to the exact date.

On November 13, the plaintiff formally petitioned the Board, setting forth certain facts as to his work, and stating that he has now ready for submission to the Board, at their pleasure, his time-books and cheque-books, from which there is compiled the ledger account of the weekly wages paid for the year 1915, including all wages paid out by the plaintiff, the summary whereof is attached to the petition, which shews a total of $37,821.57.

It would appear that upon this petition the case was opened and the matter was referred to Mr. A. W. Bastedo, an auditor of the Board. The plaintiff with his solicitor attended before Mr. Bastedo, and what is called a pay-roll audit report, exhibit 20, was made out on the usual form. In the body of the document is written:—

Different items shewn in statement dated November 13, 1916, covers total wages paid on all my operations for year 1916,.....$37,821.57
with the additional amount of..... 197.25

Totals.....$38,018.82

with a declaration:—

I hereby declare the above to represent the whole earnings of all persons in our employ. M. H. MURPHY.
(Date Nov. 29, '16).

Having made a careful audit and investigation, I certify that this statement is a true presentment of the whole earnings of all employees and other facts relating thereto. M. W. BASTEDO, *Auditor*.

This was accompanied by a statutory declaration made by the plaintiff, exhibit 9, which, it was conceded on both sides, was made on the same occasion, though it was dated November 30. This statutory declaration verifies the correctness of the amount.

Mr. Bastedo was called, and he denied that this document was an audit. What it meant, or what it is, except as appears upon its face, was not made clear.

Thus the matter stood until January 5, when the Board demanded payment from the defendants of $2,230.20, under s. 10 of the Act, and the defendants, under such demand, paid the

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

same to the Board, and plead such payment in answer to the plaintiff's action.

The petition was disposed of adversely to the plaintiff. Upon the back thereof it is stated that: "Board decides cannot alter assessment upon evidence now submitted. Apl. 26-17. S.P." (the initials of the Chairman of the Board). The plaintiff denies that he ever heard of this disposition of the petition until the trial.

The result of all the evidence is: (1) That the Board did not make and has not made an estimate, as an official act, of the pay-roll upon which the rate of 3 per cent. was to be levied. (2) Upon certain representations made to the Board for the plaintiff by his brother, that the total figures were between $30,000 and $35,000, the Board's officer, Mr. Giles, who is authorized to deal with matters of this kind, declared that he did not believe the statement, "as it is not likely that a contractor taking work to such a large extent would not keep a proper account of the wages," and recommended the collecting of the assessment as it stood, subject to refund upon the production of proper books of account; on October 19, 1916, or about that time, the Chairman made a memorandum, "Board confirms the assessment," and signed his initials, "S. P." This is the only record of what was done. (3) The case was subsequently opened in November and referred to the auditor, Mr. Bastedo, who, having taken a declaration of the plaintiff that $38,018.82 was the total amount of the pay-roll, made what purports to be a formal audit in the following words: "Having made a careful audit and investigation, I certify that this statement is a true presentment of the whole earnings of all employees and other facts relating thereto. M. W. Bastedo, Auditor." (4) No action appears to have been taken upon this audit until April, when there is endorsed upon the petition the following: "Board decided cannot alter assessment upon evidence now submitted. Apl. 26, '17. S. P."

A corporate officer cannot appoint a deputy to act for him generally, unless he have clear authority to do so by the constitution, and it is immaterial that a by-law made subsequent to the charter may require him "or his sufficient deputy" to execute the duties of his office: *The King* v. *Gravesend Corporation* (1824), 4 Dowl. & Ry. (K.B.) 117, where the court seemed to think that an officer might appoint a deputy to do a purely ministerial act for him, subject to the approval of the corporation: Halsbury's Laws of England, vol. 8, par. 740.

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

"A corporation can only do corporate acts at a corporate meeting, unless a special method is authorized by the constitution: *River Tone Conservators* v. *Ash* (1829), 10 B. & C. 349, 378, 109 E.R. 479; *Rex* v. *Varlo* (1775), 1 Cowp. 248, 98 E.R. 1068:" *ib.*, par. 769.

One person cannot constitute a meeting: *Sharp* v. *Dawes* (1876), 2 Q.B.D. 26.

Having regard to the law applicable to a corporation such as this, whose function is largely judicial, I am of opinion that the Board could not delegate its authority to fix the amount of the roll upon which the Board might act. What is the effect, then, of what was done on October 19? There is no record of the meeting of the Board on that date. The Chairman was uncertain whether the entry purporting to confirm the assessment was made then or not. He says it was about that time. There is no record beyond the memorandum as to who was present, or that a regular meeting was called for that date; or that what was done was done as an act of the Board as distinct from that of the individual Chairman.

I have reached the conclusion, with some doubt, that, although the assessment as made by Mr. Giles on the pay-roll, as fixed by him, was not binding on the plaintiff, yet, the question having been opened at the plaintiff's request, and the Board having confirmed what Giles had done, that was an act of the Board which cured the defect and rendered the assessment valid. Nor do I think the re-opening of the question on petition affects this result. The assessment was again confirmed on the 26th April, 1917. It is true the money was paid over by the defendants in January, 1917, while the second investigation was pending. The Board was not bound to accept the findings of its auditor, and was entitled to claim from the defendants what at the time was the amount due by the plaintiff as the amount of the assessment as estimated by the Board.

The action is dismissed. The costs remain as fixed by the order allowing further evidence; that is, no costs of the first hearing. The plaintiff to have the costs of the rehearing to judgment.

Frank J. Hughes, for appellant; *Irving S. Fairty*, for respondent.

ONT.

S. C.

MURPHY v. CITY OF TORONTO.

Maclaren, J.A.

The judgment of the Appellate Division was delivered (orally) by

MACLAREN, J.A.:—This is a matter arising out of the Workmen's Compensation Act. An appeal was brought by the plaintiff from a judgment that was rendered by Mr. Justice Clute (41 O.L.R. 156) dismissing the action.

It was strenuously argued before us that, notwithstanding the very large powers given to the Board in that Act, the plaintiff had still a right to press his claim in this court. The jurisdiction of the Board is given in s. 60 of the Act, sub-s. (1) of which reads as follows:—

60 (1). The Board shall have exclusive jurisdiction to examine into, hear, and determine all matters and questions arising under this part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review, in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.

It would be difficult to invent language more sweeping than this. Mr. Justice Clute was of opinion that the present case came within the prohibition of this section, and that exclusive jurisdiction was given in this matter to the Board.

We are of opinion that he was right, and the appeal is dismissed.

Appeal dismissed.

NORTH AMERICAN ACCIDENT INSURANCE Co. v. NEWTON.

CAN.

S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin and Brodeur, JJ., and Cassels, J. ad hoc. December 9, 1918.

INSURANCE (§ VIII—436)—EMPLOYER'S LIABILITY—INDEMNITY—ENFORCEMENT—ASSIGNEE FOR CREDITORS.

The right of indemnity under an employer's liability insurance policy, for liability incurred for an injury to an employee, will pass, upon the employer's insolvency, to his assignee for the benefit of creditors and is enforceable by him; the insurer's liability is not limited by what the insolvent's estate is able to pay, but extends to the full amount of the judgment against the employer, regardless of the source from which the money came to make payment thereof. Nor is it essential that the payment should have been made before the assignment for creditors; it is sufficient when paid by the assignee with funds advanced by a third party.

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba affirming the judgment at the trial in favour of the plaintiff. Affirmed.

Chrysler, K.C., for appellants; *E. K. Williams*, for respondents.

Davies, C.J.

DAVIES, C.J.:—I concur with Anglin, J.

CAN.

S. C.

NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON.

Idington, J.

IDINGTON, J.:—The contract evidenced by the appellant's policy was a chose in action and the benefit thereof clearly passed to respondent by virtue of the assignment of Nelson and Foster under and pursuant to the provisions of the Assignments Act, R.S.M. (1913), c. 12, in the same plight and condition as it was held by the assignor at that time.

The respondent assignee was just as much entitled to comply with the condition which, being complied with, gave vitality and force to the appellant's obligation as his assignor had been and would have had if no assignment had been made.

It matters not then where the money came from—the condition has been fulfilled.

It so turns out that the estate was in an insolvent condition. To-morrow the like case might arise under circumstances in which the insured, although driven to make an assignment, might be possessed of an ample estate which could liquidate all the obligations of the insured.

Are we to hold that such an unfortunate insured was deprived of the right to have his assignee recover on such an obligation? No case has been cited deciding any such thing or anything like it.

The case of *Connolly* v. *Bolster* (1905), 187 Mass. 266, is the only one counsel claimed as being so. It, on examination, bears no resemblance to this.

What was attempted there was to get a receiver appointed in hope that by such means such steps could be taken as might place the party concerned in funds to raise the money to meet the condition and give force and thereby vitality to the obligation.

That appointment was refused. And I venture with some confidence to think that in the case of *Collinge* v. *Heywood* (1839), 9 A. & E. 633, 112 E.R. 1352, had someone been kind enough to lend or give the plaintiff before action the money to pay, and he then had paid the bill of costs there in question, the plaintiff, even if hopelessly bankrupt and his benefactor never likely to receive any return for his advance, must have succeeded. The motive for such generosity could not have been inquired into.

I think the case has been rightly decided by the court below, and that in doing so they have not had to rely upon any principles

of equity, but upon the rigid common law. Everything nominated in the bond has been complied with.

The appeal should be dismissed with costs.

ANGLIN, J.:—I am disposed to agree with the appellant's contention that under the terms of the policy sued upon actual payment by the assured of a liability of the class insured against imposed upon him by law was not merely a condition precedent to his right of action, but the very thing against loss from which the insurance was effected. In other words, not only would no right of action against the insurer arise until such payment but no actual or absolute liability on its part would exist.

Nevertheless, when his employee, Fornell, was injured a contingent right arose in favour of the assured against the insurer and there was a corresponding contingent liability on the part of the latter. Upon payment of whatever liability the law imposed in consequence of the injury sustained by Fornell, ascertained by due process, that contingent right, as well as the correlative contingent liability, would become absolute. This was the situation when the insured, having become insolvent, made an assignment for the benefit of his creditors under the Assignments Act (R.S.M. 1913, c. 12). I am satisfied that the contingent right of the assured against the defendant company thereupon passed to his assignee. Neither can there be any reasonable doubt that it was the intention of the parties to the insurance contract that this should happen. Condition 1 of the policy provides that, while the policy shall terminate upon an assignment by the insured for the benefit of his creditors, such termination shall not affect the liability of the company as to any accident theretofore occurring.

This condition is not limited in its terms to cases in which the assured shall have actually paid the claim of an injured employee before the assignment, and it would, in my opinion, be unwarrantable to place such a restriction upon its application. It follows that the parties to the contract sued upon must have contemplated that the assignee might make the payment (which the assured would by the assignment have divested himself of the means of making) necessary to convert the contingent right which passed by the assignment into an absolute right and the corresponding liability of the insurer into an absolute liability.

CAN.

S. C.

NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON.

Anglin, J.

Nor does this view do violence to the condition precedent to his client's liability of payment of the employee's judgment by, and loss thereby to, the assured so much pressed by counsel for the appellant:—

> An assignee for creditors is a trustee not only for the creditors but also for the debtor. It is his duty to make the most of the estate and pay the debts; but it is the debtor's estate all the time; and when the debts are paid it is his duty to restore the surplus or what is not required for debts, if there be any, to the debtor. The assignee is accountable to the debtor for his dealings with the estate and if he is guilty of any wrongdoing or breach of trust or if he neglects or refuses to do any duty in respect of the estate he can be held to his duty and be compelled to perform it at the debtor's instance. The covenant in question was a counter security which the debtor possessed to protect him against the claims of the plaintiffs and others . . . The debtor still had an interest in the covenant notwithstanding the assignment and that interest was the right to have it enforced against the defendant the moment anything fell due on the mortgage. That beneficial right he could assign and transfer . . . *Ball* v. *Tennant* (1894), 21 A.R. (Ont.), 602 at 610. *per* Maclennan, J.A.

The fallacy in the appellant company's contention is that it ignores the assured-assignor's continued interest in its liability. Because of that interest payment by his trustee to his judgment creditor (Fornell) out of the assigned estate would be payment by the assured-assignor and to his loss. It would diminish the fund to meet his creditors' claims. In the event of a deficiency he would in consequence of such payment remain liable for a larger balance to his other creditors. Should there be a surplus returnable to him it would be less *pro tanto* than it would have been had the Fornell claim not existed.

Nor is the appellant entitled to inquire, or to base a defence upon, the source from which the money paid by the assignee to Fornell came any more than he would be entitled to make a like inquiry or to raise such a defence if the payment had been made by the assured himself. It would be intolerable that a person bound to indemnify or reimburse a judgment debtor should escape liability because the latter had borrowed or had received as a gift from some kindly disposed friend either of himself or of the judgment creditor the money required to meet his obligation. The assignee has paid a judgment against the assured-assignor as he was entitled to do in the interest of all his *cestuis que trustent*—the other creditors as well as the debtor. He is accountable only to them for the money so expended. The source from which it came is their business but not that of the insurer.

CAN.

S. C.

NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON.

Anglin, J.

Moreover, the insurer's liability is not measured by the amount of the dividend to which the judgment creditor would ultimately have been entitled on a distribution of the debtor's estate had his judgment not been satisfied. It is the full amount of the judgment of which, when satisfied, it covenanted for reimbursement. The assured, as already pointed out, is directly interested in having the entire liability to his judgment creditor discharged. Were it not he would remain personally liable for any unpaid balance of it. Since the payment of the judgment the respective rights and liabilities of the parties in the present case are, in my opinion, indistinguishable from those dealt with in such English cases as *Re Law Guarantee Trust and Accident Society; Liverpool Mortgage Insurance Co.'s* case, [1914] 2 Ch. 617; *Cruse* v. *Paine* (1868), L.R. 6 Eq. 641, 653, 4 Ch. App. 441; *Re Perkins; Poyser* v. *Beyfus* [1898] 2 Ch. 182, 189.

The appellant's contingent liability for the full amount of Fornell's judgment existed when the assured made his assignment. The correlative contingent right of the assured passed to his assignee and payment of the judgment by him has converted the latter into an absolute right, enforceable for the benefit of the estate in which both creditors and debtor are alike interested, and the former into an absolute liability.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—This is an action for the recovery under a contract commonly known as an employers' liability policy. That policy undertook to indemnify Nelson & Foster against loss from the liability for damages on account of bodily injuries suffered by an employee of the company. One condition of that policy was that no action could be instituted against the company to recover unless it shall be brought for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue.

An accident occurred to an employee of Nelson & Foster and an action was instituted against them. While the case was pending, Nelson & Foster made an assignment under the provisions of the Assignments Act of Manitoba, R.S.M. 1913, c. 12. Judgment having been rendered against Nelson & Foster in favour of that employee, the assignee paid the amount of the judgment with money which was handed over to him by a man named Brandon,

CAN.

S. C.

NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON.

Brodeur, J.

who does not seem to have been a creditor, but who seems to be interested in some way or other in the distribution of the assets of Nelson & Foster or in the discharge of their liability with regard to that employee. An action was then instituted by the assignee, the respondent Newton, to recover from the insurance company for the loss which had been suffered and the reimbursement of the money which he had paid to that employee.

The applicant company claims that it should not be held responsible for a larger sum than the amount of dividend to which that employee was entitled. That question came up in a case which was decided in 1914 in England, viz., the case of *Re Law Guarantee Trust and Accident Society; Liverpool Mortgage Ins. Co.'s* case [1914] 2 Ch. 617. It was there held that in a contract of insurance or indemnity the insurance company was liable to pay to the liquidator the amount of the deficiency and not merely the amount of dividend payable.

Lord Lindley, on Partnership, 5th ed., p. 375, says that:—

> Where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified; and the limit of defendant's liability to the plaintiff is the full amount for which he is liable; *or if he is dead or insolvent the full amount provable against his estate and not only the amount of dividend which such estate can pay.*

The contention of the appellant is that this contract is not only a contract of indemnity to but also of previous payment by the insured. But in this case there was a previous payment which had been made and we are not concerned with the question whether that payment has been rightly or legally made by the assignee. The condition of previous payment has been fulfilled and the insurance company cannot pretend now that it is not bound to reimburse the amount which has been paid by the assignee.

A question has been raised also with regard to the power of the assignee under the Assignments Act to recover. The contract of assignment disposes of that contention, since it is therein declared that the assignor has handed over to the respondent all his personal estate, rights and credits, choses in action and all other personal estate.

I may say with the trial judge, Prendergast, J., that the assignee was bound to protect the trust, to save all that could be saved of the estate, and to make out of it all that could be made.

There was a chose in action that could be left barren or could be made to develop into an actual asset. It was then the assignee's duty to do what was necessary to preserve or to enforce the claim which he now exercises against the appellant company.

The appeal should be dismissed with costs.

CASSELS, J.:—I concur with Anglin, J.

Appeal dismissed.

GOLD MEDAL FURNITURE CO. v. HOMESTEAD ART CO.

Alberta Supreme Court, Walsh, J. March 3, 1919.

CONTRACTS (§ VI A—410)—SALE OF GOODS—REPUDIATION BY PURCHASER BEFORE PROPERTY IN GOODS HAS PASSED—ACTION FOR PRICE NOT MAINTAINABLE—ACTION FOR DAMAGES.

Where the purchaser of goods repudiates the contract before the property in the goods has passed to him, the vendor cannot maintain an action for the price of the goods sold, but must be content with such damages for non-acceptance as it can prove itself entitled to, based on the difference in value between the contract and the market price at the date of the breach.

ACTION to recover the price of goods manufactured by plaintiff for the defendant; the goods being different from those contracted for the defendant refused to accept delivery. Statement.

M. B. Peacock, for plaintiff; *A. A. McGillivray*, K.C., and *J. B. Barron*, for defendant.

WALSH, J.:—The evidence satisfies me that the final arrangement between the parties, even if it was not so agreed upon at an earlier stage of the dealings, was that each of the 14 D cabinets was to be equipped by the plaintiff with such a horn as would permit of the installation in the cabinet of a No. 3 Heineman motor. There is a dispute as to whether or not the plaintiff was bound, under its original contract, to furnish a horn with each of these cabinets at the contract price of $25. Be that as it may, the plaintiff did eventually agree to and did put a horn in each of them. Its instructions were, I am satisfied as I have said, to put in one that would accommodate a No. 3 Heineman motor and that eventually became a part of the contract. It is admitted that the horns fitted into these cabinets will not permit of the installation of these motors and for that reason, I think, the defendant was quite within its rights in rejecting these cabinets and refusing to pay for them. Walsh, J.

ALTA.

S. C.

GOLD MEDAL FURNITURE CO. v. HOMESTEAD ART CO.

Walsh, J.

Without attempting any detailed analysis of the lengthy evidence upon the point, I will content myself with saying that it convinces me that this particular motor was selected by the defendant for this particular cabinet, that this selection was indicated to the plaintiff by Wood, the Heineman agent through whom the motors were purchased, who gave McMurtry a memorandum to that effect, that a sample of one of these motors was put and left by him in one of these cabinets at the plaintiff's factory for the guidance of the plaintiff in installing the horn and that the boring of the motor boards which was done by the plaintiff was done in such a way as to fit the No. 3 motor. Strength is lent to these conclusions by some of the letters written by the plaintiff. In the letter of April 28, 1917, it is stated that the factory was "waiting for the sample motors to be quite sure the borings were all right." The letter of October 23 states that the superintendent of the plaintiff's factory "claims that he personally fitted a motor in, the same type of motor that Mr. Gescheit wanted for this particular style of cabinet." The letters of November 16 and 28 are also suggestive.

While the suggestion running through the plaintiff's letters that the defendant should purchase motors which would fit these cabinets and equip them with same may not have been an unfair business proposition, the defendant, of course, was under no legal compulsion to adopt it. The plaintiff's ultimate contract was to supply these cabinets equipped with horns which would take in the motors that it had purchased and taken delivery of for that purpose. It was not bound to accept cabinets differing essentially from those so contracted for, it refused to accept the same and promptly notified the plaintiff of such refusal and, in my judgment, cannot now be compelled to pay for them.

The defendant ordered from the plaintiff 150 No. 53½ record cabinets at the same time that the phonograph cabinets were ordered. Each order is on a separate sheet. The shipping instructions on the order for the phonograph cabinets read simply "at once." The shipping instructions on the order for the record cabinets read at the top "soon as possible" and at the bottom, "ship some in first car going balance in second car going." These latter instructions refer, I think, to the cars in which the phonograph cabinets were to be shipped, meaning that in the first car of

phonograph cabinets some of the record cabinets were to go and the rest of them in the second car. These orders were given on April 18, 1917. Four cars containing these shipments were sent forward by the plaintiff, one in May, 1917, and the other three in August, 1917. None of these 53½ record cabinets came in any of these cars. The last of these four cars contained what was left of all the goods covered by these two orders except the 53½ record cabinets. By letter dated September 29, 1917, written, I think, after all of the above mentioned four cars had been received by the defendant, the defendant repeats its refusal to accept the 14 D cabinets which it had already expressed to the plaintiff, and concludes: "Under the circumstances we will have to cancel the balance of the order." Notwithstanding this, the plaintiff after considerable correspondence shipped these record cabinets to the defendant on December 17, 1917; the defendant refused to receive them on arrival and their contract price forms a part of the sum for which the plaintiff now sues.

It is suggested that the cancellation which the defendant attempted to affect by this letter was not of the record cabinets but of the phonograph cabinets. It is contended that these are two separate and distinct orders, that in this letter the defendant is voicing its dissatisfaction with some of the phonograph cabinets and consequently that the balance of the order to which it refers is the balance of the order for phonograph cabinets. I do not think that is so, because the only part of the order then unfilled was that for these record cabinets and therefore there was then nothing else to cancel. The plaintiff's letter of October 4, answering this letter of September 29, shews quite plainly that the plaintiff understood the cancellation to refer to the order for the record cabinets. After dealing with this letter of cancellation it proceeds:—

> You will understand the 500 record cabinets were made specially for you according to the order. The balance are now ready and we could not accept cancellation at this late date.

In another letter, however, of the same date, the plaintiffs express a doubt as to whether the cancellation was intended to apply to the phonograph or the record cabinets, and speaking of the latter says: "Are these the cabinets you mean when you say you will have to cancel the order? Advise by return mail." The defendant never wrote further on the subject until December 21,

ALTA.

S. C.

GOLD MEDAL FURNITURE CO. v. HOMESTEAD ART CO.

Walsh, J.

1917, when, in answer to a letter from the plaintiff advising that these cabinets had been shipped on the 17th inst., it wrote expressing its surprise in the face of its cancellation of September 29 and stating its intention not to accept them. The plaintiff wrote in answer to this on December 28 stating that it understood the letter of September 29 to refer to the 14 D cabinets and not to the 53½ and stating that, in any event, it was too late to cancel that order. And here the correspondence on the subject practically ended.

The defendant puts its right to reject these record cabinets on two grounds. It says, in the first place, that its dissatisfaction with the 14 D cabinets for the reasons mentioned justified it in putting an end to so much of the contract as did remain unfulfilled and then it says that the long delay in making the shipments of these cabinets entitled it to refuse to take them.

I do not think that the defendant had any right to cancel the order for the record cabinets for either of the reasons now assigned. I am of the opinion though that under the judgment of the Appellate Division in *Butterick Publishing Co.* v. *White & Walker* (1914), 18 D.L.R. 636, the plaintiff is not entitled to recover their contract price. In this case, as in that, the property in the goods had not passed to the defendant at the date of its repudiation of the contract, and in this case, therefore, as in that, the plaintiff cannot maintain an action for the price, but must be content with such damages for non-acceptance as it can prove itself entitled to, based upon the difference in value between the contract and the market price at the date of the breach.

This action is for the price of goods sold and delivered. If the plaintiff sees fit to amend by making a claim for damages for the non-acceptance by the defendant of these record cabinets I think it should be allowed to do so as all of the facts are now before me except those relating to the amount of its damages. It may so amend within one month of this date, and its failure to do so will be taken as an election not to amend, in which event, judgment will go dismissing the plaintiff's action, in so far as it seeks to recover anything in respect of either the 14 D cabinets or the 53½ record cabinets. I do not know how this will leave the accounts. If, as I take it, nothing will then be owing by the defendant to the plaintiff, the defendant will, of course, have its

costs from the plaintiff. If, on the other hand, anything is still owing by the defendant, the question of costs may be spoken to before me. If the plaintiff amends, it may do so only upon the terms of paying to the defendant such costs as, under the foregoing directions, it would be entitled to if the amendment had not been made.

Judgment accordingly.

ALTA.

S. C.

GOLD MEDAL FURNITURE CO. v. HOMESTEAD ART CO.

CANADIAN PACIFIC R. Co. v. CHEESEMAN.

CAN.

S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. November 18, 1918.

MASTER AND SERVANT (§ II A—95)—DEFECTIVE SYSTEM—RAILWAYS—BRAKES—FELLOW SERVANT—LIABILITY—WORKMEN'S COMPENSATION.

The use of an auxiliary truck in substitution of a damaged car next to the engine, unconnected with the braking apparatus, thereby reducing the braking efficiency to one-half, is not of itself evidence of a defective system so as to charge the railway company with common law liability for the death of the engineer when the cab of the engine was struck by it in the process of shunting; the accident having been occasioned by the negligence of a fellow servant in thus placing the truck, the liability of the company was limited to recovery under the Workmen's Compensation Act.

Statement.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1918), 40 D.L.R. 437, 22 Can. Ry. Cas. 253, 45 N.B.R. 452, maintaining the verdict awarding the plaintiff $12,000 damages at the trial. Reversed.

Daniel Mullin, K.C., for respondents.

Davies, C.J.

DAVIES, C.J.:—I concur with my brother Mignault.

Idington, J.

IDINGTON, J. (dissenting):—There was evidence adduced which amply supported the finding of the jury that the equipment of the car in question was, having regard to the operation of the shunting of cars which led to the accident in question, so defective as to have been likely to, and did, produce the result complained of.

It was neither self-evident nor established that the said result was due to the negligence of any fellow employee or workman, and expressly found by the jury that it was not.

If the appellant was entitled to be relieved under the doctrine of common employment, it devolved upon it under such circumstances to demonstrate such defence by evidence, and in that it failed.

Such attempts to do so as were made either failed of proof, or were directed to matters that did not reach so far as to cover

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. CHEESEMAN.
Idington, J.

the actual cause of the defective equipment, by reason of want of an efficient hand-brake, and trace its non-existence to the neglect of any fellow servant.

The duty of inspection of brakes seems to have been confined to the air-brakes, and no one seems to have had the duty of seeing that the hand-brakes were efficient for such an emergency as was occasioned by the need for the shunting operation in question and therewith the case of a car with a truck upon which it could not operate effectively. Who was to blame for that? If there was neglect on the part of any such person it was not proven.

I think, therefore, the only defence set up resting upon the doctrine of common employment fails.

Primâ facie the defective condition of the car in question rendered the appellant responsible.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I am, with great respect, unable to perceive in this case any evidence of breach of statutory duty, defective system or operation, or failure to furnish and maintain proper equipment such as would render the defendants liable at common law. On the other hand, negligence and breach of rules on the part of the defendant's servants are so patent that the findings of the jury negativing them can only be adequately characterized as clearly perverse. These findings must be entirely disregarded.

Assuming that the collison happened not owing to failure to back the cars placed on the Fairville siding clear of the main track, as counsel suggested, but, as the plaintiff contends and the jury must have found, owing to their having moved down towards the main track after the engines were detached, there can be no doubt that the primary cause of the collision or "side swipe," which resulted in the death of the plaintiff's husband, was the neglect of the train crew to obey the company's air brakes rule No. 7:—

> If cars are to be detached from a train or engine the air-brakes must be released and hand-brakes immediately applied on train before same are detached.

Notwithstanding the equivocal use of the word "train" in the last line of this sentence, the meaning of the rule is reasonably clear, at all events in the case—such as this was— of cars to be detached from an engine. It is on the cars so to be detached that the hand-brakes must be applied before the engine is removed.

The brakes were not applied before the engines were detached, with the result that the cars, which were left on the siding with a slight incline, moved down towards the main track so rapidly that the corner of the foremost car caught the side of the cab in which the plaintiff's husband was as his engine moved back along the main line.

As the cars started to move down the siding towards the main track the brakeman in charge applied the hand-brakes on the foremost car, which had been next to the engine before it was detached and was proceeding, as was proper, also to apply them on the second car of the "train" when the accident occurred. The brakes on the first car were insufficient to stop the train. There is evidence that had they been of full efficiency they would have sufficed. Their efficiency at the most was 50% and there is some evidence that it was even less. The jury has found that this defective equipment was a cause of the accident, and I am not disposed to quarrel with the view, which has prevailed in the provincial courts, that, taking their verdict as a whole, it implies a finding that its presence on the train next to the engine amounted to negligence. For the plaintiff it is maintained that this negligence was of such a character that it must be imputed to the defendant itself and that as to it the defence of common employment is not open.

So far as appears, the car in question was in good condition when it was started on its journey to St. John laden with frozen meat intended for transatlantic shipment from that port. It seems reasonably clear that it was necessary to have this freight reach St. John with all possible expedition. *En route* the rear truck of the car became unfit for further service and if the car was to proceed it was necessary to replace it. It was replaced with what is known as an auxiliary truck which cannot be connected with the braking system of the car. The brakes, however, can be, and, according to the evidence, they were in fact so arranged as to operate on the wheels of the remaining front truck. Hence their partial efficiency.

The change of trucks was made at Greenville in the State of Maine, through which the car was proceeding in bond. At that point only an auxiliary truck could be provided, and the evidence is that transhipment there of the freight to another car would

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. CHEESEMAN.
Anglin, J.

have entailed three days' delay owing to the necessity of obtaining authority from Washington, D.C., to break the bonding seals. The train afterwards passed Brownville, also in the State of Maine, where there are shops and an ordinary truck with brakes attached might have been substituted for the auxiliary truck, but a delay of thirty-six hours would be involved in this operation. The same thing might have been done at McAdam Junction in the Province of New Brunswick after the train had crossed the international boundary, or the load could there have been transhipped to another car which would involve a delay of six hours. The responsible officials, however, thought that even this delay would have been unjustifiable and allowed the train to proceed with the auxiliary truck. Allowing for the car in question and two others with defective brakes, the braking capacity of the train was still over the 90% prescribed by the defendants' rules and of course exceeded the 85% prescribed by an order of the Board of Railway Commissioners.

But the car in question was wrongly placed or allowed to remain next to the engine when the train left McAdam Junction, in direct violation of the company's rule No. 25 (*a*):

> More than two consecutive brakes must not be cut out on a freight train and none on the car next the engine which must always have a quick action triple in good working order.

Had this car not been in that position—had a car with brakes of full efficiency been next to the engine—when the brakeman set the brakes on the foremost car of the train of detached cars at the Fairville siding it would probably have been held and the accident would thus have been avoided.

There is no evidence of defective system, and a perusal of the record has satisfied me that no such issue was present to the minds of the court, the jury, or counsel, at the trial. Had it been raised, the Chief Justice who tried the action would, undoubtedly, have submitted to the jury some question appropriate to elicit a finding upon it. He did not do so. I am certainly not prepared to hold that under no circumstances should a freight car on which a truck becomes disabled *en route* be permitted to proceed to its destination with an auxiliary truck. Whether it should or should not must depend on the nature of the freight, the degree of urgency in its transmission, and other circumstances, upon all of which the responsible officials of the railway

company on the spot must exercise their judgment. In the present case the judgment of these officials may have been erroneous—they may even have grossly neglected their duty—but such mistake or neglect, if any, was that of fellow employees of the plaintiff's deceased husband and cannot be imputed to the company itself, so that such common employment would not afford a defence to a claim based on it. The law on this branch of the case is fully discussed in the judgment delivered in this court in the comparatively recent appeals in *Bergklint* v. *Western Canada Power Co.* (1914), 50 Can. S.C.R. 39, (1915), 34 D.L.R. 467, 54 Can. S.C.R. 285 (on appeal from 24 D.L.R. 565, 22 B.C.R. 241). The duty was of such a character that its discharge was necessarily deputed to officials along the line of the railway. There is no suggestion in the evidence that the company had employed incompetent officials for this purpose or had failed to provide all material and equipment necessary to enable them to do whatever they might deem requisite or proper. The case was not one of defective original installation or its equivalent, as in *Ainslie Mining and R. Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420, nor of negligence in allowing a permanent part of a plant to fall into dangerous disrepair as in *Canada Woollen Mills* v. *Traplin* (1904), 35 Can. S.C.R. 424, due to a defective system of inspection.

A master is not bound to give personal superintendence to the conduct of the works, and that there are many things which is general it is for the safety of the workmen that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, at 343, [1915] A.C. 734, at 738.

If there was any negligence in sending forward the car in question with an auxiliary truck it was in the "subsequent care," rather than in the "providing" of proper plant—it was in the discharge of a duty naturally devolving on the person or persons to whom the company was entitled, and, indeed, from the very necessity of the case, compelled to entrust it. *Wilson v. Merry* (1868), L.R. 1 H.L. Sc. 326.

No doubt the placing of the car with defective brakes next to the engine or allowing it to remain there when the train left McAdam Junction was clearly a direct violation of rule 25 (*a*);

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. CHEESEMAN.
Anglin, J.

but it was equally clearly the act of a servant of the company to whom the discharge of the duty of seeing that such a car was not so placed was properly entrusted. The same may be said of the failure to "card" the car as defective.

In no aspect of the case can I discover any evidence which would justify a finding of negligence imputable to the defendant itself as distinguished from its employees—negligence consisting of breach of a duty which it could not delegate so as to relieve itself of responsibility at common law for its discharge—negligence to which the defence of common employment would not afford an answer.

I would, therefore, restrict the plaintiff's recovery to the sum of $2,000 under the Workmen's Compensation Act, to which her right is now admitted, as it was in the provincial appellate court. The appellant is entitled, should it see fit to exact them, to its costs in this court and the Appellate Division. But, as the company did not admit liability under the Workmen's Compensation Act for $2,000 in its plea, or make any tender of that amount, or pay it into court, the plaintiff should have her costs of the action down to and inclusive of the judgment at the trial.

Brodeur, J.

BRODEUR, J. (dissenting):—I concur with Idington, J.

Mignault, J.

MIGNAULT, J.:—I have given to this case my most serious and anxious consideration, and have carefully read the evidence, but I cannot come to the conclusion that the judgment appealed from was rightly decided.

There is really no dispute or contradiction in the evidence as to the material facts. The respondent's husband, Justus G. Cheeseman, was an engineer in the employ of the appellant, and on February 21, 1917, was in charge of a locomotive which, with another locomotive of the appellant, in charge of one Kaine, was hauling, on that night, a train of 47 freight cars from McAdam, N.B., to West St. John, Cheeseman's locomotive being the second, and Kaine's the first. The train was a regular freight train, but was some hours late; it carried a consignment of frozen meat to be transhipped at St. John to Europe, and, apparently, was proceeding with all possible haste. The car which came into collision with Cheeseman's locomotive was a box car, No. 67639 C.R.I.M.P., and on its way from Montreal had sustained damage to its rear truck, near Greenville, Maine, necessitating the removal

of this truck, and its replacing by an auxiliary truck. The latter truck was not connected with the brakes, but the front truck was, and the evidence of the assistant superintendent, David H. Ryan, is that the hand-brake connected with the front truck was found, after the accident, wound up and in good condition, but the braking capacity of the car was diminished by at least 50%. The train was made up at McAdam, and car No. 67639 was placed immediately behind Cheeseman's engine. On the way, near Fairville, the train was stalled on an up grade, and even with the aid of the locomotive of the Boston train, which had come up behind, could not be moved, and in the effort to move it, the coupling between the fifth and sixth cars broke, so it was decided to bring the five first cars into Fairville and to return for the rest of the train. At Fairville, the conductor, Sullivan, had the five cars backed on No. 1 siding—how far they were backed being somewhat uncertain, the conductor thinking it was three or four car lengths, but it is possible they were left nearer the switch—and then the engines were uncoupled from the cars and went down to the main line, the conductor following them to the switch. Sullivan directed the brakeman, O'Leary, to get on top of the cars and set the hand brakes. O'Leary states that he wound up the brake on the first car, after the engines were uncoupled, and then went on to the second car, but the evidence of Mr. Ryan—who arrived on the scene about an hour after the accident—shews that he did not wind its brakes. O'Leary noticed, when he was on the first car, that the cars were moving, and he is the only witness who saw that they were moving, but his memory seems hazy on this point, so it is difficult to say whether it was merely the slack between the cars easing off, or whether they started down the siding on account of a slight down grade. At all events car No. 67639 struck the side of Cheeseman's locomotive, which was then backing up the main line, bending in the cab, so that the engineer was pinned in and so severely scalded by escaping steam that he died a couple of days later.

The respondent, Cheeseman's widow, acting for herself and her four young children, sued the appellant both under the New Brunswick Workmen's Compensation Act, and under c. 79 of the New Brunswick Consolidated Statutes, 1903, embodying the provisions of Lord Campbell's Act, claiming $20,000 damages.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. CHEESEMAN.

Mignault, J.

The appellant admitted its liability under the Workmen's Compensation Act for the full amount allowed by the Act, $2,000, but denied liability under Lord Campbell's Act.

The case was tried before McKeown, C.J., and a jury and a verdict was rendered for $12,000 for which sum (including the $2,000 admitted under the Workmen's Compensation Act), judgment was entered. This judgment was affirmed by the Appeal Division of the Supreme Court of New Brunswick, Hazen, C.J., White and Grimmer, JJ., White, J., taking no part in the judgment, 40 D.L.R. 437. It is from the latter judgment that this appeal is taken.

The jury found that Cheeseman's death was not caused by the negligence of any of the employees of the appellant, but that the accident was the result of a defect in the equipment or arrangement of the train, that defect being "auxiliary truck and defective brakes on the freight car, the brakes being connected with only one truck, therefore, not having sufficient power to hold the cars, which ran back and struck the engine on the main line at Fairville No. 1 siding." P. 439.

The jury absolved the deceased from any contributory negligence, and found that there was no negligence on the part of the defendant in the employment and retention of the brakeman O'Leary, and that the latter was not inefficient or incompetent for employment or retention as a brakeman on a freight train. The following question was also put to the jury:—

7. If you find that there was negligence both on the part of the defendant company and on the part of the deceased as well, whose negligence was the final cause of the accident—in other words, who had the last chance of avoiding the accident?

To this the jury answered: "Canadian Pacific Railway Co."

Viewing all the evidence, I am of the opinion that the jury could not reasonably find—if their answer to q. 7 be construed as a finding of negligence against the appellant—that the accident was caused by the appellant's negligence as distinguished from the negligence of its employees, the fellow servants of the deceased. Leaving aside the use of an auxiliary truck for car No. 67639 without brake connection, and the placing of this car immediately behind the locomotive, which—if they amount to negligence—are the negligence of the employees of the company, and coming to the real cause of the collision, it was undoubtedly due to the

fact that the conductor failed to comply with the following rule of the company, being r. 7 of the air brakes rules:—

When necessary for a train with an engine to stand on a grade for over five minutes, air-brakes must be released and train held by hand-brakes. If cars are to be detached from a train or engine, the air-brakes must be released *and hand-brakes immediately applied on the train before same are detached.*

Sullivan knew that there was an auxiliary truck under the first car, and had he caused the hand-brakes to be set before uncoupling the engines, as it was his duty to do, no accident could have happened, and therefore the negligence of Sullivan alone, and his failure to comply with this rule, was the cause of the five cars moving down the siding and colliding with Cheeseman's engine, so that the latter's death was brought about by the negligence of one of his fellow workmen.

There can be no doubt that under these circumstances the defence of common employment is a fatal objection to the respondent's action in so far as it is based on Lord Campbell's Act, and exclusive of her remedy under the Workmen's Compensation Act. The object of the latter Act was to give to the workman a remedy where none could be claimed under the common law, the risk of injury through the negligence of a fellow servant being a risk assumed by the workman at common law. *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; *Wilson* v. *Merry*, L.R.I.H.L. Sc. 326.

The jury have expressly found that O'Leary was not inefficient or incompetent for employment, and even granting that the braking power of the first car was reduced by the fact that an auxiliary truck, unconnected with the brakes, had been placed under the car, this was not the cause of the accident, which would have been impossible had Sullivan complied with r. 7 and had seen that the hand-brakes were applied on the 5 cars before uncoupling the engines.

With all possible deference, it would seem to me somewhat of a mockery to hold the appellant negligent and liable for this accident, when it had done all it could do to render such an accident impossible by expressly ordering that the hand-brakes be applied before the engines are detached, and when no accident could possibly have occurred had this order been complied with.

The Workmen's Compensation Act was adopted, as I have said, to provide a remedy in cases where, on account of the negli-

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. CHEESEMAN.
Mignault, J.

gence of a fellow servant, no remedy existed at common law. The respondent should have been content with the scale of compensation provided by this Act, the maximum amount of which is conceded to her. When she goes further and also claims damages under Lord Campbell's Act, her claim is clearly, in the circumstances of this case, defeated by the application of the fellow servant rule.

Mr. Mullin argued that the company had allowed a negligent system to be established in operating its cars, whereby the accident in question was caused, and that therefore the company is liable. There was no evidence of any such system; on the contrary, had the system or rules of the company been followed, the accident could not have occurred.

In my opinion, the verdict is clearly against the weight of the evidence and should be set aside, and the respondent's action dismissed for anything in excess of the $2,000 admitted by the appellant under the Workmen's Compensation Act.

My brother Anglin thinks the respondent should have her costs in the trial court, but should pay those of the appellant in the Appeal Division of New Brunswick Supreme Court and in this court, if the appellant sees fit to exact them. In this I am disposed to concur, but I must say that it deals most liberally with the respondent, who should have been satisfied with the remedy provided for cases like this one by the Workmen's Compensation Act, liability under which was never denied, but on the contrary expressly admitted by the appellant.

I would allow the appeal.

Appeal allowed.

ONT.
S. C.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LTD.

Ontario Supreme Court, Meredith, C.J.O., Magee, and Hodgins, JJ.A., Riddell, J., and Ferguson, J.A. November 8, 1918.

1. WATERS (§ I C—15)—NAVIGABLE WATERS—ASHBURTON TREATY—CERTAIN WATER COMMUNICATIONS AND PORTAGES OPEN TO CITIZENS OF BOTH COUNTRIES—LAND OWNERS NOT AFFECTED.

The object of the Ashburton Treaty of 1842 Art. II. which provides that "all the water communications and all the usual portages along the line of Lake Superior to the Pigeon river . . . . . shall be free and open to the citizens and subjects of both countries"; was for the advantage of those desiring to pass along the waters or the portage; there was no intention to take care of the rights of land owners or others near the route.

2. WATERS (§ I C—51)—B.N.A. ACT, SEC. 91 (10)—JURISDICTION OF DOMINION OVER NAVIGATION—WORK FOR IMPROVEMENT OF NAVIGATION—ORDER-IN-COUNCIL—VALIDITY.

The Dominion under the B.N.A. Act, sec. 91 (10) has jurisdiction over navigation and has jurisdiction to cause or allow any act or work within the Dominion for the advantage of navigation, the dam in question being such a work, the Dominion has jurisdiction in the premises. The statute of Canada in force at the time gave the Governor-in-Council authority to approve of the work in question and the order-in-council of September 19, 1905, was perfectly valid.

ONT.

S. C.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LTD.

Statement.

APPEAL by defendants from a judgment of Kelly J. 42 O.L.R. 167 in the above and four other actions, for damages for injuries to property caused by the erection of a dam. Allowed in part.

A. D. George, for the appellants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

R. T. Harding and *C. R. Fitch*, for plaintiffs, respondents.

The judgment of the Court was delivered by

RIDDELL, J.:—This is an appeal by the defendants from the judgment of Mr. Justice Kelly, 42 O.L.R. 167. The facts connected with the defendants' undertaking are set out in part in the reasons for judgment: it should, however, be added that the defendants also obtained legislation by the Dominion, and that pursuant to that legislation they made an application to the Governor-General in Council, under ch. 92 of the R.S.C. 1886, an Act respecting certain works constructed in or over Navigable Waters, and had these plans approved by order in council.

Riddell, J.

They built their dam, with the natural and necessary result of holding back the water in the river and also in the lake—that is what the dam was for.

In 1916 there was an unusual flood—the reason is thus given by an engineer called by the defendants: "The high water in the month, the latter part of April and the months of May, June, July, and possibly August, of 1916, was caused by the heavy rainfall in October and November of 1915, and the heavy fall of snow in the winter of 1915-1916, which practically all remained on the ground until about the 10th April, 1916, and it had about the same effect as if the entire precipitation had occurred in the fore part of April, 1916. The accumulated snow did not commence to thaw until April, 1916. Then the weather was cold in the spring, the snow remained on the ground until about the 8th or 10th April,

ONT.

S. C.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Riddell, J.

and it turned very warm, unusually warm for a spring which had been cold, and the snow disappeared in a few days and the water rushed into the lakes; very little was taken up by absorption; it flowed over the frozen ground and ran off much greater in proportion than in the ordinary spring . . . there was very little absorption . . . those conditions are unusual . . . both . . . as to quantity and as to the long duration of the rainy period."

This state of affairs made the water higher than usual, even where there was no dam. It would appear that such a high flood had not before occurred, so far as the memory of those on the spot went; but in 1888 and 1897 the flood was nearly as high; and, in any case, it was to be expected that this concurrence of unfavourable conditions would occur at some time. I can see nothing here to indicate that the flood came under the category of *actus Dei* or *vis major* or that the damage caused to the plaintiff was *damnum fatale*, as the civilians have it, i.e., loss arising from inevitable accident which human means or prudence could not prevent. It is elementary that in our law all loss caused by the act of God must lie where it falls, and be borne by the person on whom the loss or damage has been inflicted.

The argument on the appeal was able and exhaustive; but, in my view, the matter reduces down to a very small compass.

The first attack by the plaintiffs on the defendants' dam was that it was illegal—that failing, it was argued that there was negligence; for the defendants it was contended that the dam was placed and maintained on competent authority, and that their course of conduct was the best under all the circumstances.

Many questions of more or less importance from a constitutional point of view were argued; but I do not think it necessary to consider more than a very few.

The first contention of the plaintiffs, as has been said, is that the dam is a mere trespass, and that the defendants have no right to maintain it because (it is said) it is against the provisions of the Ashburton Treaty of 1842. That treaty is between Her Majesty and the United States of America, and by art. II. it provides: "It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake

of the Woods, and also Grand Portage from the shores of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries." At the time of the Treaty, the water communications from Lake Superior to the Lake of the Woods and further west were used by fur-traders for the passage of goods, rum, etc., inward, and furs outward—the Grand Portage was at the head of a bay on the shore of Lake Superior, from which a portage of 9 miles led to the widening of the Pigeon River (La Rochefoucault's Travels in Canada, 1795, in the Ontario Archives Report for 1916 (Toronto, 1917), p. 180 *ad fin.*); thence the fur-traders made their way to the Lake of the Woods (or reversely) (Wisconsin Hist. Coll., vol. 11, pp. 123-125, especially 124; p. 579). Of course it was for the advantage of traders of either nation to be allowed to use the waters of the other and for those of the one nation to use the portage on the territory of the other.

It must be obvious that the whole object of this clause is the advantage of those desiring to pass along the waters (and) or the portage: the provision is that such passage shall be free and open. There was no intention to take care of the rights of land-owners or others near the route; and I do not think such persons can appeal to the Treaty as it is sought to do here.

It is said that, had the "water communications" been kept open, this damage would not have occurred; had the damage complained of arisen from interference with the plaintiffs' right to pass along the water communications, the argument would be sound enough (so far as it goes), but such is not the case.

In *Gorris* v. *Scott*, L.R. 9 Ex. 125, an owner of sheep lost them overboard in the North Sea; he claimed that, had the vessel-owner taken the precautions enjoined by the Privy Council and placed the sheep in pens divided by substantial divisions, they would not have been swept overboard. But the Court held that the pens were intended merely to prevent the spread of infectious disease, and he could not complain of the neglect as failing to prevent infection—failing to prevent falling overboard is quite another matter.

I see no reason for reading the Treaty on any other principle. In that view, it is necessary to consider only the effect of the

ONT.

S. C.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Riddell, J.

legislation. (Even if the Treaty did apply, I have no shadow of doubt of the power of the United States and Canada, acting together, to abrogate this provision, at least so far as it affects the citizens or subjects of the two countries, and therefore these plaintiffs; but I do not think it necessary to go into reasons in detail.)

The Dominion, under the British North America Act, sec. 91 (10), has jurisdiction over navigation—the Dominion then has jurisdiction to cause or allow any act or work within the Dominion for the advantage of navigation—this dam was considered such a work, and I think the Dominion had jurisdiction in the premises. It may be that the jurisdiction also attaches under sec. 92 (10*a*.), but that may be less clear.

The Dominion Act respecting the company, 4 & 5 Edw. VII. ch. 139,* requires the plans to be submitted to the Governor-General in Council, and they were submitted accordingly, but explicitly under the general Act.

The statute of Canada in force at the time, R.S.C. 1886, ch. 92, secs. 1 to 9, gives to the Governor in Council authority to approve such a work as is now in question, Parliament retaining the right to vary or annul at any time any order made by the Governor in Council—and the order in council of the 19th September, 1905, is perfectly valid. It may well be that, if the necessary result of constructing the work would be to flood lands, the company might acquire the right to do so without compensation if there were nothing to indicate that compensation was to be paid. But here we find that the applicant, in whose shoes the company stand, takes an order in council based upon the proposition that "a clause in the Act of incorporation of the company . . . makes all damages to lands caused by their works a charge to be borne by them." If the defence that there was and is no obligation could here succeed, I should think we should retain these cases until an application could be made for the repeal of 4 & 5 Edw. VII. ch. 139, and the revocation of the order in council, or an annulment under R.S.C. 1886, ch. 92, sec. 9. I cannot conceive of this company being allowed to retain the advantage of an order in council if procured by a misstatement of fact. I think, however, we may

*The Act recites the incorporation of the company by letters patent under the great seal of the Province of Ontario, under the Ontario Companies Act, R.S.O. 1897, ch 191.

read the words above quoted as a condition imposed on the company or a limitation of their then powers. It is quite clear that the order in council was never intended to give the company the power to do damage to lands without paying for it, and I do not think that the words necessarily import such power.

While to determine the intent and objects of an order in council, as of a statute, we can legitimately regard only the language employed, viewed through the light of the surrounding circumstances (*Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428, at p. 439; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763), it is a sound rule of construction that an intent is not to be imputed to the Legislature or the Governor in Council to take away or injure any one's property without compensation "unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts . . . as a canon of construction, and was approved and acted on by Lord Watson in *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (1882), 7 App. Cas. 178, at p. 188:" *Commissioner of Public Works (Cape Colony)* v. *Logan*, in the Judicial Committee, [1903] A.C. 355, at pp. 363, 364; see also *Barrington's Case* (1611), 8 Co. R. 138 *a*.; *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743; *Cannon Brewery Co.* v. *Central Control Board*, [1918] 2 Ch. 101. Here there is not only no language to express such intention, but the contrary.

I think, therefore, that the company have no power to damage land without paying compensation.

That consideration by no means disposes of these cases. All but two of the plaintiffs are mere squatters on land of the Crown in Ontario, and their rights cannot prevail against the Crown. The agreement of the 9th January, 1905, gives the defendants permission to flood the "lands . . . the property of the Crown in Ontario under the control and administration of the Government of Ontario, and . . . no permission is given . . . to overflow or cause to be overflowed any lands not the property of the Crown in Ontario and not under the control and administration of the said Government . . . ." There is nothing anywhere in the Ontario proceedings giving the defendants the right to overflow land not that of the Crown or not under the control and administration of the Crown. As to Tighe and M. H. Smith (who claims

ONT.

S. C.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Riddell, J.

under a locatee, Roach), there can be no pretence that the company are protected by the Ontario proceedings: the others are in a very different position. If the agreement is valid—and it has been recognised by the Legislature: (1906) 6 Edw. VII. ch. 132 (O.)—the defendants have the right to flood the land upon which the squatters' buildings stand, being given such right by the owner. "*Omne majus continet in se minus;*" "*Non debet cui plus licet, quod minus est, non licere*"—he who owns land may do with it what he will—sell, lease, or give it away; and, with such powers, it would be absurd to suppose he could not exercise the lesser power of granting an easement of flowage.

I am unable to see that there can be a valid claim for damages for the exercise on land of rights expressly conferred by the owner, who could himself have exercised these rights. I would therefore allow the appeal as to the plaintiffs other than Tighe and M. H. Smith, and dismiss their actions, but without costs, in view of the facts of the case.

As to Tighe and M. H. Smith I accept the law as laid down in Dom. Proc. in *Greenock Corporation* v. *Caledonian R.W. Co.*, [1917] A.C. 556: "It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by an extraordinary rainfall, and if damage results from the deficiency of the substitute . . . he will be liable." That indeed is a case of alleged *actus Dei*, but the principle is applicable here. The onus is on the person injured to shew: (1.) that the work "has not been fortified by prescription, and (2.) that but for it the phenomena would have passed him scatheless" (p. 571).

Here there is no pretence of prescription, and I think it has been proved that but for this dam the flood would have passed these two plaintiffs (not indeed wholly, but in part) scatheless.

If the case depended upon negligence, I should not be able to find it. I find nothing in the conduct of the defendants inconsistent with sound sense and prudence. I accept fully the evidence of Prof. Meyer, an engineer of deservedly high repute, and am unable to follow my learned brother Kelly in his animadversions on Fanning. Fanning seems to me to have been trying to avoid being turned into an expert against his will—modesty not too frequent in our Courts.

Taking Meyer's evidence after examination at length, it seems to reduce down to what he says on pp. 192 and 193 of the notes of evidence—that, had the dam not been there, the water would have been 1.3 feet (say 1 foot 4 inches) lower—that the defendants are liable for at least 1.3 feet of water. Rolph, also an engineer, says (p. 321) that the water was higher than if there had been no dam, but his evidence is not convincing.

Most of the evidence given is little to the point.

Curiously enough, the plaintiffs thought they had made their case when they proved that the flood was abnormally high (pp. 12, 14, 21, 142, 145, etc.), and the defendants their defence when they had established that the discharge past their dam was greater than in the state of nature—these are of course quite consistent, and neither one nor both can establish a defence or a cause of action. It would appear that part of the damage complained of would have been done had the dam not been in existence, but apparently not all—the plaintiffs M. H. Smith and Tighe are entitled to recover for the difference between the whole and what would have occurred in the absence of the dam: *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503; *Workman* v. *Great Northern R.W. Co.* (1863), 32 L.J.Q.B. 279.

While the defendants may suffer from the impossibility of accurately ascertaining the amount (*Leeds* v. *Amherst* (1850), 20 Beav. 239), the evidence was not directed to an inquiry on such principles, and I am unable to form any satisfactory opinion as to the proper amount to be allowed.

In respect of these two plaintiffs, I would allow the appeal so far as to refer it to the Master to fix the damages, if the parties cannot agree. The costs of the reference and of this appeal may well be left to the discretion of the Master, but the defendants should pay the costs of the action (including the trial before Mr. Justice Kelly), on the Supreme Court scale. No damages should be allowed for anything upon the road allowance, but it appears that Tighe perhaps wholly, and M. H. Smith at least in part, have been flooded as to lands not on the reservation: their damages should be confined to such places.

It may be that these respondents may prefer not to take the reference; they should be at liberty within 30 days to elect not to take it, and, if they so elect, their actions will be dismissed without

ONT.

S. C.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LTD.

Riddell, J.

costs, and there will be no costs of the appeal to either of the parties.

[A motion was subsequently made by the defendants for a direction that the costs ordered to be paid by them to the plaintiffs M.H. Smith and Tighe should not be payable until after the result of the reference should be known: the court held that these costs should be paid forthwith after taxation and that the taxation and payment should not be delayed until the determination of the reference.]

Allowed in part.

CAN.

EX. C.

THE KING v. DEACON.

Exchequer Court of Canada, Audette, J. February 20, 1919.

PUBLIC LANDS (§ I C—17)—HOMESTEAD—JURISDICTION OF EXCHEQUER COURT—VALIDITY OF PATENT—DELIVERY—"IMPROVIDENCE"—JUDGMENT CREDITORS—BONÂ FIDE PURCHASERS.

The defendant, S., an alien, for a number of years was a homestead entrant on land in Manitoba and entitled to a patent therefor under the Dominion Lands Act. He refused to make application for the patent, because, until the patent was registered in Manitoba, the land was not subject to the payment of certain taxes, nor to the execution of judgments obtained against him. He was induced to consummate the application for patent under threat of the Dominion land-office to cancel his homestead entry, and having taken out his naturalization papers and signing the application, the patent regularly issued and was mailed to him at his post-office address. It was later returned to the land-office because not called for by him. In the meantime a copy of the patent was registered against the land, whereupon the land was sold to satisfy the taxes and judgments, and thus found its way into the hands of innocent purchasers for value. Proceedings were instituted to set aside the patent and subsequent conveyances on the ground that the patent was procured by fraud and improvidently issued.

Held, the Exchequer Court has no power to review or question the validity of the judgments obtained by the creditors in the Provincial courts; that it has jurisdiction, under s. 94 of the Dominion Lands Act (7-8 Edw. VII., 1908, c. 20) and s. 31 of the Exchequer Court Act (R.S.C., 1906, c. 140) to determine the validity of the patent, and to set aside, if need be, the registration of instruments affecting the land in the registration offices of the Province.

2. The patent having duly issued, in conformity to the provisions of s. 90 of the Dominion Lands Act, physical delivery was not essential to render it operative or effective.

3. Upon the registration of the patent thus issued the judgment creditors of the patentee had the right to treat it as having been regularly issued and to secure a sale of the land in execution of their judgments.

4. Under the evidence adduced, no fraud, error or improvidence was established as would warrant the avoidance of the patent under s. 94 of the Act; the fact that the patentee, in a letter to the land-office, stated his unwillingness or refusal to sign the patent papers, when he in fact did sign them, does not shew "improvidence" in issuing the patent, particularly when his object for doing so was to defeat the payment of taxes and hinder his judgment creditors.

5. After the land has passed into the hands of third parties, who were innocent purchasers for value, no relief can be granted in violation of their rights.

CAN.

Ex. C.

THE KING v. DEACON.

Statement

INFORMATION exhibited by the Attorney-General, asking that letters patent for certain Dominion lands issued to the defendant, August Swanson, on March 24, 1911, be declared void and be delivered up to be cancelled. Tried at Winnipeg.

A. J. Andrews, K.C., and *F. M. Burbidge*, for plaintiff; *H. A. Bergman*, for defendant, Iver Edborn; *B. L. Deacon*, for defendants, Paul Dolman and Sarah Goodman; *W. S. Morrisey*, for defendant Deacon.

Audette, J.

AUDETTE, J.:—It is alleged by par. 15 of the information that the letters patent for homestead in question granted to Swanson, were sent by mail on April 11, 1911, to his regular post-office, but it is averred that such letters patent had been issued fraudulently, improvidently and by inadvertance, and that the same should be declared as having never been duly and regularly issued and *delivered so as to vest the said lands in Swanson*. The information further seeks, in the alternative, for a declaration *that if the said patent was issued, the issue of the same was procured by fraud, or that it was inadvertently and improvidently* issued, and that the same should be declared void and should be delivered up to be cancelled—and further, that the alleged sales and mortgages be declared void and of no effect and be set aside.

Now, the facts of the case are intricate, but stripped and freed from all unnecessary details, may be stated as follows:

At the outset it must not be overlooked that the defendant Swanson, the patentee, is not a relator, but is purely and simply a defendant in the case.

Swanson is a Swede who, according to his own statement, came to Canada from Minnesota, U.S., in 1900. Einarson, who has always lived in the neighbouring community of Pine Creek, now Piney, says that when he arrived in the fall of 1899, Swanson was already there, being a squatter on the land in question. Swanson duly signed his application for entry on August 27, 1900, and has performed and completed all the settlement duties that entitle him to his patent. In fact, he had done so many years previous to the issue of his patent, and so became entitled to the same according to the laws and regulations in that behalf made and provided.

Somewhere about 1903, Swanson got into trouble with some of his neighbours. He was arrested on a charge of having mal-

CAN.

EX. C.

THE KING v. DEACON.

Audette, J.

iciously injured cattle belonging to certain of his neighbours that he caught roaming on his quarter-section, which, at the time, was not fenced. At the trial he was acquitted, or rather discharged. Then he turned around and sued his prosecutors for malicious prosecution, giving the conduct of the action to one Mr. Deacon, a defendant herein, who looked after his case up to a certain stage. Swanson, finding that his action was not being prosecuted as speedily as he desired, took the case out of Deacon's hands and retained the services of another legal firm who saw the case through, when the action was dismissed with costs against Swanson—the judgment being registered against his quarter-section. Deacon, in the meantime, failing to get paid for his services, sued for his costs, and obtained a judgment against Swanson, which judgment was registered in like manner.

It is unnecessary for the purposes of this case to go into the details of the cases in which judgments were so obtained in the courts of the Province of Manitoba and afterwards registered against the lands in question. However, in view of the allegations in the information, it is, I think, incumbent upon me to state here that no blame can be attached to Deacon for his conduct in this matter. The evidence at the trial so thoroughly cleared up the whole matter and exonerates Deacon from any blame that counsel for the plaintiff was impelled to withdraw averments impugning Deacon's conduct as made in the information.

It may be mentioned, by the way, that this court has no power to review the judgments rendered in the courts of the Province of Manitoba. The Exchequer Court is not a court of appeal for such province, and, if Swanson had at any time reason to be dissatisfied with these judgments, his recourse was to the courts exercising appellate jurisdiction in that province, and not to the Exchequer Court of Canada. It appears, however, that Swanson took his complaints to the Governor-General of Canada, to the Attorney-General of Canada, and to the Attorney-General of the United States, and even brought the matter before the grand jury in Manitoba; but no action seems to have been taken thereunder.

These judgments not being appealed from, stand now in full force and effect, although that question—but for the allegations in that respect in the information—has no occasion to be mentioned, not being a consideration in arriving at the decision of the question involved in this issue.

Furthermore, ever since Swanson became entitled to his patent, he refused to make application therefor; because, until the patent was registered in Manitoba, he was exempt from the payment of certain taxes, and advised his neighbours to that effect, inciting them to follow his example, and thus creating annoyance both to the government and the municipality. The latter, as it appears from the evidence, complained to the government and pressed the issue of the patent.

There is spread on the record a very long and protracted correspondence from which it appears that, for a number of years previous to the issue of the patent, the government was earnestly endeavouring to induce Swanson to make his application for the patent, and going so far as to threaten him with the cancellation of his entry under s. 26 of the Dominion Lands Act, if he failed to do so. Instructions were even given to institute proceedings to that effect and notice of the same was accordingly given to Swanson.

However, after a number of months, even years, had elapsed, Swanson duly signed his application. Under the evidence on record, I have no hesitation in finding that he did personally, of his own free will, sign the application. The evidence of the homestead inspector, Lagimodiere, who gave his testimony in a most straightforward and creditable manner, leaves no room for doubt, and besides, the signature on the application for the patent is undoubtedly the same as that which is to be found on Swanson's application for entry and on many other documents on record.

It appears from the evidence, both oral and documentary, that for a very long period instructions were being repeatedly given, by the department, to take Swanson's application for this overdue patent. However, Swanson persistently refused to do so, giving as his reasons for so behaving that he had been in trouble with some of his neighbours at Piney, who had obtained judgment against him, and further that the school trustees were after him for taxes, and that he wanted to delay the issue of the patent to allow him, in the meantime, to get rid of the same. The complaint by the municipal authorities was that Swanson was avoiding the payment of his taxes.

Witness Lagimodiere says that he had had instructions at different times to take Swanson's application for the patent, and

CAN.
EX. C.
THE KING
v.
DEACON.
Audette, J.

being, on February 19, 1910, in the Dominion Land Office, at Winnipeg, Swanson, who was quite in good humour, called at the counter and informed him he wanted to make application for his patent. That was some time after he had been threatened with the cancellation of his entry. Lagimodiere, under the instructions of his superior officer, then took the application, filled it up in his own handwriting and had Swanson sign it in his presence. Having said he was not naturalized, Lagimodiere prepared naturalization papers, but when it came to sign these, Swanson demurred and refused to do so.

But for some stress being laid upon the letter of January 26, 1910, in which appears the words:—

> Swanson refuses to make application for his patent and it is desired by the department that you will visit him after seeding next spring, and do your best to shew him his position in the matter and persuade him to make his application—

I would refrain from making any reference to the same. Obviously that is only a part of the heavy and protracted correspondence relating to the same subject and cannot be construed as intimating that the application could not be taken before the spring. As witness Lagimodiere puts it, that letter would have been considered as optional, of letting Swanson off up to and after seeding; and, moreover, that letter was never communicated to Swanson and, therefore, is of no effect in his behalf.

There is another important link, in the chain of facts, in that letter of February 21, 1910, which reads as follows:—

> Warren, Minn., Feb. 21, 1910.
>
> To the Honourable Homestead Inspector
> of Dominion Land,
> Winnipeg, Manitoba.
>
> I cannot sign those papers that we made out when I saw you last. If I did, I would sign all my property away for nothing. It will not be necessary to come to my place until you get a letter in writing from the Attorney-General of Manitoba to the fact that he will bring the case up in court in the King's Bench. If this case is not adjusted in a reasonable time I will bring it up in court in Minnesota.
>
> P.O. Piney, Man. (Sgd.) AUGUST SWANSON.

Reference will be hereafter made to this letter.

Subsequently to this date, it having been found out by some one that Swanson had been naturalized and so become a British subject, his naturalization papers found their way into the hands of the department. The evidence does not disclose who so sent

them, but the evidence is superabundant as to their legality. While it is of no importance to know how these naturalization papers came into the possession of the department, it is suggested by counsel that Swanson, upon being threatened with cancellation of his homestead entry, and in fear of losing it, sent them himself. This, if true, would operate as a complete estoppel against Swanson.

These naturalization papers having completed the preliminary steps in the application for the patent, the same was duly signed and sealed on March 24, 1911, and I assume, duly registered in the Department of the Interior pursuant to s. 90 of the Dominion Lands Act. The patent was then in due course, according to the practice in that behalf, duly transmitted by mail on April 11, 1911, to Swanson's address, at Pine Valley, Manitoba. But the same was returned some time in the month of May following, with a memorandum endorsed on the envelope by the postmaster at Pine Valley, that the letter had not been called for, and further stating that Swanson had been away for some time, etc.

However, Dolman having heard that the patent had issued and was at the post-office at Pine Valley, informed his legal adviser of it, who wrote to the department at Ottawa and obtained—in the interval between the mailing and the return of the patent—a copy of the same, which he duly registered against the lands in question.

The patent being thus registered, the land was sold to satisfy the taxes and the judgment creditors, and the property found its way into the hands of a third party—an innocent purchaser for value without notice—who spent and disbursed upon the property in improvements the sum of $2,053.17, inclusive of the purchase price of $1,200. The land was sold in due course at Winnipeg to one Ainsley, who sold afterwards to defendant Deacon, who, in turn, sold to defendant Edborn, who is in possession living on the land, and who, when purchasing, did not even know Swanson and all that has been mentioned above. R.S.M., 1913, c. 107, s. 3; *U.S.R. Co.* v. *Prescott* (1872), 16 Wall. 603.

In approaching the law of the case we are confronted with the question of jurisdiction. It is contended that the Exchequer Court of Canada has no jurisdiction to hear and determine the present case, either under s. 94 of the Dominion Lands Act, or the Exchequer Court Act, and that the court has no jurisdiction

CAN.

EX. C.

THE KING v. DEACON.

Audette, J.

respecting real property in the province—and for setting aside registration in the registration office—etc., etc.

The King, from time immemorial, has the undoubted privilege attaching to his prerogative of suing in any court he pleases.

We find in Chitty's Prerogatives (1820), p. 224, dealing with actions "by the King and Crown":—

> In the first place, though his subjects are, in many instances, *under the necessity* of suing in particular courts, the King has the undoubted privilege of suing in any court he pleases. . . . The Crown possesses also the power of causing suits in other courts to be removed into the Court of Exchequer where the revenue is concerned, in the event of the proceeding, or the action touches the profit of the King, however remotely, and though the King be not a party thereto. . . . The King is also supposed to be always present in court.

Under s. 91 (1) of the B.N.A. Act, the Parliament of Canada has the paramount power to legislate with respect to its property, *Burrard Power Co.* v. *The King* (1910), 43 Can. S.C.R. 27, 50, 52, [1911] A.C. 87. Under s. 31 of the Exchequer Court Act, the Exchequer Court is given concurrent original jurisdiction by sub-sec. (b), in all cases in which it is sought, at the instance of the Attorney-General of Canada, to impeach or annul any patent, lease or other instrument respecting lands; and, by sub-sec. (d) of the same section, it has also been given jurisdiction in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. Moreover, the Exchequer Court of Canada comes within the purview of s. 94 of the Dominion Lands Act and is one of the courts "having competent jurisdiction in cases respecting real property in the province where the lands are situate," and this principle and question have been clearly established and decided by the judgment of the Supreme Court of Canada in the case of *Farwell* v. *The Queen* (1894), 22 Can. S.C.R. 553-562, 3 Can. Ex. 271. See also *Cawthorne* v. *Campbell* (1790), 1 Anst. 205, 218, 145 E.R. 846; *The King* v. *Powell* (1910), 13 Can. Ex. 300; and *Williams* v. *Box* (1910), 44 Can. S.C.R. 1.

Furthermore, as said by Anglin, J., in *Gauthier* v. *The King* (1918), 40 D.L.R. 353 at 365 and 366, 56 Can. S.C.R. 176, 195:—

> Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in the right of the Dominion. . . . It does not at all follow that, because the liability of the Crown in right of the Dominion is to be determined by the laws of the province, where the cause of action arose, that liability is governed by a provincial statute made applicable to the Crown in right of the province, since it is by the provincial law only so far as applicable to it that the liability of the Crown in right of the Dominion is governed.

Therefore, I find the Exchequer Court has full power and jurisdiction to hear and determine the present issue and controversy.

This takes us now to consider whether the patent in question was duly issued, under the circumstances above mentioned, and I find that the patent herein was legally issued, without the formality of its being delivered into the hands of the patentee. It is duly issued when signed and sealed as provided by s. 90 of the Dominion Lands Act. This title is of record in the department and it is therefore by no means necessary that delivery be made before it is completed. 6 Hals., p. 479, says: "Grants under the Great Seal require no delivery and take effect from the date expressed in the grant." See also *Contois* v. *Benfield* (1875), 25 U.C.C.R. 39, 43.

A very large number of authorities can be and have been cited in support of that proposition. Norton on Deeds, 2nd ed., p.14: "The operation of a deed is not suspended by the fact that the person entitled to the benefit of it is ignorant of its existence."

"Depositing a deed directed to the grantee in the post-office has been declared to be sufficient delivery." 13 Cyc. 561; *Doe'd Garnons* v. *Knight* (1826), 5 B. & C. 671, 108 E.R. 250; *Staple of Eng., Mayor, etc.* v. *Bk. of Eng.* (1887), 21 Q.B.D. 160, 165; *Gartside* v. *Silkstone* (1882), 21 Ch.D. 762; *Re Mathers* (1891), 7 Man. L.R. 434.

See also *Lonabaugh* v. *United States* (1910), 179 Fed. 476, a case much in point, wherein, at p. 480, the following observation is found:—

> We are of opinion that when, upon the decision of the proper office, that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the land office, and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the Government of the United States, and *needs no further delivery* or other authentication to make it perfect and valid. *Colorado Coal Co.* v. *United States* (1887), 123 U.S. 307, 313.

No physical delivery of the patent is essential to make it operative or effective. See also *Stark* v. *Starrs* (1867), 6 Wall. 402; *Benson Mining Co.* v. *Alta. Mining Co.* (1892), 145 U.S. 428, 431.

Now let us consider whether or not Swanson's patent is open to avoidance under the provisions of s. 94 of the Dominion Lands

CAN.

EX. C.

THE KING v. DEACON.

Audette, J.

Act, as having been issued through *fraud*, or *improvidence* or *error*.

Fraud is alleged in the information, but no fraud was attempted to be proved, and as there is never any presumption of fraud, the plaintiff fails on this point.

Can it be contended that there was any error in issuing the patent in the manner it was issued? The patent was issued for the right piece of land, to the entrant for his homestead, the party entitled thereto, upon his own application, long after the expiry of the period fixed by the Act, and after performing all settlement duties and requirements. In fact, under s. 25 of the Act, he had acquired a right to it, before it was signed and sealed. There certainly was no error. 32 Cyc. 1029, 1030; *Simmons* v. *Wagner* (1879), 101 U.S. 260; *U.S.* v. *Detroit Lumber Co.* (1906), 200 U.S. 321.

Was there any improvidence? Where was the improvidence, in the true sense and meaning of the word? Does the charge of improvidence rest on the letter of February 21, 1910, written by Swanson, two days after signing his application for the patent and when he refused to sign papers for naturalization? In that letter he says: "I cannot sign those papers that were made out when I saw you last. If I did, I would sign all my property away for nothing," etc., etc. Can this letter have reference to the application for the patent he had duly signed? I would take it from the ordinary meaning of the words that it would have reference to papers unsigned, to the naturalization papers that Lagimodiere had made out for him to sign, but which he had refused to sign at the time without giving any reason. This letter gives his reason for refusing his patent and also the apparent reason for refusing to sign those naturalization papers; but he was aware that years ago he had signed such papers and did not want to disclose it for fear the patent might issue at once. Did he not wish that to be kept to himself, to disclose it later on if any trouble were to arise in the issue of the patent—his answer being ready that he had long ago complied with all requirements? And at p. 40 of his evidence, speaking of his naturalization papers, he denies having known he ever had been naturalized, but he says: "Those papers that are made out, they can keep them that way when I get my money and property back." In his letter of May 7, 1915, he claims protection "as a British subject."

Be all this as it may, surely a letter of this kind could not and would not, under the known circumstances, have justified the staying of the hand of the government in issuing the patent. It was well known and spread upon the record that the government for years, at the request of the municipality claiming its taxes, and in compliance with its duties defined in the Dominion Lands Act, had been endeavouring to have Swanson make his application. It had repeatedly threatened Swanson with cancellation of his entry, under the provisions of s. 26, for his persistent neglect to make the application for his patent, when he had been for years entitled to it.

There is nothing new disclosed in the letter. It is nothing more than a consistent confirmation of the position taken by the patentee in the past. It is the same old characteristic letter following the trend of the past correspondence on the record, shewing the obsession of his grievance to which the Crown is absolutely foreign, and in face of which it had been earnestly pressing Swanson to make his application for the patent. Why attach so much importance to this isolated letter, in view of the welter of letters already on record and practically to the same effect? I fail to see. The plaintiff had full notice and knowledge of all the facts in the case when the patent was duly issued.

Moreover, what reliance and credence can be placed upon this letter? Turning to the evidence we find that Swanson himself states he never wrote that letter. He denies that it is his letter, or that he told anyone to write it for him, and he says he never signed it. Then on cross-examination, by counsel for the plaintiff, he adds he must have had somebody to write it—that he signed it—and then at the end he adds he does not recollect anything about the letter. The facts in respect of the writing of that letter instead of being cleared up by the evidence of Swanson are placed in such an obscure and bizarre circumvolution that no reliance can be placed either upon the letter or upon Swanson's evidence in that respect.

There is in that letter nothing new that was not disclosed before in the long-protracted correspondence which loads the record. That letter was only repeating and maintaining the same position taken from the beginning of his difficulties with his neighbours. All these facts were perfectly well known to the

CAN.
EX. C.
THE KING
v.
DEACON.
Audette, J.

Crown, who, in face of the same, gave repeated instructions to endeavour to have him apply for his patent. The Crown even went further, they gave instructions to institute proceedings to cancel his entry for his want to apply for his patent, relying upon s. 26 of the Act, and notice given Swanson to that effect.

The Commissioner of the Dominion Lands, heard as a witness, at Ottawa, testified he was unable to say whether the letter was on the Ottawa file, in the department, when the patent did issue. But even if that letter were not on file when the patent was issued, can that fact, considering all the allegations in the letter as obviously referable to all the circumstances of the case, amount to improvidence in issuing the patent? I must unhesitatingly answer that in the negative. The term "improvidence," indeed, as defined by the Supreme Court of Canada, in the head-note of the case of *Fonseca* v. *Att'y-Gen'l of Canada* (1889), 17 Can. S.C.R. 612,

as distinguished from error, applies to cases when the grant has been to the prejudice of the commonwealth or the general injury to the public, or when the rights of any individual in the thing granted are injuriously affected by the letters patent.

What are the reasons for cancellation asserted by Swanson himself all through his correspondence and evidence, if not in aid of defeating the payment of his taxes and his judgment creditors, whose claims would be barred by the Manitoba Statute of Limitations were the whole matter to be reopened.

The hand of the law cannot be extended in relief of the defendant Swanson under the circumstances, and much more so indeed, in violation of the rights of a third party who became the purchaser for value without notice and who has spent a substantial sum of money upon the land in question. *Proctor* v. *Grant* (1862), 9 Gr. 224; *Cumming* v. *Forrester* (1820), 2 J. & W. 342; *Stevens* v. *Cook* (1864), 10 Gr. 415, 32 Cyc. 1057, 1029, 1030, 26 Am. & Eng. Enc. Law, 444; *U.S.* v. *Stinson* (1905), 197 U.S. 200, 204, 205.

The cancellation or avoidance of a patent cannot be trifled with. The burden of proving by clear testimony, of an unquestionable character, that the patent was granted improvidently wholly rested upon the plaintiff, and such evidence was not given. *Fonseca* case, 17 Can. S.C.R. 612 at 652. There is no evidence on the record of such a nature as would justify cancellation.

CAN.

Ex. C.

THE KING v. DEACON.

Audette, J.

It is suggested, in the official correspondence filed as exhibits, that another homestead be given the patentee. It is always open to the Crown, under its benevolence, grace and bounty, to allow Swanson some other quarter-section upon which to enter, the time placed on the original homestead to count—or under any other condition which may appeal to the law officers of the government.

The action is dismissed with costs. *Action dismissed.*

LENO v. SIMPSON-HEPWORTH CO. LTD.

MAN.

K. B.

Manitoba King's Bench, Galt, J. February 22, 1919.

CONVERSION (§I B—10)—SALE OF GRAIN—BILLS OF LADING SIGNED AS DIRECTED BY AGENT—OWNER OF GRAIN ILLITERATE—FRAUD OF AGENT—NOTICE TO PURCHASERS OF OWNERS' INTEREST—DAMAGES FOR VALUE.

The owner of grain being illiterate except that he could sign his name, instructed an agent to sell the grain to the purchasers, and signed the bills of lading in blank as instructed by the agent. The agent fraudulently crossed out the owner's name and signed his own name as shipper, and sold the grain to the purchasers as his own. In an action against the purchasers for the price of the grain, or for damages for wrongful conversion, the court held that the purchasers could not obtain title through the forged bills; that the conduct of the plaintiff was not such as to estop him from recovering; that the alterations on the bills of lading should have put the purchasers on enquiry, and that the purchasers had express notice of the plaintiff's interest in time to stop payment of the cheques, that they had converted the goods to their own use and were liable for their value.

Statement.

ACTION to recover the balance of the proceeds of a sale of grain, or in the alternative damages for its conversion.

W. J. Donovan and *A. S. Morrison*, for plaintiff; *G. A. Elliott*, K.C., and *J. C. Bery*, for defendants.

Galt, J.

GALT, J.:—In this action the plaintiff claims $6,675.41 as the balance of the proceeds of sale of grain with interest from May 8, 1917; or in the alternative, the same amount as damages for conversion of the plaintiff's grain.

The circumstances attending the transaction are unusual. The plaintiff is a farmer residing about 3 miles from Prussia, Saskatchewan (recently changed to Leader). He has lived there for several years, and is illiterate except that he can sign his name.

One Gotlieb Zaiser lived at Prussia and dealt in grain. In the year 1916 Zaiser had acted as agent for the defendant company at Prussia, but his agency expired in August, 1916. During the early months of 1917, Zaiser endeavoured to be reappointed as agent of the defendants, but the evidence given by Alfred Thomas

MAN.

K. B.

LENO v. SIMPSON-HEPWORTH CO. LTD.

Galt, J.

Hepworth, manager of the defendant company, together with the correspondence produced by him, clearly establishes the fact that the company refused to appoint Zaiser as their agent in 1917, and that he did not in fact become such agent.

In April, 1917, the plaintiff desired to sell 2 car loads of grain, and he had it in mind to sell it to the defendants. He knew that Zaiser had acted as the defendants' agent and supposed that he was still their agent. He went to Prussia and spoke to Zaiser about shipping this wheat to the defendant company, and asked Zaiser to obtain a quotation of current prices from the defendants. Shortly afterwards Zaiser informed the plaintiff that he had a quotation from the defendants of $2.24⅝ cents for May delivery.

Some mistake seems to have been made about these figures as the evidence is that no such figures actually represented the price of wheat at the time in question.

On April 25, Zaiser wired Simpson-Hepworth & Co. Ltd. that:—

E. Zaiser will load car this week and another car next week please sell sixty-five hundred bushels of wheat and twenty hundred bushels oats for to-day's track price May delivery I will start to ship this wheat next week and complete next week after answer.

On April 27, the defendants wired Zaiser:—

May delivery strong advance cannot sell any more against wheat not yet loaded dangerous better wait until loaded or even sell arrival.

On the same day they wrote to Zaiser:—

We wired you to-day that May delivery was very strong and advancing, and that you had better not sell any more against wheat not yet loaded, for as you know chances of it getting down to Fort William in time will not be good, for there are so many orders ordered ahead. As the market looks now they will not lose out by having orders come forward for sale on arrival or when we get the shipping Bill. Our office manager has sent you out confirmations of all previous sales ordered.

Zaiser says he communicated this correspondence to the plaintiff, and they concluded that no definite price could then be fixed.

By April 27 the plaintiff had loaded two cars of wheat. He then went to see Zaiser, who conducted his business in the office of E. Zaiser, his son.

The plaintiff says that Zaiser invited him to come into the office and said he would fix things right. Two bills of lading were prepared by Zaiser. They were prepared on forms originally supplied by Simpson-Hepworth & Co. Limited to Zaiser when he

had been acting as their agent. The bills are practically identical in form. When signed by Leno the bills read substantially as follows:—

Canadian Pacific Railway.

Bulk Grain Bill of Lading—Original.

Not negotiable unless property is consigned "to order." Received, subject to the tariff in effect on date of issue of this original bill of lading.

At Prussia, Sask., April 27, 1917.

From—Henry Leno. The bulk grain described below.

[Name of Shipper.]

consigned and destined as indicated below, etc., etc.....

The surrender of this original bill of lading properly endorsed, shall be required before delivery of the bulk grain when consigned "to order" or upon application by the owner or consignee for terminal elevator delivery or warehouse receipt, etc.

Consigned to order of Simpson-Hepworth & Co., Ltd.

Destination—Port Arthur.

Notify—Simpson-Hepworth Co. Limited.

At—Winnipeg.

Car No. 201116.

Bushels. Kind of Grain.

.....Agent.....

Per.....

.....Shipper.

Per.....Henry H. Leno.....

It was stated that the plaintiff was somewhat in a hurry and the two bills of lading were left with Zaiser for completion. I am not sure whether the number of the car or the name of the railway agent was on the bills when they were presented by Zaiser to the plaintiff for signature; but in my opinion this is immaterial. Zaiser undertook to fill in particulars of the shipment. He then presented the bills to the plaintiff and told him to sign his name at the bottom. The plaintiff did so, but apparently did not notice that the bottom line was intended to be signed by some person acting for the shipper. Consequently the document reads at the bottom:".....Shipper

Per.....Henry H. Leno....."

After the plaintiff left the office, Zaiser took the bills of lading and instructed his son E. Zaiser to fill them out, and the son filled in under the word "bushels" "1,500 more or less" and under the words "kind of grain" the word "wheat." He also may have then taken the bills to the railway agent and secured the number of the car for each bill and the signature of the railway agent.

Zaiser had an account with the Merchants Bank at Prussia

MAN.

K. B.

LENO v. SIMPSON-HEPWORTH CO. LTD.

Galt, J.

and was desirous of procuring an advance, and during his examination in chief he made the following statement:—

My son filled out the bills and told me to look after them. I took the bills to the Merchants Bank manager and he told me to sign over to the Merchants Bank as I dealt with them to the extent of $2,800. I did not notice that Leno had signed in the wrong place until I was at the bank. It was there I signed my name and altered the bills by putting in the name of Merchants Bank.

At a later stage of his evidence Zaiser said that he altered the name of the consignee and inserted his own name as shipper before he went to the bank. The manager accepted the bills of lading in their altered form and gave Zaiser an advance of $800 in respect of the bills. The documents were then forwarded by the bank to their office at Winnipeg and the two cars of wheat, Nos. 201,116 and 109,154, went forward to Winnipeg. In due course, Simpson-Hepworth Co. were notified and upon payment by them on May 3, 1917, of the $800 previously advanced by the bank, the bills of lading, endorsed by the Merchants Bank of Canada at Prussia were handed over to Mr. Reilly, an official of the defendants. On May 8, the grain was sold at the price of $2.70 per bushel, and the proceeds received by the defendants, from which they realized $6,672, over and above the $800 advance and charges for freight, etc. Ex. 11 gives particulars of the purchase moneys and deductions.

From time to time, the plaintiff inquired of Zaiser regarding the moneys coming to him from the defendants, but Zaiser put him off with excuses.

On June 7, the plaintiff telegraphed to the defendants as follows: "Have cars 109,154 and 201,116 been unloaded yet. Wire reply."

Mr. Hepworth states in his evidence that this was the first intimation he had that the plaintiff was interested in the two car loads. He says he then for the first time personally examined the bills of lading, but paid no attention to Leno's name at the top of the bills. He furthermore states that on June 6 his firm had settled up some outstanding accounts against Zaiser, who appeared to be the owner of this grain and who was largely indebted to them on transactions connected with his agency in 1916; so that, instead of remitting to Zaiser, or to the Merchants Bank at Prussia for his credit, the total proceeds of the grain, they remitted

a balance of only $1,987.41 by cheque to the Merchants Bank at Prussia for his credit.

In reply to the plaintiff's telegram of June 7, Mr. Hepworth, on behalf of the defendants, wrote to the plaintiff acknowledging his telegram and saying:—

Both these cars were received for account of Mr. G. Zaiser, and we have sent him the account sales for same, giving him the government weights and inspection certificates, and the proceeds of the two cars were receipted to his account, and the statement sent him yesterday acknowledging the same was a part of his credit balance. This is the first time we have received any intimation that you might be the shipper of these two cars, but even had we known it we would have had to make returns to Mr. Zaiser as the cars were shipped in his name and under the Grain Act we must send the returns in the name of the shipper. If you are interested in these cars, Zaiser will of course settle with you and deliver the government certificates.

On June 13, the plaintiff, being himself unable to write, procured the manager of the Standard Bank at Prussia to write the following letter to Simpson-Hepworth & Co. Ltd.:—

Winnipeg—Dear Sir:—Re Cars Nos. 201,116 and 109,154. Some time ago I shipped the above two cars through your agent, G. Zaiser. I loaded the cars myself, and after signing the bills of lading, I handed them to Zaiser. These bills of lading were endorsed over to Zaiser's order, and I would thank you to let me have a cheque for the proceeds of the two cars. P.S.—Please also advise when and for what price the wheat was sold by Zaiser.

On June 22, the plaintiff, not having received any reply to his letter, procured another letter to be written to the defendants urging payment for his grain. The plaintiff then went to the Merchants Bank at Prussia to make further enquiries and having found that the bills of lading had been altered and consigned to the order of the bank, he went to Zaiser and succeeded in obtaining a promissory note for $800, the amount which Zaiser had obtained previously from the bank. Later on Zaiser paid this amount in cash to the plaintiff.

Zaiser was called as a witness for the plaintiff. His position was an embarrassing one. He was forced to admit that he had altered the bills of lading for his own purposes, and that he received the money coming from the two cars and used it in his own business. He endeavoured to support the plaintiff's claim that throughout the transaction he had acted as agent for the defendants. His conduct was such that little reliance can be placed upon his evidence, except where it is corroborated either by some other witnesses or by the documents in evidence. At the same time, it must be observed that he had nothing to gain by favour-

MAN.

K. B.

LENO
v.
SIMPSON-HEPWORTH CO. LTD.

Galt, J.

ing one or other of the parties to this action in respect of either civil or criminal responsibility. He may well have concluded that his wisest course would be to tell the truth so far as he recollected it.

The plaintiff, as I have said, is an illiterate man, but so far as his demeanour and evidence goes, is honest and trustworthy.

Mr. Hepworth gave his evidence in a frank and satisfactory manner, and I feel satisfied that, until the receipt of the plaintiff's telegram of June 7, Mr. Hepworth believed that his firm were dealing simply with Zaiser, their former agent, as shipper of the grain in question, but Hepworth was not the official who originally received the bills of lading on May 3. On or about that day, the bills were delivered to Mr. Reilly, and were held by the defendants until they sold the grain on May 8.

Mr. Elliott, on behalf of the defendants, argued firstly: that the plaintiff had in fact sold the two car loads of grain to Zaiser, and it was immaterial what Zaiser did thereafter with either the grain or the bills of lading. I consider that this contention is not only unsupported, but is negatived by the evidence throughout.

Mr. Elliott next argued that Zaiser was at least the plaintiff's agent, and that under the provisions of the Bank Act relating to warehouse receipts and bills of lading, the defendants obtained a clear title to the grain, even though the bills of lading did contain one or more forgeries.

Upon evidence given by the plaintiff and by Zaiser himself, I am constrained to find that Zaiser forged both bills of lading, after they had been signed by the plaintiff; in the first place by striking out the name of the consignee "Simpson-Hepworth & Co. Ltd." and inserting in lieu thereof "Merchants Bank"; and in the second place by inserting his own name "G. Zaiser" in front of the word "shipper" at the bottom.

The plaintiff certainly never intended to employ Zaiser as his agent, but on the other hand, after signing the bills of lading as above mentioned, he left them with Zaiser to fill up particulars of the shipment and possibly to get inserted the number of each car, and the railway agent's signature and to have the grain shipped to Simpson-Hepworth Co. To this extent, perhaps, Zaiser may be treated as the plaintiff's agent. The manager of the Merchants Bank at Prussia was not called as witness, and so it is impossible to know just what his evidence would have been,

but he advanced $800 to Zaiser on the security of the two bills, which shewed at the top that Henry Leno was the shipper, and also shewed that originally the name of the consignee was "Simpson-Hepworth & Co. Ltd." but that it had been struck out and "Merchants Bank" inserted in lieu thereof.

Assuming for the purposes of this case that Zaiser was, to the extent above mentioned, the plaintiff's agent, I can see no escape from the conclusion that Zaiser, by his forgery and dealings with the bank, converted the grain to his own use.

He could not transfer to the bank or to the defendants a title to goods obtained by forgery.

It appears to me that no reasonable man could deal with these bills of lading, and feel sure that Leno was not the real shipper, without at least communicating with him. Then, the grain reached Winnipeg, and the documents were handed over to Mr. Reilly, an official of the defendant company, on payment of the $800 which had been advanced by the Merchants Bank at Prussia. The same grounds for suspicion which should have occurred to the manager at Prussia were plain to be seen by the defendants when they took the bills of lading and paid the $800. The documents remained with the defendants until May 8th, when the grain was sold.

I see nothing in the cases relied upon by counsel for the defendants to justify the argument that the Bank Act, any more than the general law, recognizes a title obtained by a forgery, even when the forgery is committed by an agent. The law is stated in 1 Hals: p. 205, as follows:—

> No disposition, however, which depends for its validity upon a forged instrument is binding upon the principal.

This statement of the law is supported by the *Mayor etc. of the Staple of England* v. *The Governor etc. of the Bank of England* (1887), 21 Q.B.D. 160.

Next it is argued for the defendants that the plaintiff by his negligence and laches enabled the alterations to be made in the bills of lading, and that he should be estopped against the defendants from setting up the forgeries in question.

A wide distinction is drawn between the case of a man whose name has been forged to a document of title, and the case of a man who signs a document in blank giving instructions to another

MAN.

K. B.

LENO
v.
SIMPSON-HEPWORTH CO. LTD.

Galt, J.

person to fill in the blanks, and restricting the amount to be filled in. In the former case the document is a nullity. See *The Mayor etc. of the Staple of England* v. *The Governor etc. of the Bank of England, supra*. In the latter case, where the signature is genuine, the defendant is usually estopped from denying the validity of the document as between himself and a *bonâ fide* lender or purchaser for value upon the principle that any loss occasioned by the fraud of the agent should fall upon the person who trusted the agent, and thus enabled him to commit the fraud. See *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A.C. 173. In that case the appellant brought an action against two building societies and another party claiming to redeem certain mortgages on payment to the society, or such one of them as might be entitled thereto, the sum of £2,250, the amount he had authorized his son to borrow with interest. The son had been entrusted with the securities in question, but, in order to make use of them for his own purposes, he had forged certain other documents. The respondents had been induced by the son to advance a very much larger sum of money than the father had authorized. The decision of the House of Lords, affirming the Court of Appeal, was that the innocent lenders of the money were entitled to retain the securities until their entire advances were repaid. The securities themselves were not forgeries. In delivering judgment, Lord Watson says at p. 184:—

> It is true that the agent forged a number of documents, which he delivered to the respondents, and by which he probably induced them to advance their money. The respondents can take no benefit from documents which are tainted with the vice of forgery; but that circumstance can afford no reason for depriving them of any right in security which is not affected by that taint.

In the present case, the securities, *i.e.*, the bills of lading, are themselves tainted with forgery.

Another wide distinction is now fully recognized by the House of Lords between the duties owing by a customer to his banker and the duties owing by a man (whether as acceptor of a bill of fraud) to the drawer or indorsees of the bill. In the former case, a special duty to guard against alterations by forgery or otherwise exists, whereas, in the latter, no such duty exists. The question is dealt with and decided in *London Joint Stock Bank* v. *Macmillan and Arthur*, [1918] A.C. 777. This case shews that the differences of opinion with regard to the case of *Young* v. *Grote*

(1827), 4 Bing 253, 130 E.R. 764 (stated in 1. Halsbury's Laws of England, at p. 616, to be now overruled) must have arisen from a failure to observe that *Young* v. *Grote* was a case between a customer and his banker, and that it is still good law in all such cases.

But even when the question arises between a bank and its customer, there are limitations to the liability of the customer. In the case just referred to, Lord Shaw of Dunfermline points out, at p. 825, that when the cheque is presented for payment three things must be satisfied to exonerate the banker: (1) that the cheque is duly signed; (2) that its appearance and statement of contents present no reasonable ground for suspicion; and (3) there are customer's funds available.

If, in the present case, Leno had been the customer of the bank and had employed Zaiser to raise money for him at the bank, different questions might have arisen, but Leno was not such a customer and owed no special duty to the bank, or other persons dealing with his bills of lading, to guard against a possible forgery. Besides, I think the Merchants Bank would have had insuperable difficulty in satisfying Lord Shaw's second condition.

But after the forgery has occurred, it is quite possible for the person whose name is forged to act in such a manner as to estop himself from relying upon it. This is shewn in *Ewing* v. *Dominion Bank* (1904), 35 Can. S.C.R. 133. There, Ewing & 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. Held, affirming the judgment of the Court of Appeal, Ontario (Sedgewick and Nesbitt, JJ., dissenting), that on receipt of said notice, E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note, and not doing so they were afterwards estopped from denying their signature thereto.

It is not pretended in the present case that the plaintiff had any notice or knowledge of the forgeries in question until he

MAN.

K. B.

LENO v. SIMPSON-HEPWORTH CO. LTD.

Galt, J.

received from the defendants their letter dated June 13. They had sold the grain more than a month previously, and had sent the proceeds or the balance thereof to Zaiser on June 6. There is no ground for estoppel here. But the defendants say that the signature of the plaintiff to the bills of lading was such as to mislead anybody dealing with the bills. This is a more difficult question. We know from the evidence that the plaintiff was illiterate, and that when he was told by Zaiser to sign his name at the foot of the bills he tried to comply literally, but he was not obliged to anticipate a forgery of the documents which he signed. These documents plainly shewed at the top that Henry Leno was the shipper. If Zaiser had not written his name in at the bottom the signature would have read:—

"..... Shipper

Per Henry H. Leno....."

This would practically conform to what had been expressed at the top of the bill, and might have been accepted by the consignee. But, if any negligence can be imputed to the plaintiff arising out of the way in which he signed the bills, the difficulty could have been cleared up promptly by a letter or telegram from the consignee to Leno.

Lastly, it is argued for the defendants that they acted entirely innocently, and ought not to be held guilty of a wrongful conversion of the goods.

It does not follow that, because a man has no intention to misappropriate or convert another's goods, he is, therefore, free from liability for a conversion. The contrary is the law. See *Hiort* v. *Bott* (1874), L.R. 9 Ex. 86.

I am of opinion that the forgery committed by Zaiser prevented any title whatever to the grain in question passing either to the Merchants Bank at Prussia or to the defendants at Winnipeg. If there be any law to the contrary to be found in the Bank Act or otherwise in favour of a bank or other person innocently dealing with goods covered by a forged bill of lading, I find that the bills of lading in question were so expressed as to place an innocent lender or purchaser upon enquiry. They plainly shewed at the top of each of them that Henry Leno was the shipper. There was ample time between May 3 and June 6 for the defendants to communicate with the plaintiff by letter or by telegram,

yet they did not do so. Then the cheques which were sent by the defendants to the Merchants Bank at Prussia for Zaiser's credit on June 6 were not paid at Winnipeg until June 12 and 14 respectively. The defendants were advised distinctly by the plaintiff on June 7 that he was interested in the two car loads. The defendants could have stopped payment of their cheques and had the matter cleared up, but they did not do so.

I find, therefore, that the defendants did, between May 3 and May 9, 1917, convert the 2 car loads of grain belonging to the plaintiff to their own use, and that they are liable to the plaintiff for the value thereof, amounting to the sum of $6,672, together with interest from May 8, 1917, and the costs of this action, and owing to the importance and difficulty of the case, I remove the statutory bar.

Judgment for plaintiff.

DE FELICE v. O'BRIEN.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 24, 1918.

APPEAL (§ VII L—470)—QUESTION OF FACT—JUDGMENT APPEALED FROM MUST BE ERRONEOUS—BURDEN OF PROOF.

Before an appellate court will set aside a judgment on a pure question of fact, the appellant must demonstrate that such judgment is erroneous. Where the proof leaves it in a state of about equal probability that goods sold conformed in quality to sample as that they were inferior, the appeal will be dismissed.

Statement.

APPEAL from the Court of King's Bench dismissing an appeal from the Superior Court of Quebec, dismissing an action for damages for breach of contract. Affirmed.

The judgment of the Court of King's Bench, Archambeault, C.J., and Lavergne, Cross and Carroll, JJ., was given by Cross, J., as follows:—This is an action taken by the appellant, a cigar-maker at Montreal, to recover damages from the respondent, a tobacco planter of Chatham, Ontario, for alleged failure of fulfilment of a contract of sale of leaf tobacco to be supplied by the latter.

The respondent had sold 5,000 lbs. of tobacco to the appellant's husband, S. F. Capuano, in October, 1915.

The contract now in question was made on January 12, 1916, by acceptance of an order of Capuano worded: "Ship to S.

CAN.
S. C.
DE FELICE
v.
O'BRIEN.

Capuano, 196 Murray St., terms B.L. to draft Montreal, ship Feb. 15, 1500, price 6. And every month during the year 1916, goods same as last, f.o.b. Chatham—50 lbs. bales."

The parties have taken this to mean a sale by the respondent of leaf tobacco to be shipped 1,500 lbs. per month throughout the year 1916, commencing on February 15, 1916, of the quality of that sold in October, 1915, above mentioned, and for 6 cents per pound.

In substance, the appellant's statement of claim sets forth that the respondent sent her a first lot of 1,500 lbs. of tobacco which had to be returned as being unfit to make into cigars; that the respondent next sent 3,000 lbs. in three shipments, which seemed to be good and with which she made 70,000 cigars, but that about April 30 she was informed that "on account of the bad quality of the tobacco none of those cigars could be smoked because the tobacco did not burn after being lighted even several times;" that the respondent replaced 17 bales of the bad tobacco which had not been used, with good tobacco, but has made default to send any more; that she accordingly treats the contract as broken by the respondent, and claims $4,879 as damages.

In defence, the respondent admits having contracted with Capuano, but not with appellant, and alleges that, though he consented to take back the first consignment, he did so to oblige Capuano, that the tobacco of that consignment and of all the others was of good quality and conform to the sample of October, 1915; that if the cigars were not good it was not because of defective tobacco or anything attributable to respondent; that the cigars were sent out too fresh; that the appellant acquiesced by taking substituted tobacco; that the appellant waived recourse by accepting and using the tobacco delivered; and that the action (served on July 18, 1916) comes too late.

By an answer to plea, the appellant denied the facts alleged in defence and alleged that the tobacco which she had used had the latent defect of not being combustible which could only be discovered when the appellant's customers tried the cigars.

The judge who decided the action in the Superior Court came to the conclusions that the proof left it uncertain whether the tobacco delivered was really defective as alleged; that the appellant, instead of refusing acceptance, had used up enough of the

tobacco to make 70,000 cigars and did not offer to return any cigars or tobacco, and that the action was one to which the rule of art. 1530 C.C. is applicable. He, accordingly, dismissed the action, and the plaintiff has brought up this appeal.

On her behalf, it is contended that this is not a redhibitory action subjected to the requirement of diligence declared in art. 1530, but is an action the right to which is given to the buyer of a thing which proves to be defective even if he elects to keep it: arts. 1526 and 1527 C.C. It is further contended that the tobacco shipped was defective, and a careful and elaborate analysis of the proof is sent out in the appellant's factum to establish that point.

The material facts may be summed up as follows: Capuano made the contract in his own name and not in the name of the "Societa Sigaria Italiani" under which the appellant was carrying on business.

Capuano had had about 4 years' experience in cigar making, and the factory which he operated in the name of his wife (the appellant) under the style of "Societa Sigaria Italiani" employed about a half dozen cigar-makers, the appellant herself assisting in the work. No books were kept. The cigars made were chiefly of a longer and thinner shape than cigars usually seen. The tobacco contracted for would fall into the class known as "thirds" and would not be as good as tobacco of first or second quality. The market price was rising in and after March, 1916.

Sometimes, but not often, tobacco is found which will not burn sufficiently. Whether it will burn properly or not can readily be ascertained by using a lighted match on the leaf or by smoking it in a pipe. The practice of intending buyers is to test it before concluding a purchase contract. The whiteness of the ash-residue is a favourable indication as regards quality. Cigars may be spoiled in the making by being rolled too tightly or by twisting the fibres so that air cannot be sucked through them easily enough. In well-ordered factories, a foreman supervises the making, and a cigar out of every lot of a certain number is lit and tested.

The first lot (1,500) lbs. of tobacco sent by the respondent in February, 1916, was objected to by Capuano as being "rotten." The respondent told him to send it back and that was done, except as regards two bales or 100 lbs.

CAN.
S. C.
DE FELICE
v.
O'BRIEN.

In his letter on the subject, the respondent said: "But the first 1,500 pounds it is not for us to criticise, but in our opinion it was the "best lot you ever received from us and this happened to be the lot returned."

Subsequently, shipments were made as follows: March 4, 10 cartons or bales, 500 lbs.; March 13, 20 cartons or bales, 1,000 lbs.; April 7, 30 cartons or bales, 1,500 lbs.; May 16, 10 cartons or bales, 500 lbs.; June 5, 7 cartons or bales, 350 lbs.

The tobacco mentioned in the first three of these five shipments is that about which there has been the chief controversy. It happens that the first four shipments were all taken from the crop of a planter named Bradley.

On receipt of each of the first three consignments, the appellant proceeded to make the tobacco into cigars. She made 70,000 cigars or more. On May 8 she addressed a letter of complaint to the respondent, stating in it that she had made about 40,000 cigars, but that her customers had sent them all back because they would not light or burn and that she had 15 bales of the same tobacco on hand which she asked respondent to exchange or replace.

On May 18, the respondent called at the appellant's shop in Montreal and had an interview. Capuano's testimony is to the effect that the respondent admitted that the tobacco was defective and acknowledged responsibility. The respondent in his testimony denies these statements of Capuano, but he telegraphed to his office at Chatham to send Capuano 25 lbs. of a certain lot of "smoked" tobacco.

In a letter of May 26, Capuano acknowledged receipt of the 25 lbs. of "smoked" tobacco which he said was satisfactory, and went on to say that of the 3,000 lbs. received by the shipments of the 4th and 13th March and 7th April, he was sending back 17 bales and had used 43 bales, and the letter continues: "So now I want you to ship me 60 bales of tobacco the very same as your sample. So 17 bales will be in exchange of the 17 which I will ship you on Monday, May 29, and 43 bales you'll keep on account as soon as I sell out my cigars. I will pay it all up, because it is too much for me to keep 40,000 cigars in stock, as you see this will be the very best way to settle things, you will not loose anything and I will also be covered, or else, you want the cigars then we will ship them to you immediately."

In another letter of June 1, Capuano acknowledged receipt of the 10 bales sent on May 16 which, he said, was "not bad, but still not the same as the sample, the sample of 25 lbs. was a different kind altogether." He goes on to ask for 17 bales in replacement of those returned and 2,000 lbs. (a ton) of tobacco on the terms of his letter of May 26.

The 17 bales had been sent back to Chatham in the interval.

In a letter of June 12 to Capuano the respondent stated:—

We received your letter re the ton of tobacco. Now if this tobacco suits you we can send you a ton of it. But the terms would have to be the same as usual bill of lading attached to draft. We are sorry but we cannot extend the time as requested as this tobacco is sold on too close a margin.

In a letter dated June 17, Capuano stated to the respondent:—

In reply to yours of June 12, I could tell you only so much that, it is well known to you that I lost on affair about $500, and it is all your fault; I returned the money to all my customers and took the cigars back, and as I did not receive any answer from you, I cut them all up. Now if you are not willing to loose the tobacco, we will be obliged to discontinue business with you.

The statement that he had "cut them all up" was explained by Capuano at the trial to mean that he had destroyed the cigars. The summons issued on June 30 and was served on July 18.

I take it to be proved by the testimony that the same 28 bales of the February consignment which were sent back by Capuano to Chatham were brought to Montreal a week before the trial, and also that the 17 cartons of the 60 shipped to Montreal in March and April and returned to Chatham were also brought to Montreal a week before the trial, and that sample bales or cartons drawn at random from both of these lots were inspected by four persons skilled in the tobacco trade. It is true that Capuano and a fifteen-year-old lad in his service have denied in testimony that the cartons of the 17 carton lot are part of those returned by the appellant to Chatham, but the testimony to the contrary is more convincing.

The four witnesses who made the inspection have stated in testimony that the tobacco was found to burn satisfactorily and to leave a white ash residue.

It is to be observed that the consignment of 10 bales of May 16, which Capuano found "not bad" and which is admitted to have been good in plaintiff's declaration, was shipped from the same lot (grown by Bradley) as that from which the 60 bales shipped in March and April were taken.

CAN.

S. C.

DE FELICE v. O'BRIEN.

In the course of his testimony at the trial, Capuano produced two cigars which he said were made out of the tobacco complained of and which he happened to get back from a customer named De Santos after he had destroyed the main lot. He offered to shew that they would not burn. He next produced two cigars which he said were made from the tobacco bought in October, 1915, and offered to shew that they would burn. Thirdly, he produced two cigars as samples of recently-made cigars which would remain lighted for 2 minutes, this being in his view satisfactory.

He admitted in cross-examination that the cigars which would not smoke are "bigger and crooked and rough."

This testimony, standing by itself, would help to make a plausible case against the quality of the tobacco. Against it there is the testimony of the skilled witnesses; and I think I may add, a certain lack of plausibility in the appellant's pretension, for, after all, tobacco leaves are tobacco leaves and the use of a little fire should soon tell an intending or actual buyer whether the things will burn or not.

It results from the facts above set out that the learned Judge of the Superior Court is not shewn to have erred in holding that the plaintiff has not proved the existence of the defect alleged. The proof leaves it in a state of about equal probability that the tobacco did conform in quality to the sample as that it was inferior. In such a situation a plaintiff's case is not proved. It may be noted that in his letter of May 26, Capuano demanded tobacco of the same quality as the 25 lbs. sample of smoked tobacco, but it is made clear by the testimony of one of the skilled witnesses that the 25 lbs. sample was a snuff tobacco not used in cheap cigars and to which Capuano's contract did not give him a right.

Then, as regards delay in complaining and taking suit, it is true that this is not a redhibitory action in the sense of being a demand to have the seller take back the thing sold because of defect in it. The appellant does not, and confessedly cannot, tender back what she received.

But where a buyer has accepted delivery and afterwards, while retaining the thing, takes action to recover damages from the seller for alleged defects, he must act promptly. The reasons are

obvious. The seller is deprived not only of the thing but also in great measure of the means of proving that the thing was not defective when delivered, whilst, in the meantime, the buyer has had the thing to do what he pleased with.

The appellant should have verified the degree of combustibility of the first 2,000 lbs. of the tobacco in controversy, in March, and that of the consignment of 1,500 lbs. in April, but she used up about 2,150 lbs. in the making of 70,000 cigars and made no complaint till about May 8. Her explanation is that she learned of the alleged defect only from customers who bought the cigars. That is not a good excuse. She should have tested the tobacco before using it and she should have tested the cigars before marketing them.

It is true that she offered to return 40,000 cigars on May 26, if the respondent desired to have them, but that represented only part of the tobacco used up, and, as we have seen, she afterwards took upon herself to destroy all the cigars. That act of the appellant in destroying the cigars and unreturned tobacco should weigh heavily against her as it may well be regarded not merely as an appropriation of the tobacco so used, but also as amounting to a suppression of evidence.

Upon the whole the appellant has not shewn that the judgment is erroneous. The appeal should be dismissed.

The appeal was heard by Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ.

Edmond A. Brossard, K.C., for plaintiff appellant; *H. J. Kavanagh*, K.C., *J. M. Pike*, K.C., and *Henri Gerin-Lajoie*, for respondent.

DAVIES, C.J.:—The questions arising on this appeal are all those of fact, and may be reduced really to one, namely, whether the respondent defendant had supplied the plaintiff with the kind and quality of tobacco he had agreed to for manufacture into cigars or whether it was tobacco of a much inferior quality and not such as could be manufactured into fair salable cigars. Davies, C.J.

The contract for the sale and purchase of the tobacco in question was made in January, 1916. It was to be the same tobacco as a previous purchase made by plaintiff from defendant in the month of October, 1915. I formed the opinion during the argument of the case that the tobacco supplied to the plaintiff

CAN.

S. C.

DE FELICE v. O'BRIEN.

Davies, C.J.

under the January contract was of a very inferior quality and not such as good cigars could be manufactured from. Subsequent reading and consideration of the case confirmed me in my opinion. The facts that the cigars manufactured by the plaintiff from the tobacco in question proved unfit to smoke and that such of them as were sold by the small tobacco shops which formed the clientelle of the plaintiff to their customers were returned to them as no good and unfit to smoke; that these small shop keepers at once, in their turn, returned to the plaintiff, as being unsalable and unfit for smoking, all of these cigars they had purchased from her and that plaintiff repaid them the moneys they had paid her for the cigars; the further fact that when the circumstances were made known by the plaintiff to the respondent and alternative offers made to him by letter for a settlement upon reasonable terms he vouchsafed no answer of any kind to plaintiff's letters of complaint and that, later on, when he made a visit to plaintiff's little establishment in Montreal, saw the returned cigars and was told all the facts, he finally agreed to send the plaintiff a sample of kiln-dried tobacco, and if it suited, to exchange it for the lot the plaintiff complained of—an agreement he failed to carry out; all combined to convince me of the truth and justice of the plaintiff's case, and of her right to damages for the breach of the contract by the defendant.

I think, in view of all the facts, a quite exaggerated importance has been given to the destruction by the plaintiff of the cigars which the ten or more cigar shop keepers had purchased from her and then returned to her as unsalable and useless. She dare not have attempted to put them again on the market without imperilling her name and reputation as a cigar manufacturer, and when the defendant ignored her letters of complaint and offers for a settlement, but subsequently promised and agreed verbally to send her a sample of kiln-dried tobacco, and if it suited to exchange it for the lot plaintiff had received and complained of as unsuitable and no good, but failed to keep his promise and agreement, I do not see, under all the circumstances, that plaintiff should be held so much to blame for the destruction of the useless and unsalable cigars as she has been. Looking backward, of course, it is easy now to see that she would have been well advised if she had kept the cigars as evidence to prove her case but that is not, in my

opinion, good ground for dismissing her case, well proved otherwise against defendant, and for raising, what I venture to say, are unwarranted presumptions, from this act of destruction, at the time and under the circumstances it took place.

I have read the carefully reasoned judgment of my brother Mignault and fully concur with it.

IDINGTON, J.:—Assuming Quebec law to govern in absence of anything there anent in argument, I agree entirely with the reasons assigned by Cross, J., writing the only notes which appear in the case on behalf of the Court of Appeal, save in his one sentence of presentation of the case as one of possibly about equal probability relative to the quality of the tobacco in question. It is quite possible the learned judge merely intended to assume for argument's sake such was the case, for in such event his judgment would be the same in its results seeing the plaintiff had to prove her case. In view of the fact that he had just immediately before saying so expressed the view that there was a certain lack of plausibility in the plaintiff's pretensions, I rather think that assumption was what he meant to express.

I have read the entire evidence in the case. I have failed to find any proof of the quality of the tobacco in question being inferior to that contracted for save what rests upon the non-smokable quality of some of the cigars appellant had manufactured out of the goods.

Surely that isolated and possibly accidental fact, which might have resulted from many causes after delivery to and acceptance of the goods by the appellant, and, more probably than otherwise from something done in the several processes of manufacture destructive of the combustibility of the tobacco, falls far short of the proof required in such a case.

There was not a witness called of those who had handled the tobacco in such processes of manufacture, save the plaintiff and her husband, and neither of them ever tested the tobacco. Indeed, the knowledge of tobacco possessed by either seems to have been very limited.

Is it not extremely improbable that all those in their employ, so engaged, were non-smokers and, or if smokers, that they carefully abstained from using a pipe full of that tobacco in the course of making seventy thousand cigars? Was it because they had

CAN.
S. C.
DE FELICE
v.
O'BRIEN.
Idington, J.

tried it thus and found it good that none of them were called, even to try to rebut the case made against the process of manufacture as the probable cause of the trouble and shew it was not at fault?

Capuano, who managed everything for the plaintiff, presumed to exercise his judgment in condemning and sending back, in February, 1916, 28 bales of tobacco which were found by experts 2 days before the trial—in May, 1917—to have been of the required quality.

Meantime, he received in substitution for part of that so returned ten bales of same growth which he recognized as good when giving evidence.

We are not enlightened as to how much inferior, if at all, as suggested but not proved, and in what respect, unless as to shade of colour, it was inferior; or possibly the shade of colour got was evidence of its superior quality.

Certainly there was no such pretence as is made the basis of this action: that cigars made from it would not burn.

Such are some of the peculiar incidental features of a case in which the plaintiff undertook to prove, in order to succeed, that the quality of the goods he got was not up to the standard agreed on, and proved it only by shewing that part of one-fourteenth part of his manufactured product therefrom was useless. That is all of which any evidence is given relative to its quality. We have absolutely no proof as to the alleged inferior quality of the remainder of that in question, unless we accept the hearsay complaints of customers, as Capuano did, without testing the goods returned.

How should we look upon the pretensions of a miller to whom a grain merchant sold wheat as of a third-class quality, and tried, after the flour he had produced therefrom had been sold to a number of customers in the baking business, and they found it bad bread, if he should turn round and seek to recover damages from his vendor upon no other evidence than that a fractional part of the product was useless?

Or what should we think of the manufacturer of the products made from wool, or cotton, or flax, buying any such goods of a third-class quality, and only after the merchant-tailor or dress-maker had condemned his goods, then seeking to recover from the vendee of the raw material, and support it by no evidence but the dissatisfaction of a few of the customers? And, possibly, as

herein, without the slightest proof of fact relative to the quality except as to a part of one-fourteenth part of the entire quantity in question.

But if the miller or manufacturer in the analogous cases I submit by way of illustration should swear he took his entire product back and destroyed it without testing it, would that be a case to present to any court as founding a claim for damages by reason of the quality of raw material not being of the quality sold?

Yet in substance that is the appellant's case.

Capuano, her manager, tells us he was so simple-minded that he manufactured out of tobacco, got from a man selling him that which he found (according to his story) so rotten he had to return it, and yet went on manufacturing from shipments by same merchant, within a month later, over 70,000 cigars and never once tested the goods or any of his products therefrom, till after he had sold 30,000 cigars and found some customers returning them or complaining they would not burn. And, incredible as that story seems, he returned the balance of the raw material without taking or keeping a single sample thereof to prove his case by; and writes, on June 17, that he had "cut up" all the cigars returned and began this suit on the 30th.

He says in his evidence that he did not mean that he cut them all up, and proceeds to explain as follows:—

Q. What did you do with the 70,000 cigars? A. No, I destroyed them.

Q. In what way did you destroy them? A. I destroyed a little at a time.

Q. To-day they are all destroyed? A. Yes, but I have 500 that were sent back last week and I have not destroyed them yet, as I have not had time.

Q. What do you mean when you say destroyed them? A. I broke them up and threw them away.

Q. How? A. With my hands.

Q. You took the trouble of breaking each of the cigars for the purpose of throwing them away? A. Yes.

Q. Didn't you cut up those cigars? A. No.

Is that story true? Nobody is called to corroborate such a curious story of apparently senseless destruction, unless, in fact, the process to which the tobacco had been subjected by him had in effect destroyed the material as tobacco. And in it there was, he swears, a $100 worth of excellent tobacco in shape of wrappers bought elsewhere.

I have looked in vain for some explanation of such a proceeding.

CAN.

S. C.

DE FELICE v. O'BRIEN.

Idington, J.

That is the appellant's case.

The respondent, who had refused to sell him goods on credit, took the raw material, reshipped by appellant, back into his warehouse and kept it there along with the bales returned previously till the approaching of the trial hereof when he shipped all the returned goods he had, on the several occasions in question received from appellant, and then submitted them to the inspection of first-class experts of long and wide experience who testified at the trial the result, as given pretty fully in Cross, J.'s notes, and hence I need not repeat.

The result of that test coupled with the expert evidence as to the possibility of destroying good tobacco by a vicious method of manufacturing, illustrated by what they found in the 2 cigars appellant had produced ostensibly out of said 500 above mentioned cigars, should be held clearly destructive of a much more substantial case than appellant had made.

If the absurd sort of case presented needed any reply, it has, I submit, been met overwhelmingly by respondent's production, in court, of the returned goods and tests thereof by experienced men of standing in the business, and their evidence of what is the usual course of manufacture of cigars to guard against either non-combustible tobacco or, what is more common, the destruction of good tobacco by bad workmanship.

These returned goods so surprised Capuano that he had the boldness to swear positively they were not in the same cases he had returned them in. The appearances he had relied upon were non-existent and the appearances they should bear of sending and returning were shewn clearly to exist.

In short, unless respondent and his son are to be held to have planned a successful fraud upon the court, and then committed perjury to carry it out, the defence has been established by the evidence I have alluded to.

Complaint was made in argument that the appellant had not been invited to be represented at the inspection by the experts called. The doing or not doing that in any given case of the kind is purely a matter of discretion on the part of those conducting such a defence. In this case they would seem, considering Capuano's denial, to have been well advised in the course taken, for evidently he had expected when all at his end of the business

had been destroyed, or his story of destruction accepted, there was nothing more to be said.

A little remnant turned up by trial day, long after his examination on discovery does not, to my mind, alter the situation as he saw it then or when launching this suit.

And why, if the slightest doubt of the evidence of the respondent's experts, was no attempt made to examine the returned goods then in court during a long trial?

Only one other feature may be remarked upon, and that is what transpired between the respondent and Capuano on the visit of the former to Montreal on May 18, 1916, in course of his travelling eastward on business.

If Capuano is to be believed, there seemed an admission on respondent's part to become liable for the appellant's loss. Respondent expressly denies all the allegations of that sort.

I may be permitted to say, after perusing all the evidence, and noting mentally the difference in quality thereof, that I have no hesitation in accepting O'Brien's evidence as against that of Capuano whenever they come in conflict, and that after making due allowance for their relative facilities in the use of the English language.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—If the plaintiff appellant should not receive the measure of justice to which the actual facts in this case, as distinguished from those apparently established by the testimony and reasonable inference therefrom, would entitle her she can have no one to blame but Capuano, her husband-manager. Assuming his contention, that the tobacco in question sold him by the defendant was so inherently bad that it would not burn, to be well founded, he had in his own hands the means of establishing its truth conclusively. On his own story he imprudently, to say the least, destroyed this vital evidence. I am not wholly satisfied that he did, in fact, deliberately destroy nearly 70,000 cigars. Confronted with the suggestion that in doing so without authorization he had committed a breach of the excise laws, he at first offered as an excuse that he did not wish to trouble the revenue officers, and immediately afterwards shifted his ground, saying that he did not know of the provision of the law requiring permission for the destruction of cigars. His explanation that he

CAN.
S. C.
DE FELICE v. O'BRIEN.
Anglin, J.

destroyed these cigars within a very short time—2 or 3 weeks, according to his own story—after the defendant had promised to assume responsibility for the disposal of them, merely because he had not room for them in his business premises, seems to me incredible. If he did, in fact, destroy them, some more compelling motive must have actuated him. His description of the method of destruction which he adopted is also highly improbable. Although the fact that he had sent samples of the cigars (2) and tobacco to the defendant to test (if one could be certain that this was honestly and fairly done—it is vouched for solely by Capuano himself) coupled with the fact that the defendant in his letter acknowledging receipt of these samples said (untruly, as he now deposes) that they had been tested, adding that he would forward another 500 lbs. which he trusted would prove satisfactory, might, to some extent, lessen the significance of this destruction of evidence (*Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 615), nevertheless, under all the circumstances, the present case seems to be one for the application in almost, if not quite, its full force of the maxim *omnia præsumuntur contra spoliatorem*.

Capuano's failure to produce at the trial even one of the five boxes of cigars returned to him, as he tells us, by De Santos shortly before the trial and then at his factory, notwithstanding that he was asked to do so—his production of what he claimed to be two of those cigars, selected, of course, by himself, without the distinguishing bands, which he admitted having removed before bringing them into court, is not calculated to lessen the suspicion of his honesty to which the earlier act of destruction gives rise.

The destruction or withholding by one party of something which, if produced might or might not afford evidence of a particular issue will (not) in itself supply evidence which would otherwise be entirely wanting. It may, however, in certain cases alter the burden of proof. *Williamson* v. *Rover Cycle Co.*, *ubi. sup.* at p. 626.

Assuming the credibility of the plaintiff's customers called as witnesses, and the truth of Capuano's story that the cigars supplied to them had been made from the tobacco in question, their evidence no doubt established *primâ facie* that it would not burn either in cigars or in pipes. On the other hand, however, likewise assuming the truth of the evidence of the defendant and his son as to the identity of the tobacco submitted to the experts who testified on their behalf with that returned by the plaintiff, their testimony

established at least with equal probability, in my opinion, that the tobacco in question was readily combustible either in pipe, or in cigars properly made, and that the failure of the cigars manufactured by the plaintiff to burn must have been due either to their having been made badly or with tobacco too damp.

Dealing with the effect of all the evidence the trial judge says:—

Considering that plaintiff has not proved, to the satisfaction of the court, that the tobacco sold to her was really affected by the redhibitory vice alleged by the plaintiff; that, at all events, the proof which the plaintiff has attempted to make on this point has been contradicted by that of the defendant, and that, according to the evidence adduced in this case, there is reason to assume that, if the cigars manufactured by the plaintiff from the tobacco sold to her by the defendant did not burn, the fault could be attributed rather to the manner in and the condition under which the said cigars were manufactured, than to the bad quality of the tobacco in question.

Cross, J., delivering the opinion of the Court of King's Bench which held that there was no error in the judgment of the Superior Court, says, after reviewing the evidence:—

It results from the facts above set out that the Judge of the Superior Court is not shewn to have erred in holding that the plaintiff has not proved the existence of the defect alleged.

While the burden of proof may have shifted during the course of the trial, the trial judge was ultimately confronted with the question whether with all the evidence before him the burden that originally rested on the plaintiff of proving that the tobacco in question, which he had accepted and manufactured into cigars, would not burn owing to some inherent defect in its quality had been discharged. *Rex* v. *Stoddart*, 25 T.L.R. 612, 616; *Pickup* v. *Thames Ins. Co.* (1878), 3 Q.B.D. 594 at 600; *Lindsay* v. *Klein*, [1911] A.C. 194. He held that it had not. That conclusion was affirmed in appeal on the view that "the proof leaves it in a state of about equal probability that the tobacco was conformable in quality to the sample as that it was inferior. In such a situation the plaintiff's case is not proved."

Before such a judgment, on a pure question of fact, can be set aside in this court the appellant must demonstrate that it was erroneous. She has not been able to do so.

The appeal, therefore, fails and should be dismissed with costs.

MIGNAULT, J.:—I have given to this case serious and anxious consideration, and with some hesitation I have come to the conclusion that, viewing the whole question of substantial justice

Mignault, J.

CAN.

S. C.

DE FELICE v. O'BRIEN.

Mignault, J.

between the parties, the respondent did not supply to the appellant tobacco of good merchantable quality, and that, therefore, the appellant's action should have been maintained.

The trial judge gives three reasons for the dismissal of the plaintiff's action.

The first reason is that the plaintiff has not proved that the tobacco was really affected by the redhibitory vice alleged by her, and that, at all events, her proof has been contradicted by that of the defendant.

As to the plaintiff's proof, coupled with what I must consider as admissions made by the defendant, I think it is sufficient. She had manufactured cigars out of the tobacco sent her, and these cigars were returned to her by her customers claiming that they would not burn, and several of these customers were called at the trial and testified to this fact. I do not think the defendant's evidence meets this proof. He had sent the plaintiff some tobacco in February, 1916, and on the plaintiff's complaint that it was of bad quality, the defendant agreed to take it back.

Of this tobacco which the defendant agreed to take back, totalling 28 bales, the defendant produced two bales in court, and the total quantity, to wit, 28 bales, was sent to Montreal by express during the week preceding the trial. This is the tobacco which the defendant's experts examined at the express office, and in view of the fact that the defendant agreed to take it back, I am not impressed by any evidence that it was of good quality, and such evidence is certainly not conclusive as to the quality of tobacco subsequently shipped to the plaintiff, with respect to which alone the present controversy exists.

The second reason given by the trial judge is that the plaintiff is not in a position to exercise a right of action against the defendant, the plaintiff not having offered to remit to the defendant the quantity of cigars manufactured by her from the tobacco supplied by the defendant, which cigars the plaintiff destroyed, thus depriving the defendant of the possibility of taking back the goods and of disposing of them.

If this reason, as stated, were founded in fact, I would agree that the action should be dismissed, but, with deference, I think it is entirely in error. The plaintiff, by her husband and agent, wrote to the defendant on May 26, stating that she had 40,000

cigars (returned by customers), for which she says the defendant *had promised to be responsible*, and which, she adds, it is too much for her to keep in stock, and she offered to ship the cigars to the defendant immediately. The defendant did not answer this letter, and therefore did not contradict the statement that he had promised to be responsible for the tobacco; and not hearing from him, the plaintiff's husband wrote to the defendant on June 17, stating that he had cut up the cigars. Under these circumstances, I do not think it is in the defendant's mouth to charge the plaintiff, who certainly could not store this quantity of cigars in her very diminutive premises, with having destroyed them. It was, no doubt, imprudent on the plaintiff's part to have thus destroyed what would have been most useful to her in proving her case against the defendant, but it certainly cannot be charged that this was done fraudulently, nor does it appear to have been done for any other reason than that the defendant left the plaintiff's letter without any answer, and that the latter could not keep the cigars indefinitely, without causing serious prejudice to her business in its cramped condition.

But what entirely satisfies me is the defendant's own account of an interview which he had with the plaintiff's husband on May 18.

The defendant went to the plaintiff's place of business and he gives the following account of the conversation that took place:—

I think it was May 18 that I called into his factory, and I shook hands with him and asked him how business was, and he said it was bad. It was raining and damp, and he said he could not dry out his cigars, and he could not pay cash to me, and he said I would have to give him time to let him dispose of his cigars and he went over to the shelf and took down a box of cigars and opened them, and broke a cigar in two and lit it, and I said "That smokes very well," and he said, "Yes, some." Then he said, "Cannot you give me some dry tobacco that I can put on the market soon?" and I said, "I have some kiln-dried, smoked tobacco that I sell for snuff tobacco, and if that will suit you I can send it to you"; and he said, "Can you send me a sample?" and I said, "Yes," and he said, "If it suits, will you exchange it for the lot I have?" and I say "Yes."

We went upstairs and counted 17 cartons of the Bradley lot, of which three are here in court, and I came downstairs again and shook hands with him and left him, and I was going to St. Johns that day and I wired from here to the office at Chatham to send a sample of the Bisnet lot of tobacco to Montreal here.

The defendant clearly agreed to send the plaintiff a sample of kiln-dried tobacco, and, if it suited, to exchange it for the lot the

CAN.
S. C.
DE FELICE
v.
O'BRIEN.
Mignault, J.

plaintiff had. He sent the sample to the plaintiff, and the latter's husband wrote, on May 26, that it was satisfactory, and wrote again, on June 1, saying that he wanted tobacco the same as the sample. The defendant answered, on June 2, that he was forwarding 7 bales of the same class as sample sent.

The trouble appears to have been that the tobacco complained of was known as Bradley's tobacco. The sample sent, and which was satisfactory, was called Bisnet tobacco, and it is significant that, on June 8, the defendant credits the plaintiff with the return of 17 cartons of the Bradley tobacco.

I cannot view all this otherwise than as shewing that the defendant clearly admitted that the Bradley tobacco, to wit, the tobacco complained of, was not good tobacco, and, therefore, I must think that the defendant himself recognized that the plaintiff's complaint was well founded.

The third reason given by the trial judge is that the plaintiff's action was not instituted with the reasonable diligence required by art. 1530 C.C. I am unable to agree with this. The correspondence between the parties closed by a letter of the plaintiff's husband on June 17, which does not appear to have been answered, and the writ issued on June 30. I think the plaintiff acted with reasonable diligence.

The hesitation which I express in the beginning of my opinion does not arise from my appreciation of the evidence as a whole, but because the question at issue is one of fact and two courts have found against the plaintiff on this issue. I would, under those circumstances, feel reluctant to disturb these concurrent findings of fact, and would not have done so had not the defendant, by his admissions and conduct, clearly shewed that he recognized the plaintiff's complaint as being justified. I have not, therefore, to choose between two disputed versions of fact deposed to by the witnesses called, but only to give effect to what I must consider as admissions made by the defendant himself. It, therefore, seems to me that I cannot rely, in a case like this, on any rule as to the conclusive effect of concurrent findings of fact.

As to the damages, I would not allow the plaintiff's claim for depreciation of the value of her business, but would merely grant the real damages suffered, to wit, the amount paid for the tobacco, the cost of the manufacture of the cigars, and the loss of profit on their sale.

CAN.

S. C.

DE FELICE v. O'BRIEN.

Brodeur, J.

I, therefore, think that the appeal should be allowed, with the costs in this court and in the courts below.

BRODEUR, J.:—The plaintiff appellant is a manufacturer of cigars at Montreal. Her business is conducted and administered by her husband, Capuano. The defendant respondent is a tobacco merchant, living at Chatham, Ontario.

In October, 1915, O'Brien sold to the plaintiff 5,000 lbs. of tobacco, which had evidently given satisfaction, since on January 12, 1916, Capuano signed an order for 1,500 lbs. of tobacco per month; and this order was accepted by O'Brien with a guarantee that the tobacco should be as good as that sold in the preceding month of October ("same as last") and the goods were payable cash on delivery.

The defendant, O'Brien, took a good deal of trouble to carry out his contract, and after having shipped a certain amount of tobacco which did not give satisfaction and which was returned, he shipped 3,000 lbs. in March and April, 1916. These 3,000 lbs. were put up in 60 bales of 50 lbs. each.

The plaintiff went to work to make cigars with this tobacco, and to send them out among her customers, when, in the month of May, complaints were made to her that the cigars did not burn properly. She had then converted into cigars the 3,000 lbs. of tobacco, with the exception of 17 bales. Her husband, Capuano, then hastened to make known these complaints to O'Brien by letter dated May 8, 1916. He told him further in the same letter, that he had made 40,000 cigars and that he was going to send him back the 17 bales not used. He sent him at the same time a specimen of the cigars which he claimed would not burn.

On May 12, O'Brien admitted receiving this letter, and stated that he had tried the cigars; but without saying explicitly whether they were good or not he sent the plaintiff 500 lbs. of tobacco, saying to him that he hoped these 500 lbs. would give him satisfaction.

On May 18, O'Brien went to Montreal, and it was naturally a question between Capuano and himself respecting this tobacco which would not burn. O'Brien tells us that he undertook to replace the 17 bales of tobacco which the plaintiff had not used, but he added that he never made himself responsible for the cigars.

CAN.

S. C.

DE FELICE v. O'BRIEN.

Brodeur, J.

On the other side, Capuano declares that not only should he replace the 17 bales of tobacco, but that he had become responsible for the cigars which had been made, and which were, by reason of the bad quality of tobacco, unsuitable for the purpose for which they were intended.

The evidence of these two persons is contradictory with respect to what took place at the interview at Montreal. The judge who presided at the trial had the advantage of hearing these witnesses, and he does not appear to have accepted Capuano's version; and his decision is confirmed by the unanimous judgment of the Court of Appeal. It is difficult, then, in view of this decision of the two lower courts, to accept Capuano's version in preference to the defendant's.

By letter dated May 26, 1916, Capuano does not appear to have insisted, unnecessarily, upon the claimed admission of the defendant, that he was responsible for the cigars, since he had just proposed, for the future, to make deliveries of tobacco on credit and not for cash, and that he would pay him as soon as he had sold the cigars—"because it is too much for me to keep 40,000 cigars in stock; as you see this will be the very best way to settle things, you will not loose anything and I will also be covered."

He also proposed to him another alternative, viz., to send him the defective cigars.

On June 2, O'Brien admits receiving this letter, but he does not answer the proposals made by Capuano. The latter asked him, about the same time, if he would not send him 2,000 lbs. of tobacco on credit. On June 12, O'Brien positively refused to sell otherwise than for cash; and then on June 17, Capuano informed him that he had destroyed the cigars and suffered $500 damages, and finished his letter saying: "Now, if you are not willing to loose the tobacco we will be obliged to discontinue business with you." Capuano is an Italian who is evidently not very familiar with the English language in which he wrote his letters. Thus, for example, it is very difficult to understand what he meant by his expression "loose the tobacco." Did he merely wish that O'Brien should "lose" the value of the tobacco claimed to be bad, or that he should send the tobacco without a draft

attached to the bill of lading? Both ideas might be drawn from the letter and the previous relations of the parties.

In any event, we see Madame Capuano entering her action for $4,879 damages on June 30, when, a few days before, in her letter of June 17, she said she had only sustained $500 damages. It is well to remark, on this point, that the cost price of the tobacco of which she complained had only been $129. It was, as we see, an action for a very much exaggerated sum, if we take into consideration the value of the goods sold.

The question then is, whether the tobacco in question was of good or bad quality. The plaintiff proved by her customers that the cigars could not be burned, and that the tobacco must necessarily have been of bad quality. On the other hand, the defendant established, by experts who examined the bales returned, that the tobacco was of good quality, that it would burn, and that, consequently, the complaint made by the defendant was ill-founded.

I do not understand why she destroyed the cigars, which would have been very useful for the purpose of determining the question of their quality. It is true that she brought into court a couple of the cigars, but it would have been more satisfactory if a minute examination of these goods had been made, in order to establish if they were of a merchantable quality or not. The defendant preserved the tobacco which was returned to him. The plaintiff ought to have preserved the cigars which had been made with this tobacco.

The evidence is sufficiently doubtful, and it is very difficult to say if the plaintiff's evidence prevails over that of the defendant. The burden of proof falls, in such circumstances, upon the plaintiff. She must establish that the tobacco was not of good quality. This was a question of fact, and the Superior Court and the Court of Appeal having decided in favour of the defendant, their judgment should be confirmed with costs.

Appeal dismissed.

ONT.

S. C.

MOLSONS BANK v. CRANSTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. November 11, 1918.

ESCROW (§ I A—2)—SEALED INSTRUMENT—EXPRESS WORDS NOT NECESSARY—EVIDENCE OF SURROUNDING CIRCUMSTANCES SHOWING THAT CONDITIONAL DELIVERY INTENDED.

It is not essential to use express words in order to make a sealed instrument operate as a mere escrow; what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional delivery could have been intended.

[*Trust and Loan Co.* v. *Ruttan* (1877), 1 Can. S.C.R. 564, followed.]

Statement.

APPEAL by plaintiff from the judgment of Britton J. in an action on a bond executed by the defendants in favour of the plaintiff bank to guarantee the indebtedness to the bank of a certain company. Affirmed.

The judgment appealed from is as follows:—

This action is brought by the plaintiff against the defendants as guarantors for payment of the indebtedness of the Canadian National Features Limited, the amount of the claim being $15,000 and interest, under an agreement made between the plaintiff and defendants, dated the 1st March, 1917.

The Canadian National Features Limited, shortly before the 1st March, 1917, were doing business in the town of Trenton. The citizens of Trenton had expectations of great benefit from that company in its operations, if successful; but the company at the time mentioned required more money than it had available, or than there was any prospect of its getting very soon, whether from the sale of stock or from customers.

The directors expressed a willingness to come to the rescue of the company, to prevent the company being wound up, and so decided to assist the company by raising upon their credit the sum of $15,000. For this purpose a meeting was called, and it was attended by all the directors of the said company.

A bond or agreement to guarantee the payment of $15,000, the amount they promised to assist the company to raise, was to be signed by the directors and given to the plaintiff bank.

An application for a loan was first made to the Standard Bank at Trenton, but that bank declined to make it. Then followed the application to the plaintiff bank, through Mr. Webb, the

manager at Trenton, which was accepted, as alleged, upon certain terms agreed upon—the chief one was that the proposed guarantee should be signed by all the directors. At the early part of the meeting Dr. F. J. Farley was present, and he agreed with the others to become one of the guarantors.

The matter was taken up by Mr. Webb, and he drew up the agreement on one of the usual forms kept by the bank for loans such as the one in question. This guarantee-agreement was signed by all the directors of the company except Dr. Farley; and Mr. Webb, without obtaining Farley's signature, advanced the money. The company gave its note for $15,000.

There was default in the payment of the note, and this action is now brought upon the guarantee-agreement, against those who signed it.

Farley, after the meeting, refused to sign.

The defence is that there was an agreement between the guarantors that unless all, including Farley, signed, the guarantee was not to be operative.

It is alleged that Mr. Webb knew of this agreement, and accepted the guarantee as an escrow, he agreeing that the bank would not advance the money until all the directors had signed.

Mr. Webb made strong effort to procure the signature of Farley, but without avail.

The questions for consideration are: Was there such an agreement between the signers of the guarantee-bond as stated? Was the plaintiff bank aware of such an agreement? And did the manager promise that the bond would not be made operative by the bank unless all the directors signed it?

There can be no reasonable doubt, upon the evidence, that the directors among themselves understood and agreed that, unless all signed, the bond was not to be operative. The clearest evidence as to the bank's knowledge of the agreement was that given by Mr. White. Mr. White gives reasons why he could not be mistaken and why he has so clear a recollection of the language used. He stated that Mr. Young asked him if he intended to sign, and he replied that he did not know and would have to see the bank-manager first, and that his object in seeing the manager was to ascertain whether or not his signing would in any way lessen or interfere with his line of credit at the bank, he being a customer of

ONT.
S. C.
MOLSONS BANK v. CRANSTON.

the bank. He made two or three efforts to see the manager, and also used the telephone. He finally saw the manager, and the manager told Mr. White that he ran no risk in signing because the bank had collateral notes to a large amount, and that the signers of the bond would be liable to the extent of $15,000.

The manager further said to White that the bond would be signed by all the directors, and would not be used by the bank till all the directors had signed.

Looking at the correspondence between the manager and the head of the bank, and considering all the evidence that was given, I must find that the plaintiff had knowledge of the agreement between the directors, and that this bond was not to be used until all the directors had signed. It was argued by counsel for the plaintiff that such an agreement and such knowledge of the bank should not avail, because of the form of the bond, which, in addition, among many other things, provides for the protection of the bank as follows:—

"This guarantee shall be binding upon every person signing the same, notwithstanding the non-execution thereof by any other proposed guarantor."

The defendants' counsel concede that, if the bond once became operative in favour of the bank, all the conditions and provisions would be available for the bank; that this bond was held only in escrow by the bank, and so could not be used or be held by the bank until the condition, upon which it was given to the bank, was complied with.

It is well-settled law that an agreement contemporaneous with a written one may be entered into, to prevent the original agreement from being operative until the happening of some event or until some future time to be named.

In *Pym* v. *Campbell* (1856), 6 E. & B. 370, 119 E.R. 903, it was held that an agreement complete between the parties as to terms etc., but subject to the approval of a third person, could not be enforced without the approval of the third person, that is, that an original agreement was not binding if it was held only as an escrow.

In *Wallis* v. *Littell* (1861), 11 C.B.N.S. 369, 142 E.R. 840, there was an agreement for sale, but this agreement was made subject to the condition that it should be void unless within a reasonable time after the making of the agreement Lord Sydney

should consent and agree to the transfer of the farm to the plaintiff; and it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement, operating as a suspension of the written agreement, and not in defeasance of it.

See also *Pattle* v. *Hornibrook*, [1897] 1 Ch. 125. This is an important case and supports the defendants' contention.

The cases above mentioned were reviewed by Mr. Justice Kelly in *Dominion Bank* v. *Cameron* (1918), 13 O.W.N. 420. Several other cases favourable to the defendants are also cited.

The difference between that case and this is only in the fact that the learned Judge held that there was no notice to or knowledge by the bank of the agreement mentioned.

In this case the proof as to direct communication to the plaintiff of the agreement relied upon is, in the main, that given by Mr. White. It is not argued that there would be liability on the part of those of the directors who knew of the agreement between themselves, but did not otherwise know that the plaintiff was aware of such an agreement.

My decision is, that the plaintiff's knowledge of the agreement that the guarantee was not to be operative unless signed by all, is available as a defence for all the defendants.

Judgment will be for the defendants, dismissing the action against all of them, but such judgment will be without costs.

I. F. Hellmuth, K.C., and *A. Abbott*, for appellants.

M. H. Ludwig, K.C., *F. E. O'Flynn*, and *B. W. Essery*, for the several respondents.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—The chief argument addressed to us was that parol evidence of a condition that all those present at the first meeting in Trenton should sign before the bond sued on became operative, was inadmissible. This was founded upon a provision in the instrument that the individual signers should be bound notwithstanding the non-execution by any other proposed guarantor.

There is a plain answer to this contention. It is that the clause relied on is not binding on any one unless and until the document

ONT.

S. C.

MOLSONS BANK v. CRANSTON.

Hodgins, J.A.

itself becomes operative. The rule against contradicting a written document applies, of course, only to an agreement which has actual vitality, and not to one which is in a state of suspended animation, ineffective and undelivered. No such rule of evidence can be set up until the legal relation of the parties has been established; and, if the condition relied on is unfulfilled, the whole agreement fails.

I think the evidence supports the position that the delivery was a conditional one.

It is true there is a conflict of evidence between Webb, the local agent of the appellant, and Brownridge and White, who are relied upon to bring notice home to the bank. The bank itself treated the document as incomplete, and, when its head office learned that Dr. Farley had not signed it, dismissed its agent. This is not conclusive, but is a circumstance to be considered, when discussing the weight to be given to the agent's evidence. He must, in submitting the matter, have made mention of all who were to sign, and his failure to obtain one signature was considered as a non-completion of the terms of the application.

The evidence as to the signature is as follows: The bond was signed by White, Connelly, and Brownridge, in the office of Young, manager of the Standard Bank in Trenton. Then Brownridge took it away and sent it to Toronto, where Cranston and Feighen executed it, as did Regan and Wills, who had charge of it. These four were all together when they signed. Cranston signed upon the condition, which he expressed to the three others at the time, that the bond was not to be used till all the directors had signed. He noticed the absence of Dr. Farley's name. He also relates the proceedings at the original meeting, in Trenton, of the persons interested, when all agreed to go on the bond, including Dr. Farley. Feighen and Regan corroborate this evidence and add that they too mentioned the absence of Dr. Farley's signature and expressed themselves as only signing upon the same condition as stated by Cranston. Regan read the bond and noticed the word "individually," but says that that was only operative if the bond got to the bank, and that it should never have reached the bank until Dr. Farley's signature was there. Wills was not called. When the bond was returned from Toronto, Brownridge got it and gave it to Young to get Dr. Farley's signature, with instructions not

to deliver it till that was done. He recalls the telephone conversation with Wills, as stated by Regan, in which he was told of the conditional signing by the Toronto parties. Connelly made the condition, when he signed it in Young's presence, that it was not to be used till all were on it. White says he was assured by Webb to the same effect, and that he signed it shortly afterwards, in Young's presence. These statements he stoutly reaffirms on cross-examination.

White learned a few days after he had signed the bond that Dr. Farley had not signed, but admits that he did not give notice to the bank repudiating liability, though he knew that part of the money, perhaps the greater part, had been received by the company. He says he considered that this had been done contrary to the agreement with Webb. He finds it difficult to account for his previous statement that there was no agreement apart from the document itself, but excuses himself by saying that his present evidence is "more mature" in that he has had time to think it out since.

Brownridge heard from Webb that the appellant's head office had accepted the loan, and was asked by him for the bond. He then told Webb it was in Young's hands, uncompleted, waiting Dr. Farley's signature. He was asked to go for the bond, and did so, after telling Webb that it was not to be used till Dr. Farley had signed it. He further says that Webb, when he got the bond, said he would "take a chance on getting Dr. Farley to sign it." He then got $8,000 from Webb, and went to New York with it. He admits having heard the application to the head office read over to him by Webb before it went in, and that he "possibly overlooked the point of 'individually,' and that his distinct understanding was that it was 'collectively.'"

The learned trial Judge has credited Brownridge and White as against Webb, whose evidence is not quite as satisfactory as it might be, having regard to the statement made in his letter to the head office and the admissions he makes. These raise some doubt as to whether his sweeping denials are not due to a wish to clear himself from a suspicion that he thought the business good and desired to get it through, irrespective of Dr. Farley's default.

ONT.

S. C.

MOLSONS BANK v. CRANSTON.

Hodgins, J.A.

As early as 1821, the Court of King's Bench, in *Johnson* v. *Baker* (1821), 4 B. & Ald. 440, 106 E.R. 998, decided as follows:—

"Before the execution of a composition-deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors:—Held, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound."

In *Bowker* v. *Burdekin* (1843), 11 M. & W. 128, 152 E.R. 744, the Exchequer Chamber laid down a rule, which has since been widely adopted, in these words, *per* Parke, B., p. 147:—

"In this case the execution of the deed was proved in the ordinary form, and I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution,—to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow. That is the result of the two cases cited in argument, *Johnson* v. *Baker* and *Murray* v. *Earl of Stair*."*

This case was followed in Ontario in 1868 in *Corporation of Huron* v. *Armstrong*, 27 U.C.R. 533, a case against sureties, and by the Supreme Court of Canada in *Trust and Loan Co.* v. *Ruttan* (1877), 1 Can. S.C.R. 564. In the latter case Strong, J., gives his view thus (p. 583):—

"Although it was formerly essential to make a sealed instrument operate as a mere escrow that express words should be used, such is not now the state of the law, and what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional

*Murray v. Earl of Stair (1823) 107 E.R. 313, 2 B. & C. 82.

delivery could have been intended. Numerous cases, some of which I refer to below, shew this."

I do not think this has been departed from in any later case.

While these cases give the general rule permitting a reasonable inference to be drawn in the absence of express words of condition, I have found nothing dealing with the difficulty met with here.

The guarantee sued on provides for the exact situation which has arisen, and if it were operative would control it, as it makes each individual liable, even though others failed to do what was expected of them.

Something more, then, is necessary, if the desired inference is to be drawn, than the fact that the circumstances point to a conditional delivery. Express and clear notice should be required to prevent the delivery of a document, such as the present, from taking immediate effect, because its very terms shew that it is intended to become effective as to each party as soon as he puts his hand to it.

Such a notice, in my judgment, has been established here, and the conclusion follows that the delivery was conditional only, and that the guarantee never became effective as against any one of the parties.

The case which is nearest to this one was cited on the argument, namely, *Carter* v. *Canadian Northern R. W. Co.*, 23 O.L.R. 140, 24 O.L.R. 370. The feature which distinguishes it from this case is that the agreement was a complete one and had been acted on. The evidence went to prove a defeasance of this completed agreement, and the learned Chief Justice of Ontario, Sir Charles Moss, says (p. 376) that it could not be given effect to without contradicting the written agreement and depriving the defendants of the right to cancel it in a certain event, which the agreement gave to them and to them only.

Anning v. *Anning* (1916), 34 D.L.R. 193, 38 O.L.R. 277, also cited, failed on the facts. In *Great Western Railway and Midland Railway* v. *Bristol Corporation*, 87 L.J. Ch. 414, nothing is dealt with by the House of Lords except the rules of evidence regarding the meaning of a particular phrase, "traffic for the year."

Two other questions were argued. It was said that delivery to Webb was delivery to the bank, i.e., the party to take the benefit under the contract, and that no escrow could be established under those circumstances.

ONT.
S. C.
MOLSONS BANK v. CRANSTON.
Hodgins, J.A.

The ancient rule on the subject has not survived. In *Millership* v. *Brookes* (1860), 5 H. & N. 797, 157 E.R. 1399, the Court of Exchequer were all of opinion that the deed was delivered only as an escrow, where it was sealed and delivered to an attorney who was acting for all parties to it. It was delivered to the attorney to obtain another signature.

In *Watkins* v. *Nash* (1875), L.R. 20 Eq. 262, Vice-Chancellor Hall, in a much-quoted judgment, states the modern view in these words (p. 266):—

"But it is said that the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books—Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A.B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument. As regards the instrument in question, it might very well, under the circumstances, be meant and taken to be a delivery by Watkins to Collins, to be held by him for the purpose of being delivered over to the grantee when the transaction was complete. I see no difficulty whatever in that view being adopted." Collins, referred to above, was the solicitor of the grantee.

In *London Freehold and Leasehold Property Co.* v. *Baron Suffield*, [1897] 2 Ch. 608, the point was expressly raised. In the course of the judgment (pp. 621, 622), Lindley, M.R., said:—

"Counsel for the defendants contended that the mere fact that Wynne was himself one of the mortgagees was fatal to the deed being an escrow. They contended that to be an escrow the deed must be delivered to some person not a party taking under

it; in short, to a stranger. In support of this contention reliance was placed on Co. Litt. 36a; Sheppard's Touchstone, 7th ed., pp. 58, 59; and *Whyddon's Case* (1596), Cro. Eliz. 520, 78 E.R. 769. No doubt the language used in the authorities referred to and reproduced in other works on real property and conveyancing is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that where there are several grantees and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to shew the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by authority to exclude it. We hold such evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, beginning with *Murray* v. *Earl of Stair* and ending with *Watkins* v. *Nash*."

The Supreme Court of Canada had to consider, in *Scandinavian American National Bank* v. *Kneeland*, 8 W.W.R. 61, an appeal from the Court of Appeal for Manitoba (16 D.L.R. 565, on appeal from 12 D.L.R. 202) in a case somewhat similar to this one. The bond signed by all but Chase was left with Grandin, the agent of the bank. Idington, J., refers to the evidence thus (p. 73):—

"It was so clearly the purpose and understanding of all concerned that the guarantee was to be given by those who met and agreed to sign for the respective sums equal to the stock each held, that I am of the opinion no one had the right to act on the signature of any less number. It would be giving Mr. Grandin so much less credit for intelligence than I think is his due to attribute to him the conviction or belief that he would have had the right to hold that document merely as against appellant if all the others had failed to sign after he had left the bank and document there and had gone home, that I cannot credit him when he tries to induce the belief that in the absence of a negative term covering such ground he had apparently such right."

Anglin, J. (p. 77), makes a remark quite applicable to this case:—

"Upon the evidence explicitly credited by the trial Judge, if there was not an express agreement on the part of the bank with Kneeland, that the guarantee executed by him should not be

ONT.

S. C.

MOLSONS BANK v. CRANSTON.

Hodgins, J.A.

operative until, and unless, signed by the other proposed guarantors, Richardson, Berge, Hedwall, and Chase, it is clear that the bank-manager took the guarantee from Kneeland with knowledge that this was his understanding of the condition on which he assumed liability as surety . . . . . The question at issue is surely one of fact. The evidence upon it is conflicting. The judgment of the learned trial Judge shews that he exercised the greatest care in weighing the credibility of the several witnesses. His finding rests wholly upon his acceptance of the story told by Kneeland and his rejection of that of Grandin where it conflicts with Kneeland's evidence. Cases are rare in which such a finding can properly be disturbed on appeal."

I read the evidence as establishing that when the bond was finally handed to Webb, he undertook to get Dr. Farley's signature, and so held it as the agent of all parties until the time when, if he got that signature, he could properly retain it for the bank.

I do not see that Brownridge really stands in any different position from his co-defendants. He, it is true, brought the bond to Webb and left it with him and received $8,000 for his company at the time. But, if he is believed—and I see no reason for discrediting him—Webb was then informed of the condition, if not already aware of it, and determined to "take a chance" with the bond in its imperfect state. Taking a chance meant advancing money with knowledge that no one was yet bound, and, if so, it cannot be said that Brownridge was held individually. He knew the bank had other collaterals, and, if the manager was willing to risk getting the signature, his taking the cash cannot make him liable unless liability can arise because he took the bank's money knowing that it was being advanced contrary to the understanding with the head office. His company was profiting by Webb's improper action, but I can see no principle upon which can be rested the conclusion that from what occurred Brownridge made himself personally liable to the bank for the amount then advanced.

There is no ground for applying the doctrine of *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, to this case. The bank, through Webb, was all along aware of the condition; and, therefore, if any duty might have existed under other circumstances, its performance here would not have informed the appellant of anything it did not know already.

Appeal dismissed.

TRUSTEES OF GROSVENOR ST. PRESBYTERIAN CHURCH v. CITY OF TORONTO.

CAN.
S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 12, 1918.

EXPROPRIATION (§ I B—5)—MUNICIPAL CORPORATION—MUNICIPAL ACT—MUST BE BY BY-LAW—CORPORATION CANNOT CONFER JURISDICTION ON OFFICIAL REFEREE WHEN EXPROPRIATION ILLEGAL.

The acquiring or expropriation of land by municipal corporations is governed by sec. 322 of the Municipal Act (R.S.O. 1914, c. 192) and must be done by by-law. An expropriation for civic purposes being illegal because there is no by-law authorizing it, the corporation cannot, by consent, confer jurisdiction on the official referee to assess the damages, and any award made by him is void.

[*Re City of Toronto and Grosvenor St. Presbyterian Church Trustees* (1917), 40 D.L.R. 574, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1917), 40 D.L.R. 574, reversing the judgment at the trial, 40 O.L.R. 550, in favour of the claimants.

The facts of the case are stated by Anglin, J., as follows:—

S. 322 of the Ontario Municipal Act (R.S.O., c. 192) is as follows:—

1. The council of every corporation may pass by-laws for acquiring or expropriating any land required for the purposes of the corporation, and for erecting buildings thereon, and may sell or otherwise dispose of the same when no longer so required.

2. Where in the exercise of its powers of acquiring or expropriating land it appears to the council that it can acquire a larger quantity of land from any particular owner at a more reasonable price and on terms more advantageous then those upon which it could obtain the part immediately required for its purposes, the council may acquire or expropriate such larger quantity and may afterwards sell and dispose of so much of it as is not so required.

3. A by-law for entering on or expropriating land shall contain a description of the land, and, if it is proposed to expropriate an easement or other right in the nature of an easement, a statement of the nature and extent of the easement to be expropriated. 3 & 4 Geo. V., c. 43, s. 322.

By a by-law, No. 6927, passed in March, 1914, under sub-sec. 1, the respondent corporation expropriated the part of the appellants' property actually required for a proposed street extension sanctioned by by-law No. 6884. A report of its assessment commissioner, made in June, 1914, recommended that city should exercise its power under sub-sec. 2 to take the whole of the appellants' property instead of the part expropriated and asked authority to do so and,

that in the arbitration it be dealt with as if the whole had been expropriated by by-law No. 6927.

The city council adopted this report. Nothing further appears

CAN.
S. C.
TRUSTEES OF GROSVENOR ST. PRESBYTERIAN CHURCH v. CITY OF TORONTO.

to have been done until 1915. On July 6 of that year, the appellants' solicitor wrote this letter to the city solicitor:—

There was a by-law passed some time ago to expropriate the east part of this property and since then we understand the city has passed a resolution to extend the expropriation to take in the whole property.

We would like to get on with the arbitration and would ask you if the by-law to expropriate the west part has yet been passed, or when will it be passed. We presume that we cannot proceed until this by-law has been passed so that the west part may be covered by the expropriation proceedings, and we can then go on under the two by-laws with the one arbitration.

The city solicitor replied:—

I beg to acknowledge receipt of your letter of 6th instant herein. The council has authorised the taking of the whole of the church property, and as I understand your clients are agreeable to this, and the question of compensation for the whole of the property can thus be brought before the arbitrator by consent of both parties, I do not think it will be necessary to have a further by-law passed expropriating the westerly part of the property.

By notice intituled:—

In the matter of By-law No. 6927 of the Municipal Corporation of the City of Toronto and a certain resolution passed by the City Council of the said Municipal Corporation of the City of Toronto,

dated July, 1915 (said to have been served on the 20th), given under s. 3 of the Municipal Arbitrations Act (R.S.O., c. 199) the appellants referred their claim for compensation for

the property known as the Grosvenor St. Presbyterian Church property which has been expropriated by the municipality, etc., and is more particularly described as follows: (a description of the entire property by metes and bounds followed),

to the official arbitrator to be dealt with by him under that Act. The arbitration proceedings began in Nov., 1915, but would appear to have dragged.

The official arbitrator made his award on Dec. 7, 1916. Although he set out in recitals that a portion of the appellants' land was expropriated under by-law 6927, and that the remaining portion "was thereafter taken," he awarded them a single sum of $57,500 (including interest) "for the taking of their lands, buildings and church organ therein"—the entire property.

The city subsequently determined to abandon the projected street extension. On May 14, 1917, it passed by-law 7310, purporting to repeal by-laws 6884 and 6927. In October, 1917, the appellants moved the court, upon notice, for an order to enforce payment of the official arbitrator's award. On October 30, the city solicitor wrote to counsel for the appellants as follows:—

I have yours of the 29th inst. in regard to this matter. The understanding set out in your letter is correct, namely, that the rights of the parties are to be determined as if the whole of the church property had been included in by-law 6927 of the city.

The order sought by the appellants was granted by Masten, J., on November 9, 1917. An appeal by the city was allowed by the appellate division, without costs, on the ground that the city was entitled to desist from the expropriation under s. 347 of the Municipal Act. The present appeal was brought against the order of the appellate division on the grounds that s. 347 of the Municipal Act does not apply where arbitration proceedings have been taken under the Municipal Arbitrations Act and that if it does, the right it confers cannot be exercised in this case because by-law 6927 authorized entry on the land before the award and the award did not find that entry had not in fact been made.

Hellmuth, K.C., and *J. A. Paterson*, K.C., for appellants.

Fairty, and *C. M. Colquhoun*, for respondent.

The judgment of the court was delivered by

ANGLIN, J.:—Mr. Hellmuth had scarcely begun the presentation of the appellants' case when it became apparent to the court that the absence of a by-law authorizing the acquisition by the city of the western portion of the appellants' lands presented a fatal obstacle to upholding the award. The jurisdiction of the official arbitrator, as defined by s. 2 of the Municipal Arbitration Act, extends only to

> claims against the corporation of a city having a population of not less than 100,000 for compensation or damages for land expropriated or injuriously affected under the Municipal Act, and all other claims and questions arising under any lease or other contract to which the corporation is a party, and which by law or by the terms of the lease or contract are to be determined by arbitration.

Anglin, J.

It was suggested that, although not covered by the expropriation by-law, the western portion of the appellants' lands had been acquired by the city by contract on the terms that the compensation to be paid therefor should be ascertained by the official arbitrator. But the acquiring as well as the expropriation of land by municipal corporations is governed by s. 322 of the Municipal Act, which enables both alike to be done by by-law. S. 249 of the Municipal Act explicitly prescribes that the powers of every municipal council shall be exercised by by-law. This is not one of the comparatively trifling matters in which a council

CAN.

S. C.

TRUSTEES OF GROSVENOR ST. PRESBYTERIAN CHURCH v. CITY OF TORONTO.

Anglin, J.

may act by resolution. See Can. Municipal Manual, Meredith and Wilkinson, p. 268 *et seq.*, Biggar's Municipal Manual, p. 334, and the recent judgments in *Mackay* v. *City of Toronto* (1918), 43 D.L.R. 263, 43 O.L.R. 17. On the contrary, the acquisition under s. 322 (2) of "a larger quantity of land" than actually required for the immediate purpose of the municipality would seem to be a power in regard to the exercise of which it is eminently desirable that all safeguards surrounding the enactment of by-laws should be insisted upon as precautions against speculation, improvidence and extravagance, if nothing worse.

The award is of a single sum. As to the western part of the property it was made wholly without jurisdiction. Severance as to the eastern part is impossible. The award as a whole is, therefore, void. The attempt to enforce it is utterly hopeless.

The city's representatives no doubt intended to give the official arbitrator jurisdiction by consent. But consent cannot supply the absence of the subject matter of a statutory jurisdiction. The respondent may be precluded by the letters of its solicitors from raising the objection that there is no by-law authorizing the acquisition of the western part of the appellants' property, but the court itself is bound to take notice of and give effect to a defect such as this which nullifies the subject matter of the entire proceeding with which it has to deal.

The failure of the city to appeal from the award under s. 7 of the Municipal Arbitrations Act cannot be invoked to sustain it. That section assumes the existence of an award upon subject matter within the jurisdiction of the official arbitrator.

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

Appeal dismissed.

SASK.

K. B.

SHIELDS v. LANDRETH.

Saskatchewan King's Bench, Bigelow, J. February 20, 1919.

EVIDENCE (§ VI E—535)—CONTRACT—TERMS COMMITTED TO WRITING—PAROL EVIDENCE NOT ADMISSIBLE TO SHEW OTHER TERMS.

Where the contracting parties have committed the terms of the contract to writing, especially a writing under seal, parol evidence is not admissible to shew that there were other terms agreed on which were not included in the contract.

Statement.

ACTION for damages for breach of contract.

D. A. McNiven, for plaintiff.

F. L. Bastedo and *H. E. Grosch*, for defendant.

BIGELOW, J.:—On August 31, 1917, defendant gave to plaintiff an option, signed by his hand and sealed, as follows:—

Option of Purchase:—The undersigned hereby agrees in consideration of the sum of $50 (Fifty dollars) and other good and valuable considerations, to sell to Alexander W. Shields of the post office of Esterhazy in the Province of Saskatchewan, veterinary surgeon, or his assigns, as a going concern, the business carried on by the undersigned, including goodwill, fixtures, and stock-in-trade, and any machine, automobile or other agencies, the said business being known as Landreth Bros. General Hardware Store, situated in the village of Lemberg in the Province of Saskatchewan, and being contained on lot , block in the said village of Lemberg. All the said property to be at the time of sale free and clear of all encumbrances, liens and charges, taxes and assessments. The consideration for the sale to be at the rate of 100 cents on the dollar on the inventory value of the stock and fixtures on hand at the time of transfer. The initial purchase-price to be in the amount of $2,500, at the time of transfer, the amount of $1,750 to be paid in 6 months' time dating from October 15, 1917, and the balance purchase-price to be paid in 14 months' time dating from October 15, 1917.

The said Shields to have the option of renting the building and out-buildings containing the said business at a yearly rental of $500 for a period of 8 years, and also the option of purchasing the said buildings at a price of $4,000, and any rental paid during the said term of 8 years or less shall be considered to be a payment on account of the said purchase-price.

This option shall expire on the 20th day of September, 1917, unless the said Shields or his assigns shall before that time give notice in writing of his acceptance thereof, in which case the transaction is to be completed and the property delivered within two months thereafter, or earlier at the option of Shields.

The sum of $50 paid by the purchaser to the vendor as part consideration for the giving of this option, shall, upon completion of this agreement, be allowed as part payment of the purchase-money.

Witness my hand and seal this 31st day of August, A.D. 1917.

GEORGE C. LANDRETH (seal).

H. T. Menhinnick.

This option was accepted by the plaintiff in writing on the same day. Plaintiff claims damages because the defendant refused to carry out the agreement.

Considerable evidence was offered at the trial, and received subject to objection, of the conversation previous to and at the time of the agreement. I believe that such evidence was wrongly admitted, and that the law is correctly stated in *Austin* v. *Boone* (1866), 2 Old. 149. Wilkins, J., at p. 152, says:—

Where the contracting parties have committed the terms of the contract to writing, especially a writing under seal, an averment by either of the parties as to what was said or understood previous to or contemporaneous with the written contract is excluded.

The evidence offered was to shew that there were other terms agreed on and not put in the agreement; such as that the plaintiff

SASK.

K. B.

SHIELDS v. LANDRETH.

Bigelow, J.

would pay interest on the deferred payments, that the plaintiff would pay taxes and insurance on certain conditions. It was submitted that the evidence was offered to shew that the contract did not contain the actual terms agreed upon by the parties, and the authorities cited were: 7 Hals. p. 373; *Lockett* v. *Nicklin* (1848), 2 Exch. 93; *Emmet* v. *Dewhirst* (1851), 21 L.J. Ch. 497; *Sanderson* v. *Graves* (1875), L.R. 10 Exch. 234.

In *Lockett* v. *Nicklin*, *supra*, the defendant ordered goods by letter, which did not mention any time for payment. The plaintiff sent the goods and an invoice. It was held that parol evidence was admissible to shew that the goods were supplied on credit, the letter not being a valid contract with the Statute of Frauds. The judge ruled that the evidence was admissible not for the purpose of varying the contract, but of supplying the omission in the written document as to the time of payment.

Emmet v. *Dewhirst*, *supra*, was a case of a promise to pay the debt of a third person to those who should execute a release of their debts by a date named. The plaintiff did not sign by the time named, but alleged a verbal agreement extending the time. It was held that any alteration must be evidenced by writing. The facts and the judgment in *Sanderson* v. *Graves*, *supra*, appear in the judgment of Bramwell, B., at 236.

If parol evidence was admissible in the case at bar to shew that the written agreement does not contain the actual terms agreed upon by the parties, I must find from the evidence that no such thing is shewn. The burden would be on the defendant, and he has not satisfied me that there was anything agreed to except what was put in the written agreement.

It is also alleged by the defendant that the document in question was not intended to be a binding agreement, because it was the intention to have a more formal agreement drawn up, incorporating at least two other terms, namely, that plaintiff was to give security, and the defendant was to agree not to engage in similar business in competition with the plaintiff. The authorities cited for this are: 7 Hals. p. 526; Fry's Specific Performance, 5th ed. 258; *Stratford* v. *Bosworth* (1813), 2 V. & B. 341, 35 E.R. 349; *Wilcox* v. *Redhead*, 28 W.R. 795; *Ridgeway* v. *Wharton*, 6 H.L. Cas. 238; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; *Huddleston* v. *Briscoe* (1805), 11 Vesey 583 at 592.

SASK.

K. B.

SHIELDS v. LANDRETH.

Bigelow, J.

All of these cases shew that there was not a completed agreement, that negotiations were in the treaty stage. In this case it is quite true that after the option was signed the plaintiff instructed his solicitor to draw up another agreement, and that the draft agreement drawn up by the solicitor contained two terms that had not been agreed upon, namely, that plaintiff would give security, and that defendant would not engage in business. But I am satisfied that the signed paper was intended to be the record of the terms of a completed agreement; that the parties had agreeing minds on the terms of the document under seal. I cannot believe the defendant when he says that he only signed the document on the assurance that there was another agreement to be drawn up. The evidence of the plaintiff, Ferguson and Menhinnick is against that contention, and the evidence of the defendant himself is not satisfactory.

I have not overlooked the fact that after the agreement was signed plaintiff told defendant that he would give him security; that plaintiff also hoped to have an agreement from the defendant that he would not engage in business. But nothing had been agreed on about this (the defendant admits that). But to my mind that does not alter the fact that the parties had entered into a complete agreement. I am impressed with the remarks of the Lord Chancellor in *Ridgeway* v. *Wharton*, *supra*, at p. 238.

There was no satisfactory evidence in the case at bar that the parties did not imagine that they were finally settling the terms of the agreement by which they were to be bound. It is not clear upon the facts that there were other conditions of the intended contract, beyond and besides those expressed in the option, and without the settlement of which the parties had no idea of concluding any agreement. For these reasons I think the plaintiff should recover damages.

The defendant raised another point, namely, that the Bulk Sales Act has not been complied with, and, therefore, plaintiff should not recover. Statutes of Saskatchewan, 1913, c. 34, s. 7, reads:—

> In case the provisions of this Act have not been complied with, then such sale, barter or exchange shall be deemed fraudulent and void as against the creditors of the vendor; and every payment made on account of the purchase-price, and every delivery of any note or notes or other security therefor, and every transfer, conveyance, and incumbrance of property by the

SASK.

K. B.

SHIELDS v. LANDRETH.

Bigelow, J.

purchaser, shall be fraudulent and void, as between the purchaser and the creditors of the vendor, unless all creditors of the vendor are paid in full.

No authority was cited for defendant's contention, and I am of the opinion that the transaction would only be void as between the purchaser and the creditors of the vendor, and not as between the vendor and purchaser.

As to damages. *Primâ facie*, the damages for refusing to deliver the goods would be the difference between the current price and the market price at the time that the goods ought to have been delivered. The defendant agreed to sell a hardware stock and fixtures at 100 cents on the dollar, invoice price; the fixtures being worth $1,000, and the goods $5,000. It is quite clear that the market had advanced considerably as to the goods as distinguished from the fixtures, since the defendant purchased. One witness stated the goods could not be bought in October, 1917, for 25 cents on the dollar advance, although another witness said that 100 cents on the dollar was a fair value. I am satisfied there was an advance in the price of the goods, but not on the fixtures, and allow 12½ cents on the dollar as damage under this head, which equals $625. Then the agreement included the goodwill of the business. There is no evidence what this was worth, or the damage suffered, except that the defendant's bank books shewed an annual turn-over of $35,000. It would seem that the plaintiff would suffer some loss from this, but I cannot find any definite evidence to base any finding on.

Then I think plaintiff is entitled to out-of-pocket disbursements and loss of his time caused by the defendant's breach of contract. He never would have gone to Winnipeg with plaintiff; he would not have disposed of his business in Kerrobert; he would not have made the trip to Lemberg with his son. Defendant alleges that he refused to carry out the agreement early in September, but I think plaintiff was justified in trying to get the contract performed, and it was not until October 13 that defendant definitely refused. Only a few days before that, plaintiff and defendant signed a joint telegram to a hardware traveller to come and take stock for him. I can quite believe plaintiff when he says he spent over $500 in his expenses in this matter.

I allow plaintiff's claim for special damages, except item 7, $50; there is no evidence that he has paid this or will have to pay this.

These damages amount to $742.60. The total damages amount to $1,367.60, for which plaintiff will have judgment, and costs.

Judgment accordingly.

SASK.

K. B.

Bigelow, J.

MINISTER OF INLAND REVENUE v. BOURKE; CALDANI & ROCCA; CASGRAIN & PRUNEAU; FABIEN; GAGNON.

QUE.

K. B.

Quebec King's Bench, Martin, J. January 10, 1919.

MASTER AND SERVANT (§ III A—289)—WAR REVENUE ACT—PROPRIETOR OF DRUG STORE RESPONSIBLE FOR CLERK'S FAILURE TO AFFIX STAMP—REVENUE OFFICER—CONSUMER.

Under the Special War Revenue Act of Canada (1915 stats., c. 8) the proprietor of a drug store is responsible for the failure of one of his clerks to affix a revenue stamp on goods sold which require the stamp to be affixed, although the sale was made without his knowledge, and the clerk had instructions always to affix stamps where they were required.

A revenue officer buying goods requiring stamps to be affixed with a view of taking out a summons for violation of the Act is a consumer within the meaning of the Act.

[*Patenaude* v. *The Paquet Co.* (1916) 31 D.L.R. 229, annotated, referred to.]

Statement

APPEALS (5) from proceedings taken under the Special War Revenue Act (Can.) 1915.

Rainville & Gagnon, for Minister of Inland Revenue; *F. Fauteux*, K.C., for Bourke; *A. Germain*, K.C., for Caldani and Rocca and Gagnon; *J. P. W. Dagenais*, for Casgrain and Pruneau; *A. Cinq-Mars*, K.C., for Fabien.

Martin, J.

MARTIN, J.:—These five appeals are from proceedings taken under the Special War Revenue Act, 1915, c. 8, of Canada.

In the cases of Bourke and Fabien, there was a conviction and $50 fine imposed in each case.

In the cases of Caldani & Rocca, and Casgrain & Pruneau and Madame Gagnon, the proceedings were dismissed.

Two questions arise for consideration: first, that the sales of proprietary or patent medicine and perfumery in respect of which no stamps were affixed, were not made by the defendants themselves but by clerks who had been instructed to affix the stamps but who failed and neglected so to do. The second point submitted for consideration being that the sales were not made to a consumer as contemplated by the Act, but to a revenue officer who bought the articles with a view to taking out the summons.

The facts were admitted by counsel for the parties, and although both points may not arise for consideration in each case, the cases for convenience may be grouped and disposed of together.

QUE.

K. B.

MINISTER OF INLAND REVENUE v. BOURKE; CALDANI & ROCCA; CASGRAIN & PRUNEAU; FABIEN; GAGNON.

Martin, J.

In the case of *Patenaude* v. *Thivierge*, 30 D.L.R. 755, 26 Can. Cr. Cas. 138, the Court of Sessions at Quebec (Langelier, J.) decided on March 17, 1916, that criminal intent was not an essential element in the offence of vending a patent medicine without affixing the revenue stamp required under the War Tax Act, and that the dealer was liable to conviction for failure of his salesman to affix and cancel the stamps at the time of the sale, although instructed to do so.

In the case of *Patenaude* v. *Paquet Co.*, 31 D.L.R. 229, 26 Can. Cr. Cas. 205, on May 5, 1916, the judge decided in a contrary sense. The magistrate also held in this latter case that a sale to a revenue officer was not a sale to a consumer within the Act.

Pelletier, J., in the case of *Patenaude* v. *Dubé* (1917), 26 Que. K.B. 431, decided that a sale to a revenue officer was not a sale to a consumer but did not decide the second point as to whether or not the proprietor was responsible for the omission of the clerk to affix stamps.

On September 26, 1916, Cross, J., in the case of *Ethier* v. *Minister of Inland Revenue* (1916), 32 D.L.R. 320, 27 Can. Cr. Cas. 12, in confirming a summary conviction under this Act, decided that the defendant was liable for the failure and neglect of his clerk to affix stamps. He also decided that the proprietor was responsible for the acts of his clerk in this connection.

In the case of *Minister of Inland Revenue* v. *Nairn* (1917), 35 D.L.R. 224, 28 Can. Cr. Cas. 1, Smith, J., adopted the same view as that expressed by Cross, J., on both points in the *Ethier* case; and in the case of *Minister of Inland Revenue* v. *Thornton* (1917), 28 Can. Cr. Cas. 3, Judd, J., held to the same effect and disapproved of the holding in *Patenaude* v. *Paquet*.

Cross, J., in a recent case of the *Minister of Inland Revenue* v. *Huot*, re-affirmed the conclusions arrived at by him in the *Ethier* case and cited numerous authorities in support of his decision. No useful purpose can be served by repeating those authorities here. I am disposed to follow the judgment of Cross, J., on both points.

The Act under consideration (1915), c. 8, s. 15, says:—

> Every person selling . . . . shall, at or before the time of sale, affix . . . . an adhesive stamp, etc.

Who is the person selling? Who is the person with whom the

purchaser would be held to have contracted in a civil action? Clearly the owner of the business who is engaged in the business of selling.

Sales by a clerk or salesman in Morgan's, Birks', or any other establishment are sales by Morgan, Birks, or the proprietors of the business. The clerk was merely a salesman acting within the scope of his employment and within the scope of the authority which the proprietor delegates to the clerk, and it is the master's business to see that the clerk, within the scope of the authority so delegated to him, obeys the law, and the proprietor cannot protect himself by saying "although it is perfectly true my salesman sold my goods without affixing the stamp and I received the proceeds of the goods so sold, yet I am not responsible because I was not cognisant of the wrongful act of my salesman." Surely that is not the intention of the Act.

It is not necessary to consider here whether or not the clerk incurs the penalty for his neglect. If additional authority on this point were required, it might be found in the case of *The King* v. *Russill* (1913), 14 D.L.R. 792, 22 Can. Cr. Cas. 131, and authorities there cited, particularly the case of *Brown* v. *Foot* (1892), 17 Cox C.C. 509, and *Parker* v. *Alder*, [1899] 1 Q.B. 20.

On the second point, that the sale should be to a consumer, I would say that "selling to a consumer" in the express terms of the Act "includes selling by retail."

The Act is a Revenue Act. The goods on the defendant's shelves are sold; the money received and put in the till. Clearly the property passes to the purchaser and it is a sale by retail.

The convictions in the two cases of Bourke and Fabien are confirmed and the appeals dismissed with costs.

The appeals in the cases of Caldani & Rocca; Casgrain & Pruneau, and Madame Gagnon are maintained with costs, the order of dismissal is set aside, and the defendants in each of the three cases convicted of the offence charged and are each adjudged to forfeit and pay $50 to His Majesty for the public uses of Canada, with costs, and in default of payment thereof, 1 month's imprisonment. *Judgment accordingly.*

QUE.

K. B.

THE KING v. AUERBACH.

Quebec King's Bench, Martin, J. January 10, 1919.

COURTS (§ II A—175)—SUMMARY CONVICTION—CONVICTION IRREGULAR—APPELLATE COURT MAY IMPOSE NEW SENTENCE.

On an appeal from a summary conviction the appellate court is the absolute judge both of law and facts, and where the conviction appealed from is irregular in that it imposes a penalty less than that authorized by law, the appellate court may impose a new sentence.

[*The King* v. *Baird* (1908), 13 Can. Cr. Cas. 240, followed.]

Statement.

APPEAL from a summary conviction under the Inland Revenue Act (R.S.C. 1906, c. 51, s. 180) for having possession of an unlicensed still.

Rainville & Gagnon, for the Crown.

Joseph Cohen, for defendant.

Martin, J.

MARTIN, J.:—The defendant was prosecuted under the provisions of the Inland Revenue Act, R.S.C. c. 51, s. 180, for having in his possession a still and other apparatus suitable for the manufacture of spirits without license.

He pleaded guilty to the offence. He was sentenced to 1 month's imprisonment and to a fine of $200 with 1 month's additional imprisonment in default of payment of the fine. The apparatus seized was forfeited to the Crown.

Both parties appealed. The Crown appeals because the conviction was irregular in that it imposed a term of imprisonment of 1 month only in default of payment of the penalty, and the accused appealed against the conviction urging this irregularity, and further that, as it was a first offence to which he pleaded guilty, imprisonment in addition to a fine should not have been imposed:—

> The appellate court tries the case *de novo* upon the merits . . . is the absolute judge both of law and facts, and where the conviction appealed from awards a penalty in excess of that authorized by law, the appellate court may impose a new sentence at its discretion. Where an excessive sentence has been imposed on a summary conviction following a plea of guilty, the court hearing an appeal therefrom may modify the conviction by imposing a lawful punishment less than the legal maximum. *R.* v. *Baird* (1908), 13 Can. Cr. Cas. 240.
>
> *Per* Barker and McLeod, JJ.—Where a minimum term of imprisonment in default of paying a fine is imposed by statute, a summary conviction imposing a lesser term will be quashed. *The King* v. *Charest*; *Ex parte Daigle* (1906), 18 Can. Cr. Cas. 211 (37 N.B.R. 492).

The conviction was irregular insofar as it imposed imprisonment of 1 month only in default of payment of the penalty. Cr. Code s. 1054:—

No one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

It was urged by counsel for the prosecution that as the statute provided for both penalty and imprisonment that both must be imposed, but it is expressly provided in art. 1028 that:—

Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place.

Where both fine and imprisonment are provided as the authorized punishment for a statutory offence upon a summary conviction, the magistrate may in his discretion impose either a fine alone or an imprisonment alone or both, unless the particular statute specifically provides otherwise. *Ex parte Kent* (1903), 7 Can. Cr. Cas. 447; *The Queen v. Robidoux* (1898), 2 Can. Cr. Cas. 19; *Rex* v. *Davidson* (1917), 35 D.L.R. 82, 28 Can. Cr. Cas. 44, 11 A.L.R. 9.

Ought this court to interfere with the discretion exercised by the lower court in imposing imprisonment for a first offence? Ordinarily I should hesitate to do so, and if the conviction were in every respect in accordance with the law, I should be disposed to confirm, but the case is heard before me *de novo*, and I have the right to inflict such penalty as to the court seems just and reasonable.

The conviction before the police magistrate is set aside and a fine of $300 and costs imposed, and in default of payment, six (6) months' imprisonment, and the still and all property seized is ordered confiscated.

It was suggested by counsel for the complainant that under s. 181 of the Revenue Act, every person who becomes liable to a penalty provided for in the last preceding section shall, in addition thereto, forfeit and pay for the use of His Majesty double the amount of excise duty and license duty which should have been paid by him under this Act; that 15 gallons of spirits were seized on which the double excise duty would be $3.80 per gallon and the license fee $250 of which the double would be $500, and it was urged that it was obligatory upon the court to impose this additional penalty.

I do not so construe the statute. This is alleged in the margin to be an "additional penalty." These items did not form any

QUE
K. B.
THE KING
v.
AUERBACH.
Martin, J.

substantive part of the complaint. Possibly the accused may be liable therefor upon proper proceedings had to obtain condemnation for same. I do not decide anything upon this point.

Under the circumstances, I make no order as to costs on appeal; each party will bear their own.

Judgment accordingly.

N. S.
S. C.

CICERI v. BURINO.

Nova Scotia Supreme Court, Harris, C.J., Russell and Drysdale, JJ., Ritchie, E.J., and Mellish, J. February 22, 1919.

EXECUTION (§ I—3)—MORTGAGEE IN FEE—NOT IN POSSESSION—ESTATE OF, NOT SEIZABLE IN POSSESSION.

The estate of a mortgagee in fee who has not taken possession of the land is not seizable in execution on a judgment against him.

Statement.

APPEAL from the judgment of Chisholm, J., refusing an application for the appointment of a receiver by way of equitable execution. Affirmed.

I. Oakes, for appellant; *L. A. Lovett*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The plaintiff has a judgment against the defendant for $1,074.45 recorded on September 10, 1917.

On October 10, 1918, the defendant and one Varonne took a mortgage to secure the sum of $7,700 from one Vetesse, payable 3 years after date thereof, which was recorded on October 11, 1918.

On October 11, 1918, defendant and Varonne assigned the mortgage to the Hon. Orlande T. Daniels and this assignment was recorded on the same day. The mortgagor remains in possession and there has been no default in payment of interest.

The plaintiff applied to Chisholm, J., for the appointment of a receiver by way of equitable execution. The application was refused and there is an appeal.

In *Nova Scotia Mining Co.* v. *Greener*, 31 N.S.R. 189, at 191, Ritchie, J., expressed the opinion that a judgment recorded against a mortgagee bound his interest in the mortgaged premises and that this interest could be sold under execution.

This statement was not necessary to the decision in that case, and the decision itself may probably be supported on the grounds mentioned in the judgment of Graham, J.

The question, it seems to me, is squarely raised here as to whether or not the view expressed by Ritchie, J., in the *Greener*

case is or is not the correct view. With the greatest respect for anything said by that judge, I am obliged to say that I think the interest of a mortgagee in mortgaged premises cannot be sold under execution and is not bound by a judgment.

The judge based his opinion upon the provisions of the Registry Act, and there had been no argument of the question by counsel for the appellant because he was taken by surprise when the point was raised on the argument. (See per Meagher, J., p. 193.)

Before referring to the provisions of the Registry Act it is necessary to examine the state of the law at the time when the statute was passed.

At common law a mortgagee has the legal estate, but in equity a mortgage is treated as a mere security for a debt and the mortgagor as the real owner of the property.

As long ago as the time of Lord Hardwicke the rule seems to have been well settled, and that judge said, in 1740, "that even the law considers the debt as the principal and the land to be only an accident;" and in *The King* v. *St. Michaels* (1781), 3 Doug. 630 at 632, 99 E.R. 399 Lord Mansfield said:—

> The mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner.

In 2 Fonblanque on Equity, page 257, there is the following note:—"As to the nature of the estates of the mortgagor and mortgagee, it seems to be at length settled that as the mortgagee is considered as holding the estate merely in the nature of a pledge or security for payment of his money, a mortgage, though in fee (the legal estate in which descends to the heir at law) is considered in equity only as personal estate."

Also, 1 Maddock Chan. 512:—"It is a rule in equity that a mortgagee is only considered as a trustee, and that a mortgage, as in the civil law, is but a security for the money lent . . . nothing real passes to the mortgagee, and the mortgage conveys nothing in the land, neither dower nor tenancy by the curtesy . . . the equity of redemption is considered as an estate in the land."

In Cruise's Digest, Title XV. "Mortgage," c. 1, s. 14, it is said:—"As money borrowed on mortgage is seldom paid on the day appointed, mortgages are now become entirely subject to the Court of Chancery, where it is an established rule that the mort-

N. S.
S. C.
CICERI
v.
BURINO.
Harris, C.J.

gagee holds the estate merely as a pledge or security for the repayment of the money; therefore a mortgage is considered in equity as personal estate. The mortgagor is held to be the real owner of the land, the debt being esteemed the principal and the land the accessory," and in c. 2, s. 11, of the same book: "As long as the right of redemption exists, the mortgagee is considered merely as trustee for the mortgagor, and that none of his charges or incumbrances attach on the estate."

See also Story's Equity Jurisprudence, s. 1016.

Under our statutes the interest of the mortgagor can be seized and sold under execution and the interest is expressly bound by the recording of a judgment (See c. 170, s. 1 (*a*) and s. 5 of the R.S.N.S., 1900).

Under our law also a mortgage can be seized under execution (see O. 40, r. 34) and a sale of the mortgage carries the debt and the security as well. On the other hand, no one suggests that a sale of the interest of the mortgagee in the land carries the debt, and if such a sale were permitted we would have the debt in one person and the security for it in another; and if the security could be sold without the debt what is its value? How can a value be fixed upon it when the mortgagor may pay off the debt and render the security valueless.

These and other weighty considerations have led the courts of all countries, without any exception so far as I have been able to discover, to hold that the interest of a mortgagee in the mortgaged premises cannot be sold under execution, at least until after possession has been taken by him.

See also in *Simpson* v. *Smyth* (1846), 1 U.C.E. & A. 9.

In *Lodor* v. *Creighton*, 9 U.C.C.P. 295, Draper, C.J. said at p. 297:—

> The Court of Queen's Bench of Upper Canada determined in *Doe d. Campbell* v. *Thompson*, that after a mortgage in fee had become absolute by non-payment, the mortgagee's interest cannot be sold under a *fi. fa.* against lands, and our statute, 12 Vict. c. 73, only authorizes the sale of the mortgagor's interest in real estate on the execution against lands, leaving the mortgagee's interest as it was before.

See also to the same effect *Neil* v. *Bank of Upper Canada*, 2 Gr. Ch. 386, and *Parke* v. *Riley*, 3 E. & A. 215, at 231 and 232.

In *Doe on the Demise of Vernon* v. *White* (1859), 4 Allen N.B. 314, the court consisting of Carter, C.J., Neville Parker, M.R. Parker, Wilmot and Ritchie, JJ., after a full examination of the

authorities, held that the estate of a mortgagee in fee who has not taken possession of the land is not seizable in execution on a judgment against him, and that the fact of there being no bond or covenant to pay the money does not affect the question.

Parker, M.R., after an examination of the authorities, speaking for the court, said:—"The mortgagee's incumbrances do not affect the estate he has in mortgage, nor is it subject to dower; that there is no instance cited either from England, the United States, or any of the colonies where such a principle has been established, and the only case occurring in England (*Cooper* v. *Gardner*) shewed it to be certainly not recognized there; that if a law is passed making debts liable to execution, the debt will be seizable and not the security for it; and that the sheriff cannot seize and assign the mortgage deed or any power for sale therein contained; we think we shall be fully justified in holding that the estate of a mortgagee in fee who has not taken possession is not seizable in execution."

See also *Jackson* v. *Willard*, 4 Johns Rep. 42 (N.Y.)

Hutchins v. *King*, 1 Wall. (U.S.) at p. 58.

Smith v. *Peoples Bank*, 24 Me. 185; *McLaughlin* v. *Shephard*, 32 Me. 143; *Portland Bank* v. *Hall*, 13 Mass. 207; *Blanchard* v. *Colburn*, 16 Mass. 345, per Parker, C.J.

A number of American authorities will be found collected in 20 Am. and Eng. Encyc. 974 and Freeman on Executions, ss. 118 and 184.

This being the law at the time when the statutes in question were passed it is clear, I think, that the legislature never intended to make any change in it by either the Registry Act or the Act with regard to sale of lands under execution. I quote the sections which it is suggested may apply.

The Registry Act, R.S.N.S. 1900, c. 137, s. 16:—

A judgment, a certificate of which is registered in the manner by this chapter provided in the registry of any district, shall, from the date of such registry bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment.

The Interpretation Act, R.S.N.S. 1900, c. 1, s. 23 (12):—

The expressions "land," "lands," "real estate" or "real property," include respectively lands, tenements, hereditaments, and all rights thereto and interests therein.

N. S.

S. C.

CICERI v. BURINO.

Harris, C.J.

"Of the sale of lands under execution," R.S.N.S. 1900, c. 170:—Sec. 1 (*a*). The expression "land" includes the possessory right and right of entry of a judgment debtor, and also the interest of a mortgagor or any equitable interest in land which may, by the provisions of this chapter, be sold under execution. S. 3. The land of every judgment debtor may be sold under execution after the judgment has been registered for one year in the registry of deeds for the registration district in which the land is situated. S. 5. Land subject to mortgage may be levied upon, sold and conveyed under execution.

If we bear in mind that the courts had pointed out the difficulties and anomalies which would result from holding that the interest of a mortgagee was salable under execution it is inconceivable that the legislature would deliberately change the law and, in effect, say, notwithstanding all the difficulties and anomalies referred to, the law shall be changed and all these difficulties and anomalies brought about. Of course, I quite admit that if the legislature had plainly shewn by the language used an intent that the law should be changed and that the mortgagee's interest should be liable to be sold under execution, it would be the duty of the courts to carry the law into effect. But it is clear that the legislature never intended anything of the kind, but quite the reverse.

They have passed Acts which specifically make the interest of the mortgagor liable to seizure and sale under execution and provision has been made by which the mortgage itself may be levied upon, but there is no specific provision dealing with the interest of a mortgagee. Under these circumstances it is manifest that the legislature never intended the Registry Act to have the effect suggested in the *Greener* case, and that statute cannot be construed as applying to a mortgagee's interest. As I have pointed out, in equity a mortgagee has no real interest in the mortgaged premises and, therefore, it is impossible to say that the statute has the effect contended for. For the same reason the registration of the judgment bound nothing, and consequently the mortgage and debt having been assigned before the mortgage was levied upon or otherwise became bound by the judgment; the plaintiff has lost any rights he had and there is nothing which a receiver could do if appointed.

For these reasons I would dismiss the appeal with costs.

Ritchie, E. J.

RITCHIE, E.J.:—I adopt the decision of my brother Chisholm at Chambers as my judgment on appeal. The case of the *Nova*

N. S.

S. C.

CICERI v. BURINO.

Scotia Mining Co. v. *Greener*, 31 N.S.R. 189, was heard before McDonald, C.J., Ritchie, Meagher and Henry, JJ. The decision of the court was delivered by Ritchie, J., being concurred in by the Chief Justice and Henry, J. As to the point under the Registry Act Meagher, J., gave no opinion on the ground that it had not been fully argued at the bar. I am far from being convinced that the decision of the court is not perfectly sound, but if I thought otherwise I would refrain from casting any doubt upon it. A decision of the court can only be overruled by the court. Until overruled, it is binding upon every individual judge of the court. I think it my duty to be loyal to it. If I did not agree with the decision I would not be prepared to express that disagreement until the soundness of the decision was argued at the bar. In this case, an attempt was made to distinguish it. There was no argument that the case should be overruled. I would dismiss the appeal with costs.

Ritchie, E. J.

MELLISH, J (after setting out the facts):—In my opinion, the appeal should be dismissed with costs. I am unable to see any ground upon which such an application could be successfully made in a case like this. It is, I think, very clear that the mortgage debt is personal property, and if this be so, it cannot be bound by the recorded judgment. This debt could, it is true, have been seized under execution in the hands of the mortgagee before he parted with it. This was not done and I can see no ground whatever for following this debt in the hands of the assignee. There are dicta in the case of *N.S. Mining and Transportation Co.* v. *Greener*, 31 N.S.R. 189, to the effect that a mortgagee has such an interest in land as may be taken in execution. If this be so, it is clearly the mortgagee's interest only that can be so taken and this interest only involves the right to hold the land as security for the mortgage debt. It is not apparent that any default has been made by the mortgagor which would entitle a resort to such security or call for the intervention of the court. See cases cited in 23 Cyc. (1906), p. 1367, n. 99, sub-title "judgments."

Mellish, J.

RUSSELL and DRYSDALE, JJ., concurred with Mellish, J.

Russell, J.
Drysdale, J.

Appeal dismissed.

ALTA.

S. C.

PRUDENTIAL TRUST CO. v. McQUAID.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. February 8, 1919.

COMPANIES (§ IV C—117)—ADVISORY BOARD—DUTIES TO INVESTIGATE APPLICATIONS—APPLICATION AND VALUATOR'S REPORT APPARENTLY SATISFACTORY—NEGLIGENCE—LIABILITY OF COMPANY.

Members of an advisory board of a loan company whose duties are to investigate the application and valuator's report, and who act without remuneration, are not liable for negligence, causing loss to the company, in recommending a loan based in part upon the personal standing of the applicant, the application and valuator's report being apparently regular and satisfactory, the loss being caused by the fraud of the local solicitor of the company who was also on the advisory board, but of whose fraud the other members were unaware.

Statement.

APPEAL by plaintiff company from a judgment of Ives, J.

S. B. Woods, K.C., for appellant; *N. D. Maclean*, for respondents Bulyea and Anderson.

Beck, J.

BECK, J.:—This is an appeal by the plaintiff company against the judgment of Ives, J., at the trial dismissing the action at the conclusion of the plaintiff's case against the defendants Anderson and Bulyea.

The defendant McQuaid did not defend. The case went to trial only against the defendants Anderson and Bulyea.

The action was one for negligence in recommending a loan, the defendants being the local board in Edmonton of the plaintiff company, a loan company.

Among the by-laws of the company there is one reading as follows:—

(16.) The Board of Directors may, from time to time, by resolution establish and appoint local advisory boards or committees, consisting of such number of members, and to act at such places, in Canada or elsewhere, as the board may, from time to time, deem expedient, and may grant to such local boards or committees such powers of advising or directing the business carried on by the company, at all such places at which the company or the board of directors may appoint local managers or agents, as to the board may seem fit.

Power was given to pay such fees or remuneration to members of advisory boards as the directors might, from time to time, consider advisable.

By by-law (20), the general manager was given general charge and control of the business of the company and power to appoint all officers, employees, agents and servants of the company and fix their remuneration, subject to the general control and supervision of the Board of Directors.

By-law (27) provides that every officer and employee entrusted with the funds or securities of the company shall give a bond or other security satisfactory to the company for the faithful discharge of his duties. The by-laws did not define the duties of local managers or members of local advisory boards.

In October, 1911, the general manager visited Edmonton. He had interviews with Bulyea, who was a "director" of the company, and arranged that McQuaid and Anderson should act with him in an advisory capacity in relation to loans. He says: "I explained that our principal business at the start would be the loaning of moneys, and we would appreciate their advice and safeguarding of the company's interests—that was practically all."

The general manager's action was confirmed by the board at Montreal.

The general manager also says that subscribers for the company's shares had been given to understand that local advisory boards presided over by a director would be appointed and that a pamphlet was sent out to all shareholders containing a list of shareholders, the names of the directors (including the name of Bulyea), and the branch advisory or local boards, that of Edmonton shewing the names of the three defendants. This pamphlet was sent out in October, 1912, that is, subsequent to the acts or omissions of the defendants complained of. Still later, apparently, the company sent out another pamphlet prepared by McQuaid in which the Edmonton Board was given as: Bulyea, chairman, Anderson, and McQuaid, secretary.

McQuaid was appointed by the general manager, by letter, apparently in August, 1911, solicitor and "the company's representative at Edmonton."

In one of these pamphlets Bulyea, in the list of directors, is styled "Hon. G. H. V. Bulyea, Lieutenant-Governor of Alberta," as in fact he was; McQuaid, under branch offices and agencies, as solicitor and representative; Anderson was in fact the manager of the Edmonton branch of the Union Bank, through which the company's business was transacted. It looks as if the board thought Bulyea would be a magnet and expected from him nothing more, as a member of the advisory board, than a mere perusal of applications and reports and of Anderson the same, with the benefit of any knowledge he might possibly have of the financial standing of any particular borrower.

ALTA.

S. C.

PRUDENTIAL TRUST CO. v. MCQUAID.

Beck, J.

No provision was made for the payment of fees or remuneration to the members of the local board beyond the power to do so contained in the by-laws, and it seems to have been contemplated that they should receive none until the company was in a position to pay a dividend.

The particular transaction in respect to which the company seeks to hold the defendants liable in this action is as follows:—A form of "application for loan" and "appraiser's report" purporting to be complete and apparently satisfactory was presented to Anderson and Bulyea by McQuaid, with a form of recommendation attached which at his request they both signed. This recommendation read as follows:—

To the Prudential Trust Co. Ltd. Edmonton, Alberta, Aug. 21, 1912.

We, the undersigned, members of the local board in Edmonton, Alberta, hereby certify that we have investigated the application of Joseph Harkin for a loan of twenty-three hundred dollars and the valuator's report on the same, and we hereby recommend a loan of twenty-three hundred dollars on security offered.

It was signed by all three defendants. The "application for loan" was a printed form. It had a caption, "city property." It was filled out in the handwriting of McQuaid, who signed as witness to what purported to be the signature of the applicant. The applicant was described as "of the City of Edmonton." The property was described as being "in the City of Edmonton in the Province of Alberta and being composed of lots 27 & 28 bl. 33"—(here are marks which, only after being told that they are intended for "W. L." standing for a subdivision called "West Lawn," am I able to recognize for what they are said to be)—then follow the words, "City of Edmonton." Other statements contained in the application were: "Assessment, $1,600, land only." "Insurance is for $2,300, will be in Yorkshire Company." "The yearly rentals are $360." The P.O. address of the applicant is given as "Edmonton." The "appraiser's report," which is on the same paper and is signed by one Charles May as a valuator, against whom even now no suspicion of dishonesty is cast, states among other things that the purpose of the loan is to pay for the building; that the applicant owns "considerable Edmonton property"; that the roadway adjacent is "graded and plank sidewalk"; that as to heating and lighting there was a "furnace" and "electric light." The land was stated to be on Victoria St. The assessment was

stated to be "$1,600, land only for 1912." It was said to be "occupied by owner," to be easily rented and the rental exclusive of taxes to be $360. The value placed upon the land was $1,600; on the buildings $3,000, making a total of $4,600. At the foot of the "appraiser's valuation" is a skeleton "diagram of property" with the points of the compass shewn. "Victoria Ave." is shewn on the north side and "Jasper Ave." on the south side of a block in which the two lots are delineated in the north-west corner. Jasper Ave. is the main street of the city. Victoria Ave. is the next avenue to the south and is perhaps the most important residential street in the city.

The duty which the members of the local advisory board assumed when signing their certificate of recommendation was to investigate the "application" and "the valuator's report on the same."

Confining oneself to the application and valuator's report, everything seems regular and satisfactory and the lots are asserted directly or by inference in half a dozen ways to be in the City of Edmonton. In fact, they were beyond the city limits. In the city are numerous subdivisions which have local names which are given upon the registered and published plans—such as "Norwood," "Delton," etc. So that if the letters which are now said to be "W.L." had been recognized they would not have suggested that the lots were not in Edmonton, even if they had not been followed by the words "City of Edmonton." It is true that the diagram puts Victoria Ave. north of Jasper Ave. instead of south, but as the points of the compass are printed it might well be supposed that this was merely a slip. Any one familiar with the city would, I am satisfied, have said that any two lots lying anywhere between Jasper Ave. and Victoria Ave. assessed, without improvements, for $1,600, and having upon them a dwelling-house worth $3,000 and insurable for $2,300, owned by a man known to the company's valuator as "steady and industrious, punctual in his business transactions and likely to prove a satisfactory borrower, and owning considerable other Edmonton property" would be excellent security for a loan of $2,300.

It is said that had the members of the local board looked at a map of the City of Edmonton they would not have been able to find any lots answering to the description. This is so; but under

ALTA.

S. C.

PRUDENTIAL TRUST CO. v. MCQUAID.

Beck, J.

all the circumstances were they so negligent in not doing so as to make them liable? I think not. On the face of the application and valuator's report they were justified in recommending the loan. It had already been approved by McQuaid, who was not only the company's solicitor but its local representative, and by May, the company's valuator, both of whom, in my opinion, Anderson and Bulyea were justified in relying upon, inasmuch as having been appointed by the company they had been accredited by it as men of high standing, honesty and ability.

Neither Anderson nor Bulyea received or expected or were intended to receive any remuneration for their services. There was no office accommodation furnished for them, where they might be expected to meet and consult, and where the company might have supplied them with maps and plans if it was thought these should be made use of by them. That the Board of Directors attached little importance to such matters is shewn by the fact that when the application was considered in Montreal first by its executive committee and then by the board, no reference was made to the map of Edmonton, although there was one hanging upon the wall of the room at the time.

Subsequent events lead to the conclusion that the whole transaction was a fraudulent scheme of McQuaid. It looks as if the signature of the applicant is a forgery by McQuaid, and I surmise that May having made an honest inspection, possibly of this, but probably of some other property, gave the result of his inspection orally to McQuaid, who pretended to put down truly the information given, and having put it down falsely, had May sign the report on the supposition that McQuaid had honestly set down what he had been told.

In addition to all this, the loan recommended to Harkin was in fact made to one John J. Knoll without the intervention of Anderson or Bulyea, McQuaid forwarding a mortgage made by Knoll, an insurance policy, etc., and saying: "This application was sent through in the name of Joseph Harkin, but he was unable to sign the mortgage as a certain deal which was pending did not go through. Mr. Knoll is a first-class man, however, and will prove just as satisfactory a borrower."

There was no report upon the personal standing of Knoll corresponding to that upon Harkin. Had the application not been

"switched" in this way with the consent of the board at Montreal, it may be that, in the course of attempting to carry through the loan in the name of Harkin, McQuaid's fraud would have been discovered.

In any case, the plaintiff company has not shewn what is its final loss in connection with the loan.

In the result, I think the defendants Anderson and Bulyea are not liable to the plaintiff company: (1) because the company has failed to shew sufficient negligence on their part in the performance of the duties they undertook to perform; (2) because the loan recommended was based in part upon the personal standing of Harkin, the applicant, and even if the property security turned out to be deficient, it does not appear but that the personal security of Harkin would have saved the plaintiff company from ultimate loss, and it would, in any case, be for only the ultimate loss upon the totality of the security that Anderson and Bulyea would be liable and the burden of establishing the amount of the ultimate loss was upon the plaintiff company.

I would, therefore, dismiss the appeal of the plaintiff company against the defendants Anderson and Bulyea, with costs.

HARVEY, C.J., and SIMMONS, J., concurred with BECK, J. Harvey, C.J. Simmons, J.

MCCARTHY, J., concurred in result. McCarthy, J.

McMILLAN v. CITY OF WINNIPEG.

Manitoba King's Bench, Mathers, C.J.K.B. February 6, 1919.

1. MUNICIPAL CORPORATIONS (§ II A—30)—POWERS OF—ONLY THOSE DELEGATED BY EXPRESS WORDS, OR NECESSARY IMPLICATION.

The only powers which a municipal corporation can exercise are those granted by express words, those necessarily or fairly implied in or incident to the powers expressly granted and those essential to the accomplishment of the declared objects and purposes of the incorporation.

2. MUNICIPAL CORPORATIONS (§ II E—153)—GRANTS OF MONEY—WINTER SPORTS AND PEACE CARNIVAL—CURLING ASSOCIATION—ULTRA VIRES—SAILORS' RELIEF FUND WITHIN POWER OF.

Grants of money by the City of Winnipeg to the "Winter Sports and Peace Carnival" and to the "Manitoba Curling Association" are beyond the power of the city, as they are neither grants to "charitable institutions" or for the entertainment of important "guests" and so are not within secs. 589 and 590 of the charter of incorporation.

A grant to the "Mercantile Sailors' Relief Fund" is within the powers of the city, it being a charitable institution of a permanent character which has received the approbation of the Civic Charities Bureau (s. 700, sub-s. 198). The latter grant is not *ultra vires* as being contrary to s. 92 (2 and 7) of the B.N.A. Act although the objects to be relieved are outside the limits of the province.

[*Re Homan and City of Toronto* (1918), 45 D.L.R. 147, 43 O.L.R. 632, referred to.]

MAN
K. B.
McMILLAN v. CITY OF WINNIPEG.
Mathers, C.J.K.B.

ACTION for an injunction to restrain payment of certain grants voted by resolution of the City Council.

A. J. Andrews, K.C., and *F. M. Burbidge*, K.C., for plaintiff.

T. A. Hunt, K.C., and *Jules Preudhomme*, for defendants.

MATHERS, C.J.K.B.:—This is an action by the plaintiff on behalf of himself and all other ratepayers of the City of Winnipeg for an injunction to restrain payment of the following grants voted by resolution of the council on December 9 last, namely:—(1) $1,000 to the 1919 Winter Sports and Peace Carnival; (2) $15,000 to the Mercantile Sailors' Relief Fund; (3) $2,500 to the Manitoba Curling Association for year 1918-1919.

By the statement of claim exception was also taken to a vote of $5,000 to the Citizens' Christmas Fund for Soldiers' Families, but this objection was subsequently waived, not as I understand it as an admission that the objection was not a valid one, but as a concession to the beneficiaries.

The matter now comes on by way of motion for an interim injunction, which by consent was turned into a motion for judgment.

The sections of the charter relied upon as conferring the power to make these grants are the following:—

589—The council of the city may make provision for grants of money to charitable institutions of any character which have received the approbation of any civic charity bureau appointed under the provisions of this charter.

590—The council of the city may pay for the reception and entertainment of important guests and expenses incurred in matters pertaining to the interests of the corporation a sum not exceeding $10,000 in any one year, and the expenditures of any moneys heretofore voted or paid for any such purposes are hereby validated and confirmed. The city shall be deemed to have always had the powers contained in this section.

700—The city may pass by-laws not inconsistent with the provisions of any Dominion or provincial statutes.

(1) For the peace, order, good government and welfare of the city.

(198) For and for any and all purposes connected with the maintenance, organization and regulation of the Civic Charities Bureau, the duties of said bureau being to examine into the character and *bonâ fides* of all charitable concerns seeking aid from the city or citizens.

The council of the city is a trustee of the funds of the corporation—*Bowes* v. *Toronto* (1858), 11 Moo. P.C. 463, at 524; *Pease* v. *Moosomin* (1901), 5 Terr. L.R. 207, at 217, and as such it has no power or authority to apply these funds for any other object than such as the city charter contemplates: *Att'y-Gen'l* v.

Vestry of Bermondsey (1882), 23 Ch.D. 60; *Hart* v. *MacIlreith*, 41 N.S.R. 351; affirmed by *MacIlreith* v. *Hart* (1908), 39 Can. S.C.R. 657; *Davis* v. *Winnipeg* (1914), 17 D.L.R. 406, 24 Man. L.R. 478; *Re Homan and Toronto*, 45 D.L.R. 147.

The powers which a municipal corporation can only exercise are (1) those granted by express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable: Dillon, par. 237; *Re Homan and City of Toronto*, *supra*.

S. 700 (1) may be left out of consideration. That section only relates to the powers to pass by-laws and these resolutions cannot be supported by any authority derived from it. If the authority exists it must be found in ss. 589 or 590 or both.

As the considerations affecting each resolution are different, I propose to discuss them separately.

Dealing in the first place with the proposed grant to the "1919 Winter Sports and Peace Carnival" I have been furnished with no definite information as to this carnival, or the organization by which it is promoted. I infer from its title and from the affidavit of Mr. Wallace that it is to be a sporting event of some kind. It is plainly not a "charitable institution," and the money is not to be used for the "entertainment of important guests," because Mr. Burns, chairman of the ways and means committee, in his letter to the mayor applying for the grant says it is "to be used in connection with the arranging an attractive programme and advertising the event."

I have no doubt the purpose the gentlemen promoting this carnival have in view is highly commendable, but, at the same time, I entertain a very clear opinion that it is beyond the power of the council to use the city's funds for the purpose of assisting them.

I will next consider the proposed grant to the Manitoba Curling Association.

It appears that the city has for a great many years made an annual grant in aid of the curling bonspeil held yearly in this city. The application for the grant for this year's event was made in May, 1918, and when the city's estimates for the fiscal

MAN.

K. B.

McMILLAN v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

year ending April 30, 1919, were being prepared, a sum to cover this grant was included in the amount appropriated for "special grants."

The right of the city to pay out this money was opposed on four grounds.

In the first place, it is said, that the curlers who come to the city to attend the annual bonspeil are not "guests" of the city; secondly, if they are, they are not "important guests"; thirdly, the grant can be made if at all, only after the expenses have been incurred; and fourthly, that the money would be used not only for the entertainment of guests but of residents of the city also.

I do not think there is anything at all in objections three and four. As to three, it appears to me the fair reading of s. 590 is that the city may pay for the "reception and entertainment of important guests," *and* may also pay "expenses incurred in matters pertaining to the interest of the corporation." The word "and" is used disjunctively, the part of the sentence following is restricted to the payment of expenses already incurred in matters pertaining to the interest of the city, whereas the first part of the sentence is not so restricted. If money can be used for the entertainment of guests at all, I see nothing to prevent it being voted in anticipation.

As to objection four, it is quite possible that whatever form the entertainment may take, resident curlers will participate, but the grant cannot be held void for that reason. It would be a sorry form of hospitality to leave the guests of the city to themselves, unaccompanied by any of the citizens.

As to the second objection, I think the question of "importance" is one that must be left to the judgment of the council. It must determine the question as to whether or not a guest is or is not important, and it is not for the court to override the judgment of the council upon such a matter.

This brings me to the first and by far the most serious objection. The word "guests," as here used, means, I think, people who are being received and entertained by the council itself in its official capacity. That such was the intention of the legislature becomes perfectly clear when the fact is recalled that s. 590 was passed for the express purpose of enabling the city to pay the expenses of a banquet tendered by the city council to the members

of the local government and legislature which, in *Davis* v. *Winnipeg*, *supra*, this court held it had no power to do. The curlers who attend the annual bonspeil are not the guests of the city. They are merely visitors who come here to compete in this annual curling event, and who, while here, are treated to some form of entertainment by the curling association. While being so entertained, they are guests of the association, but at no time are they the guests of the city as that term is used in this section of the charter.

The fact that this grant has been paid annually for upwards of 10 years without objection can make no difference. Unauthorized expenditure of money cannot be validated by usage, however long continued.

In holding as I do that the council has no authority to make a grant to the curling association for the purpose stated, I do not wish to be understood as condemning the proposed grant upon the merits.

There remains to be considered the proposed payment to the "Mercantile Sailors' Relief Fund." The application for the grant was made to the council by the Manitoba branch of the Navy League of Canada, an organization incorporated by Dominion charter.

Its respectability is vouched for by the fact that it is under the patronage of their Excellencies the Governor-General and the Duchess of Devonshire and the Lieutenant-Governors of the nine Provinces of Canada. Its purposes and objects as set out in its charter are *inter alia* "to raise funds for the relief of British and Canadian sailors, for their dependents and for the sailors' homes, institutes and hospitals in Canada or throughout the Empire as may be decided upon by the Dominion council from time to time." And "to co-operate with any kindred society designed to promote the welfare of British and Canadian sailors."

The material filed by the city shows that the Navy League of Canada has been registered by the Dominion government and given authority to collect money as an authorized charity, and has been recognized as such in all its provincial divisions and local branches, throughout Canada, including the City of Winnipeg, and that it has taken over the work of the British and Foreign Sailors' Society, and has taken steps to collect moneys which otherwise would have been collected by that society.

MAN.

K. B.

McMILLAN v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

It is also stated that upwards of 16,000 British sailors of the mercantile marine lost their lives during the war, leaving over 40,000 dependents who receive no pensions from the government, and that it is for the relief of these dependents that aid from the city is asked. The material also shews that a campaign to raise money for the purpose stated had been conducted throughout the whole Dominion, including the Province of Manitoba, and that the City of Toronto had voted $50,000 towards the fund. A deputation from the Navy League waited upon the Board of Control and subsequently upon the city council and explained the purpose for which a grant was asked, and it was after such explanation had been given that the resolution now objected to was passed.

To this grant the following objections were raised:—

1. The only "charitable institutions" which the council is authorised to aid are those of a permanent character, located within the city, and the objects of whose charity are within the city, or at least the Province of Manitoba, and the Navy League is not such an institution.

2. That the Navy League has not "received the approbation" of the Civic Charities Bureau.

3. If s. 590 is wide enough to authorize this grant, to that extent the section is *ultra vires* the provincial legislature as beyond the powers given the province by the B.N.A. Act, 92 (2) and (7).

I entertain no doubt but that the Navy League is a charitable institution of a permanent character, and is located within the city, but no doubt the principal objects of its bounty—the dependents of merchant sailors who lost their lives during the war are in England. Such being the fact is it one of the "charitable institutions" referred to in the section? The language of the section is: "charitable institutions of any character which have received the approbation, etc." S. 700 (199) also deals with the question, and gives the right to pass a by-law "for granting aid to any charitable institution." That sub-section however seems to contemplate aid to those belonging to or found within the city. S. 589 appears to be wider in its scope and authorizes aid to a charitable institution of "any character," the only limitation being that it must be approved by the Charities Bureau. It is common knowledge that the city has in the past voted sums of

money for the relief of those outside the province on the occasion of some great disaster, such as the San Francisco earthquake, the Halifax explosion, etc. That fact would not of course strengthen the defendant's position, if such grants were plainly unauthorized, but it shews how the council in the past interpreted a section, the meaning of which cannot be said to be entirely free from doubt. Upon the best consideration I have been able to give, I hold that the language of the section is wide enough to authorize the council to make this grant, although the greater part of the money, if not all, is to be spent for the relief of those who reside outside the Province of Manitoba.

The second objection also raises a serious question. S. 700 (198) authorizes a by-law to provide for the organization, maintenance and regulation of a Civic Charities Bureau, "the duties of said bureau being to examine into the character and *bonâ fides* of all charitable concerns seeking aid from the city or citizens," and such a bureau was created and is in existence. Neither this section nor 589 delegates to the bureau the duty of approving any particular grant. Its authority is limited to examining into the "character and *bonâ fides*" of the concern seeking aid. Until the bureau has given its "approbation" to the concern, the city has no power to grant it money, but once that approbation is given, the whole responsibility for making or withholding a grant belongs to the council.

One of the methods adopted by the Navy League to raise money for the Mercantile Sailors' Relief Fund was the holding of what has become known as a "tag day"; that is to say, women and girls are posted about the streets selling tags of some description which the purchaser may wear to shew that he has been "tagged" or has contributed to the cause for which collections are being made. By s. 30, added to "The Charity Aid Act" by c. 10, s. 7 of the Acts of 1917, it was made unlawful to hold a "tag day" in Winnipeg unless authorized by the Civic Charities Bureau. The Navy League made an application for such authorization to this bureau, and the necessary authority was given. The plaintiff in this action is a member of the bureau and was present at the meeting when the Navy League application was considered, and knew that the money was to be collected for the relief of the dependents of sailors of the mercantile fleet who had

MAN.

K. B.

McMILLAN v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

been killed or disabled during the war. The secretary of the bureau was examined by Mr. Preudhomme, one of the counsel for the city, with respect to the application, and the following is an extract from his examination:—

Q. Had you any knowledge of the character of the Navy League? A. Only in a general way.

Q. I mean did you find out as a result of this application? A. Oh, yes, we got audited statements as to the finances and that indicated the extent to which they had been operating.

Q. And the character of their organization? A. Yes.

Q. And did the bureau satisfy itself that it was a *bonâ fide* concern? A. The bureau through its sub-committee was satisfied with the returns.

Q. Who were on that sub-committee? A. It was composed of the chairman and the secretary.

Q. And you are the secretary? A. Yes, and Mr. Cox is the chairman.

Q. And you satisfied yourselves as to the character and *bona fides* of the Navy League and of the purpose for which they were asking money? A. Yes.

Q. And you granted the permission? A. Yes.

Q. That is, you approved of it? A. Yes.

It was urged that the bureau only approved of the Navy League for the purpose of a "tag day" and not for the purpose of receiving a grant from the city, as to which different considerations arise. I do not think the bureau has anything whatever to do with considerations affecting the wisdom or otherwise of making a grant; that is a matter for the consideration of the council alone. The bureau has fulfilled its entire function when it has certified as to the "character and *bonâ fides*" of any particular institution. It is then for the council alone to say whether a grant shall be made or withheld. In this case, the bureau was satisfied as to the character and *bonâ fides* of the Navy League and approved of it. That is all that was necessary to give the council power to consider its application for a grant. I do not think it makes any difference that the approval was given upon an application for leave to hold a "tag dag." The money was to be used for the same purpose, and the character and *bonâ fides* of the Navy League remained the same. I find, therefore, that the Navy League has "received the approbation" of the Civic Charities Bureau.

The third objection remains to be considered. It was argued that if s. 589 in terms authorized this grant, it is *ultra vires* as being contrary to s. 92 (2) and (7) of the B.N.A. Act. I fail to see what possible argument can be founded upon sub-sec. 7. A single grant to a charitable institution inside the province, although

the objects to be relieved are outside its limits, cannot possibly be construed as establishing or maintaining a charitable institution outside the province. It is said, however, that sub-sec. 2 only authorizes direct taxation within the province for provincial purposes. In other words, that the provincial legislature has no power to authorize taxation if the revenue therefrom is to be spent outside. That would be a very narrow construction to give the words "for provincial purposes." I do not think the decision in the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, requires them to be so construed. Lord Haldane was careful to point out that he was speaking particularly with respect to the incorporation of companies with provincial objects. If the construction contended for were correct, it is difficult to see how the various provinces could maintain, as they do, agents-general in London, or immigration agencies there or elsewhere, or maintain exhibits of their products at fairs and exhibitions held outside the Province.

The cities and municipalities of Canada have in the past on numerous occasions made grants for the relief of those who had suffered from some great disaster. If the plaintiff's contention is sound, all these grants were illegal, and those who voted for them could be compelled at the suit of a ratepayer to make restitution; and the legislature of the particular province would have no power to validate them.

In *Hart* v. *MacIlreith*, *supra*, the council of Halifax voted a sum of money to pay the expenses of the mayor of that city to a convention of a union of Canadian municipalities held in this city. The court held the grant illegal and pending the action an Act was passed by the Legislature of Nova Scotia legalizing the payment. According to the plaintiff's argument, the Act of the legislature was entirely futile, but it apparently did not occur to any of the counsel engaged or the judges of either the full court of Nova Scotia or of the Supreme Court to suggest that the Act was *ultra vires*. On the contrary, Graham, J., in the court below, and MacLennan, J., in the Supreme Court, both refer to the Act as having effectually legalized the payment.

In *Dow* v. *Black* (1875), L.R. 6 P.C. 272, it was held that an Act of the Legislature of New Brunswick, which authorized a municipality to give a bonus to a railway company for the building

MAN.

K. B.

MCMILLAN v. CITY OF WINNIPEG.

Mathers, C.J.K.B.

of a line from a point in the province to another point some distance within the United States was within the capacity of the legislature.

The Province of Manitoba is vitally interested in the maintenance of the British and Canadian mercantile marine. They supply the means by which alone its produce can find a market. The business of every exporter and importer, both rural and urban, largely depends upon them. The prosperity of the province during the last 4 years was largely if not entirely due to the officers and seamen of the merchant marine. Any expenditure calculated to promote the efficiency of these services is in the interest of the province and a tax levied with that object in view is a tax "for provincial purposes" within the meaning of s. 92 (2) of the B.N.A. Act. If it is competent for a province to empower a municipality to bonus a railway company to build a line of railway from a point within to a point without the province, as was decided in *Dow* v. *Black* (*supra*), I can see no reason for thinking that it is not equally competent for the province to empower the city to make the grant in question.

On the whole, I have come to the conclusion that the plaintiff must succeed as to the proposed grants to the "1919 Winter Sports and Peace Carnival" and to "The Manitoba Curling Association," but that he fails as to "The Mercantile Sailors' Relief Fund."

Judgment will go for the plaintiff quashing the resolution authorizing the two grants first mentioned and for an injunction restraining the city from making these payments, with costs against the city, except such costs as were incurred with respect to that part of this claim which relates to the Mercantile Sailors' Relief Fund. The defendants are entitled to the costs occasioned by this latter claim to be taxed and set off against the plaintiff's costs.

Judgment accordingly.

ALTA.

S. C.

FERGUSON v. KEMP.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, and Simmons, JJ. February 6, 1919.

BILLS AND NOTES (§ V A—121)—PROMISSORY NOTE—UNENDORSED—LEFT FOR COLLECTION WITH AGENT—THEFT OF—PAYMENT MADE TO PERSON PRESENTING—DISCHARGE OF MAKER.

Where an unendorsed promissory note, which has been placed in the hands of a solicitor for collection, is stolen from his office and the maker pays the note in good faith to the person presenting it without notice of or reasonable cause to suspect that it has been stolen, such payment relieves the maker from liability on the note.

ALTA.

S. C.

FERGUSON v. KEMP.

Beck, J.

APPEAL by plaintiff from a County Court judgment in an action on a promissory note. Affirmed.

William Rea, for appellant.

Joseph A. Clarke, for respondent.

The judgment of the court was delivered by

BECK, J.:—The action is on a promissory note. The note was one made by the defendant payable to the order of the plaintiff. It was dated July 1, 1915. It was placed by the plaintiff, so he says, in the hands of Mr. Brice, a solicitor, for collection—the plaintiff says about September 1, 1916. Mr. Brice is not sure that the plaintiff left the note with him. It was not endorsed by the plaintiff. $15 had been paid on account on July 10, 1916, and was noted on the back of the note. Mr. Brice wrote to the defendant 2 or 3 letters demanding payment to which he received no response. Nothing was done till some time early in 1918, when the plaintiff called on the defendant and was told by him that he had paid the note and they went together to Mr. Brice's office and produced the note.

Briefly the defendant's story is as follows: A few days before February 10, 1917, a man came to his house saying that he was collecting for Mr. Brice and had the note and wanted payment. The defendant did not then ask to see the note but said that he was going to have a sale in a few days and would settle after the sale. The man came back after the sale, produced the note from a pocket-book in which there appeared to be other notes. The defendant paid the amount of the note and interest—overlooking and forgetting the previous payment of $15, which in fact had been paid by his wife, and was given the note, which he retained in his possession up to the time of the trial. The man signed a receipt on the back of the note reading "Received $194.30, E. Brice, per J.R."

Mr. Brice says that he has no recollection of the note being left with him though he recognizes his handwriting upon it made when the plaintiff first spoke to him about it, but that if left with him it would when in his possession be kept with other notes which he had for collection in a note-case which was kept in his safe; that this note, when he came to look for it on the occasion, in 1918, when the defendant came in to say he had paid it, appeared to be the only one missing from the case; that there were no signs of a burglary at any time in his office.

ALTA.

S. C.

FERGUSON v. KEMP.

Beck, J.

Mr. Brice says, speaking of the time when the defendant paid the note:—

> At this time I just had two stenographers in the office. I didn't have any student or any man assistant. Anyway, I never authorized any one outside my office to collect any note or other claim in Edmonton in this case or any other case; in fact, it is not the custom of my office to have a student make personal duns; we do it by correspondence, even in the city. In exceptional circumstances myself or a student has, but it is very rare.

He said he had never had any one in his office whose initials were "J.R." He had no knowledge of course how or by what means the note was taken from his safe.

There appear to be American decisions to be found in the digests and text books both for and against the proposition that the maker of the note, inasmuch as it was not endorsed and thus made payable to bearer, would be discharged in such a case. Daniel on Negotiable Instruments, sub-s. 1230 (*a*) seems to favour the negative.

It seems to me that the affirmative is the sounder view and is more in accordance with English authority such as it is.

Chichester v. *Hill* (1882), 52 L.J.Q.B. 160, was the case of a negotiable instrument payable to bearer. It was stolen. It passed into the hands of the defendant *bonâ fide* and for value. The court held that the plaintiff from whom it was stolen could not recover it from the defendant. The court, at p. 162, pointed out that:—

> At common law, the larceny of a chattel did not alter the ownership; the owner was entitled to recover it, if he could. But there was this curious provision, that unless the thief was attainted by appeal of felony at the suit of the owner on fresh pursuit, the property was forfeited to the Crown. If the thief was attainted of felony, the owner then had his property restored to him; and that was the only mode of recovering his property at that time. An indictment of the thief at common law did not enable the owner to get back his property.

After some changes in the law, a statute was passed from which, evidently, was taken s. 1050 of the Criminal Code, which provides for an order for restitution of stolen property by the court trying the charge which, however, contains the proviso that:—

> If it appears before any award or order is made, that any *valuable security* has been *bonâ fide paid or discharged* by any person liable to the payment thereof, or being a *negotiable instrument* has been *bonâ fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or, if it appears that the property stolen has been transferred to an innocent purchaser for value who has

acquired a lawful title thereto the court or tribunal shall not award or order restitution of such security or property.

The court in *Chichester* v. *Hill*, in deciding upon the English statute in the same terms, said that, in its opinion, this proviso was intended to protect the *bonâ fide* holder of such a security not only against an order for restitution but against all proceedings. It is perhaps as well to note that, under the practice requiring a party suing upon a lost negotiable instrument, he would ordinarily be required to give indemnity, notwithstanding that the instrument was not capable of lawful negotiation without endorsement. *Crowe* v. *Clay* (1854), 7 Ex. 604, 156 E.R. 258, and see cases cited in Chalmers on Bills of Exchange, notes to s. 70.

"Valuable security" includes a promissory note: Code s. 2, clause (40)—that it does so is said by implication in the proviso quoted—and I think that "negotiable instrument" in the proviso includes an instrument capable of being lawfully negotiated upon endorsement; that is its popular meaning.

According to the experience of myself, and I believe of the other members of the court, it is not in accordance with custom that notes placed in the hands of a solicitor or a collection agency for collection are endorsed either in blank or specially by the payee, although it is said in Daniel (par. 1230*a*) that in the United States of America "nothing is more common."

Mr. Brice was the plaintiff's agent to collect the note. The most reasonable inference from the facts proved, is, it seems to me, that the note was got from either the plaintiff or Mr. Brice's custody by some one unknown by a means probably amounting to theft within the definition given by s. 347 of the Code.

If it came into the possession of the man who took payment of it from the maker otherwise than by theft it seems likely that it was in consequence of negligence on the part of the plaintiff or someone in the employ of Mr. Brice for which his client rather than the innocent debtor should suffer.

The defendant in paying the note undoubtedly did so *bonâ fide* and "without any notice and without any reasonable cause to suspect that the same had, by any indictable offence, been stolen." (Code s. 1050).

For the reasons indicated my opinion is that the defendant is not liable upon the note.

ALTA.

S. C.

FERGUSON v. KEMP.

Beck, J.

The question of stolen goods, as distinguished from valuable securities and negotiable instruments, is dealt with by the English Sale of Goods Act, 1893, s. 24, but this section is omitted from our ordinance. The law and its history will be found in the cases noted in Chalmers Sale of Goods Act under that section.

In the result the appeal should be dismissed with costs.

Appeal dismissed.

N. S.

S. C.

MARTINELLO & Co. v. McCORMICK.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, and Drysdale, JJ., Ritchie, E.J., and Mellish, J. January 14, 1919.

INTOXICATING LIQUORS (§ III H—90)—SHIPPED INTO PROHIBITED AREA AND PAID FOR—PROPERTY OF PURCHASER—LIABILITY TO SEIZURE—NOVA SCOTIA TEMPERANCE ACT (N.S. 10 EDW. VII. c. 2).

After intoxicating liquor has been shipped into a prohibited district, been paid for and become the property of the purchaser, it is liable to seizure under the Nova Scotia Temperance Act (10 Edw. VII. c. 2), although purchased in another province, consigned to the order of the shipper, and seized while in the custody of the station agent of a government railway. The liquor being the property of the plaintiff when seized by the inspector, s. 4 of the Act does not apply.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff in an action of replevin brought by plaintiff against the inspector appointed under the N.S. Temperance Act for the City of Sydney and the stipendiary magistrate for said city for the return of a number of cases of gin shipped to Sydney by a Montreal firm, consigned to its own order, and seized while in the custody of the station-agent of the government railway at Sydney. Reversed.

Finlay MacDonald, K.C., for appellant.

A. D. Gunn, K.C., for respondents.

Harris, C.J.

HARRIS, C.J.:—The plaintiffs ordered 40 cases of gin from Boivan, Wilson and Co. Ltd., Montreal, which were shipped to the order of Boivan, Wilson & Co. Ltd., the bill of lading being indorsed and attached to a bill of exchange drawn by the shippers on the plaintiffs and to be delivered on payment of the draft.

On March 17, 1917, the plaintiffs went to the Bank of Nova Scotia, paid the draft, and received the bill of lading.

The trial judge has found that whilst the plaintiff's agent was at the bank, and before he returned to the railway station, the inspector, under the N.S. Temperance Act, seized the liquor under the provision of s. 36 of c. 33 of the Acts of 1911 as amended by c. 46 of the Acts of 1913.

N. S.

S. C.

MARTINELLO & Co. v. MCCORMICK.

Harris, C.J.

An information was laid before the stipendiary magistrate of the City of Sydney, and after investigation, an order for the destruction of the liquor was made on August 27, 1917, by the said stipendiary magistrate under the provisions of s. 36 of c. 33 of the Acts of 1913.

On August 4, 1917, the plaintiffs issued a writ and in the statement of claim delivered on October 9, the plaintiffs allege that the inspector unlawfully seized and carried away from the Canadian government railway station at Sydney the 40 cases of gin of the value of $200, the property of the plaintiffs. In the meantime, the gin had been replevied by the plaintiffs as owners under an order, and the plaintiffs had previously on July 31, 1917, by their solicitor, demanded the gin, claiming it as the property of the plaintiffs. Prior to the payment of the draft, and before the goods arrived, the plaintiffs had notified the station-agent that they would not accept the goods, which would be returned to the shippers. The trial judge has found the following facts: (1) That the liquor was at the time of its seizure on the premises of the Canadian government railways at Sydney and was there found by the inspector and that he reasonably believed it was to be sold or kept for sale in contravention of the N.S. Temperance Act. (2) That the plaintiffs had no genuine intention to return the liquor.

Those findings are in accordance with the evidence and are not questioned. The judgment of the trial judge proceeds upon the ground that the seizure and sale of the liquor by the inspector affected a *bonâ fide* transaction in respect to liquor between a person in this province and a person in another province within the meaning of s. 4 of the N.S. Temperance Act, 10 Edw. VII. c. 2.

S. 4 reads as follows:—

> This part shall not affect any *bonâ fide* transactions in respect to liquor between a person in any portion of the province in which this part is in force and a person in another province or in a foreign country.

As was pointed out by Graham, C.J., and other judges in *Kelley & Glassey* v. *Scriven* (1916), 28 D.L.R. 319, 26 Can. Cr. Cas. 187, 50 N.S.R. 96, that section was inserted because, under certain decisions of the Privy Council, it would be *ultra vires* the provincial legislature to pass legislation to prevent the transactions mentioned in s. 4 from taking place.

N. S.

S. C.

MARTINELLO & Co. v. McCORMICK.

Harris, C.J.

With deference, I find myself unable to agree with the trial judge that this section is applicable. While it is true that the liquor had been bought in another province and shipped to Nova Scotia, it is also true that, when the plaintiffs paid for it after its arrival in Sydney, the transaction between the Montreal shippers and the plaintiffs was at an end. The liquor was then in Sydney and the property of the plaintiffs who had the title, and it became liable to seizure. The whole theory of the plaintiffs' case is that it was their liquor when seized by the inspector, and if it was, then there was no transaction (*bonâ fide* or otherwise) between a person in another province and a person in this province to be affected.

If it was not the plaintiffs' liquor, they cannot maintain the action.

I think the appeal should be allowed with costs and the action dismissed with costs.

Russell, J.
Longley, J.
Drysdale, J.

RUSSELL and LONGLEY, JJ., agreed with Harris, C.J.

DRYSDALE, J.:—I would allow the appeal and dismiss the action herein.

I do not think s. 4 of the Temperance Act has any application. The transit was at an end and the only enquiry really was, was the gin held in Sydney for sale? I think the provisions of the Temperance Act apply and are a complete answer to the plaintiffs' action.

Ritchie, E. J.

RITCHIE, E.J., concurred with Drysdale, J.

Mellish, J.

MELLISH, J., agreed with Harris, C.J.

Appeal allowed.

DOMINION CHAIN Co. v. McKINNON CHAIN Co.

CAN.

S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 4, 1919.

PATENTS (§ I—1)—PLACE OF MANUFACTURE—ASSEMBLING OF PARTS—NEW INVENTION.

A patented article made in the United States in detail in the sizes required in accordance with specific orders, the parts merely being joined together in Canada, is not manufactured nor constructed in Canada within the meaning of the Patent Act, R.S.C. 1906, c. 69, s. 38.

The one feature of placing at right angles instead of diagonally, as in other grip treads patented, the chains connecting the side chains of the grip treads is not a new and useful improvement in grip treads for pneumatic tires.

[*Dominion Chain Co.* v. *McKinnon Chain Co.* (1918), 38 D.L.R. 345, annotated, affirmed.]

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, 38 D.L.R. 345, 17 Can. Ex. 255, dismissing an action for damages by infringement of the plaintiffs' patent and declaring the patent void. Affirmed

Russell Smart, for appellants.

J G. Gibson, for respondents.

Davies, C.J.

DAVIES, C.J.:—I concur with Anglin, J.

Idington, J.

IDINGTON, J.:—The appellant, as the assignee of a patent obtained by one Weed, a resident of New York State, on December 20, 1904 in response to a petition praying for the grant thereof, for an alleged "new and useful improvement in grip treads for pneumatic tires," sought in the Exchequer Court to restrain respondent from infringing its alleged rights under said patent.

It was met by two defences amongst others: first, that the said patent if ever valid had been rendered null by reason of failure to comply with the requirement of s. 38 of the Patent Act rendering it obligatory upon a patentee to manufacture the article covered by a patent; and instead of doing so importing said article into Canada; and secondly, that the patent had always been void. Both of these defences have been, as I think rightly, maintained by the trial judge, Cassels, J., and the action dismissed.

As I agree entirely with the reasons assigned by the judge, I only desire now to add thereto a few remarks suggested by the course of the argument here.

And what I am about to say I intend to apply to and cover, so far as applicable thereto respectively, each of the said defences.

Counsel for appellant claimed that the obligation relative to

CAN.

S. C.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Idington, J.

manufacture had been complied with by an assembling of the chains imported and fitting them together with the hook fastenings which required only the application of an ordinary tool and very little labour, evidently an infinitesimal fraction of what is involved in the manufacture of the grip tread for pneumatic tires.

It seems to me the determination of the question thus raised must turn upon the nature of the patent and what the alleged inventor claimed to have invented and covered in his application for a patent, and especially by the terms of the specifications therein.

Originally there were fourteen specifications in Weed's application of what he "claimed and desired to secure by letters patent."

The majority of them were disclaimed by the appellant filing a disclaimer on November 2, 1917, over 6 months after this action had been initiated and the pleadings were at issue.

Of those remaining, counsel selected, in argument here, the tenth as that upon which he felt he might with most safety rely. It reads as follows:—

10. A reversible grip tread for elastic tires comprising two parallel lengthwise chains composed of comparatively short links, and parallel cross chains at right angles with and linked to the lengthwise chains.

I pointed out to him that by these very terms the patented article so described as a "reversible grip tread for elastic tires," etc., seemed to be a thing capable of manufacture in Canada and thus fitted to complete and render imperative the obligation imposed by s. 38, on pain of nullification of the patent.

The answer made was that it was only an improvement upon what was well known in the market that in fact was now claimed.

And then, in reply as to what the improvement consisted of, counsel pointed out the fitting of the cross chains so that they would run at right angles across the tire instead of diagonally as in accordance with the specification in an application made by someone else for an earlier patent granted by the United States.

It does not seem to me, however ingenious, that this gets the appellant out of its difficulties on the score of non-manufacture.

It is not as an improvement that the invention is claimed in a single line of its specifications. It is a complete whole that they each and all aim at a definition of.

And the very obvious purpose of the application was to claim an invention of the whole.

The objects of the invention are set out as follows:—

The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.

These grips or auxiliary treads are adapted to be applied to the traction or driving wheels of automobiles, and one of the important objects is to enable any one, skilled or unskilled, to easily and quickly apply the auxiliary tread when needed by partially deflating the tire and then placing the grip thereon, and finally, reinflating the tire to cause the transverse chains to partially imbed themselves into the periphery of said tire, whereby the auxiliary tread or gripping device is firmly held in operative position against circumferential slipping on the tire.

Another object of equal importance is to construct the auxiliary grip or tread in such a manner that it may be collapsed into a minimum space when not in use to be carried in the vehicle, and owing to the fact that it is constructed of chains with comparatively short links, it will be apparent that it may be compressed into a very small space, and therefore can be placed under the seat or in any other available receptacle in the vehicle.

Some minor objects in drawing details are given which in no way help appellant in this regard.

Nor does the usual introduction, common to all such applications, of "certain new and useful improvements" help.

There is in short nothing than can be said to point specifically to any improvement on old grip treads as the purpose of the inventor. And this is not the case of an application for a patent of a combination of old, well-known devices being applied to a new object, and an improvement of that character.

The only claim either expressly or impliedly made in way of combination is that made in the 7th specification, which is a combination of the specified grip tread with the pneumatic tire.

Nor can the combination to be patented be found, as has been found in some cases, by a consideration of the scope and purpose of the whole application, to be either expressly or impliedly in a claim for a mere improvement.

It is a claim for the whole article as a new invention that is made and hence not of an improvement that is entitled to be protected by a patent.

I would refer to Terrell on Patents, 4th ed., under the heading of "The Complete Specification" and the cases cited therein, and especially the language of Buckley, J., in *British United Shoe Co.* v. *Thompson* (1904), 22 R.P.C. 177, at p. 198, quoted therein, pp. 155

CAN.

S. C.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Idington, J.

and 156, for I venture to think the pith of the relevant law necessary for us to consider is well summed up in the last sentence of that so quoted, as follows:—

> The whole is summarised in a few words by saying that the patentee must shew what is the new thing that he claims.

Assuredly the patentee in this case has failed entirely in shewing that the new thing he claims is the alleged simple improvement counsel is reduced by force of circumstances to contend for.

If that had been all that had been claimed and specified as his claim, a very nice question might have arisen as to what, if anything, had to be manufactured in Canada. And another nice question as to whether it was not so impalpable as to be impossible of definition or when defined so evidently simple in its character as to render it impossible to claim it as a novelty.

I repeat it is, with tiresome reiteration, made manifest by the 14 claims set forth in the original specifications that what the alleged inventor had in mind was a whole article, easily capable of manufacture in Canada, and nothing of that kind having been attempted within the prescribed time, the patent should be held null.

The argument so fully and forcibly set forth in appellant's factum founded upon the extensive use of the article and the attendant prosperity arising therefrom, I respectfully submit, appears most fallacious when we use that common knowledge we are permitted to resort to relative to the recent advent of the automobile and its remarkably rapid progress in becoming an article of common use.

That, and not this adoption of the right angle crossing of a gripping chain, is the result of the expansion of trade in and manufacture of such devices as the patentee claimed.

Common knowledge again tells us that in manifold ways the parallel lines of ridges on a wheel, crossing it at right angles when intended to furnish it with a gripping capacity, was older than automobiles and in common use in many mechanical applications of the use of power.

It was not the need of inventive faculty that prevented that exact adaption of a well-known gripping device such as a ridge across a wheel, but the application thereof by means of metal across a rubber wheel in such a way as not to destroy the rubber that was the thing that was wanted.

The chain device of the Parsons' patent, which I take the liberty of thinking the patentee here in question appropriated, because that was not patented in Canada, and made the foundation of his patent got here in question, furnished what was really needed.

The fact that Maxim's attempt to construct a leather grip for a bicycle a few weeks anterior to the patent in question was tried transversely and, I imagine, more nearly at right angles than the grip in question, shews how naturally the mind turned that way would resort to the parallel right angle traversing the wheel in solving what was in question.

It was the choice of material and the least hurtful mould thereof that really was the puzzle, and that was solved by Parsons' ample demonstration anticipating and destroying any foundation for the claim in question.

He, however, apparently had the accomplishment of some other objects in view as well as the gripping, as his specifications plainly shew, and hence the diagonal shape he specified instead of the usual transverse ridge for the chains running.

There was nothing left for the alleged inventor here in question except to copy two old things. Indeed, everything he used or claimed to use had long been in one form or another anticipated; and of a patentable combination he never had the faintest conception.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—The material facts of this case appear sufficiently in the report of the judgment of the Judge of the Exchequer Court, 38 D.L.R. 345, 17 Can. Ex. 255, from which the plaintiff appeals. Although the claims in the Weed patent remaining after full effect is given to the disclaimer filed by the plaintiff, on November 2, 1917—Nos. 4, 7, 9, 10 and 12—as I read them cover much more than the mere disposition of "parallel cross chains at right angles with and linked to the lengthwise chains," mentioned in claim No. 10, the appellant now would limit the patented invention solely to this arrangement of the cross chains at right angles to the side chains. I assume that this feature is claimed by the phrase "extending transversely the shortest distance across the tread of the tire," in claim No. 4, and by the words, "extending from anchor to anchor directly across the periphery of the tire," in No. 7. In No. 9, however, there is not even a veiled reference to the right-

Anglin, J.

CAN.

S. C.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Anglin, J.

angled arrangement of the cross chains. They are described merely as "cross chains parallel with each other and connecting the lengthwise chains." They might be at any angle—right, acute, or obtuse—provided all were at the same angle to the side chains. In No. 12 the description is "cross chains disposed at substantially right angles to the lengthwise chain."

In a very recent case, *Betts* v. *Reichenberg* (1918), 35 R.P.C. 1, Younger, J., held a patent void because the particular idea or device relied on as the novelty was not set forth in two of the seven claims and the specification in some of its descriptions of the patented articles—in that case a wrist watch strap—also omitted it. Here the right angle feature is only mentioned once in the specification and then not in the vital part of it but merely in a paragraph descriptive of a figure said to be shewn as demonstrating or illustrative of "the practicability of my invention." Reading the specification as a whole, the right angle feature would appear to be quite unessential and a mere accident in the illustration and the idea that that was the real invention claimed certainly would not occur to one.

The patentee declares that,

> The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by the inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.
>
> Another object of equal importance is to construct the auxiliary grip or tread in such a manner that it may be collapsed into a minimum space when not in use to be carried in the vehicle, and owing to the fact that it is constructed of chains with comparatively short links, it will be apparent that it may be compressed into a very small space, and therefore can be placed under the seat or in any other available receptacle . . . in the vehicle.
>
> The end links at one side of the (lateral) chains are of special construction.

Flexibility in all directions, reversibility, and compactness were the objects.

Cassels, J., has pointed out other features of the invention of importance as described in the patent which have been wholly discarded. Claims No. 7 and 9 are as follows:—

> 7. In combination with a pneumatic tire, a reversible gripping device comprising endless anchors disposed at opposite sides of the tire and flexible circumferentially, and flexible members extending from anchor to anchor directly across the periphery of the tire and secured to said anchors.
>
> 9. A reversible grip tread for elastic tires comprising two parallel length-

wise chains, and additional cross chains parallel with each other and connecting the lengthwise chains.

How is it possible in view of these claims to maintain that the disposition of the cross chains at right angles to the side chains is the entire invention patented, or even an essential feature of it? In my opinion the invention claimed and for which the patent stands is much wider and covers the entire grip-tread. The idea of confining the patent to the feature of right-angled connections between the cross and side chains was purely an afterthought resorted to in an attempt more ingenious than ingenuous to meet the difficulty presented by non-manufacture and importation of the invention as described by the patentee in the specification and in the claims which his disclaimer did not remove from the patent.

Confessedly, however, this feature of cross chains at right angles to the lateral or anchor chains is the only novelty to which the patentee could lay even the semblance of a fair claim in view of the Parsons' patents (British and American) for a grip-tread consisting of side chains with transverse chains attached thereto. Although Parsons in the specification of his United States patent described the cross chains as passing "diagonally across the tire," the claims of that patent are not confined to that construction. Under them the cross chains might be placed at any angle to the side members. In his British patent the cross chains are described merely as "fitting loosely over the periphery of the tire and passing from side to side across the tire."

In his illustrative figures shewing "modes of construction and classifications" the cross chains appear as passing diagonally across the tire. In both patents, however, he distinctly says: "I do not limit myself to any particular construction of chains."

The defendant's chief witness, Prof. Carpenter, speaking of the Weed patent, says that, "a departure not exceeding 10 or 15 degrees from the right angle would not be a practical variation." Yet it would be within the Parsons' patent.

Having regard to all these facts, I am of the opinion that the plaintiff's patent is impeachable on the grounds of want of novelty and anticipation, as well as for failure to disclose and claim as the invention patented the feature which is now solely relied on. I express no opinion on the question whether the arrangement of

CAN.
S. C.
DOMINION CHAIN CO. v. MCKINNON CHAIN CO.
Anglin, J.

cross chains at right angles to the side chains was a patentable invention.

I also think the defendant's patent has been avoided under clause (*b*) of s. 38 of the Patent Act by importation.

(*b*) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported. 3 Edw. VII. c. 46, s. 4.

In *United Telephone Company* v. *Dale* (1884), 25 Ch. D. 778, Pearson, J., is reported, at p. 782, to have said:—

If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any school boy could put them together and construct the knife, surely that sale would be a breach of the injunction.

In *Dunlop Pneumatic Tyre Co.* v. *Moseley* (1904), 21 R.P.C. 274, at p. 280, Vaughan Williams, L.J., approves of this statement of the law, adding:—

If you are in substance selling the whole of the patented machine, I do not think that you save yourself from infringement because you sell it in parts which are so manufactured as to be adapted to be put together.

In *E. M. Bowden's Patents Syndicate* v. *Wilson* (1903), 20 R.P.C. 644, a sale of all the component parts of a patented brake was held to be a violation of an injunction protecting the patented invention. I find the observation of Pearson, J., in the *Dale* case (1884), 25 Ch. D. 778, cited with approval in Frost on Patents, vol. 1, at p. 377, and Fletcher Moulton on Patents, at p. 161.

The importation of *all* the component parts of the patented invention ready to be put together by some very simple process would, in my opinion, constitute an infringement of the patent quite as much as would the sale of the same parts. The importation of them by the holder of the patent would entail its avoidance under clause (*b*) of s. 38 of the Patent Act. See also Fisher and Smart on Patents, pp. 148 *et seq.* But without condemning it, I wish especially to guard myself against being committed to an indorsement of the first paragraph on p. 152, expressing the personal view of the authors of the work last cited as to the effect of the importation of "anything on which labour has been done to particularly adapt it to use in the invention."

The decision of Burbidge, J., in *Anderson* v. *American Dunlop Tire Co.* (1896), 5 Can. Ex. 82, is an authority against their view.

But we are dealing not with a case of the importation of one or more of the component parts of the patented article, but with the importation of *all* the component parts "together in such a form that they can easily be made into the combination."

I have not overlooked the cases of *Sykes* v. *Howarth* (1879), 12 Ch. D. 826; and *Townsend* v. *Howarth* (1875), 12 Ch. D. 831. The *Townsend* case was not a case, such as this is, of supplying all the component parts of the invention—parts specially manufactured according to specifications in sizes and lengths and with appropriate attaching fittings, the whole as manufactured being suitable and suitable only for the making of the patented invention. The *Sykes* case is merely authority for the general proposition that "selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the patent."

Here, according to the evidence, the side chains with hooks attached, and the cross chains with hooks attached, all made to order and of particular sizes—"manufactured to the proper lengths"—being *all* the component parts of the plaintiff's chain tire grip were imported "adapted to be put together" by a simple process which "any school boy," if endowed with sufficient strength could apply. All that was done in Canada was the insertion of the hooks of the cross chains in the links of the side chains and the clamping or nipping of these hooks together by the use of a heavy pair of pincers. That this, if not actually inconsistent with his specifications, was, at least, not regarded by the patentee as an essential operation in constructing his invention is shewn by the following extract from the specification:—

> I also contemplate detaching the cross chains from one or both of the parallel chains by making an open link or hook connection, as seen on the left hand side of Fig. 3, in which case the ends of the parallel chains might be permanently connected.

Whether what was done in Canada amounted to construction or manufacture sufficient to satisfy clause (*a*) of s. 38 of the Patent Act, even if the patent could be confined to the disposition of the cross chains at right angles with the side chains, is, to say the least, very doubtful. But if the patent claimed is wider, as I think it is, there was nothing approaching construction or manufacture in Canada of the patented article.

CAN.

S. C.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Mignault, J.

On the grounds that I have indicated, I would affirm the judgment of the Exchequer Court and dismiss the appeal.

BRODEUR, J.:—I am in favour of dismissing this appeal for the reasons given by my brother Idington.

MIGNAULT, J. (dissenting):—The whole question here is whether the Weed Canadian patent, No. 90650, for alleged new and useful improvements in grip treads for pneumatic tires, now belonging to the appellant, is a valid and subsisting patent. If so, the action taken by the appellant against the respondent for infringement should be maintained, if not, it must be dismissed.

The appellant having taken proceedings against the respondent for infringement, the latter asked for the dismissal of the action on three grounds:—

1. The patent is not a valid invention within the meaning of the Patent Act.

2. The patent is void because the owners of the patent did not within 2 years from the date thereof commence, and, after commencement, continuously carry on in Canada the construction or manufacture of the invention patented, as required by s. 38 of the Patent Act.

3. The plaintiff, after the expiration of 12 months from the granting of the patent, imported into Canada the alleged invention.

The trial judge in the Exchequer Court, Cassels, J., maintained these three grounds of defence, and dismissed the plaintiff's action, and the latter now appeals to this court.

I am, with deference, of the opinion that the second and third grounds of defence are not made out. S. 38 of the Patent Act, which provides for both, is in the following terms:—

> Every patent shall, unless otherwise ordered by the Commissioner as hereinafter provided, be subject, and expressed to be subject, to the following conditions:—
>
> (a) Such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period or an authorized extension thereof, commence, and after such commencement, continuously carry on in Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada,
>
> (b) If, after the expiration of 12 months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of

them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported.

As to non-manufacture in Canada, the requirement is that the patentee or his legal representatives shall within 2 years from the date of the patent or an authorised extension thereof commence, and after such commencement, continuously carry on in Canada *the construction or manufacture* of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

The alleged invention consists of a lateral chain around the wheel or tire of an automobile or other similar vehicle, to which are attached several cross chains crossing the tire so as to prevent the wheel from skidding when the automobile is being driven along a slippery road.

The evidence shews that both the lateral and cross chains were, during the 2 years, manufactured in the United States and imported into Canada, where, at a small establishment at Bridgeburg, Ontario, they were fastened together so as to be ready to be fitted on the tires. When orders were received, and they were not very numerous during the first years, specifications were sent to the manufacturers of the chains, and then chains of the required lengths were made, sent to Canada, and were there fastened together in the manner required by the patent of invention.

I cannot escape the conclusion that this was at least a *construction* of the patented invention in Canada for the whole invention consisted of fastening the cross chains to the lateral chains, so that they could be fitted on the tires. Moreover, it was such a construction of the invention patented that, in the words of s. 38, "any person desiring to use it" could "obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada." Consequently, in my opinion, the defence of non-manufacture fails.

The same reason disposes of the defence of importation into Canada of the alleged invention. What the patentee imported into Canada was the chains, which could have been used for other purposes, and not the invention. The latter, as I have said, was constructed in Canada.

CAN.

S. C.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Mignault, J.

There remains the first ground of defence, whether the alleged invention was, at the date of the patent, a valid subject-matter for a patent of invention. On this ground, after serious consideration, I have come to the conclusion that this defence also fails and that the judgment of the Exchequer Court should be set aside.

The case, I must frankly say, is one of considerable difficulty, and I have not felt entirely free from doubt. Such a device as Weed patented comes very close to the border line which separates invention from no invention. I have very briefly described it, and the only novel feature that the appellant claims has been achieved, the placing of the cross chains at right angles to the lateral chains.

The question now is whether this arrangement of the cross and lateral chains has sufficient novelty to entitle it to a patent of invention. To answer this question I will briefly give the history of this particular art.

The evidence made as to the prior art shews that several devices had been manufactured and were subsequently patented with a view to prevent the skidding of rubber tires. The really pertinent alleged anticipations are those of Maxim and Bardwell, 1901, and of Parsons, 1903, these dates being those of the above patents, and the appellant's patent having been granted in 1904.

The Maxim and Bardwell device was made of leather or other tough, pliable material, and consisted of side or lengthwise members to which were attached cross members or straps, some of which were arranged to be strapped around the tires so as to hold the whole appliance firmly in place. The cross members were placed at right angles to the side members. Mr. Maxim, one of the inventors, examined as a witness at the trial, stated that the invention did not prove a success, for it was impossible to strap on the appliance tightly enough to keep it in place, and, moreover, the leather would become wet, and then it would stretch, lose its strength and finally break. He says that the straps could not be put on otherwise than at right angles, adding that

> the general idea seemed to be that we must have something diagonal across the tire, and it was the general opinion that this was necessary, but when it came to leather the proposition was different owing to the flexibility of the leather to have it across the tire at right angles, and by fastening it down very tightly.

The difficulty as to other materials was that it was then considered that the use of metal instead of leather would injure the

tire, so the Parsons' patent was a distinct advance in the art, for he used metal cross chains attached to a lateral ring made out of wire or of chains (the English patent mentions both wire and chains, the American one merely wire or wire rope or other suitable material). But following the prevailing idea mentioned by Mr. Maxim that the cross members should be placed diagonally and not at right angles to prevent skidding, Parsons' cross chains were so placed and described in his specification, although his claims and especially the claims of the American patent, merely state that the cross chains extend across and around the periphery of the wheel. These claims, however, should be construed to mean the form of construction specified, that is to say, the diagonal arrangement of the cross chains.

The evidence shews conclusively to my mind that the then prevailing idea that the cross members should be placed diagonally and not at right angles to prevent skidding was a fallacy. It was thought the diagonal position would arrest an incipient skidding movement, but it was found that once the skidding had commenced, Parsons' device would not stop it, so that practical experience shewed that the desired end was not obtained by the Parsons' grip tread. This device, had, however, a creeping effect which was useful to prevent the wearing of the tire.

It was under these circumstances that Weed designed a grip tread made of chains like Parsons', with lateral and cross chains, but the latter were placed at right angles to the lateral chains, and this arrangement was found to produce the desired effect, for the right-angle position of the cross chains altogether prevents incipient skidding. Moreover, although the inventor appears not to have foreseen this result, there was the same creeping effect as with the Parsons' grip tread, and, like the latter, Weed's device was reversible.

The evidence shews that, after the fallacy of the diagonal arrangement of the cross chains had been demonstrated by actual experience, the success of the Weed device was conspicuous and lasting, and while at first a very small establishment was sufficient, to-day there is an immense manufactory of Weed's device at Niagara Falls, Ont., representing an investment of half a million dollars for the building and equipment, and of an equivalent amount for material and stock, and the Parsons' grip tread has been driven out of the market by the Weed invention.

CAN.

S. C.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Mignault, J.

This success of the appellant's patent, as well as the history of the art which I have very briefly traced, have convinced me that there is here sufficient invention to sustain the patent. I think that Weed, contending, as he did, against a prevailing fallacy, evolved something really new, and based on different principles as to skidding prevention devices. One of the best tests of patentability is the fact that the alleged invention has supplied a long-felt need which previous devices had failed to satisfy. Commercial success, of course, is not the only test, and may in some cases be an insufficient one, of invention, but it certainly goes very far to prove that an invention has really been made. Referring to the evidences of invention, Fletcher Moulton, in his work on Letters Patent for Invention, page 22, says:—

> One class of such evidence is of supreme importance. If the development be one of great utility, and one which has satisfied a long-felt want in the trade, the inference is almost overwhelming that it required inventive ingenuity or it would have been made before, that is presuming that there has been no material change in the conditions of the trade, such, for example, as a new demand caused by a change of fashion.

It is suggested that the popularity of the Weed grip treads may have been caused by their lightness as compared to the Parsons' appliance, but even this would be a merit in a matter of this kind.

And should it be said that all the elements here are old and were well known, I would consider that as furnishing no insurmountable objection to the patent, if these old elements are brought or combined together in a new form and have satisfied a long-felt need of the trade.

Of course the question of the novelty of an invention is in each case a question of fact, so that other cases, where other matters and problems were involved, are not always a very secure guide. However, I think that I can rely on the statement of Lord Halsbury in *Taylor* v. *Annand* (1900), 18 R.P.C. 53, at pp. 62 and 63, with regard to the principles governing the class of cases where a very useful improvement has been made meeting the needs of the trade, but involving nothing more than the combination of old and well-known elements.

The trial judge expressed the opinion that under the evidence the Weed device with the cross chains at right angles would be an infringement of the Parsons' patent, the cross chains of which would still be diagonal if placed at so small an angle from the right angle

as fifteen degrees. It must, however, be observed that Parsons, not having obtained a patent in Canada, no question of infringement of his patent here can arise. Moreover, the counsel of the appellant stated at the hearing that his clients owned the Parsons' patent in the United States, so they could not be considered as infringers there. I may add that the criterion of novelty and that of infringement are not the same. A device improving a patent can be patented, although it might be an infringement of the original patent. Frost on Patents, 4th ed., vol. 1, p. 349. Of course, the patentee of the improvement would not have the right to use the original invention, but this would not affect his patent for the improvement. Patent Act, s. 9.

Since writing what precedes, I have had the advantage of reading the opinion of my brother Anglin, and I will merely say that I have not overlooked the question discussed at bar with regard to the claims of the patent sued on. During the pendency of these proceedings in the court below, the appellant filed a disclaimer of certain claims contained in Weed's patent, and, as I understand the respondent's contention, as stated in its factum, it is that the claims retained were restricted to the placing of the cross chains at right angles, and that there is no originality in this form of construction. I do not find that the respondent raised any question whether the remaining claims, as restricted to the right-angle arrangement, were too wide to support a patent for such an arrangement, assuming that there is sufficient originality in this arrangement of the cross chains. And as I feel constrained to decide that the right-angle arrangement of the cross chains is an advance on the prior art, and that by means of this arrangement the patentee has successfully solved the problem of discovering an effective anti-skidding device, I would not deem myself justified in setting aside this very useful patent for the reasons now urged in connection with the disclaimer and the remaining claims.

For these reasons, I state as my opinion that the appellant's patent is a valid patent of invention. The appeal should, therefore, be allowed with costs in this court and in the court below.

Appeal dismissed.

B. C.

C. A.

REX v. NEVISON.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. February 11, 1919.

COURTS (§ I B—24a)—CRIMINAL LAW—ACCEPTING BRIBE—OFFENCE COMMITTED BEYOND COUNTY LIMITS—JURISDICTION OF COUNTY JUDGE TO TRY.

A County Court Judge of the County of Vancouver has jurisdiction under s. 577 of the Criminal Code to try a sleeping car conductor on a through train from Calgary to Vancouver for accepting a bribe from persons to permit them to ride free in his car, although the offence was committed prior to the arrival of the train within the boundaries of the County of Vancouver. The words "within the jurisdiction of said court to try" in the section have reference, not to the territorial limits of the court, but to any crime or offence within the competence of the court to try.

[*The King* v. *McKeown* (1912), 8 D.L.R. 611, 20 Can. Cr. Cas. 492, followed.]

Statement.

APPEAL by way of stated case from the judgment of Cayley, Co.J. Conviction approved.

W. W. B. McInnes, for prisoner.

H. S. Wood, for Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The prisoner was a sleeping-car conductor in the employ of the C.P.R. Co. on a through train from Calgary to Vancouver. He accepted bribes from two persons to permit them to ride free in his car. This happened prior to the arrival of the train within the boundaries of the County of Vancouver. He was arrested in Vancouver, given a preliminary hearing, and committed to take his trial before the then next competent court of criminal jurisdiction. Subsequently he elected to be tried before the County Court Judges Criminal Court of Vancouver County, and was there tried and convicted of having corruptly accepted bribes contrary to the statute.

With the prisoner's guilt or innocence we have nothing to do. The only questions submitted to us relate to the jurisdiction of that court to try the accused.

Two sections of the Criminal Code were relied upon by counsel for the Crown as giving the said court jurisdiction, namely, s. 584 (*c*) and s. 577.

With respect to the first, I am of opinion that that section is not applicable to the facts of this case as we are concerned with them, since the charge of theft was dismissed and that of acceptance of a bribe only sustained.

A good deal of argument hinged on the meaning of the word "through" as used in said section, but in the view I take, as above

expressed, it is unnecessary to decide whether "through" means merely "into" or "into and out of the county." The first question submitted to us, however, has to do with this controversy, because it appears that before permitting the accused to plead, his counsel objected to the jurisdiction of the court on the ground that as the train in question did not pass into and out of the County of Vancouver it could not be said to have passed "through" that county. The objection was overruled and we are asked: "Was I right in overruling the said objection?" The question is, for the reasons above stated, irrelevant, and, therefore, does not call for an answer.

S. 584 has to do with offences committed on or in respect of mail or mail carriers, or "on any person or in respect of any property in or upon any vehicle employed in a journey."

It is admitted that there is no question affecting mail or mail carriers involved in this case. Now, the acceptance of a bribe by a car conductor is not an offence committed on any person in or upon a vehicle, nor on any property in or upon a vehicle.

This reasoning also answers question 2 (b) which reads: "Had the County Court Judges' Criminal Court of Vancouver jurisdiction under s. 583 of the Criminal Code?" which answer is—no. I do not say that the court could not entertain the charge of theft, but that is immaterial in view of the dismissal of that charge.

The only remaining question is question 2 (a), which reads as follows: "Had the County Court Judges' Criminal Court of Vancouver jurisdiction under s. 577 of the Criminal Code?" My interpretation of that section is that the requisite jurisdiction was thereby given to the court below. Jurisdiction is given to "every court of criminal jurisdiction," and is not restricted, as was contended by Mr. McInnes, to superior courts.

The words, "within the jurisdiction of the said court to try," have no reference to the local territorial jurisdiction of the court, a limitation to which would be manifestly absurd when the object of the section is plainly to give jurisdiction territorially beyond such local limits in the circumstances set out in the section. This interpretation of the meaning of s. 577 is in harmony with the decision of the Alberta Appellate Division in *Rex* v. *Thornton* (1915), 30 D.L.R. 441, 26 Can. Cr. Cas. 120, 9 A.L.R. 163.

B. C.

C. A.

REX v. NEVISON.

Galliher, J.A.

Question 2 (a) should, therefore, be answered in the affirmative.

MARTIN, J.A., dismissed the appeal.

GALLIHER, J.A.:—There is no substance in the first point reserved and I would answer that in the affirmative.

I am equally clear that the trial judge had jurisdiction under s. 577 of the Criminal Code. The words in s. 577 "within the jurisdiction of such court to try" have reference not to the territorial limits of the court, but to any crime or offence within the competence of the court to try. Such being my view, it follows that s. 577 meets any contention raised as to the trial being held where the offence is actually committed.

This question (a) being answered in the affirmative it becomes unnecessary to consider question (b).

I might point out that in the case of *The King* v. *Lynn* (1910), 17 Can. Cr. Cas. 354, 3 S.L.R. 339, relied on by Mr. McInnes, Lamont, J., uses this language at p. 359:—

> The charge alleges that the journey on which the offence was committed was one from Swift Current to Parkbeg, both within the Judicial District of Moosejaw. So far as we can gather from the charge, the train, while on the journey during which the offence was committed, did not pass through any judicial district other than the judicial district of Moosejaw. If the charge had alleged that the offence was committed on the train in the course of a journey from Swift Current to Regina, I could see some force in the contention that this section enabled the Crown to proceed here because in that case the offence would be considered as having been committed in the Judicial District of Regina as well as in the Judicial District of Moosejaw.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The counsel for the appellant, Mr. W. B. McInnes, in a very able argument, submitted that there was no jurisdiction in the County Court Judges' Criminal Court, County of Vancouver, to try the accused—the offence admittedly being actually committed outside the boundaries of the County of Vancouver. That whatever jurisdiction there might be under s. 577 of the Criminal Code in respect to the offence, no jurisdiction extended to the County Court Judges' Criminal Court. That the common law rule that the accused should have been tried in the county where the crime was committed had not been followed and that there was no statutory authority for any departure from the rule in the present case. Further, that jurisdiction could not be claimed in the present case, under s. 584 (c) of the Criminal Code, the "vehicle," the passenger train, not having passed through the County of Vancouver (see *Provident*

Trust Co. v. *Mercer County* (1898), 170 U.S.R. 593, at 602). In that the railway depot in the City of Vancouver at which the train stopped is situate within the County of Vancouver not at the western boundary of the county, and that the court was for this reason *coram non judice*, with the still further objection that in any case no offence was established under s. 584 (*a*) in that the accepting of the gift or bribe was not an offence committed "in respect of any property" within the purview of the statute. I do not find it necessary to consider s. 584 (*c*) but were I called upon to do so as at present advised, I am inclined to the view that the offence of which the accused has been found guilty comes within the meaning of the language as set forth in s. 584 (*c*). In my opinion, s. 577 is conclusive and conferred jurisdiction upon the County Court Judges' Criminal Court of the County of Vancouver, the offence being committed in the Province of British Columbia, the accused being "in custody within the jurisdiction of such court" being a court of "criminal jurisdiction" within the purview of s. 577 of the Criminal Code. The accused elected to be tried before the court and consented to be so tried as required under the provisions of the Criminal Code without the intervention of a jury, although it would appear that counsel for the accused objected before he allowed the accused to plead that there was no jurisdiction in the County Court Judges' Criminal Court of Vancouver to try the accused for the offences charged. The accused was acquitted upon the charge of theft, but convicted under s. 3 of the Secret Commissions Act, 1909 (8-9 Edw. VII.). It would appear to me that parliament has, in apt words, in s. 577 of the Criminal Code conferred jurisdiction which admitted of the County Court Judges' Criminal Court of the County of Vancouver exercising the jurisdiction it did in trying the accused and finding him guilty of the offence as charged under the Secret Commissions Act, 1909, and an authority for so deciding is to be found in the decision of the Court of King's Bench, Quebec (appeal side) *The King* v. *McKeown* (1912), 8 D.L.R. 611, 20 Can. Cr. Cas. 492 (also see *Rex* v. *Harrison* (1917), 41 D.L.R. 381, 29 Can. Cr. Cas. 159, 10 S.L.R. 434). The court there upheld a conviction of the Court of Sessions at Montreal, the complaint in that case being laid in Victoriaville—the offence being committed in the District of Athabasca—the accused being arrested in Montreal, and tried

B. C.
C. A.
REX
v.
NEVISON.
McPhillips, J.A.

and convicted in Montreal. It is fitting that, in the carrying out of the criminal law of Canada, and the exercise of jurisdiction by the courts of criminal jurisdiction throughout Canada, that there should be as much uniformity of decision as possible and with such high authority supporting us, the exercise of jurisdiction by the County Court Judges' Criminal Court of the County of Vancouver as the Court of King's Bench, Quebec (appeal side), pronounced as long ago as 1912 and no legislation from the Parliament of Canada declaring to the contrary, it can be well concluded that the intention of parliament has been rightly interpreted, couched as the language of s. 577 is in apt and conclusive words indicative of the intention to confer the jurisdiction here challenged. I would, therefore, answer the question in the affirmative, that the County Court Judges' Criminal Court of the County of Vancouver had jurisdiction under s. 577 of the Criminal Code, and do not find it necessary to give any considered opinion as to whether there was jurisdiction under s. 584 (*c*) of the Criminal Code, as in my view there is no necessity to invoke the application of that section to sustain the conviction. It follows that, in my opinion, the conviction should be sustained.

Eberts, J.A

EBERTS, J.A., dismissed the appeal. *Appeal dismissed*

CAN.
EX. C.

CANADA SHIPPING Co. Ltd. v. SS. "TUNISIE."
DEPPE v. SS. CABOTIA.

Exchequer Court of Canada, Maclennan, Dep. L.J. in Adm. March 2, 1918.

COLLISION (§ I A—2)—HARBOUR—INCOMING AND OUTGOING VESSELS—DUTY. A vessel has no right to manœuvre her entry into the basin of a harbour while another vessel was leaving her moorings ready to come out; under such circumstances it is the duty of the former to remain below the canal entrance, in order to give way to the out-going vessel, and her failure to do so will render her liable in case of collision.

[*Taylor* v. *Burger* (1898), 8 Asp. M.C. 364, followed.]

Statement.

ACTION for damages resulting from a collision.

A. Geoffrion, K.C., for plaintiff.

Meredith Holden & Co., for defendant.

Maclennan, Dep. L.J.

MACLENNAN, Dep. L.J.:—These two actions *in rem* arise out of a collision between the SS. "Tunisie" and the SS. "Cabotia" which took place in the harbour of Montreal on the morning of October 28, 1917. The owner of each vessel sues the other for damages, each alleging that the collision was due to the fault of the other.

CAN.

Ex. C.

CANADA SHIPPING CO. LTD. v. S.S. "TUNISIE."

Maclennan, Dep. L.J.

The SS. "Tunisie" was a steel single-screw steamer 310 ft. long, 42 ft. wide, having a gross tonnage of 2,470 tons, and at the time was drawing about 21 ft., being loaded and ready for sea. The SS. "Cabotia" was a single-screw wooden steamer 243 ft. long, and 35 ft. wide, drawing 13.10 ft. and having a gross tonnage of 1,530 tons. The officers and pilot on the SS. "Tunisie" gave very clear and satisfactory evidence regarding the movements of the steamers immediately before the collision. The evidence of the master and others on board the SS. "Cabotia" is far from satisfactory, and I accept the evidence of the master, pilot and officers of the "Tunisie" in preference to the testimony given on behalf of the other steamer. The "Tunisie" had been lying at the Grand Trunk quay in the Windmill Point Basin, where she took her cargo aboard and was ready for sea early on the morning of Sunday, October 28, 1917. Windmill Point Basin can be described as a slip about 300 ft. wide and 2,000 ft. long; it opens into a large basin approximately about 1,000 ft. square between the lower end of the Lachine Canal and Alexandra Pier, and on the downstream side leads into the main channel through the harbour of Montreal. The "Tunisie" was moored about 600 or 700 ft. from the outer end of the Windmill Point Basin and on its west side stem inward. Shortly before 6.50 a.m. on October 28, last, a competent licensed pilot came on board the "Tunisie" and took charge. The steamer was unmoored, the engines put slow astern for a minute or two, a signal of three blasts was given twice and with a tug at the stern and another tug at the bow the steamer was slowly pulled out into the middle of the basin, the stern pointing downward to the mouth of the basin, with the intention to proceed down the harbour to turn round and proceed to sea. The master of the "Tunisie" swears that when his steamer was unmoored and left the quay no other steamer was in sight; but when he had proceeded about half a ship's length he saw the "Cabotia" standing still in the large basin between the lower end of the canal and the Alexandra Pier, and when at a distance of about 700 ft. from the "Cabotia" another signal of three blasts was given on the whistle of the "Tunisie." When the latter arrived at about 250 ft. from the end of the Windmill Point Basin, the master of the "Tunisie" saw the "Cabotia" moving forward, and a signal of three blasts was given again on the whistle of the "Tunisie." Both these signals were heard by the

CAN.

EX. C.

CANADA SHIPPING CO. LTD. v. S.S. "TUNISIE."

Maclennan, Dep. L.J.

master of the "Cabotia." No signal of any kind was given by the "Cabotia." The "Cabotia" appeared to be endeavouring to enter the west side of the Windmill Point Basin, came forward, reversed her engines and then came forward again, apparently at full speed. The "Tunisie" was well to the starboard or east side of the Windmill Point Basin, being pulled out by the two tugs. While the "Cabotia" was manœuvring ahead and astern she was affected by a strong northwest wind blowing 27 miles an hour on her starboard side, which tended to carry her to the east side of the large basin where she was performing these manœuvres. The "Cabotia" made no allowance for this wind. At 7.13 a.m., when it became apparent to those in charge of the "Tunisie" that there was going to be an accident, the engines of the "Tunisie" were put full speed ahead in order to lessen the effect of the impending collision. Notwithstanding this the "Cabotia's" stem came into collision with the stern of the "Tunisie" at 7.15, causing considerable damage to both steamers. The master of the "Cabotia," while he was manœuvring for the purpose of entering the Windmill Point Basin, was alone in his wheelhouse steering and handling his vessel. The "Cabotia" had come down the Lachine Canal a little to the west and parallel to Windmill Point Basin, and her master admits that, when he came out of the last lock and entered the basin between the end of the canal and the Alexandra Pier, he turned to starboard, and when he was about 200 ft. from the end of the pier on the west side of the Windmill Point Basin, he saw the "Tunisie" in mid-channel at a distance of about 600 ft., being towed out by the tugs. He admits having heard the "Tunisie's" signal of three blasts twice. No signal was given by the "Cabotia" to indicate her movements or that she wished to enter the Windmill Point Basin, but she continued to manœuvre for that purpose until the collision.

My assessors advise me that the pilot and master of the "Tunisie" took all proper and necessary precautions before starting to go out of the Windmill Point Basin; that the "Tunisie" left nothing undone which she should have done while attempting to go out; that her manœuvres were right; that the "Cabotia" was not justified in manœuvring to enter the basin while the "Tunisie" was coming out and should have remained below the canal entrance where she was in safety, until the "Tunisie" had passed clear;

CAN.

Ex. C.

CANADA SHIPPING CO. LTD. v. S.S. "TUNISIE."

Maclennan, Dep. L.J.

that the "Cabotia" was at fault for not blowing her whistle to indicate what her intentions were; that she was not handled in a seamanlike manner; that her master should have had the wheelsman with him on the bridge and that his injudicious conduct was the cause of the collision.

The evidence establishes that, when the "Tunisie" was about half way out of the Windmill Point Basin and in full view of the "Cabotia," the latter was in a position of safety and instead of remaining in that position she began manœuvring to enter the Windmill Point Basin while the "Tunisie" was coming out. These manœuvres ended in the collision.

In the case of *Taylor* v. *Burger*, 8 Asp. M.C. 364, the Lord Chancellor, p. 365, referred to "the universal rule that an outgoing vessel should get clear of a dock or harbour before the incoming enters," and the House of Lords applied this rule and held that, where a steamer was approaching a lock leading from a basin into a dock at the time another vessel was coming out, the incoming vessel should give way to the out-going vessel.

Having regard to the evidence and the advice of my assessors, I find that the collision between these steamers was caused solely by the improper and negligent navigation of the "Cabotia." There is no blame imputable to those in charge of the "Tunisie."

There will be judgment, therefore, against the SS. "Cabotia" and her bail for damages and costs, with a reference to the deputy district registrar to assess the damages.

The action against the SS. "Tunisie" will be dismissed with costs. *Judgment accordingly.*

MILLS v. CONTINENTAL BAG and PAPER Co.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 14, 1918.

CONTRACTS (§ II D—145)—CONSTRUCTION—PARTICULAR WORDS—"ALL MATERIALS EXCEPTING ROCK."

Under a contract to "do the excavating of all materials excepting rock" under a building, the court held that the word "rock" should be considered as having its usual meaning of large stones or boulders, and that the contractor was under the circumstances entitled to charge extra for removing these.

Statement.

APPEAL by the plaintiff from the judgment of Gunn, Jun. Co. C.J., dismissing an action to recover $659.90 for excavating rock for the foundations of a building erected for the defendants.

ONT.

S. C.

MILLS v. CONTINENTAL BAG AND PAPER CO.

The plaintiff was a contractor, and he agreed to do the excavating of all materials, "excepting rock." He claimed extra payment for removing certain large boulders; and the question in the action, which the trial Judge decided in favour of the defendants, was whether these boulders were or were not "rock" within the meaning of the agreement.

E. P. Gleeson, for appellant; *W. L. Scott*, for respondents.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—Appeal from judgment of Gunn, Co.C.J., who dismissed the action without costs.

The appellant was a contractor, and agreed to "do the excavating of all materials, excepting rock, under the entire factory building of the owners (in) Ottawa and remove same from the premises, disposing of same as he may see fit."

The price was to be "$1 per cubic yard for all material removed by the said contractor."

During the work, the appellant encountered large boulders and removed them, and this claim is for payment of the cost thereof, upon the ground that the contract did not include them. The appellant says that, when he encountered these boulders, weighing from 1,700 to 7,500 lbs., he went to the respondents' architect, and said they could not be excavated at the contract price, but were worth three times the cost of earth excavation, and was instructed to proceed, and told that he would be treated well—and would be paid. He repeats this, and the architect will not contradict him, saying however that he "has no recollection of making such a statement." The appellant's story is corroborated by what was done when the final certificate was issued. That certicate was, according to the architect, for more cubic yards than the excavation really measured, and also included the space occupied by the piers. This was to compensate the appellant for the general difficulty he had in doing the work, removing boulders and pieces of boards and old roots. In addition to this, the architect gave him a letter to the owners recommending them to give him a bonus of $150, the place being exceptionally hard to work in, on account of the piers, and "also on account of the large number of heavy boulders which he encountered as the work proceeded."

The learned County Court Judge says he rather inclines to

the appellant's story as to the statement he says was made to him by the architect, but dismisses the action because he concludes that boulders are not "rock" as that word is used in the contract. He properly discards the evidence given as to the practice and custom prevailing in Ottawa or followed under contracts which specifically classify material. None of it was admissible because it did not profess in any way to conform to the rule governing evidence explanatory of the meaning of doubtful words, nor to that relating to custom.

I think the word "rock" must, under the circumstances of this case, be considered as having its usual meaning. "Rock" was not to be excavated—and this word, according to the dictionaries, includes stratified as well as loose rock. The Imperial Dictionary in 1859 gives it as meaning "a large mass of stony matter . . . bedded in the earth or resting on its surface." Murray's Dictionary, 1914, calls it "a large detached mass of stone; a boulder." The Century Dictionary, 1911, defines it as "a mass, fragment, or piece of that crust (of the earth), if too large to be designated as a stone, and if spoken of in a general way without special designation of its nature." This dictionary says that a stone is "a piece of rock of small or moderate size."

The Encyclopædia Britannica practically adopts the definition of rock just quoted.

There is no judicial authority as to the meaning of the word, save in a case of *Drhew* v. *Altoona City* (1888), 121 Penn. St. 401, in which the Supreme Court of Pennsylvania in appeal decided that "rock" excavation included "all the divers qualities of what was properly called rock, encountered in the progress of the work" (p. 421). The agreement there provided that the contractor was to be paid 35 cents per cubic yard for earth excavation, and 75 cents for rock excavation.

I think the same rule must be applied in this case, and that rock, either in stratified or boulder form, was not included in the written contract, but may be recovered for under the circumstances disclosed here. Enough evidence was given to enable the Court to conclude that the boulders charged for were of sufficient size to distinguish them from stones or small boulders such as were buried, and there seems no reason for sending the case back upon that point.

ONT.

S. C.

MILLS v. CONTINENTAL BAG AND PAPER CO.

Hodgins, J.A.

The case quoted also refers to the limitation upon the functions of an architect, i.e., that he cannot make a new contract for the parties, and that they are not bound by his classification or certificate unless they have expressly agreed to accept it as final.

I think the architect's measurements are the most accurate and can be used as a basis for payment.

He gives the cubic yards at 4,386. This is all the appellant is entitled to at $1 per yard. No proof other than the testimony of the appellant was given as to the cost of the excavation of these boulders, namely, $659, and it stands uncontradicted. The price he mentioned to the architect, namely, three times that of earth, would make it $750.

Taking the lower figure, $659, and adding it to $4,386, the total is $5,045, of which the appellant has received $4,650, leaving a balance due him of $395: judgment should be entered for the appellant for this amount, with costs throughout.

Appeal allowed.

CAN.

EX. C.

McCORMICK v. SINCENNES-McNAUGHTON LINE, Ltd.

UNION LUMBER Co. Ltd. v. SINCENNES-McNAUGHTON LINE Ltd.

Exchequer Court of Canada, Maclennan, Dep. Loc. J. in Adm. April 5, 1918.

TOWAGE (§ I—1)—NEGLIGENCE—DEFECTIVE STEERING GEAR—INEVITABLE ACCIDENT.

A steering wheel in a tug, rendered inoperative by a defect in the steering gear, will not relieve the owners of the tug from liability for damage to a tow, resulting from the grounding of the tow when released by the master of the tug, on the ground of inevitable accident; the accident could have been avoided by passing the tow to another tug which was there to assist.

Statement.

ACTIONS *in personam* to recover damages resulting from the negligent performance of a towage contract.

R. C. Holden, K.C., for plaintiff.

A. Geoffrion, K.C., and *Peers Davidson*, K.C., for defendant.

Maclennan, Dep. L.J.

MACLENNAN, Dep. Loc. J.:—These two actions *in personam* were tried together and on the same evidence, as they both arose out of the same mishap. Plaintiff McCormick is the owner of the barge "Middlesex," and the Union Lumber Co. is the owner of the schooner "Arthur," which, along with another barge, the "Dunn," were being towed down the River St. Lawrence, near Morrisburg, Ontario, on August 13, 1917, by the defendant's

tug "Myra," which was accompanied by the tug "Long Sault," also belonging to the defendant. The tow was made up of three vessels lashed abreast, the schooner "Arthur" in the middle, the barge "Middlesex" to her port, and the barge "Dunn" to her starboard side. Each vessel of the tow had a line of about 150 ft. attached to the "Myra." The tug "Long Sault" was lashed to the port side of the "Myra." The towing and steering was done entirely by the "Myra," which was equipped with a steam steering gear and was steered from a wheel on the top of the wheel-house. This steering-wheel turned a shaft on which there was a sprocket wheel which carried a chain that passed over another sprocket wheel in the wheel-house, where there was a small engine which controlled and operated the rudder. The sprocket wheel on the shaft on the top of the wheel-house was held in place by a key pin. This key pin fell out, the shaft jammed, and the steering-wheel became inoperative. When this happened the tug and tow were opposite Ogden Island, a short distance above Canada Island, and in a current running about ten miles an hour. The captain and mate of the "Myra" were on the top of the wheel-house when the steering gear failed, the captain being at the wheel. The tug took a sheer to starboard and in the next 10 or 15 minutes made a complete circle, carrying the tow around with it. The tow lines were then cut on the "Myra" and the tow grounded and went ashore. When the captain of the "Myra" saw that something was wrong with the steering gear, he sent the mate to the wheel-house to ascertain the cause. The mate reported that the chain had fallen off the sprocket wheel, and he then went aft to place the tiller in position in order to steer by hand, but before he could use the tiller the tow lines were cut without warning or notice to those on the tow, with the result that both barges and the schooner went ashore on Canada Island. The plaintiffs in their respective actions claim from the defendant damages arising from the striking and grounding of their respective vessels, due, as they allege, to the fault and negligence of the defendant and its representatives and to the improper condition of the tug. The defendant pleads that the grounding occurred as the result of inevitable accident to the steam steering gear which, suddenly and without warning, failed to operate and which had always been in perfect working order, and from all appearances

CAN.

EX. C.

MCCORMICK v. SINCENNES-MCNAUGHTON LINE LTD.

UNION LUMBER CO. LTD. v. SINCENNES-MCNAUGHTON LINE LTD.

[Maclennan, Dep. L.J.

was in good condition up to the occasion in question, that it had been periodically and properly inspected, and no further or additional inspection could have prevented the accident, and that there was no fault on the part of the defendant or its servants.

The company defendant undertook to tow the plaintiff's vessels down the river and the defendant was bound to use reasonable care and skill in the performance of its undertaking. The duties of the tug under circumstances like these were clearly laid down by the Privy Council in *The Julia* (1861), Lush 224, a case under a contract of towage, where Lord Kingsdown, delivering the judgment of the court, said, p. 231:—

> When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident. These are the plain rules of law by which their Lordships think that the case is to be governed.

This statement of the law was later approved by the House of Lords in *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 220.

The defence to these actions is that the grounding of the tow was caused by an inevitable accident. In *The Uhla* (1867), 19 L.T. 89, Dr. Lushington said, p. 90:—

> Inevitable accident is that which a party charged with an offence could not possibly prevent by the exercising of ordinary care, caution and maritime skill. It is not enough to shew that the accident could not be prevented by the party at the very moment it occurred, but the question is, what previous measures have been adopted to render the occurrence of it less probable?

This definition of inevitable accident was followed and approved by the Privy Council in *The Marpesia* (1872), L.R. 4 P.C. 212. In the case of the *William Lindsay* (1873), L.R. 5 P.C. 338, at 343, where a ship attempted to cast anchor, but failed because the cable became jammed in the windlass, the vessel collided with another ship, and the defence of inevitable accident was sustained. Sir Montague E. Smith, delivering judgment in the Privy Council, said:—

The master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed.

Later the Court of Appeal in the *Merchant Prince*, [1892] P. 179, considered and applied the defence of inevitable accident in a case where the steam steering gear of the defendant's vessel failed to act and a collision happened, for which the defendant was sued in the Admiralty Court, and the defence of inevitable accident was sustained. The judgment was reversed in the Court of Appeal, where Lord Esher said that the only way for the defendant to get rid of liability for the accident was to shew that he could not by any act of his have avoided the result. In that case the steam steering gear failed because the chain connecting with the rudder had stretched and kinked and the gearing jammed. Fry, L.J., observed that this was a danger which any person who had applied his mind to the matter might have avoided by the use of the hand steering apparatus instead of the steam.

The plaintiff's cases are based upon allegations of insufficient equipment and crew on the tug and upon failure to take effective measures to save the tow between the time the steering gear failed and the tow lines were cut.

The first question to be considered appears to be: When the steam steering gear on the "Myra" failed, could the tow have been saved by the exercise of ordinary maritime skill and careful seamanship on the part of those in charge of the tugs? An affirmative answer to this question will put an end to the defence of inevitable accident. The failure of the steam steering gear was caused by a key pin of the sprocket wheel dropping out, the steering wheel and shaft becoming jammed and the chain from the sprocket wheel having dropped off the wheel in the wheel-house. This made it impossible for the captain to operate the valves of the small engine controlling the rudder from the top of the wheel-house. He sent his mate to see what had happened. It is proved by the evidence of Thomas Hall, a marine engineer of long experience, examined on behalf of the defendant, and who had made a careful examination of the steering gear on the "Myra," that the

CAN.

EX. C.

MCCORMICK v. SINCENNES-MCNAUGHTON LINE LTD.

UNION LUMBER CO. LTD. v. SINCENNES-MCNAUGHTON LINE LTD.

Maclennan, Dep. L.J.

lever controlling the valves of the small engine which did the steering could have been operated in the wheel-house quite easily by hand and almost instantly. The captain admits he did not ask the mate to try to work these valves by hand. If the mate of the "Myra," who went into the wheel-house to see what was wrong, had exercised reasonable foresight and ordinary maritime prudence and skill he could, in my opinion, have easily operated by hand the small engine which controlled the rudder until the shaft on top of the wheel-house had been unjammed and a new key pin put in the sprocket wheel or until other measures had been taken to ensure the safety of the tow. That would have saved the situation and the accident would have been avoided.

When the steam steering gear failed, it was the imperative duty of the captain of the "Myra" to take the most prompt and immediate measures to meet the obvious dangers to which the tow was exposed. The *Santandarino* (1893), 3 Can. Ex. 378; 23 Can. S.C.R. 145. Ordinary seamanship and maritime skill would have required him to have stopped the engines on the "Myra" and the "Long Sault" and to have at once passed the tow lines to the "Long Sault." He made no such attempt. There was ample time to have done so. He gave orders to the "Long Sault" to starboard her helm and afterwards to reverse her engines, but he omitted to instruct the "Long Sault" to take over the tow lines. Both tugs were there to bring the tow down the river, and the defendant is responsible for the acts of the crew on both tugs. The "Long Sault" refused to give any assistance to the tow, although it is proved that the captain of the "Middlesex" asked the captain of the "Long Sault" to take a line from the "Middlesex." For a period of from 10 to 15 minutes the "Myra" manœuvred with the tow and made a complete circle, when suddenly, without warning to the barges or schooner, the tow lines were cut on board the "Myra" and the tow was abandoned and allowed to go ashore on Canada Island. I am advised by my assessor that the conduct of the captain of the "Myra" in the circumstances was unseamanlike. The captain and pilot of the "Long Sault" acted under the orders of the captain of the "Myra" and proved themselves absolutely inefficient and incompetent. They made no reasonable effort to assist the tow or to keep it out of danger. The captain of the "Myra" manœuvred for nearly a quarter of an

hour before he abandoned the tow. He had ample time in which to consider what ordinary care, precaution and maritime skill imperatively called for. He had another tug to assist him in taking care of the tow, and there was ample room in which to take effective measures to avert disaster. The burden was on the defendant to prove that the unfortunate result could have been prevented at the very moment it occurred by the exercising of ordinary care, caution and maritime skill. In my opinion the defendant has not made that proof, and after careful consideration I have come to the conclusion that the evidence establishes that the grounding of the tow was caused by the want of reasonable promptitude, foresight and seamanship on the part of the master and crew of the two tugs when and after the dangerous situation arose. My assessor concurs in this conclusion.

Under these circumstances it is not necessary for me to express any opinion on the allegations of the plaintiffs, that the tugs were insufficiently equipped and supplied and insufficiently and improperly officered and manned.

There will be judgment for the respective plaintiffs for damages and costs with a reference to the deputy district registrar to assess the damages in each case.

Judgment for plaintiffs.

ROSS v. STOVALL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. February 27, 1919.

LAND TITLES (§ IV—40)—AGREEMENT FOR SALE—SUBSEQUENT SALE AND TRANSFER—FRAUD—SPECIFIC PERFORMANCE.

The fraud referred to in ss. 42, 104, 135 and 106 of the Land Titles Act (Alta.), is actual fraud, or dishonesty of some sort, not constructive or equitable fraud.

Statement.

APPEAL from a judgment of Scott, J., 13 A.L.R. 521, in an action to set aside a certificate of title and transfer and for specific performance of an agreement for sale. Reversed.

A. E. Dunlop, for plaintiff; *C. F. P. Conybeare*, K.C., for defendant Baalim; *A. H. Clarke*, K.C., for defendant Stovall.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from Scott, J. The defendant Emma Stovall, who lived in Georgia, owned property in Lethbridge, where she had formerly resided and employed one Bowman, a

ALTA.

S. C.

ROSS v. STOVALL.

Harvey, C.J.

real estate broker there, to find a purchaser. Her co-defendant, Baalim, made an offer and there was some negotiation, and letters and telegrams passed between the owner and Bowman, in which the price and general terms of payment were specified by the owner, the price being $15,000, about $500 in cash and a further sum of about $5,500 in payment of arrears of taxes within 2 months, and the remainder spread over a term of 9 years.

On the final telegram, Baalim signed an acceptance, and on the same day, Bowman telegraphed Mrs. Stovall: "Everything satisfactory. Draft and papers being forwarded to bank." The telegram specifying the terms provided that notes should be given for the deferred payments, and that there should be a contract drawn fully protecting the owner's interest, and forwarded to the bank.

Bowman had previously advised her that as the cash payment was small, it would be advisable for her to give only an option until the substantial payment for taxes was paid, and thus, if that payment were not paid promptly, the owner would then not find herself bound by a contract. Although the terms specified by her said "contract" and not "option," Baalim's solicitor, who was also an old friend of Mrs. Stovall's, prepared an option agreement, but signed by Baalim, instead of an agreement of sale and sent it to the bank. When this was received, Mrs. Stovall telegraphed that her conditions specified a sale and not an option. Baalim's solicitor, evidently having her interest in mind, telegraphed that he could not advise her giving an agreement until more money was paid, and advised her to consult her legal adviser. On the same day he wrote her and her legal adviser, whom he knew, explaining the situation. This was on June 7, and on the following day, one Mrs. Little, who was apparently a friend of Mrs. Stovall, telegraphed the latter, advising her not to give an option. The telegram is not produced, but apparently, from the subsequent correspondence, it suggested, or at any rate Mrs. Stovall had in mind, a possible sale to the Hudson's Bay Co. On the following day Mrs. Stovall telegraphed Mrs. Little advising her that she "had declined option" and, on the same day, her legal adviser telegraphed Baalim's solicitor stating that she would not accept paper submitted, and wrote him at length pointing out objections to the procedure. He also wrote a letter to Mrs. Little. In it he

said that she would see that the offer made to the Hudson's Bay Co. was a little less than that to Baalim, but that Mrs. Stovall would rather deal with the former.

As Baalim's solicitor had prepared the papers in the form he had believing it to be better for Mrs. Stovall, on receipt of the letter from her legal adviser, he prepared an agreement as she required, and on June 16, he telegraphed that it would be sent on Monday. There was a little delay and it was not sent until June 21, and before it was received, there arrived a telegram from Mrs. Little, dated June 23, which said: "Have good news. Think will be able to close deal for cash in a few days. They cannot bind you if you do not cash cheque. They made bad move. Do not sign papers until you hear from me." On receipt of the papers from Baalim's solicitor, advice was sent that her legal adviser was away. On his return he wrote on July 3, offering further objections and returning the papers. On July 4, Mrs. Little wired that she had sold the property to the plaintiff for $15,000, $2,000 in cash, $8,000 on December 1, and the balance in a year.

It is unnecessary to refer, in much detail, to the subsequent proceedings. An agreement was executed between the plaintiff and Mrs. Stovall. Mr. Baalim, on his part, went into possession and had a caveat filed, his solicitor all the time maintaining that he had a completed agreement, and a memorandum that would satisfy the Statute of Frauds, but expressing a willingness, without prejudice, to make concessions to meet objections. Mrs. Stovall's legal adviser, who contended that she was not bound to Baalim, came to Lethbridge, and there saw the solicitors for both the plaintiff and Baalim. He apparently agreed with Ross's solicitor as to the legal rights, but the latter advised him to consult counsel in Calgary. He did so, and was then advised that Baalim probably could succeed if he persisted in his claim. As a consequence, he came to terms with Baalim's solicitor, and under the authority he had, gave a transfer from Mrs. Stovall to Baalim, which was registered, and a certificate of title was granted thereon. This was done without the knowledge of the plaintiff or his solicitor, who had not taken the precaution to file a caveat against the land before, though he did after the transfer was registered.

This action is brought to set aside the certificate and transfer,

ALTA.
S. C.
ROSS
v.
STOVALL.
Harvey, C.J.

and for specific performance of the agreement, also for a return of the purchase price paid and notes given as well as for $10,000 damages.

The trial judge directed specific performance, with a setting aside of the certificate of title and transfer.

He was of opinion that there was not a binding agreement between Mrs. Stovall and Baalim and points out that *Sydie* v. *Saskatchewan and Battle River Land Co.* (1913), 14 D.L.R. 51, 6 A.L.R. 388, a decision of this court, held that s. 135 of the Land Titles Act is not a bar as against "a person who obtains a transfer and certificate of title with knowledge of an outstanding registered interest which will be thereby defeated."

The appeal is by the defendant, Baalim alone. He contends that ss. 44 and 135 of the Land Titles Act (Alta. stats. c. 24, 1906), furnish a complete defence.

S. 44 provides that

> Every certificate of title . . . shall (except in cases of fraud wherein the owner has participated or colluded) . . . be conclusive evidence . . . that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, with certain exceptions within which the present case does not fall.

S. 135 provides that except in case of fraud a person dealing with a registered owner need not enquire as to other interests and that "knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud."

In *Assets Company* v. *Mere Roihi*, [1905] A.C. 176, the Judicial Committee had to determine the nature of the right of a registered owner under the New Zealand Act on a claim to set aside his certificate of title. That Act is in general tenor and effect similar to ours, though the details and arrangements differ. In the judgment, at p. 202, it is stated:—

> The sections making registered certificates conclusive evidence of title are too clear to be got over.

Then again, at p. 210:—

> Passing now to the question of fraud . . . ss. 55, 56, 189 and 190 appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, *i.e.*, dishonesty of some sort, not what is called constructive or equitable fraud. . . . Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value . . . must be brought home to the person whose registered title is impeached or to his agents.

The sections specified correspond in general terms to ss. 42, 104, 135 and 106 of our Act.

It seems clear then that the certificate of Baalim cannot be set aside unless he or his agent has been guilty of actual fraud or in other words dishonesty.

The trial judge makes no finding or suggestion of any such fraud, and he tells us that he had no intention of making any such finding. Moreover, I can find no evidence to support any such finding. I find nothing at all inconsistent with an honest attempt to compel the carrying out of what might and very probably was considered by Baalim and his solicitor to be a binding and enforceable agreement. Whether it actually was a binding agreement appears to me to be of little consequence. It was certainly so near it that they might, as, it appears to me they honestly did, consider it such. That being so, they would consider Baalim's right prior and superior to that of the plaintiff, and s. 135 would, in this aspect, appear to have no application whatever, s. 44 being the important section. I am at a loss to see what there was fraudulent or dishonest in their action. That Baalim did, in fact, waive some of the terms in his favour, and did in order to get the matter settled pay cash in full rather than insist on the time which he might have demanded does not, in my opinion, furnish any ground for questioning the honesty of the belief in the sufficiency of his agreement.

In the *Sydie* case, *supra*, the agent of the company who had effected a sale of some of the company's lands to the plaintiff, which, by mistake, were incorrectly described, subsequently, with a knowledge of such mistake, himself bought from the company and obtained a certificate of title for the lands which he had before sold the plaintiff.

The court was of opinion that Brown was guilty of actual fraud or dishonesty. The present case is, however, quite different. If Baalim had a binding agreement his interest was prior to that of the plaintiff, and there could be no question of depriving him of any interest, and if he honestly believed he had, he would be no less honest than if he actually had.

I am of opinion, therefore, that no fraud is shewn and consequently no ground for setting aside the certificate of title, and Baalim's appeal should be therefore allowed.

The alternative claim of the plaintiff against Mrs. Stovall must then be considered. He claims for a return of the money and notes given under the contract. The claim is admitted, the money

ALTA.
S. C.
ROSS
v.
STOVALL.
Harvey, C.J.

has been paid into court, and the notes tendered back. He also claims damages for breach of agreement. In *Stephens* v. *Bannan* (1913), 14 D.L.R. 333, 6 A.L.R. 418, this court held that the English rule of *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, applied here and that the damages were the amount paid with interest and costs of investigating title and incidental thereto. With the money paid into court has been included a sum sufficient to cover interest, cost of draft and the solicitor's costs based on the solicitor's own statement. Whether the facts of this case might possibly take it out of the rule in *Bain* v. *Fothergill*, *supra*, I do not think it is necessary to consider, for, in my opinion, there is no satisfactory evidence upon which it could be held that the full value of the land was in excess of the purchase price. It appears indeed, as I have shewn, that there was an offer to the Hudson's Bay Co. for something less, which apparently was not accepted.

I think there is no ground, therefore, for any damages for loss of profit on the purchase.

In the result, the appeal should be allowed with costs and the action dismissed with costs, the costs of the defendant Mrs. Stovall to be limited to the costs incurred after the payment into court, for though there is evidence that before action was brought her willingness to settle in this way was made known to the plaintiff, it does not appear that there was any legal tender and she asks for no further costs than this.

The caveat filed by the plaintiff should be discharged at his expense. *Appeal allowed.*

CAN.
Ex. C.

"LAWRENCE C. GIFF" v. SINCENNES-McNAUGHTON LINE Ltd.

Exchequer Court of Canada, Maclennan, Dep. Loc. J. in Adm. December 21, 1918.

COLLISION (§ I A—3)—TUG AND TOW—SNOWSTORM—INEVITABLE ACCIDENT.
In attempting to avoid a collision with a black gas buoy in a channel, which became invisible owing to a snowstorm, the master of a tug, after passing an upbound steamer, starboarded his vessel and ran his tow, composed of several barges, into shallow water, thereby bringing about a collision between them.
Held, it was not an inevitable accident and could have been avoided by the exercise of ordinary caution and maritime skill; that the collision was caused by the improper starboarding of the tug; its failure to take soundings; the failure to anchor.

Statement.

ACTION for damages resulting from a collision.

Peers Davidson, K.C., and *T. Winfield Hackett*, for plaintiff; *Aime Geoffrion*, K.C., for defendant.

CAN.

EX. C.

GIFF v. SINCENNES-MCNAUGHTON LINE LTD.

Maclennan, Dep. L.J.

MACLENNAN, Dep. Loc. J.:—This case arises out of a contract of towage. Plaintiff is the owner of the barge "Lawrence C. Giff," and the defendant is the owner of the tug "Virginia." About 2 a.m. on the morning of November 3, 1917, the defendant's tug "Virginia" left Three Rivers bound for Quebec with a tow consisting of the barge "Atlasco" at the head of the tow, then the barge "Lawrence C. Giff" and the barge "Mary Giff" fastened abreast, and then the barge "E. H. Lemay" in rear. On leaving Three Rivers the tug pulled out into the stream, turning to head down the river, and, before the tug had succeeded in getting the barges in a straight line behind the tug, the master of the tug saw the headlights and the green light of a steamer up-bound, which passed the tug and tow starboard to starboard opposite the red buoy 56-C. It had been snowing more or less during the night and snow was falling when the tug and tow left Three Rivers, and continued to fall for some time thereafter. The tug passed down 100 ft. from the red buoy 56-C, and owing to the snowfall the black gas buoy 55-C, as well as all other lights, became invisible. The black gas buoy 55-C is about 1,700 ft. from the red buoy 56-C, where the tug met the up-going steamer, and about 800 ft. from shallow water off Ile aux Cochens, on the port side of the channel going up. The deep water channel on the starboard side of the black buoy is about 2,500 ft. wide. When the tug passed the up-bound steamer and was unable to see the black gas buoy, the captain of the tug, in order, as he says, to avoid fouling the black gas buoy, starboarded his helm and continued on his course for about 3,500 ft., when the lights of a mill on Ile de la Potherie came in sight on his port bow. He then ported his helm to haul out his tow more into the stream, when the first barge in the tow, which was drawing 14 ft., stranded, and the barge "Lawrence C. Giff," drawing about 6 ft., owing to its momentum, collided with the stern of the "Atlasco," and the barge "E. H. Lemay," owing to its momentum, collided with the "Lawrence C. Giff," and both the "Giff" and "Lemay" sank in a few minutes.

The plaintiff alleges that the collision and the damages and losses consequent thereof were occasioned by the negligent and improper navigation of the tug and by the incompetency of her master and crew, and the defence is that the grounding of the barge "Atlasco" and the sinking of the barge "Lawrence C. Giff"

CAN.

EX. C.

GIFF
v.
SINCENNES-
MC-
NAUGHTON
LINE LTD.

Maclennan,
Dep. L.J.

occurred as a result of an inevitable accident which could not have been anticipated, and there was no fault on the part of the defendant nor of its servants. The tug was in charge of a master, pilot, mate, 2 engineers, 3 firemen, 3 sailors and a cook. After the tug had passed the up-bound steamer and the buoy and rangelights became invisible, the master of the tug changed his course without having consulted his compass. He made no use of his compass whatever and took no soundings at any time, though he doubtless knew that the course on which he had put his tug would bring him very close to Ile aux Cochons. He had two anchors on board ready for use and he had a river over half a mile wide, the only obstacle in it was the black gas buoy 55-C. What happened shews that, in attempting to avoid collision with the black gas buoy, he ran his tow into shallow water and the foremost barge stranded, bringing about a collision of two of the barges in the after part of the tow.

There is no dispute about the facts, and the questions involved in this case have regard to matters of navigation and seamanship on which I have consulted my nautical assessor, with the following result:—

1. After the master of the tug had passed down-stream 100 ft. off the red buoy 56-C, and had met the up-bound steamer and the range and the buoy lights had become invisible by reason of the snow-storms, was it good and prudent navigation on his part to have continued his course without regard to his compass and without taking any soundings? A. No, the compass should have been used. He should not have starboarded, especially—again—with an easterly wind blowing on the starboard side and possibly shearing him to the northward.

2. Was it good navigation on the part of the master of the tug, after he had met the up-bound steamer, to have changed his course by starboarding? If not, what should he have done in the exercise of ordinary care, caution and maritime skill? A. He should have endeavoured to find gas buoy 55-C, and not having seen it—anchored immediately.

3. Was there anything having regard to the width of the river and the extent of navigable waters at his disposal which prevented the master of the tug taking such precautions as a seaman of ordinary prudence and skill exercising reasonable foresight would

use to avert the stranding of the tow, and if not, what should the master have done in this case? A. In view of the state of the weather, it was imprudent to have left Three Rivers, but having decided to leave he should have proceeded with extreme caution with lead kept going, good look-out and to have anchored upon the lights being shut out by snow. The width of the river is such that he had more than sufficient water to handle his tow to the southward of mid-channel.

The law applicable to the relation between tug and tow was stated by Lord Kingsdown in the Privy Council in the case of *The Julia* (1861), Lush 224, at 231. It is as follows:—

> When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident. These are the plain rules of law by which their Lordships think that the case is to be governed.

This statement of the law was subsequently quoted with approval in the Privy Council in the case of *Smith* v. *St. Lawrence Tow Boat Co.* (1873), L.R. 5 P.C. 308, and in the House of Lords in the case of *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217, 220.

The defence here is inevitable accident, in other words that the accident could not have been avoided by the master of the tug by the exercise of ordinary care, caution and maritime skill. What amounts to inevitable accident was discussed by me recently in *McCormick* v. *Sincennes-McNaughton Line*, *ante*, p. 392 and it is unnecessary that I should repeat what I said on that occasion. Having regard to the advice of my assessor, in which I concur, I find the collision was caused (1) by the improper starboarding of the tug, after passing the up-bound steamer, (2) by the failure to take soundings, *The Altair*, [1897] P. 105, and (3) by the failure to anchor. It is stated in the defence that "a sudden snow flurry obscured the channel lights and the 'Virginia' lost her bearings." Ordinary caution and maritime skill then made it the imperative

CAN.

EX. C.

GIFF v. SINCENNES-MCNAUGHTON LINE LTD.

Maclennan, Dep. L.J.

duty of the master to take repeated soundings, to proceed with extreme caution and to cast anchor until he got his bearings again and could proceed in safety. The negligence of the master of the tug led to the disaster which was clearly avoidable by the exercise of ordinary care, caution and maritime skill. The defence of inevitable accident therefore fails and there will be judgment for the plaintiff for the damages sustained and for costs, with a reference to the deputy district registrar, assisted by merchants, to assess the damages. *Judgment for plaintiff.*

ALTA.

S. C.

WINELAND v AUDETT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. February 28, 1919.

1. HUSBAND AND WIFE (§ II E—80)—SEPARATION AGREEMENT—WORDS RELEASING HUSBAND FROM LIABILITY—CONSTRUCTION.

In construing a separation agreement between husband and wife, there is no justification for treating the words, releasing the husband from all claims of the wife, as meaning anything different from what the language indicates, unless it can be gathered from the evidence of the expressed intention of the parties, or of their conduct or of the circumstances that a special meaning different from the ordinary meaning was intended.

2. PLEADING (§ III C—332)—JUDGMENT FOR MONEY HAD AND RECEIVED—CLAIM OF TRUST — AMENDMENT OF CLAIM NECESSARY TO MAINTAIN JUDGMENT—STATUTE OF LIMITATIONS COMPLETE ANSWER—RIGHT OF DEFENDANT TO PLEAD STATUTE.

Where a claim of trust is found against a plaintiff, the judgment being only one for money had and received, to which the Statute of Limitations would be a complete answer, the plaintiff cannot maintain the judgment as given without an amendment of the claim, and the defendant has the right to plead the statute in answer, it not being an answer to the claim as pleaded.

Statement.

APPEAL from a judgment of Ives, J. Reversed.

J. W. MacDonald, K.C., for appellant.

J. D. Matheson, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal by the defendant from a judgment of Ives, J., in favour of the plaintiff for $4,410.

The plaintiff and defendant lived together for 17 years as wife and husband. Then the plaintiff left the defendant, she says because of his drunkenness and abuse. Apparently, she subsequently procured a divorce, and after living separate for about a year and a half, she married her present husband. The separation took place in May, 1915, and the plaintiff went back to Oregon, where they had lived before coming to Alberta. In September she came back to Alberta, partly at least, she says, for the purpose of getting a settlement. A settlement was arrived at

and an agreement drawn by a solicitor and executed by both parties under which the defendant agreed to pay her $2,000, which money was paid in full.

The statement of claim, issued in August, 1918, alleges that in March, 1909, the sum of $4,100, proceeds of the sale of the plaintiff's land in Oregon, was given by the plaintiff to the defendant to be invested for her in Alberta real estate, which was invested in the purchase of a named section of land and that about a year later she gave him a further sum of $300 to be invested and which was invested in the same way. It prays a declaration that the moneys were taken in trust and invested for her benefit and an accounting for the moneys with the profits.

The chief defence set up is the settlement above-mentioned, which contains the following clause:—

3. The said Anna Audett agrees to accept the said sum of $2,000 in full of all and every claim which she may now, or may at any time hereafter, have against the said Louis Audett and hereby agrees that she will pay any debts which may now or hereafter be owing by her and keep the said Louis Audett indemnified therefrom.

The agreement contains the following recital:

Whereas differences have arisen between the said Louis Audett and the said Anna Audett, and they have agreed to live separate from each other in future and to enter into arrangements hereafter expressed.

The plaintiff swore that she did not know what the $2,000 was given for, but suggested that it was given for her wages and support of herself and children, but she says that she did not understand it was all she was to get. She admits that it was read over to her before she signed it and that she did not then mention her understanding. She also admits that she never until 2½ years later made any claim, though she says her husband had promised her at one time to give her some land, but that he had not done so. The trial judge gave judgment in favour of the wife for the exact amount of the moneys shewn by the evidence to have been received by the husband, intimating in his reasons for judgment, and more clearly before during the course of the trial, his conclusion that the moneys had not been invested for the benefit of the wife as alleged. He expresses the opinion that the plaintiff on the uncontradicted evidence would have been entitled to alimony when she left the defendant, and that was all that the settlement agreement was intended to cover, and not any claims for money transactions between them.

ALTA.

S. C.

WINELAND v. AUDETT.

Harvey, C.J.

I find myself quite unable to see any justification for treating the words of release as meaning anything different from what the language indicates. How would it be possible in general terms to cover the money transactions more clearly than they are covered by the words "all and every claim" I am quite at a loss to comprehend. Then I think he was hardly justified in concluding that she was in fact entitled to alimony, for when it was first attempted to give evidence on that the trial judge stopped counsel for the plaintiff, pointing out that there could be no justification for a claim for alimony. Naturally no evidence was given on the point by the defence. I can quite understand that if it can be gathered from the evidence of the expressed intention of the parties or of their conduct or of the circumstances, that a special meaning different from the ordinary meaning was intended, such special meaning should be given to the words. But in this case except the bare statement of the plaintiff that she did not think it was all she was to get I can see no evidence to warrant such a conclusion. Her intention alone, however, could not prevail over the ordinary meaning of the words, and her conduct in not making any claim for 2½ years after the settlement appears to me to more than offset her statement.

I am of opinion, however, that even with this limited meaning the plaintiff ought not to have judgment. The claim of trust quite evidently was found by the trial judge against the plaintiff, and her claim then was only one for money had and received to which the Statute of Limitations would be a complete answer. Defendant's counsel, I think quite properly, argues that she cannot maintain the judgment as given without an amendment of her claim, and that, in such case, he should have the right to plead the statute in answer, since such a claim was not an answer to the claim as now pleaded. As alleged, the payments were 9 and 8 years respectively before action was brought, and thus in the absence of a trust the statute would be a bar.

It was during the defendant's evidence when he said the money had not been used to pay for land that the trial judge stated that he did not see how the plaintiff could recover anything more than the principal, and that there could be no question of accounting and that it did not matter what happened to the money or what profit was made with it. Both counsel accepted

ALTA.

S. C.

WINELAND v. AUDETT.

this and proceeded with the trial on that basis. It may be that the defendant's counsel should then have asked to set up the statute, but the plaintiff did not ask to amend so as to put his pleading in proper form to meet the new aspect, and I do not think it would be quite fair now to deprive the defendant of a perfectly good defence because he did not then apply to set it up.

Harvey, C.J.

For the reasons I have stated, I would allow the appeal with costs and dismiss the action with costs.

Beck, J.

BECK, J.:—This is an appeal from Ives, J. I have considered the case carefully. My inclination at first was to dismiss the appeal, but I do not feel sufficiently satisfied of the correctness of the views I have put forward to dissent from the opinion to the contrary of the three other members of the Court.

The plaintiff is the divorced wife of the defendant, and since the making of the agreement in question in the action she has married again.

The plaintiff sued to recover two sums—$4,100 and $310—moneys of the plaintiff alleged to have been received by her husband some ten years ago and to have been invested by him in certain lands which were subsequently sold. The plaintiff and defendant lived together till 1915. They then separated. On September 23, 1915, the plaintiff, who was then living in the United States, came to Alberta, where the defendant was then living. She came to get a settlement with her husband. An agreement was drawn up by a lawyer on September 23, 1915; it recited that:—

> Whereas differences have arisen between (the husband and wife) and they have agreed to live separate from each other in future and to enter into the arrangements hereinafter expressed.

It contained a covenant by the defendant to pay to the plaintiff in certain stated instalments, $2,000, of which $300 was paid in cash.

It also contained the following clause of release:—

> The said Anna Audett (the plaintiff) agrees to accept the said sum of $2,000 in full of all and every claim which she may now or may at any time hereafter have against the said Louis Audett (the defendant).

Ives, J., held that this general release must be restricted so as to apply only to what the plaintiff now claims it was intended to be confined, namely, her claim for alimony—"matrimony money." The recital is, with the exception of the omission of the word

ALTA.

S. C.

WINELAND v. AUDETT.

Beck, J.

"unhappy" before "differences," a common recital in separation agreements *simpliciter*, that is, agreements dealing with the rights and obligations of the parties arising from or created by reason of the separation solely. See Form 77, vol. 2, Encyclopædia of Forms and Precedents.

Especially in the case of releases general words are *primâ facie* to be construed as limited by the recitals, if any, contained in the release. See 10 Hals., "Title Deeds and Other Instruments," p. 462, sec. 806.

> If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties and intended to be released (*per* Lord Hardwicke, L.C., in *Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 304 at p. 310, 28 E.R. 196).

So far, then, as the instrument of release goes, I agree with Ives, J., in holding that it is not an express release of the claims sued for.

I take it that it is a case where the instrument should be treated as ambiguous and that it is open to the parties, therefore, to shew the circumstances surrounding the making of the instrument—the claims talked about or not talked about, the actual state of the claims in question and their history, the relationship and conduct of the parties, etc.—with the view of making that clear which the instrument leaves in doubt.

The trial judge takes one view of the evidence; the majority of this Court takes the other.

The two sums of money sued for by the wife were unquestionably her own money. I do not use the word separate because, under our law, a married woman owns her property as if she were a *feme sole*. The husband having received the corpus of this money and there being really no pretence that the wife meant to make an absolute gift of it (the onus of proving that being on the husband), the husband held the money as trustee for her and had it been invested by him in specific property she might have followed it and secured for herself either the property or a charge upon it. 1 White & Tudor's Leading Cases in Equity 732; 2 *ib.* 849.

Although the husband acquired property to a large value, it is neither clear that he still owns any property which has been

identified nor that any of the wife's money was actually invested in it. Under these circumstances the claim of the wife must, necessarily, be for the money merely.

It is suggested that had this been the form of the action the defendant might have pleaded the Statute of Limitations. (The Trustees Ordinance, c. 11, of 1903, 2nd sess., s. 55.) The interpretation of the corresponding section in the English Act is discussed in 2 White & Tudor, pp. 696 *et seq.*

While the husband and wife were living in amity, as they did for a number of years, there was no reason to expect any claim being made by the wife in respect of her moneys, either for the corpus or the income. In *Re Dixon, Heynes* v. *Dixon*, [1900] 2 Ch. 561, it was held by the Court of Appeal that it was unnecessary in order to prevent the Statute of Limitations from running to go through the formality of the husband paying interest to the trustees for the wife; the trustees paying it to the wife and the wife paying it to the husband. That was a case of the husband having borrowed from the wife's trustees a sum for which he gave a bond bearing interest. The same principle might well, I think, be applied in a case like the present.

The same case, however, further decided that as the husband took the wife's moneys with full notice that the money was trust money and liable to be invested out on interest-bearing security, he was in the position of an express trustee and therefore the statute did not apply. I think the same principle might well be applied in such a case as this.

Notwithstanding what I have said, I still retain sufficient doubt upon the application of the principles of law I have stated to the facts of the present case as to induce me to concur with doubt and hesitation in the result arrived at by the rest of the court.

SIMMONS, J.:—The plaintiff's claim is for a declaration of trust in favour of the plaintiff as to certain moneys which is admitted were the proceeds (in part at least) of the sale of the plaintiff's separate property, and which moneys came into the defendant's hands while the parties were living together as husband and wife.

Simmons, J.

The defendant pleaded a release under a separation agreement. The trial judge held that the separation agreement did not apply

ALTA.

S. C.

WINELAND v. AUDETT.

Simmons, J.

to these moneys and that the plaintiff was entitled to recover the actual moneys received by the husband. During the course of the trial the trial judge intimated that the plaintiff could not follow these moneys into the property of the defendant, and that her claim was confined to a return of the principal moneys given by her to her husband.

The plaintiff's solicitor then consented to abandon any claim for an accounting for profits.

The trial proceeded and judgment was given the plaintiff for the moneys received by the defendant, which were the separate property of the plaintiff.

The defendant says this was a claim quite different from that raised on the pleadings, and the Statute of Limitations would be no answer to the claim for a declaration of an express trust raised in the pleadings. The defendant claims that the statute would be a complete answer to the claim for money had and received which was the remedy given by the trial judge.

This raises two questions: (1) Is the remedy one which brings the parties under the rule which deprives the defendant of the plea of the Statute of Limitations? and, (2) If it is not such then should the defendant be allowed at this stage to raise the statute?

Since the trial judge has found in favour of the plaintiff for the return of the specific moneys received by the defendant, an express trust is negatived and the judgment is, in effect, a declaration for the return of moneys had and received. This is essentially a common law form of relief.

The foundation and history of this form of action is discussed by Haldane, L.C., and Lord Sumner in *Sinclair* v. *Brougham*, [1914] A.C. 398, 416, 456.

Therefore, the Statute of Limitations would be a complete answer.

The form which the action assumed was materially different from that alleged in the statement of claim. The findings of the trial judge against an express trust occurred during the examination of the defendant.

This involved an important amendment to the plaintiff's claim which would be a matter of surprise to the defendant's counsel. No formal amendment was asked nor was any made.

I think under these circumstances the defendant should be allowed at this stage to plead the statute, which is a complete answer to plaintiff's claim.

I would, therefore, allow the appeal with costs.

McCARTHY, J., agreed with Harvey, C.J.

Appeal allowed.

ALTA.

S. C.

WINELAND v. AUDETT.

McCarthy, J.

CANADIAN PACIFIC R. Co. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

CAN.

S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 4, 1919.

STATUTES (§ II D—125)—HIGHWAYS—59 VICT. c. 11—TRANSFER FROM ONTARIO TO DOMINION—HIGHWAYS POTENTIALLY EXISTING AT TIME—CONSTRUCTION.

The proper construction of sec. 2 of statute 59 Vict. c. 11, authorizing the transfer from the Government of Ontario to that of the Dominion of any lands theretofore taken by the railway company for its road-bed is, that such transfer shall not affect or prejudice the rights of the public with respect to the only common and public highways which were in existence at that time, namely, those potentially existing in the 5% acreage reserved in all government lands by the order-in-council of 1866.

APPEAL from an order of the Board of Railway Commissioners for Canada directing that a highway crossing over its railway in the Township of Kirkpatrick be constructed and maintained at the expense of the railway company.

Statement.

Bayly, K.C., for respondent.

DAVIES, C.J.:—This is an appeal from the order of the Board of Railway Commissioners authorizing the construction of a highway across the appellants' railway in the Township of Kirkpatrick, Ontario, and directing that the expense of construction and maintenance of the crossing should be borne by appellants.

Davies, C.J.

The leave to appeal was granted by the Board upon the following question of law, namely:—

Whether upon the facts found by the Board the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

The issue between the parties to the appeal is one confined to the expense of construction and maintenance of the crossing which the Board had in their previous order decided should be borne by the railway company.

The facts found by the Board, subject to which the question is to be answered are: (1) That the company's railway through the township in question was constructed in the year 1883, and the

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Davies, C.J.

right-of-way in which it was constructed was conveyed to the railway company under and by virtue of an order-in-council of the Province of Ontario made in 1901, and issued under the authority of the statute of the province, 59 Vict., c. 11; (2) that no highway was actually laid out across the said railway before title to its right-of-way was acquired and that under the terms of the said order-in-council such title was expressly made subject to the conditions and limitations contained in s. 2 of the said provincial Act, which reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date thereof, within the limits of the land hereby intended to be conveyed.

(3) That under the terms of an order-in-council made by the Government of Canada, before Confederation, in 1866 relating to the surveying and patenting of lands on the northerly shores of Lakes Huron and Superior, which include those now in question and declaring, amongst other things,

that many years will elapse ere the townships enjoy the benefits of municipal corporations and it is necessary to make provisions for the establishment of roads in the meantime,

it was provided

that an allowance of 5% of the acreage of lands be reserved for roads . . . . and that a clause be inserted in letters-patent for the land accordingly, also reserving the right of the Crown to lay out roads where necessary.

I confess that if I had to answer the question submitted to us without regard to the findings on the questions of fact of the Railway Board, I should hesitate a good deal before answering in the affirmative. The language of the section of the statute quoted above, under which the railway company acquired the title to their right-of-way, is open to two constructions neither of which would be unreasonable.

I do not, however, under the facts as found, have any difficulty in answering the question submitted to us in the affirmative.

The fact that the order-in-council of 1866 reserved out of the lands crossed in the township named by the company's railroad "an allowance of 5% for roads," and that at the date when the statute under which the company acquired its title to the roadbed

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Davies, C.J.

was passed there were no public or common highways actually laid out enables me to place a construction upon the statute which, I think, under the facts proved, is a reasonable and proper one.

If there were no public or common highways laid out at the date the statute was passed, it would be without meaning or effect unless it was held to apply to potential highways which might be opened from time to time under the reservation of the 5% area provided for in the order-in-council of 1866. If there are two meanings which may be given to the language of a public statute one of which would render the statute meaningless and ineffective for the purposes it was meant to cover and the other which would give effect to the statute, I take it, the latter must be adopted.

I construe, therefore, under the proved facts the language of s. 2 of the statute, 59 Vict., c. 11, authorizing the transfer from the Government of Ontario to that of the Dominion of any lands theretofore taken by the railway company for its roadbed, etc., to mean that such transfer "shall not affect or prejudice the rights of the public with respect" to the only common and public highways which were in existence at that time, namely, those potentially existing in the 5% acreage reserved in all government lands by the order-in-council of 1866. If the language of the statute had been slightly transposed, as I submit in order to give it any meaning or effect at all it must be, it would read,

shall not be deemed to affect or prejudice the rights of the public existing at the date hereof with respect to common or public highways within the limits of the lands, etc.

In the last analysis the question turns upon the meaning of the words, "existing at the date hereof," which, in the light of the facts that there were no actual highways then existing, I think must refer to potential highways which, up to the reservation of 5%, could be any day called into existence.

I answer the question in the affirmative and would dismiss the appeal with costs.

IDINGTON, J.:—I am of the opinion that the language of the statute in question, though of dubious import, is capable of the interpretation and construction put upon it by the majority of the Board appealed from, and, therefore, do not see my way to allow the appeal.

Idington, J.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Anglin, J.

ANGLIN, J.:—The Board of Railway Commissioners has allowed the appellants, the Canadian Pacific Railway Co., to submit to the court, under s. 56 (3) of the Railway Act a question of law stated in these terms:—

Whether upon the facts found by the Board, the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario, herein.

The order of the Board recites its finding:—

That no highway was laid out across the said railway before its right-of-way was acquired under the order-in-council dated October 31, 1901.

The Canadian Pacific Railway Co. acquired its title under a patent from the Dominion Government which made it subject to the limitations and conditions and the reservations set forth in the order-in-council of the Lieutenant-Governor of our said Province of Ontario, dated the 31st day of October, 1901.

This order-in-council transferred the tract of land in question from the Province to the Dominion pursuant to the direction of the Ontario statute, 59 Vict., c. 11 (1896), "subject to the limitations and conditions specified in s. 2 of the said Act."

S. 2 of the statute reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

At bar there was not a little discussion upon the proper construction of this section, the appellant maintaining that the well-known grammatical rule "*ad proximum antecedens fiat relatio*" requires that the phrase "existing at the date thereof" should be read as qualifying "common and public highways," and the respondent, while conceding the force of this rule of grammar, contending that it is not so rigid or inflexible as a rule of construction that it should not, under the circumstances of this case, be held to yield to another principle of statutory construction, that a statute will not be held to operate so as to take away existing rights unless its terms expressly, or by necessary implication, so provide, especially where such a construction would involve an unexplained and improbable change in the previous policy of the

law and would entail consequences seriously inconvenient to the public.

By an order-in-council passed in 1866, under the authority of Con. Stat. Can., c. 22, s. 7, which had the force of a statute, it was provided in the case of lands on the northern shores of Lakes Huron and Superior that, since road allowances had not been laid out, municipal corporations would not be established for many years and it was necessary to make provision for the establishment of roads in the meantime,

an allotment of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the land accordingly, also reserving the right of the Crown to lay out roads where necessary.

This order-in-council has never been repealed. As existing law it was continued in force by s. 129 of the British North America Act. There is nothing to indicate that there was any intention on the part of the Legislature of Ontario in 1896 to depart from the policy which had been thus established. The lands in question admittedly lie within the territory to which it applied, and the 5% reservation has not been exhausted.

In my opinion, the effect of this order-in-council was to render the lands covered by it subject to a reservation of 5% for the purpose of public highways to be located within them either by the Crown, or, when they should come into existence, by municipal authorities clothed with the right to do so. Such highways existed *in posse* from the date of the order-in-council making the reservation, and when duly located may, *quoad* the rights of subsequent grantees of the lands which they traverse, be deemed to have existed *de jure* from that date just as if they had been then shewn as road allowances on official surveys of those lands made under the system which prevailed in the older parts of Ontario.

In view of the finding of the Board, stated in its order-in-council, that no highway had been laid out across the right-of-way before its transfer to the appellant company in 1901, "the common and public highways" mentioned in s. 2 of the Act of 1896 almost certainly mean such highways *in posse* as I have indicated. If not, the inference would seem to be irresistible that the phrase "existing at the date hereof" must be referable to "the rights of the public."

An omission to follow the direction for the insertion of a clause

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Anglin, J.

of reservation in any patent (or transfer) issued after 1866 would not relieve the land thereby granted from the reservation, whatever other rights the patentee might have as against the Crown, should a portion of his land be afterwards required for highway purposes.

It is almost inconceivable in face of such a declared policy as is evidenced by the order-in-council of 1866, that the Legislature of Ontario should have intended in 1896 to transfer to the Dominion in order that it should become vested as a right-of-way in the Canadian Pacific Railway Co., a strip of land stretching across this entire territory wholly free from the reservation provided for by the order-in-council of 1866, with the result that rights of highway across it would have to be acquired from that company by the province, or by the municipal corporations which it should create, as they should be needed in order to open up roads for the public convenience. I agree with Mr. Bayly that any construction of which its language reasonably admits should be placed on s. 2 of the statute of 1896 that will prevent such a consequence—that will harmonise it with, and will obviate the necessity of implying a repeal *ad hoc* of the order-in-council of 1866. See *Re Norman's Trusts* (1853), 3 DeG. M. & G. 965, 43 E.R. 378; *Eastern Counties and London and Blackwall R. Co.* v. *Marriage* (1860), 9 H.L. Cas. 32, 11 E.R. 639, at p. 64, *per* Pollock, C.B., at p. 44, *per* Channel, B.; *Thellusson* v. *Woodford* (1805), 1 Bos. & P. (N.R.) 357, at pp. 392-3, 127 E.R. 502, *per* Macdonald, L.C.B., and cases collected in Maxwell on Statutes (5th ed., pp. 3 and 30). That result will, in my opinion, be attained by treating the phrase "existing at the date hereof" as referable to "rights of the public" rather than to "common and public highways."

The facts that the grant is by the Crown and is gratuitous, and that owing to the non-existence of municipal organization the right to open highways was reserved by the order-in-council of 1866 to the Crown itself, which was also the custodian of the rights of the public, afford additional reasons for a construction favourable to the respondent if the terms of the statute of 1896 admit of it, as I think they do.

I am, for these reasons, of the opinion that the question submitted should be answered in the affirmative and that the appeal should be dismissed with costs.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Brodeur, J.

BRODEUR, J. (dissenting):—This is an appeal from the Railway Board on a question of law, under the provision of s. 56 of the Railway Act.

The question which the Board has given leave to submit reads as follows:—

Whether upon the facts found by the Board the title of the railway company is subject to a prior right reserved in the Crown to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

In order to fully understand the bearing of that question, it is necessary to state briefly what are the facts and the circumstances which have given rise to the present appeal.

In 1883, the Canadian Pacific Railway was built in the north-western part of Ontario. When the Township of Kirkpatrick in which the crossing in issue in this case is situated was surveyed in 1884 no highways existed in that township.

The lands on which the company built its line belonged to the Province of Ontario.

In 1896, the Legislature of Ontario passed an Act to authorize the transfer of the lands occupied by the Canadian Pacific Railway. By s. 2 of that statute it was provided that the transfer should be made in such a way as not to

affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

The transfer was made with the stipulation required by that statute concerning the highways.

Having found it necessary to open a highway in the Township of Kirkpatrick, the Department of Public Works of Ontario applied to the Railway Board for an order directing the Canadian Pacific Railway Co. to construct and maintain a public crossing over their right-of-way in connection with that highway.

The company agreed that the highway was necessary and should be opened but objected to being bound to construct and maintain the crossing.

The Board came to the conclusion that the company should build and maintain the highway crossing on the ground that the proviso contained in the law of 1896 referred to the reservation for highways authorized by an order-in-council passed in 1866.

The question of law above quoted has been submitted to this court by way of appeal from the decision of the Board.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Brodeur, J.

The first question which presents itself, according to my mind, is whether the statute of 1896 had reference simply to existing highways or to the reservation for highways mentioned in the order-in-council of 1866.

If we construe it according to the ordinary grammatical rule, "*ad proximum antecedens fiat relatio*," I should say that the words "rights of the public with respect to common and public highways existing at the date hereof" mean, not rights then existing with respect to highways but rights of the public with respect to highways then existing. The participle "existing" qualifies not the substantive "rights" but the substantive "highways" because it is nearer the latter than the former.

It is true that there were no highways in the Township of Kirkpatrick; but nobody would suggest that from the District of Nipissing to the western boundary line of Ontario there were not hundreds of highways existing when the law of 1896 was passed.

I may, in that respect, refer to the Revised Statutes of Ontario of 1887, c. 46, s. 1 and ss. 45 and 48, and c. 7, s. 15, sub-ss. 79 and 80, which shew that the territory mentioned in that law of 1896 was organized for municipal and judicial purposes and formed part of two electoral districts.

The Dominion legislation then in existence referred also to the settlements of that region: R.S.C. 1886, c. 6, sub-s. 73 of s. 2.

The legislation had in view the protection of the rights that the public had in the highways then actually existing in that territory.

If the legislature wanted to refer to the highway reservation provided in the order-in-council of 1866, it would certainly have expressed itself differently. It would have been so easy to mention specifically that order-in-council.

What is the meaning of that order-in-council? It is a recommendation or order to the executive authority having to deal with the Crown lands that

> an allowance of 5% of the acreage of the lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly.

Perhaps, as there is a specific reference to the Lower Canada legislation, it might be of interest to see what that legislation contemplated.

It is embodied in an order passed under Lord Dorchester on the 30th of October, 1794. By his instructions, Lord Dorchester had the power, in laying out townships, to make reservations for public use (Constitutional Documents, Doughty and McArthur, 1791-1818, p. 21); and it is in execution of these powers that the order of the 30th October, 1794, was passed.

It provided that each lot in a township would contain 210 acres instead of 200, in order to provide for an allowance of 5% for highways. That legislation was the one in force in Lower Canada in 1866, when the order-in-council concerning Upper Canada was passed.

Those two orders-in-council are intended to oblige the settlers to give without indemnity 5% of their acreage for the use of highways. They have no reference to the rights-of-way of a railway company.

I fail to see then that the order-in-council of 1866 is referred to in the statute of 1896. I have come to the conclusion that the question submitted to us should be answered in the negative.

The appeal should be allowed with costs.

Mignault, J.

MIGNAULT, J. (dissenting):—The Board of Railway Commissioners for Canada has granted to the appellant leave to appeal to this court on a stated question of law, from its order No. 26,393, authorizing the appellant to construct and maintain at its own expense a highway crossing over the railway on the line between lots 8 and 9, concession 5, in the Township of Kirkpatrick, District of Nipissing, and Province of Ontario. In this order the Chief Commissioner, Sir Henry L. Drayton, K.C., and the Assistant Commissioner, Mr. D'Arcy Scott, concurred, while Mr. Commissioner S. J. McLean dissented. The order granting leave to appeal states the facts found by the Board and the question to be answered, and obviously, in answering this question, no facts other than those found by the Board can be considered.

These facts are:—

1. The company's railway through the township in question was constructed in the year 1883, and the right-of-way on which the said railway was constructed conveyed to the railway company, by an order-in-council made by the Lieutenant-Governor-in-Council of Ontario, dated October 31, 1901, and issued under the authority of a statute of the province, 59 Vict. c. 11.

2. No highway was laid out across the said railway before title to its right-of-way was acquired under the said order-in-council.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Mignault, J.

3. The company's title was, under the terms of the said order-in-council dated October 31, 1901, made expressly subject to the conditions and limitations contained in s. 2 of the said provincial Act, which said section provides . . . (see text further on).

4. Under the terms of the order-in-council made on the recommendation of the Commissioner of Crown Lands, dated August 6, 1866, it was provided that an allowance of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

The question to be decided is as follows:—

Whether upon the facts found by the Board, the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

The question before the Board was who should bear the cost of the crossing. According to the established practice, this liability for cost is determined by reason of the "seniority" either of the railway or of the highway. Where the railway is senior, that is to say, where it was established before the highway, the expense of the crossing is borne by the municipality or other public authority opening the highway. Conversely, if the railway comes after the highway, it must pay for the crossing. In the present case the majority of the Board, Mr. McLean dissenting, decided the question of seniority in favour of the highway.

As the statement of facts shews, the question submitted involves the construction of s. 2 of the Ontario statute, 59 Vict., c. 11, and in connection with this section it is proper to consider the provisions of the order-in-council of August 6, 1866, passed by the Government of Canada before Confederation.

The statute in question, 59 Vict., c. 11, sanctioned April 7, 1896, is entitled "An Act to authorize the transfer of certain provincial lands occupied by the Canadian Pacific Railway."

The first section authorizes the Lieutenant-Governor-in-Council in his discretion to transfer to the Dominion of Canada any lands theretofore taken and occupied by the Canadian Pacific Railway for the road-bed, stations, station grounds, and other purposes of the railway, and included in its plans, the same being so transferred to enable the Government of Canada to fulfil its obligations to the said company in that behalf with respect to the railway.

S. 2, the construction of which is in question, reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred or to affect or prejudice the rights of the public with respect to common and public highways *existing at the date hereof*, within the limits of the lands hereby intended to be conveyed.

The italics are mine.

The final section of the statute declares that such transfer shall be as binding on the Province of Ontario as if the same were specified and set forth in the Act of the legislature.

The lands mentioned in this statute were transferred to the Government of the Dominion of Canada by an order-in-council adopted by the Government of Ontario on October 31, 1901, "subject to the conditions and limitation specified in s. 2 of the said Act."

Subsequently, the Dominion of Canada granted a patent of the lands to the Canadian Pacific Railway Company, subject to the same conditions and limitations.

The order-in-council of August 6, 1866, referred to in the statement of facts of the Railway Board, was adopted by the Government of Canada, comprising then Upper and Lower Canada, and is in the following terms:—

On a report, dated 2nd instant, from the Honourable the Commissioner of Crown Lands, stating that, in surveying the lands on the northerly shore of Lakes Huron and Superior, the United States system of meridianal lines has been adopted, as it possesses the decided advantage of uniformity, regularity and economy.

That by this system the townships are laid out six miles square, a more convenient size for municipal purposes than that of the older townships, which are generally 10 miles square.

That the township boundaries are drawn on the true meridian, and at right angles thereto, each township being subdivided by lines drawn parallel at its outlines, into 36 sections of 1 mile square containing 640 acres each. These sections are subdivided into quarters by posts planted on the outlines.

That in these surveys no road allowances are laid out on the surveyed lines as formerly, the rugged and broken nature of the ground making them unfit for sites of roads. That the intention being to follow the American system with regard to the roads as well as the subdivisions of the lands, the roads there are laid out by the municipal authorities in the most suitable sites, and the proprietors of the lands over which they pass receive such compensation for the lands taken as the authorities consider just and reasonable. That, owing to the inferior quality of the lands generally on the northerly shore of

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Mignault, J.

Lakes Huron and Superior and the large blocks which have been taken up as mineral locations, many years will elapse ere the townships enjoy the benefits of municipal corporations, and it is necessary to make provisions for the establishment of roads in the meantime, he, the Commissioner, therefore recommends that an allowance of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

The committee submit the recommendation of the Commissioner of Crown Lands for Your Excellency's approval.

The recommendation of this order-in-council, adopted by the Government, was that an allowance of 5% of the acreage of lands be reserved for roads, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

Counsel for the appellant argued that this order-in-council merely adopted a policy which should govern grants of lands on the northerly shores of Lakes Huron and Superior, which policy was to be given effect by the insertion in letters patent of any of these lands of a reservation of 5% of the acreage of the land for roads, and also of the right of the Crown to lay out roads where necessary.

Upon due consideration, I do not think this construction an unreasonable one, for if a grant of lands were made by the Crown without this reservation I fail to see how the order-in-council could be relied on to restrict an absolute and unqualified grant.

No letters patent were issued for the lands in question, which were transferred by the Government of Ontario to the Government of Canada by the order-in-council of October 31, 1901, without any other instrument of title, and this order-in-council does not contain a reservation of 5% for roads, or a reservation of the right of the Crown to lay out roads where necessary. The only reservation made—excluding one concerning Indian reserves and concerning previous grants made without a reservation of the right-of-way, stations, station grounds, and other purposes of the Canadian Pacific Railway, which is not pertinent to the present inquiry—is to subject the transfer to the conditions and limitations of s. 2 of 59 Vict., c. 11. The construction of this section, therefore, determines the answer that should be given to the question submitted. To repeat the language of the statute, the order-in-council making the transfer shall not be deemed

to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the lands hereby intended to be conveyed.

The expression, "rights of the public" (there is no reservation of the rights of the Crown as distinguished from those of the public) is extremely vague. Giving this expression, however, full effect, the "rights of the public" seem to be those with respect to common and public highways *existing* at the date of the order-in-council.

It is suggested that what was intended was to reserve the existing rights of the public with respect to common and public highways, and not merely their rights to existing highways. This seems to be a forced construction, for if it was intended to reserve existing rights and not rights to existing highways, if really the public can be said to have existing rights to non-existing highways, the legislature could have used apt language to make this intention clear, and in the absence of anything plainly indicating such an intention, I would not feel warranted in giving to the language of the statute any other construction than the natural and grammatical one. It therefore appears to me that the rights of the public are reserved merely as to highways which existed on October 31, 1901. The statement of facts of the Board is that no highway was laid out across the railway before title to its right-of-way was acquired under the order-in-council.

It is also suggested that no highways existed across the lands transferred by virtue of the statute, and that therefore the language of s. 2 would be meaningless if it be restricted to the then existing highways. This fact, however, is not among the facts found by the Board as applied to the large tract of land transferred under the statute, which is described as being

> the lands lying between the terminus of the Canada Central Railway near Nipissing, known as Calander station, and the western boundary of the Province of Ontario, near Rat Portage (Kenora), and between the junction at Sudbury on the main line of the Canadian Pacific Railway for the Algoma Branch and the River Saint Mary.

I cannot, therefore, assume that there were no existing highways in this large tract of land covering several hundred miles—the contrary assumption would be much more reasonable—and therefore the construction which I feel constrained to place on the language of s. 2 does not, in my opinion, render this language meaningless.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. DEPARTMENT OF PUBLIC WORKS (ONT.)

Mignault, J.

I would further think that if existing rights of the public to highways are to be considered as being protected by the statute, the order-in-council of August 6, 1866, standing by itself, and in the absence of a reservation of 5% of the acreage for roads in the order-in-council of October 31, 1901, or of the right of the Crown to lay out roads where necessary, would not vest any such rights in the public with respect to highways then not laid out or planned. The language of the order-in-council of 1866 would indicate that at least some roads had been then laid out by the municipal authorities, but the Board has found as a fact "that no highway was laid out across the said railway before its right-of-way was acquired."

I therefore think that the question submitted should be answered in the negative. I would consequently allow the appeal with costs. *Appeal dismissed.*

ONT.

S. C.

Re BUTTERWORTH AND CITY OF OTTAWA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 19, 1918.

MUNICIPAL CORPORATIONS (§ II C—135)—BY-LAW—IRREGULARITY OF EXERCISING POWER—CAPABLE OF BEING REMEDIED—APPELLATE COURT WILL NOT QUASH.

When the subject legislated upon by a municipal council is clearly within the municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and that defect can be remedied by further or different action, the by-law will not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter.

Statement.

APPEAL from the order of Falconbridge, C.J.K.B., and from the order of the Board. Affirmed.

The judgment appealed from is as follows:—

The objection to the by-law was that it was not passed with the approval of the Ontario Railway and Municipal Board as required by sec. 401, para. 13, of the Municipal Act, as enacted by sec. 8 (1) of the Municipal Amendment Act, 1918, 8 Geo. V. ch. 32.

Since the argument of this motion, the by-law has received the approval of the Board, but the applicant contends that such approval should have preceded the passing of the by-law. *In re John Inglis Co. Limited and City of Toronto* (1904), 8 O.L.R. 570, is cited in support of this contention. But the language of the Consolidated Municipal Act applicable to that case left no room

ONT.

S. C.

RE BUTTERWORTH AND CITY OF OTTAWA.

for doubt or misapprehension. It provided, "Without the consent of the Government of Canada no municipal council shall pass a by-law . . . ," pointing clearly to a consent obtained in advance.

I cite with approval the opinion of the Board on this point.

The motion is dismissed with costs.

The opinion of the Board, written by the Chairman, was as follows:—

This is an application by the Municipal Corporation of the City of Ottawa for the approval by the Board of by-law No. 4522, intituled "A By-law amending By-law No. 3358, intituled 'A By-law to regulate Markets and Weighhouses'." The approval of the Board is rendered necessary by reason of sec. 401, para. 13, of the Municipal Act, as enacted by sec. 8 of the Municipal Amendment Act, 1918. Section 401 enacts that "by-laws may be passed by the councils of urban municipalities for certain purposes; and para. 13 reads as follows:—

"13. With the approval of the Municipal Board, and within the limitations and restrictions, and under the conditions prescribed by order of the Board, for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality, by a vehicle, from any coal-yard, store-house, coal-chute, gas-house or other place:

"(*a*) To have the weight of such vehicle and of such coal or coke ascertained prior to delivery, by a weighing machine established as provided by paragraph 11.

"(*b*) To furnish the weighmaster in charge of such weighing machine, and to surrender to each purchaser, at the time of delivery, a weigh-ticket, upon which has been printed or written the name and address of the vendor, and the name of the purchaser, and to have such weigh-ticket dated and signed by such weighmaster, and to have him enter thereon the weight of such coal or coke."

By-law No. 3358, passed in 1912, which is amended by by-law No. 4522, is in great part a revision and consolidation of various by-laws relating to markets. This by-law contains sec. 48, which was enacted originally in the year 1890 as a part of by-law No. 1081, and is in the following words:—

ONT.

S. C.

RE BUTTERWORTH AND CITY OF OTTAWA.

"48. No person shall, upon or after the sale thereof, deliver any coal from a waggon or other vehicle, or cause the same to be delivered, without first having the same weighed upon one of the city weigh-scales in accordance with the provisions of this by-law. (B. 1081/90, s. 1, in part.)"

This section (48) was repealed by by-law No. 4522, and the following was substituted for it:—

"48. Every person who shall after a sale thereof deliver coal or coke within the City of Ottawa by means of a vehicle from any coal-yard, coal-chute, store-house, gas-house or other place, shall have the weight of the coal or coke conveyed in or upon such vehicle, ascertained prior to making delivery thereof, upon a weighing machine established and operated by the corporation as hereinbefore provided."

The two sections—the one in form affirmative, the other negative—aim to ensure the same purpose, the compulsory weighing on public weigh-scales of all coal sold and delivered from vehicles within the city.

The original of sec. 48, passed in 1890, was interpreted by the city authorities and by coal-dealers as imposing a duty upon the dealers delivering coal by waggon or other vehicle within the city to weigh it on one of the city weigh-scales. This interpretation was during all these years acted upon until questioned by Mr. Butterworth, a coal-dealer of long standing in Ottawa. This gentleman, who, it appears, carried on business at two coal-yards, had complied with sec. 48 of by-law No. 3358, as generally interpreted, for many years. In or about the year 1916, Mr. Butterworth opened a third coal-yard, and erected weigh-scales on his own premises, and applied to the city council asking that his scales be taken over by the city as public weigh-scales and operated at the expense of the city, but for the weighing of his coal only. It appears that the Corporation of the City of Ottawa leases six weigh-scales, and owns four, besides two market-scales, which are distributed throughout the city at convenient points and are all operated as public weigh-scales, each in charge of an official weighmaster appointed by the city council. To Mr. Butterworth's proposal the city corporation replied expressing its willingness to take over his weigh-scales and operate them as public scales,

provided Mr. Butterworth would pay any deficit on the operation, and permit the weighing of all commodities upon them. This offer Mr. Butterworth declined, and proceeded, in defiance of the provisions of sec. 48 of city by-law No. 3358, as theretofore interpreted by the city authorities, to sell and deliver coal in the city without having it first weighed upon the public weigh-scales. The result was a prosecution of Mr. Butterworth by the city corporation for breach of the city by-law, and his conviction: this conviction was quashed, on the grounds set out in the case *Rex* v. *Butterworth* (1917), 13 O.W.N. 263. Subsequently para. 13 of sec. 401 of the Municipal Act, above cited, was enacted by the Legislature, and the amending by-law No. 4522 was afterwards passed by the Council of the City of Ottawa.

In view of the liberal provision made by the city corporation for the public weighing of coal at various points within the city, and the length of time this practice, regarded by the coal-dealers as obligatory upon them, had prevailed, without complaint, and, so far as appears, to the public advantage, the Board has reached the conclusion that it would be unwise, in the exercise of its discretion, to impose limitations, restrictions, or conditions upon the enacting faculty of the city council, and that it should approve by-law No. 4522 without more.

It was urged by Mr. McVeity that by-law No. 3358 was a defunct by-law, and that on its passage the powers of the council were spent, citing *In re John Inglis Limited and City of Toronto*, 8 O.L.R. 570. As to this it seems to the Board, first, that neither by-law No. 3358 nor sec. 48 has been held to be invalid either in the case *Rex* v. *Butterworth* or in any other proceedings; and, secondly, the *Inglis* case does not seem applicable, as the by-law in question in that case was unquestionably void, wanting the antecedent sanction of the Government of Canada, whereas many of the provisions of by-law No. 3358 are of undoubted validity, and by-law No. 4522 is clearly within the competence of the council when approved by the Board.

It was suggested as a reason for withholding the Board's approval to the by-law that the policy of the council might result in a monopoly in the coal-business, to the detriment of the public. Of this no evidence was submitted, notwithstanding that the policy of requiring compulsory weighing on public weigh-scales had

ONT.

S. C.

RE BUTTERWORTH AND CITY OF OTTAWA.

obtained for many years. Even should such a danger arise, it seems to the Board that public opinion would speedily exert pressure on the council to modify its by-law, either by establishing additional weigh-scales or dispensing with the obligation to weigh at public scales.

The by-law will be approved.

The order of the Board approving the by-law was dated the 8th June, 1918.

McVeity, for appellant.

Proctor, for respondent, the city corporation.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Appeals from the judgment of the Chief Justice of the King's Bench refusing to quash by-law No. 4522 of the City of Ottawa, and from the order of the Ontario Railway and Municipal Board approving of the by-law.

The point at issue in both these appeals is the right of the municipal corporation to pass such a by-law regulating markets and weighhouses without the previous approval of the Board.

The legislation which requires such approval is found in sec. 401, para. 13, of the Municipal Act, as enacted by sec. 8 of the Municipal Amendment Act of 1918. It is as follows (setting it out, as above).

The section of by-law 4522 which is attacked is in these words (setting it out, as above).

The disposition of the Courts is to interfere as little as possible with the exercise of the legislative functions of municipal councils, when that exercise falls within the proper limits of their powers.

And, as the jurisdiction to quash a by-law is discretionary, a further principle may be safely asserted: that is, that when the subject legislated upon is clearly within municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and that defect can be remedied by further or different action, the by-law should not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter.

In the case in hand the sole question is whether the Board must act first and if desirable lay down certain limitations, restrictions,

and conditions to which any by-law thereafter passed must conform before approval, or whether, when a by-law has passed its third reading and is, but for the want of approval, a complete act of legislation, the Board can then approve of it, if its provisions seem to the Board to be proper and reasonable.

Read literally, the enactment that "by-laws may be passed by the councils of urban municipalities . . . with the approval of the Municipal Board," would seem to require concurrent consent to the act of passage. But, this being a practical impossibility, the action of the Board must be either prior or subsequent. In actual practice the action of the Board would be taken either after the by-law was passed, as here, or between its second and third readings, as in the case of by-laws requiring the assent of the electors, or before the by-law took form and shape. In the latter case some way would have to be found of getting the Board to lay down some general conditions for such by-laws and for approving of those which complied with these provisions. That course is open to the objection that conditions may and probably would differ in different cities and towns and that it might be hard to forecast proper regulations which would fit each locality. Besides this, there is the difficulty of getting the Board to act unless there is some concrete case necessitating the exercise of its functions. If application were made by any municipality, it is quite likely that the Board would ask that the proposed legislation of which its approval was should be put in shape and submitted.

These considerations, while rendering it probable that a reasonable course has been pursued in the present instance, cannot control the construction of the statute, if the words clearly point to an opposite conclusion.

But they add force to the contention that where the approval has been given and no conditions etc. have been laid down, the statute has been complied with in fact and in law as well.

I confess that the wording of the amended section lends itself, in my judgment, to the view that the Board's action regarding conditions should precede the passage of a by-law. But its prior approval of a by-law cannot be had except by a resolution in general terms, and the whole section is therefore open to the other construction, which does no great violence to the language and certainly results in no legal miscarriage. The by-law is inopera-

ONT.

S. C.

RE BUTTERWORTH AND CITY OF OTTAWA.

Hodgins, J.A.

tive till approval is gained, and that approval is, I think, intended to be a consent to the particular by-law. Any other method of approval would, in case of a prosecution, necessitate not only proof of the breach of the by-law but also a consideration of how clearly the conditional approval, given in a general way and prior to the municipal enactment, covered the actual by-law in question—a rather clumsy procedure.

If the provisions of the section are to be construed as conditions precedent, the result would be similar to that pointed out in *Rex* v. *Lincolnshire Appeal Tribunal*, [1917] 1 K.B. 1, 14, by Swinfen Eady, L.J., that, as the appellant there had no control over the acts of others, and as acts had to be done by the local tribunal, his appeal might be rendered abortive if the local tribunal failed in any way to comply with the requirements of the regulations: so here, if the Board declined to initiate matters, no urban municipality could ever pass such a by-law.

As it is a matter of discretion, I think, for these reasons, the by-law should not be quashed.

The rule I suggest as one which it is safe, and indeed advisable, to proceed on, is based upon the same principle as has been adopted in other cases where approval is needed to validate some act.

In *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, the Court dealt with a statute which provided that "no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting." There was a by-law for payment to the president of an amount to be afterwards fixed; that by-law was ratified by the shareholders; the shareholders themselves fixed the amount, and the directors then, in terms of the by-law and as to amount in accordance with the expressed wish of the shareholders, fixed the amount of the remuneration or payment to be made. The Court of Appeal held that the statute was sufficiently complied with. Osler, J.A., says (p. 618):—

"I agree with Britton, J., that in substance all that the Act requires has been done. The mind of the directors has been expressed; so also has that of the shareholders, and exactly to the same purpose and with the same result."

In *In re Huson and Township of South Norwich* (1892), 19 A.R.

343, Hagarty, C.J.O., delivering the judgment of the Court, said (pp. 350, 351):—

"But the Courts from the earliest date have striven to avoid undue strictness in the insistence of exact performance of statutable formalities, where they could see that the objection did not reach either to the clear omission of some condition precedent required to be performed:—where a mistake had been made in perfect good faith and with an honest purpose of obeying the law, although unintentionally deviating from its strict formal observance—where the objection was wholly technical and nothing had occurred to create a suspicion of unfair dealing, and there was no reason whatever to believe that the result of the whole proceedings had been affected."

In *Re Boulton and Town of Peterborough* (1859), 16 U.C.Q.B. 380, where the statute provided that the manner of ascertaining the consent of the electors should be determined by the by-law, the Court dealt with that provision from much the same point of view. Sir John Robinson, C.J., there said (pp. 386, 387):—

"The 18th clause of the statute 14 & 15 Vict. c. 51 does literally provide that the manner of ascertaining the consent of the electors shall be determined *by the by-law*. But that must receive a reasonable construction. The proposed by-law could not be an actual by-law till after the consent of the ratepayers had been obtained, and it was therefore incorrect to require that the manner of ascertaining such consent must *be determined by the by-law*. When the by-law came afterwards to be passed, all that operation would be over."

"We see no more reasonable way of complying with the enactment than that adopted in this case, of printing a notice of the time and place of holding the meeting at the foot of the draft of the proposed by-law, and authenticating that by the signature of the proper officers, so that the draft of the by-law could not be seen by any one without seeing the notice."

I think there is much force in the observations of Middleton, J., in *Rex* v. *McDevitt* (1917), 39 O.L.R. 138, 140, and that they have some application here:—

"The Court should not interfere and defeat the general aim and object of the legislation because of an immaterial error on the part of an officer appointed to carry the law into operation. In

ONT.

S. C.

RE BUTTERWORTH AND CITY OF OTTAWA.

Hodgins, J.A.

each case the search is after what is the real intention of the Legislature—was it the legislative intention that non-compliance with the particular provision of the statute should render the proceedings abortive."

I think the Court should not be astute to quash a by-law passed by the municipal council and approved by the Board, just because the method adopted is open to some criticism due to the peculiar wording of the legislation giving authority to make the by-law effective. The only consequence would be to require the parties to try it again in a slightly different way so as to produce a result exactly the same.

In the words of Meredith, J., in *Cartwright* v. *Town of Napanee* (1905), 11 O.L.R. 69, 72,* there is every reason for "declining to exercise a jurisdiction which would compel the respondents to march up the hill merely to march down again at their will."

I think both appeals should be dismissed, but without costs, as when the original motion was launched the by-law had not secured approval.

Appeals dismissed.

**See* the judgment of the Court of Appeal in the same case, *sub nom. Re Cartwright and Town of Napanee* (1906), 8 O.W.R. 65.

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. February 11, 1919.

PRINCIPAL AND AGENT (§ III—30)—AGENT EMPLOYED TO DO CERTAIN WORK FOR A CERTAIN SUM—COMPLETION OF WORK—WORK USELESS—RIGHT TO RECOVER AMOUNT AGREED ON.

If an agent is employed to perform certain work for an agreed amount, that amount is payable when the work is completed even should it transpire that the work done by the agent prove useless to the person employing such agent. The general principle, that a solicitor must exercise the utmost good faith in transactions with his client, does not apply where the solicitor is employed to do special work, far removed from that of an ordinary solicitor, where no bad faith is shewn.

Statement.

APPEAL by the plaintiff from the judgment of Clement, J. Reversed.

E. C. Mayers, for appellant; *J. L. G. Abbott*, for respondent.

Macdonald, C.J.

MACDONALD, C.J.:—The circumstances out of which the action arose are set forth in the reasons for judgment of my brother Galliher, which I have had the advantage of reading, and I shall, therefore, proceed directly to the points at issue.

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

Macdonald, C.J.

The trial judge thought the parties were not *ad idem* and dismissed the action. There is, in my view of the evidence, no essential difference between the plaintiffs' and defendants' version of the contract. Mr. Wallace, defendants' managing director, who conducted the negotiations with the plaintiff, states the plaintiff's proposal thus:—"He (plaintiff) said if this Spencer Trask and Norwegian deal goes through I will charge you 2%"; and again, in answer to the question by the court:—"But if it had gone through would it be 2% on the $500,000, or whatever you got out of it?" said:—"Yes, whatever we got out of it." And again, reasserting former testimony, he said:—"I said it (the commission) was contingent on the deal. On the Spencer Trask Co. lending the money and the Norwegian contract being carried out, that was the two it was contingent on."

Turney, secretary-treasurer of defendants, said that Wallace told him that there was a commission of 2% to be paid to the plaintiff: "On the amount of money to be raised." That is precisely the plaintiff's contention and differs only from Wallace's testimony in that it does not mention the contingency in reference to the Norwegian contracts. These Norwegian contracts were contracts entered into by the defendants with Ellingsen & Johnnessen for the building of ships in accordance with the terms set out in the contracts. They had been made and executed prior to the contract between the plaintiff and defendants now in question, and the only contingency upon which they were subject to cancellation was the event of failure of the defendants to procure the permission of the Department of Trade and Commerce of Canada to the vessels being sailed under a neutral flag.

I think it is fair to assume that this was what the parties herein had in mind when the commission was made contingent on these Norwegian contracts being carried out, as well as upon the success of the loan.

It is manifestly fair to the defendants to take their own version of their contract with the plaintiff, which I do, and on that footing there is no question of failure on the plaintiff's part to discharge the heavy burden, emphasized by the judge, resting upon him to clearly prove the terms of the contract entered into between him and his clients, the defendants.

Nor does any question arise in this appeal as to the fairness of

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

Macdonald, C.J.

the contract and the full knowledge of the defendants of all facts and circumstances of which they were entitled to disclosure.

Therefore, I take it that the contract proven is one by which the defendants promised to pay to the plaintiff at least 2% commission on the amount of the loan should he succeed in getting it and should the defendants succeed in complying with the condition upon which the Norwegian contracts should become unconditional.

There is no question here of failure to obtain the agreed permission to the said ships being sailed under a neutral flag. The defendants acquiesced in the repudiation by the said purchasers of their contract for other reasons than the failure to obtain said permission, as to which no question was raised in this appeal.

The said purchasers withdrew from their contracts and on the evidence I must hold that the defendants acquiesced in such withdrawal without plaintiff's consent. It is conceded that the plaintiff performed his part in obtaining the loan, and is in no way to blame for the failure to bring about a complete consummation of the transaction involved in the carrying out of the Norwegian contracts and the obtaining of the loan. In these circumstances I think the plaintiff is entitled to a commission of 2% on the sum which the lenders were prepared to advance, viz: $500,000; this commission was earned when the Norwegian contracts came to an end.

It was argued, however, that the plaintiff's subsequent conduct amounted to an abandonment on his part of his right to the commission. This conduct was relied upon also as evidence that there was no contract at all for commission, or, if there was, that it was one to pay the commission only if the Norwegian contracts were carried out without regard to whether their failure was brought about by defendants' act or omission or not. As to the first, nothing short of a release, or what is equivalent to a release, of plaintiff's right to the commission could divest him of it and the evidence is far from establishing that. The answer to the second is that the contract is that proven by the evidence of the defendants themselves and is not in doubt; as regards the third, there must in reason be some point of time at which the plaintiff could say I have done my part and am entitled to my commission. That point of time in the ordinary course of a transaction of the

kind would have been reached when the loan was secured and the contingency of failure to obtain consent to the sailing of the ships under a neutral flag was removed. It would not, in my opinion, be reached only when the ships were built and delivered and all possibility of the contracts not being "carried out" on the one part or the other was removed. By permitting the Norwegians to withdraw from the contract the defendants have estopped themselves from saying, as against the plaintiff, that the contracts were not *carried out*.

There is another question remaining to be considered. Up to the time the plaintiff was instructed to enter into negotiations for the loan he was, the judgment below declares, entitled to receive from the defendant a fee of $10 a day and expenses while absent from his home on defendant's business in Montreal and New York. In his evidence, the plaintiff says that he put aside all other business of defendants and devoted his whole time and attention to the loan negotiations from and after September 22, 1916, and up to the withdrawal of the Norwegians, of which plaintiff appears to have been advised on or about December 21, of the same year. During that period the commission must be plaintiff's remuneration. Up to September 22, there can be no doubt about the correctness of his claim for fees and expenses.

With respect to the period between December 21 and his recall on February 6, 1917, I think the plaintiff is also entitled to his agreed fees and expenses, as during the latter period he was again devoting his attention to business of defendants outside the commission contract and within the scope of his retainer.

The judgment below should therefore be varied in accordance with the above findings.

MARTIN, J.A., allowed the appeal.

Martin, J.A.

GALLIHER, J.A.:—This is an appeal from the judgment of Clement, J., dated October 18, 1918.

Galliher, J.A.

The plaintiff was at all times material to the contracts in question herein solicitor for the defendants, though as to the contract for commission sued on he claims not to have been acting in that capacity.

The facts are shortly these: The defendants are shipbuilders operating at North Vancouver. On June 3, 1916, the defendants gave to one Arthur McEvoy an option to acquire all the under-

B. C.
C. A.
WHITESIDE
v.
WALLACE
SHIPYARDS
LTD.
Galliher, J.A.

taking and assets of the defendants as a going concern, for the sum of $450,000. McEvoy went east to float this option, and after being east some time, and after correspondence between himself and Whiteside and the defendants and consultation between Whiteside and the defendants, Whiteside was authorized to go east to assist McEvoy at a nominal fee which the judge has fixed at $10 per day (and against which there is no appeal) and travelling, living and other necessary expenses, as to which latter the judge has directed a reference.

Shortly after Whiteside arrived in the east the defendants entered into negotiations with a Norwegian company for the building of certain ships, which culminated in an agreement dated September 20, 1916.

To finance the carrying out of this contract the defendants were obliged to raise money and Whiteside was instructed to devote himself to this object in the east. He therefore dropped work on the McEvoy option and devoted his time and attention exclusively to the procuring of a note issue for the financial purposes I have referred to. After long and arduous work his efforts, which were, from time to time, delayed by changes in the contract permitted by the defendants, crowned with success and he procured in the Spencer Trask Co. of New York a company able, ready and willing to handle the note issue. In other words, everything had been done by Whiteside which he had undertaken to do for the defendants in this regard so as to entitle him to payment of any commission agreed upon provided it came within the terms of his contract.

Now, coming to the terms of the contract, what occurred was this:—At a time when Whiteside had interested the Spencer Trask Co. to the extent that they sent out experts and a naval architect to Vancouver to examine into the standing and capability of the defendants to undertake and complete the work they proposed entering into for constructing these Norwegian ships, Whiteside accompanied them from the east to Vancouver and while in Vancouver on the eve of his leaving again for the east to complete negotiations for the note issue the alleged agreement for commission was entered into.

The evidence as to what occurred according to Whiteside is at pages 49 and 50 of the appeal book, and is in no material way altered in cross-examination.

The evidence is short and is here set out:—

At any rate it was not discussed, but on Friday evening of that week I got Wallace at his house. I went to his house. He had had an appointment with me that afternoon and had not kept it. However, I found him at his house and we discussed the business that we were engaged on generally, and in that interview the question of my remuneration for the making of this loan came up. If you will remember, any commission to be paid in the case of the transfer of the company's assets to a reorganized company would be out of the purchasers if a deal were made under the McEvoy option; but this was a totally different matter; and I had been taken off the other financial transaction in September and had since been engaged in obtaining this temporary financial assistance, and my remuneration of course would be on a different scale. Wallace asked me what I was going to charge him, and I told Wallace that I expected to make some money out of the reorganization of the company, which I thought would be carried on after this transaction, for a temporary financial assistance had been closed. I told him that as I expected to make some money out of that I felt inclined to let him state what my remuneration for the obtaining that note issue would be—raising that note issue—that if Spencer Trask & Co. agreed to make the loan—to take this note issue, that I should expect him to pay commission between 2 and 5% of the amount of the note issue, not less than 2% and not more than 5%—5% being the proper charge in negotiating loans of that kind. Wallace—I don't know what Wallace said to that, if he said anything, but he begged me to leave at once. He did not demur, and he begged me to leave at once for the east, and complete the deal as they were anxious to get on.

Wallace's evidence at the trial does not contradict the statement that 2% was to be paid on the amount of the loan procured, but qualifies it in two respects—that it was contingent on, 1st, Spencer Trask lending the money, and, 2nd, the Norwegian contract being carried out.

Counsel for plaintiff pointed out that the answer is not consistent with the answer made in examination for discovery, and this is quite true, but I think the explanation of Wallace shews, although it is not quite clear, that there was no intention to make a wrong statement, but that his memory was rather hazy as to what took place. In fact, from reading the evidence, I have come to the conclusion that while Wallace was called into consultation on matters of detail and finance, when they had been decided upon he left them largely to his staff and did not charge his memory with what took place to the same extent as he did with the practical matters of construction.

Turney, the secretary-treasurer of the shipyard company, admits that Wallace told him Whiteside was to be paid a 2% commission on the amount of money that was raised.

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

Galliher, J.A.

He also states that he thinks Whiteside understood that the need of the Spencer Trask money was contingent upon the carrying out of the contracts for the Norwegians.

Asked why he thinks Whiteside understood that, he replies: "Why should we want to borrow money if we were not going into these other contracts?"

There is no doubt Whiteside understood that the money was needed for the carrying out of these contracts, but that is quite a different thing to his commission for floating the loan being contingent on the carrying out of the contracts unless it was so stipulated.

Now as to whether there was a contract. We have Whiteside's evidence as to the conversation. No assent or dissent expressed by Wallace at the time other than to be inferred from his urging Whiteside to leave at once and go on with the work and his afterwards telling Turney they had to pay Whiteside a 2% commission and there being a consideration a contract is established.

The remaining question in regard to the contract is: What was the remuneration contingent on?

Both sides are agreed that it was contingent on procuring the money to be advanced, and it is admitted, or at all events it cannot be disputed upon the evidence, that Whiteside procured the Spencer Trask Co., able, ready and willing to advance the money. The more difficult problem as to which the parties are at variance is: Was the remuneration contingent upon the entering upon and the carrying out to completion of the construction of the Norwegian ships? For the defendants must go that far on this branch of the case in order to escape liability.

No definite words were used in the conversation between Whiteside and Wallace as to any contingency upon which commission was to be paid.

Ordinarily speaking, when you employ an agent to perform certain work for you for an agreed amount, that amount is payable when the work is completed even should it transpire that the work done by your agent proved useless to you. We have to look at all the circumstances in this case.

First, there was the agreement with regard to assistance on the McEvoy option, and right here might be a convenient time to

deal with the suggestions of defendant's counsel that this option deal and the work done in procuring the note issue are so linked up that the work done on the latter may be said to be in furtherance of the former.

Assuming that the procuring of the shipbuilding contract and the raising of the money which would enable the defendants to carry out those contracts might be an inducing element in bringing about a sale or reconstruction under the option out of which Whiteside expected to make a substantial commission, yet in the face of what took place at the meeting in November between Wallace and Whiteside we must regard them as two separate transactions.

There Whiteside in effect said: I am inclined to let you down easy as regards my charges for procuring this loan because I expect if the deal under the option goes through I will get a commission out of the purchasers; clearly shewing that he was not relying on that chance and the nominal fee as remuneration for his services in connection with the loan, but only stating that as a reason why he would make his charges more reasonable.

At the time this arrangement was made and for some time prior thereto, the defendants had a binding contract under seal enforceable against the Norwegian interests. Both Whiteside and Wallace believed that the contracts would go through providing they could be financed. Whiteside's special mission then was to procure these finances, which he did, and certainly it was through no fault of his or of those he procured that the matter fell through.

It was the fault of either the Norwegian interests or of the defendants, and as the matter appears to me it was the fault of both.

The defendants did not seek to hold the Norwegians to their contract or enforce it, but on the other hand allowed changes to be made in its terms, changes which rendered it infinitely more difficult for Whiteside to carry out his part and in the end resulted in the whole transaction falling through.

We will first deal with the matter as if Whiteside had not been the defendant's solicitor or in fact a solicitor at all, but simply a broker or agent for procuring the loan.

In view of what I have already stated, could it be said for a moment that he would not be entitled to his commission? I

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

Galliher, J.A.

think not. Now looking at it from the point of view that Whiteside at the time was the defendant's solicitor. It is urged that there is a greater burden placed upon the shoulders of a solicitor in transactions with his client than where the parties are at arms' length in dealing, and I admit the general principle. That has been decided in a number of cases.

We have first to enquire in what capacity Whiteside acted. I doubt if the mission on which Whiteside first went east could, in strictness, be called solicitor's work, but we need not concern ourselves as to that. There was a special agreement as to that, and the trial judge has fixed the amount against which there has been no appeal.

Whiteside, however, was taken from this work by the defendants and requested to negotiate for the procuring of a very large amount of money—from ½ to ¾ of a million dollars. This is very much the work of a financial broker.

Of course Whiteside has demonstrated that a solicitor can accomplish it, but I think when one reads the appeal book one must realize how far removed from ordinary solicitor's work it is. Transactions of this nature are specialties in themselves, and often in the hands of men skilled in such fail.

I am only using these illustrations to shew the reasonableness or unreasonableness of either Wallace or Whiteside being under the impression that Whiteside was acting in his capacity as solicitor.

Is it reasonable to suppose, or was it reasonable for Wallace to suppose that Whiteside would absent himself from his practice in Vancouver for $10 per day and expenses with an arrangement as to office expenses?

It is true he did so on the work he originally went east upon, but then there was the inducement and the certainty, if successful, of getting a substantial commission out of the purchasers. While as to the loan transaction, he could look only to the defendants.

I feel that I have already dwelt upon this matter at too great length; suffice it to say that, in my opinion, we should not apply the stricter rule under the circumstances of this case.

What the defendants submit practically amounts to this—that Whiteside should have told Wallace that his commission was

payable whether the contracts were carried through or not. In my opinion the facts do not warrant this.

I do not think, under the circumstances of this case, that we are at all embarrassed by the decisions cited that solicitors dealing with their clients should exercise the utmost good faith. The evidence discloses no bad faith and the transaction was one of a strictly business character and which business men should and could readily comprehend.

I would allow the commission at the minimum fixed by Whiteside himself, and understood by Wallace, viz: 2% on the $500,000.

From this should be deducted all sums awarded by the trial judge for *per diem* fees, and also for expenses during the entire time Whiteside was engaged in the work of floating the loan and, to this extent, the judgment entered below should be altered.

The judgment below orders a reference as to expenses and this, I think, should be had.

McPHILLIPS, J.A. (dissenting):—This appeal has relation to a claimed commission upon arranging a loan by way of short term notes, the respondent to be the borrower and Spencer Trask & Co., bankers and brokers of New York, to be the lenders, the appellant claiming to have brought about the agreement to make the advance and the contention of the appellant is that the respondent contracted to pay a commission for his services not less than two per cent. nor more than five per cent. upon the total amount of the note issue, namely, $500,000. McPhillips, J.A.

The respondent is a company engaged in shipbuilding, and at the time of the happening of the events necessary to be considered in this appeal was in the market for orders for the building of ships, this class of work being accelerated, and large orders offering consequent upon the loss of shipping during the continuance of the war.

The respondent needed money to engage in these operations, and adopted two methods of procedure to meet the situation: one was the giving of an option to one McEvoy, who had been a partner of the appellant at one time in the practice of law in the City of Vancouver, for the sale of the undertaking and assets of the respondent for $450,000; as to $225,000 of the purchase price, this was to be in cash, and as to the balance to be secured by debentures of the new company to be formed to take over the

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

McPhillips, J.A.

undertakings and assets of the respondent—it was to be really more or less the procuring of purchasers who would make the necessary cash advance, form a new company, and Wallace was to be the president of the new company, and to carry on, in fact, it was to be in the nature of a reorganization to meet the situation which had presented itself of the possible very profitable building of ships but which was only possible with additional capital. The second idea of meeting the situation largely arose because of the fact that McEvoy was not making any speedy headway in bringing about the new flotation and the introduction of the needed capital. Then it was thought that it would be well to see if the required moneys could not be obtained by way of loan. The appellant was to receive, if the McEvoy option went through, one-third of the commission on profit recoverable by McEvoy. It would seem that McEvoy was desirous that the appellant should assist him in his work in the east at Montreal and New York, and other financial centres, and it resulted in the respondent retaining him to go east to assist McEvoy, the appellant to have a *per diem* allowance and expenses. The expense account, it would seem, was to be liberal. The appellant contended for an allowance of $20 per day, and the judge at the trial allowed $10 per day and expenses, and there is no cross-appeal, the judge disallowing any further claim of the appellant.

The whole transaction is somewhat involved and complicated by the fact that the appellant was at one time, if not at the actual time of the occurrences, the solicitor of the respondent. In fact, it would seem that the respondent really dealt with the appellant more as a solicitor than as a broker in the matter. This is illustrated by one feature amongst others, namely, that, as the appellant was to be necessarily away from his office in the City of Vancouver, advances were to be made, and were made by the respondent in the way of meeting the appellant's office expenses. The claim for the commission which is made for 3% on the $500,000 is in amount $15,000, this being the disallowed item, and which forms the subject of this appeal. It was never really advanced as a claim until a short time before action was commenced, and it is to be noted that, even after the lapse of 2 months after this commission was earned, if the appellant's view is to be accepted, no specific claim was made, at a time that the appellant was

embarrassed for funds. The new flotation or reorganization was not possible of accomplishment, nor the loan, unless the respondent was able to demonstrate that substantial contracts for the building of ships had been entered into. Contracts were entered into with a Norwegian syndicate which would, it was estimated, have produced a profit of $1,000,000, but the Norwegians, after entering into the contracts, withdrew from same, and apparently it was not possible to enforce these contracts, at any rate no steps were taken to that end. Then negotiations with a French syndicate and with others were entered upon, but nothing came of these negotiations, and difficulties arose about deposits in the bank to ensure the carrying out of the contracts and the execution of needed surety bonds.

Without entering into the details of all these matters, I cannot but come to the conclusion that the appellant was in the position, all through, of a joint adventurer with McEvoy in the chances of obtaining remuneration for his services over and above the *per diem* allowance and expenses, in relation to the option, new flotation, and reorganization, and as to the loan was a joint adventurer with the respondent. That is, either one of the contemplated occurrences were to become accomplished facts to enable the appellant to obtain more than the daily allowances and expenses. It is a truism upon the facts that neither of the possible events were at all possible unless there were firm contracts for the building of ships—and without these contracts all was impossible. Nevertheless, although neither of the contemplated events happened, the appellant insists upon this further claim for services rendered although nothing in the way of executed contracts took place, followed by any advance of moneys from Spencer Trask & Co. That is, the respondents in no way profited by the services of the appellant, yet the respondent did make very considerable advances to the appellant for services and expenses, and the trial judge has allowed his claim in this respect, only disallowing the claim for the commission upon the arranged loan which, under the circumstances, by reason of the failure of obtaining firm contracts for the building of ships, was not possible of being taken advantage of.

In view of all the facts and circumstances attendant upon all the happenings, the relationship of the parties to each other, all

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

McPhillips, J.A.

being considered, a very considerable onus unquestionably rests upon the appellant to make out his case, and the trial judge, who had the opportunity of seeing and hearing the witnesses, has found against the appellant, and it rests upon the appellant to establish that the trial judge arrived at the wrong conclusion. The question now is: Has the appellant discharged this onus resting upon him? I have been impelled to the conclusion that the appellant fails in this appeal. It is more incumbent upon a solicitor dealing with a client to make out his case than any other person acting in business transactions. He must be held to be better acquainted with the necessity for and certainty of contract, and not leave matters too vague and difficult of ascertainment. It would have been reasonable and proper that the contract should have been reduced to writing, so that the possibility of misunderstanding would be reduced to a minimum. As it is now upon the facts before us in this appeal, all is left to conjecture, and the respondent disputes the appellant's understanding of the words of the alleged contract, and all is uncertainty, and in such a state of facts who is to suffer? The appellant suing must make out his case, not leave it for the court to make the contract. That is not the province, nor within the line of duty of the court. The contract, failing of establishment, cannot be enforced, nor can damages be awarded for the breach of a non-existent contract. I would refer to what the Lord Chancellor said in *Jorden* v. *Money* (1854), 5 H.L.C. 185, 10 E.R. 868, 23 L.J. Ch. 865, at 869, the language being peculiarly applicable to the present case:—

> The question on this case then becomes one merely of fact. In my opinion no case has been made out, in point of fact, by this complaint. There could be but one witness on each side for the undertaking, as a promise binding in equity, if made at all, was only made in conversation between . . . (in the present case between the appellant and Wallace, the managing director of the respondent). Now, he asserts that the promise was distinctly given, and she as positively denies the fact. In such circumstances, equity cannot, without additional testimony shewing the promise to have been made, enforce the observance of it, unless, indeed, the denial of the promise should be so alleged as to prove that it could not be relied on. So far from that being the case, I think on the evidence here no such contract was entered into in the sense which the respondent supposes,

and Lord Brougham at p. 870:—

> . . . amounted merely to the expression of intentions which at the moment, no doubt, she intended to fulfil; but they were mere intentions; they were altered by subsequent circumstances, and, therefore, the performance of them could not be enforced.

(The learned judge here set out the evidence at length and concluded):—

It is apparent that really no concluded contract was ever entered into whereby the advance by way of loan could ever have been exacted from Spencer Trask & Co., and it is evident that the appellant fully appreciated this, and was desirous of keeping in touch with them to the end that if further contracts for the building of ships could be got on satisfactory terms then to revive negotiations for the loan. It is further apparent that, at this time, no suggestion is made by the appellant that notwithstanding the changed situation the default of the Norwegian syndicate and no contracts in sight, that, nevertheless, he would claim a commission on the loan transaction with Spencer Trask & Co., abortive as it was, and the telegram from the respondent is clear indication that no thought of a commission being payable was in the mind of the respondent. There could not reasonably be commission, *per diem* allowance and expenses, and everything indicates that, under the circumstances, all that was done by appellant was referable only to the agreement that he should receive a *per diem* allowance and expenses, and this has been allowed to the appellant throughout the whole time: the judgment as entered in its operative part reads as follows:—

This court doth order and declare that the plaintiff is entitled to be paid or allowed by the defendant for his services mentioned in the statement of claim, $10 *per diem* for the period from August 20, 1916, to February 6, 1917, namely, $1,710, and also his own living and travelling expenses during that period including the plaintiff's own expenses of his return from Montreal to Vancouver after his recall by the defendant and all other expenses properly incurred by the plaintiff on behalf of the defendant;

And this court doth order that the following questions in this action, namely, the amount of the plaintiff's own living expenses and travelling expenses during the said period, including the plaintiff's own expenses of his journey from Montreal to Vancouver after his recall by the defendants and all other expenses properly incurred by the plaintiff on behalf of the defendant and the amount for which the defendant is entitled to credit in respect of payments already made by the defendant to the plaintiff, be referred to the district registrar for his enquiry and report.

I cannot satisfy myself that the evidence establishes any contract or agreement which may be said to be susceptible of legal enforcement for the payment of the commission claimed. The appellant really does not go the length of saying that there was a concluded contract for the payment of commission to him nor was

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

McPhillips, J.A.

the rate or percentage of commission agreed upon if all that the appellant says be accepted as against the explicit denial of Wallace. The trial judge has held that the parties were not *ad idem*. With this holding I entirely agree. No concluded agreement was come to whereby the appellant was to receive a commission for arranging a loan such as is claimed. In *Love* v. *Instone* (1917), 33 T.L.R. 475, Lord Loreburn, at p. 476, said: "The law would not come in and say they must agree on what was reasonable. It would say that there was no bargain. That was this case, and on that ground the appeal failed." And Lord Parmoor, at p. 478, said: ". . . they could not convert into a contract an arrangement of which the terms were not agreed. . . ."

According to Wallace any commission if payable at all was contingent upon Spencer Trask & Co. advancing the money, and the Norwegian contract being carried out, and certainly if contract there was, upon the evidence it is impossible to say that it was of any other nature. This situation was one of very considerable advantage to the appellant, as in the event of matters going off, which was the result, he was protected to the extent of the *per diem* allowance and expenses, really a very favourable position, with the possibility of earning a very handsome commission, if the whole transaction matured. It certainly would not appear to be at all equitable that the commission should now be payable with nothing achieved to the advantage of the respondent. Unquestionably, to establish the claimed contract upon all the surrounding facts and circumstances calls for the presentation of more cogent evidence than that advanced by the appellant at the trial. And in view of the express finding of the trial judge against the appellant's contention, and with ample evidence to so find, it is clear to me that the appellant fails utterly in making out a case for the commission. Even were a contract established for the payment of a commission independent of the controversy, it is indeed doubtful in view of the admitted fact that the rate or percentage of commission not being agreed upon—that there could have been an enforceable contract. In *Henning* v. *Toronto R. Co.* (1905), 11 O.L.R. 142, it was held (see head note) that:—

A provision in a contract for the right to use space for advertising purposes for its renewal "at the end of three years at a price to be agreed upon but not less than $5,000 per annum" leaves the matter at large unless the price is agreed upon, and the person using the space cannot insist on a renewal at the rate of $5,000 per annum.

B. C.

C. A.

WHITESIDE v. WALLACE SHIPYARDS LTD.

McPhillips, J.A.

However, upon this point I give no considered opinion. (See *Taylor* v. *Brewer* (1813), 1 M. & S. 290, 105 E.R. 108; *Roberts* v. *Smith* (1859), 4 H. & N. 315, 157 E.R. 861, in which both Martin and Bramwell, BB., appeared to disapprove of *Bryant* v. *Flight* (1839), 5 M. & W. 114, 151 E.R. 49; *Harvey* v. *Facey*, [1893] A.C. 552; and *Burns* v. *Godson*, [1918] 3 W.W.R. 587, affirmed by Supreme Court of Canada.)

In the present case the appellant states what he will charge as a commission—within a sliding scale—and does not pretend to say that there was any acceptance by Wallace on behalf of the respondent. In view of this, what Anson says in Law of Contract (14th ed., 1917), at p. 48 is applicable:—

> And an offer must be capable of affecting legal relations. The parties must make their own contract; the courts will not construct one for them out of terms which are indefinite or illusory.

In the present case, there is no written contract to interpret. All is based upon a very hurried conversation, and the judge was called upon to decide the question of fact upon rival evidence. It is, therefore, a heavy burden that rests upon the appellant when he asks that the finding of fact of the trial judge should be displaced and judgment be entered for him. Lord Loreburn, L.C., in *Lodge Holes Colliery Co.* v. *Mayor of Wednesbury*, [1908] A.C. 323, at 326, said:—

> When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury except that a jury gives no reasons. The former practice of Courts of Equity arose from the fact that decisions often rested upon evidence on paper of which an appellate court can judge as well as a court of first instance.

In *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 21 Can. Ry. Cas. 377, 86 L.J. P.C. 95, at p. 193-4, Lord Buckmaster, L.C., said:—

> But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

I cannot persuade myself that the appellant has made out a case in this appeal. The appeal, therefore, in my opinion, fails.

EBERTS, J.A., allowed the appeal. *Appeal allowed.*

Eberts, J.A.

N. S.

S. C.

TAYLOR v. DURNO.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Drysdale, JJ. and Ritchie, E.J. February 22, 1919.

1. EVIDENCE (§ III—374)—ASSAULT AND WRONGFUL IMPRISONMENT—ACTION FOR—LOSS OF WARRANT OF ARREST—EVIDENCE AS TO REGULARITY OF.

At the trial of an action for assault and wrongful imprisonment the warrant of arrest could not be found. It was proved that the defendant had the warrant prepared by a solicitor and took it to the justice, who compared it with the form in the statute; found it correct and thereupon signed it. Held, that this was sufficient proof of the form and contents of the warrant. The form in the statute concludes with the words "Given under my hand and seal." Held, that there was *primâ facie* evidence that the warrant had been issued under the seal of the justice.

2. MUNICIPAL CORPORATIONS (§ II C—228A)—NON-PAYMENT OF TAXES—ARREST—CONTENTION THAT TAX-RATE NOT MADE UP AS REQUIRED BY STATUTE—BURDEN OF PROOF.

In an action for assault and wrongful imprisonment arising from the arrest and imprisonment of the plaintiff for non-payment of school rates and taxes the plaintiff contended that the rate was not made up as required by the statute. The court held that the burden of proving this was, under the pleadings, on the plaintiff and he had not satisfied this burden.

Statement.

APPLICATION for an order setting aside the verdict for the defendant and the order for judgment made thereon and ordering a new trial in an action by plaintiff claiming damages for unlawful assault and imprisonment. Affirmed.

W. E. Roscoe, K.C., in support of application.

S. Jenks, K.C., *contra*.

Harris, C.J.

HARRIS, C.J.:—The plaintiff sued the defendant for assault and wrongful imprisonment.

The defence is that the defendant was secretary of the trustees of Cambridge School Section, King's County, under the provisions of the Education Act, of which section plaintiff was a resident, and was indebted to the section in the sum of $3.60 for school rates and taxes, which the plaintiff after demand had refused and neglected to pay, and that the defendant as such secretary applied to a justice of the peace for a warrant of distress which was duly issued and returned unsatisfied, whereupon he as such secretary of trustees applied to the said justice of the peace for a warrant for the arrest of the plaintiff which was duly issued according to the provisions of the Education Act and delivered to one D. E. Woodman, a constable in and for the County of Kings, who duly arrested the plaintiff under said warrant and conveyed him to the common jail for the county and there delivered him to the keeper of the jail.

There is a reply in which the plaintiff sets up that no rate

had ever been determined by the trustees on the assessed value of the property and income liable to be rated for schools in the section, nor any list of persons, firms, companies, associations, or corporations revised or approved by the said trustees or ever prepared or made up as required by c. 2 of the Acts of 1911, by reason whereof no rate was made and the alleged warrant was without jurisdiction and was null and void.

By another paragraph of the reply the plaintiff set up that if any such list was prepared the trustees did not by writing on such list signed by them authorize or direct the defendant as secretary of the said trustees to collect the said taxes from the persons named in said list, by reason whereof the alleged warrant was without jurisdiction.

There is also a paragraph setting up that the warrant was not under seal of the justice and was, therefore, void and the arrest illegal; and still another that the defendant was guilty of other acts than merely procuring the warrant for the arrest of the plaintiff.

On these issues the case went down to trial before Chisholm, J., with a jury and there was a verdict for the defendant and the plaintiff now applies for a new trial.

1. The first contention is that no warrant was proved.

It appears that the warrant was delivered to the constable, and by him left with the jailer when he left the plaintiff at the jail, and at the time of the trial it could not be found. It was proved that the defendant had the warrant prepared by H. H. Wickwire, K.C., of Kentville, which he took to the justice and the justice compared it with the form in the statutes, found it correct, and thereupon signed it. I think this was sufficient proof of the form and contents of the warrant.

It is urged that the warrant must be under the seal of the justice and that there was no proof of this fact.

The form of warrant given at p. 671 of the Revised Statutes applicable to the case concludes "given under my hand and seal at, etc."

In *Re Jane Sandilands* (1871), L.R. 6 C.P. 411, Bovill, C.J., said, p. 413:—

> To constitute a sealing, neither wax nor wafer, nor a piece of paper, nor even an impression, is necessary.

N. S.

S. C.

TAYLOR v. DURNO.

Harris, C.J.

And Byles, J., said:—

The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed and delivered by the several parties and the certificate of the two special commissioners says that the deed was produced before them and that the married women "acknowledged the same to be their respective acts and deeds." I think there was *primâ facie* evidence that the deed was sealed.

And Montague Smith, J., said:—

Something was done with the intention of sealing the deed in question. I concur in granting this application on the ground that the attestation is *primâ facie* evidence that the deed was sealed and that there is no evidence to the contrary.

This case has never been questioned, and if the attestation is *primâ facie* evidence that a private deed is sealed I do not see why the concluding paragraph of the warrant signed by the justice is not *primâ facie* evidence of the sealing of the warrant.

I think this point fails and the warrant must be regarded as in proper form and to have been issued under the seal of the justice.

2. The next contention is that the rate was not made up as required by the statute because there was no proof that on the collector's roll the trustees indorsed a memorandum in writing authorizing or directing the defendant as secretary of the trustees to collect the taxes from the persons named in the roll. Ss. 93, 94, and 95 of c. 2 of the N.S. Acts of 1911 are as follows:—

93. The secretary of trustees shall prepare a list of the names in alphabetical order of all persons, firms, companies, associations or corporations liable to pay school rates, and the amount of the rate payable by each such person, firm, company, association or corporation, and such list shall be revised and approved by the trustees.

94. The trustees shall, by writing on such list signed by them, authorize and direct the secretary to collect from the persons therein named the amounts set opposite their respective names, and such list with such authorization and direction shall be called the collector's roll for the section.

95. The secretary of trustees shall post up copies of the collector's roll in at least three public places in the section as soon as possible after he receives the same from the trustees and shall file a copy thereof with the municipal clerk and shall, on request, file a copy thereof with the inspector.

The contention is that each of the copies posted up under s. 95 must have on it the authority in writing to the secretary to collect the rates from the persons in the list. It was proved that the rate was made up and that plaintiff's name appeared on the list as rated for $3.60, and it was also proved that the secretary demanded the amount, that it was not paid, that a warrant of

distress was issued and returned unsatisfied, and, thereupon, the warrant to arrest was issued. Before the issue of the warrant of distress, there was an affidavit by the secretary of the demand on the plaintiff for payment of the taxes. This and the warrant of distress were produced, and on the latter there is an indorsement of the constable that he had been unable to find goods and chattels sufficient to satisfy the warrant. There is no objection to these latter documents but it is said that the rate roll put in evidence does not shew that it had the authority in writing to collect. The particular copy of the rate roll produced, and which had been posted in the secretary's store was proved to have been signed by the trustees of the section near the end, but the bottom part of the document was missing, the evidence shewing that another roll, or some other paper, had been pasted over it and, in taking it down, the bottom part adhered to the paper which had been pasted over it. There was no evidence as to whether or not this roll had contained the direction in writing to the secretary to collect the amount of the taxes referred to in s. 94 of c. 2 of the Acts of 1911; nor is there any evidence as to whether other rolls were posted and, if posted, whether they had or had not the authorization to collect referred to.

Assuming that the statute requires this direction to be on the rolls posted up, the burden under the pleadings is, I think, on the plaintiff to prove that it was not there, and I do not think he has satisfied this burden. For all that appears it may have been on the part torn off of the particular roll produced and it may have been on three other copies properly posted.

In *Meisner* v. *Meisner* (1899), 32 N.S.R. 320, plaintiff's property had been seized under a warrant of distress; there was an action founded on what was claimed to be an illegal seizure of the property, and one question was as to whether the rolls had been posted. There was evidence that a copy of the roll had been given to one of the trustees to post and he had neglected to post it. There was no evidence as to whether other rolls had been posted or not. Graham, E.J., as he then was, at p. 331, said:—

> The burden of proving that there were not notices posted in three public places within the section is, under the circumstances, upon the plaintiff. There is a presumption in favour of its having been done and he has not, by the foregoing evidence, proved that it was not done.

There was a contention that the trial judge had misdirected

N. S.

S. C.

TAYLOR v. DURNO.

Harris, C.J.

the jury, but if the conclusions already expressed by me are correct there was no misdirection, and for the same reason it is unnecessary to deal with any of the other questions argued. They were all based on the contentions with which I have dealt being answered in the plaintiff's favour.

I would dismiss the appeal with costs.

Russell, J.

RUSSELL, J.:—I incline to the view that the production of the copy of the collector's roll posted without the prescribed notice amounts to affirmative proof that the Act has not been complied with. But I have some doubt whether the weight of this consideration is not overborne by the maxim *omnia rite acta*. If the result depended on my opinion I should prefer to take further time to consider the case. But a majority being ready to dismiss the appeal I see no reason for deferring the decision.

Longley, J.

LONGLEY, J.:—In this case I regard the warrant as sufficient. From the fact that it was lost the plaintiff undertakes to draw the inference it was without a seal. I think it should, under the circumstances, be held to be with a seal unless proved to the contrary.

I regard all the circumstances in relation to the defendant's going up to the jail with him and all other things as entirely out of the question. The defendant went up to town in the automobile simply because he had business in the town and for no other reason.

The plaintiff was assessed for $3.60; was requested and required to pay it; he utterly refused; warrant was issued and the warrant returned unsatisfied and then finally a warrant to arrest was issued and executed and the amount paid after.

I think the circumstances form a complete justification from beginning to end, and that the remarks of the presiding judge are entirely in order and must be so interpreted.

In my judgment the appeal should be dismissed with costs.

Drysdale, J.

DRYSDALE, J.:—This appeal arises out of a school rate of $3.60 that plaintiff neglected and refused to pay. The questions of fact were settled by a jury who declined to believe plaintiff's version of payment. It seems that defendant, a public officer, viz., secretary of the school section, was obliged to apply to a magistrate for a warrant to collect the rate. This was granted and plaintiff was arrested by a constable for the sum mentioned. Thereupon, although he borrowed the money from the jailer and paid the

rate this action was brought for false imprisonment. The argument before us largely turned upon the question of the burden of proof. Plaintiff was arrested by a constable under a warrant good on its face. The defendant justified under this warrant. Thereupon, plaintiff replied attacking the validity of the school rate in several particulars and as the case went down to trial I think plaintiff had the burden of the attack. He failed in the proof as to his allegations of invalidity and I am of opinion that the warrant is an answer to the plaintiff's claim as well for the constable as for the defendant.

I would dismiss the appeal with costs.

Ritchie, E. J.

RITCHIE, E.J. (dissenting):—The action is for false imprisonment. The defence, if any defence there be, to this action consists of justification under a warrant for the collection of a school tax. On this defence issue is joined in the reply; it goes on to point out the absence of certain jurisdictional facts.

S. 93 of the Education Act provides that the secretary of the trustees shall prepare a list of all persons liable to pay school rates. S. 94 is as follows:—

> The trustees shall, by writing on such list signed by them, authorize and direct the secretary to collect from the persons therein named the amount set opposite their respective names, and such list with such authorization and direction shall be called the collector's roll for the section.

The collector's roll, of which the authorization and direction forms a part, is the basis upon which the right to issue a warrant in the event of non-payment stands.

A copy of the collector's roll was put in evidence by the defendant; it did not contain the authorization and direction to which I have referred. The defendant was the secretary of the trustees; the collector's roll under the statute was prepared by him; his evidence in regard to it is as follows:—

> Q. The rate was made up that year? A. Yes.
>
> Q. Was it posted up? A. Yes. (Objected. Marked, G.A.)
>
> Q. The paper G.A., what is that? A. That is the rate roll as posted for Cambridge section for 1915-1916.

The rate roll of which the defendant was speaking was, of course, a copy posted up under s. 95.

The defendant put it in as a copy. I need not argue the point that when a party to litigation puts in a copy of a document as a copy, he puts it in as a true copy. The copy did not contain the authorization and direction to which I have referred; therefore,

N. S.

S. C.

TAYLOR v. DURNO.

Ritchie, E. J.

there is affirmative evidence, coming from the defendant, that the original did not contain it. But, if it was so contained in the original, why was not the original produced? It was, I assume, in the custody of the defendant as secretary of the trustees. If there was any sufficient reason for its non-production why did not the defendant who made it up and had knowledge of its contents give evidence that the direction and authorization was on the original? Lord Mansfield's rule is still the law, and has been cited with approval in the Supreme Court of the United States. Lord Mansfield said in *Blatch* v. *Archer* (1774), 1 Cowp. 63, at 65, 98 E.R. 969:—

> All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.

And Mr. Starkie, in his book on Evidence, says:—

> The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumption against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.

Under the circumstances, and looking at G/A, put in as I have said by the defendant as a copy of the original, the conclusion of fact is, I think, clear, namely, that the original did not contain that which the statute in imperative terms required it to have, namely, the authorization and direction without which there was no right or power to collect the rate. Another fatal objection is that G/A, the copy posted, did not contain the authorization and direction. If the original contained it, then G/A is not a copy, and it is copies of the collectors' roll which s. 95 requires to be posted. An inspection of G/A shews that it is not there; this settles the question of fact. The part of G/A which had the trustees' names on it was torn off; there is no suggestion in the evidence that the part torn off contained the authorization and direction. If that was the case one would expect the defendant to say so; he had peculiar knowledge of the contents of G/A, it having been made out by him. An inspection of G/A shews that the part torn off was not large enough to contain the authorization and direction. I have no hesitation in coming to the conclusion that it is clearly proved that the authorization and direction was not on the original and not on G/A; this being so, I am of opinion that the defendant has not made out his justification. The warrant was

issued without jurisdiction because two things necessary to jurisdiction are wanting. This is the law in this court as shewn by the case of *Sterling* v. *Cumberland School Trustees* (1915), 49 N.S.R. 125. What is more important is, it is the law in the Supreme Court of Canada. In *O'Brien* v. *Cogswell* (1890), 17 Can. S.C.R. 420, at pp. 424 and 425, Sir Henry Strong said:—

The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared.

The statute under which the city officers assumed to act in making the assessment and sale now called in question is the statute of Nova Scotia entitled the Halifax City Assessment Act of 1883, as amended by an Act passed in May, 1886.

This statute, conforming to the scheme generally followed in legislation of this kind, provides for two distinct processes in the imposition and enforcement of the tax to be carried out by two distinct sets of officers—the assessors and the collectors. Applying the principles already referred to it is plain that if any of the formalities or requirements prescribed by the Act have been omitted by any of the officers in question the sale and the deed executed for the purpose of carrying it out are absolute nullities, unless it is indicated in the statute itself that the step which has been omitted is to be regarded as a non-essential proceeding, or unless the case comes within the terms of some provision enacted for the purpose of covering defects caused by failure to observe the procedure laid down by the statute.

The tax deed and the tax warrant are both the creatures of the statute and can only be valid if the imperative requirements of the statute are complied with. There is no distinction between them in this regard.

In Bullen & Leake's Precedents, 6th ed., at p. 809, it is said:—

A defence of justification under the process of an inferior court should allege or shew that the court had jurisdiction.

If this is necessary in the pleading, it follows as a logical sequence that it must appear in the proof.

It is the law to-day and has been the law for one hundred and fifty years or longer:—

That nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.

N. S.

S. C.

TAYLOR v. DURNO.

Ritchie, E.J.

Peacock v. *Bell* (1668), 1 Wm. Saund. 73, 85 E.R. 84.

This well-known rule was recognized by this court in *Gallihew* v. *Peterson* (1887), 20 N.S.R. 222 at p. 225. In *The King* v. *All Saints* (1828), 7 B. & C. 785 at p. 790, 108 E.R. 916, Holroyd, J., said:—

> The rule, that in inferior courts and proceedings by magistrates the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction has never been questioned.

I also refer to Best on Evidence, 11th ed., p. 360.

There are two jurisdictional questions of fact, namely, did the authorization and direction appear on the original rate roll? Did they appear on the copy as posted? I have pointed out that evidence coming from the defendant demonstrates that the answers to both these questions must be in the negative; but apart from this the judge took the questions from the jury and applied the maxim *omnia præsumuntur rite esse acta*. This course was in conflict with the authorities which I have referred to, and, therefore, with great respect, I am of opinion that the charge cannot be supported.

I cannot see what the burden of proof has to do with this case, because when evidence of a fact comes from the defendant it is useless for him to say the burden of proof is on the plaintiff. However, as this question of the burden of proof was raised at the bar I deal with it.

In my opinion, it is very clear that the burden of establishing his justification rests on the defendant. He is seeking to escape liability by what was formerly known as a plea in confession and avoidance.

In *Sterling* v. *Cumberland School Trustees*, 49 N.S.R. 125, I said, at p. 132:—

> In my opinion it is very clear that if one man has taken another man's property, and it is admitted, as it must be here, that the taking is only legal by virtue of a statute, then the man who has taken the property must shew compliance with the statute, because the statute is his only justification. Before the warrant can legally issue, the statute, in imperative language, requires that certain things be done.

My only reason for making this quotation is that the late Sir Wallace Graham gave it his unqualified approval, thereby giving to what I said a weight and importance which it would not otherwise have.

N. S.

S. C.

TAYLOR v. DURNO.

Ritchie, E. J.

In *Cogswell* v. *Holland* (1889), 21 N.S.R. 279 (which went to the Supreme Court of Canada under the name of *O'Brien* v. *Cogswell*), one question was whether the assessment was bad in consequence of a statutory requirement in making the assessment not having been complied with. The objection to the regularity of the proceedings was set out in the statement of claim; therefore, if the state of the pleadings settled the question of the burden of proof it would have rested on the plaintiff. Counsel for the defendant contended as follows, p. 282:—

There is no evidence that the notices required by the Assessment Act were not given. The onus is on the plaintiff to shew the irregularities charged in the statement of claim.

Sir Robert Weatherbe said:—

You must shew that a deed made after the commencement of the action is a defence.

And McDonald, C.J., said:—

The word "conclusive" in the amendment to s. 95 is not applicable; it could only be rendered applicable by the production of the lists. You have failed there, and can only escape the consequences of the failure by proving everything done.

Ritchie, J., said:—

I think, in order to make the sale a good one, every provision of the Act must be complied with. The deed does not do away with the necessity for proof . . . that the notice was given, that is, the notice to the occupant of the property before the sale. The only evidence was that the notice was served on somebody in Argyle St. I think there has been a complete failure in that respect, and that there could not be a sale without it.

In *Ridgway* v. *Ewbank*, 2 Moo. & R. 218, Baron Alderson said:—

It matters not in the least on which party the affirmative may in terms lie; the question is on whom it lies in substance.

But the question of the burden of proof is settled by *O'Brien* v. *Cogswell*, in that case, 17 Can. S.C.R. 420:—

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder the city collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and seal of the corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, etc. In a suit to foreclose a mortgage on land which had been sold for taxes under this Act the legality of the assessment and sale was attacked.

Held, *per* Strong, Taschereau and Gwynne, JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give

N. S.

S. C.

TAYLOR v. DURNO.

Ritchie, E. J.

a notice required by a previous section it was necessary for the defendants to shew, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the Act, and the production and proof of one of such statements was not sufficient.

At p. 438 Gwynne, J., said:—

This special replication to the defence of the defendant Meagher does not appear to have been at all necessary, for the plaintiff's rejoinder in issue to the defendant's statement of defence put in issue everything that was material, and cast upon Meagher the whole onus of proving everything necessary to his establishing the title pleaded by him and upon which he relied, and sufficiently raised all questions of law which might present themselves upon the facts which should be proved for the purpose of establishing the title which he had pleaded. The whole onus of proving such title rested upon him; the plaintiffs had nothing to do but produce and prove their mortgage.

So, I think, here, all the plaintiff had to do was to prove the imprisonment.

At p. 478 Patterson, J., said:—

The onus of establishing a valid sale was clearly upon the defendants. There is no presumption in its favour.

So I think, here, the onus of establishing a valid warrant was clearly upon the defendant; there is no presumption in its favour.

If the defendant in this case was the constable justifying under the warrant, other considerations might arise; but, as the case stands, I see no distinction, so far as the burden of proof is concerned, between the tax warrant in this case and the tax deed in *O'Brien* v. *Cogswell*. Mr. Roscoe, K.C., at the argument strongly urged that *O'Brien* v. *Cogswell* was in point; it is a decision of the Supreme Court of Canada which it is my duty to follow unless I can distinguish it, and, if I attempt to distinguish, the burden clearly rests upon me to point out wherein the distinction lies; this, after the most careful consideration, I am unable to do.

The decision of Sir Wallace Graham in *Meisner* v. *Meisner*, 32 N.S.R. 320 at 330, in my opinion, is not an authority in favour of the burden of proof being on the plaintiff in this case, but, on the contrary, it is an authority the other way. In that case the plaintiff was one of the trustees and it was his duty to have the notices posted. Under these circumstances Sir Wallace Graham held that the burden of proof was on him.

In this case the defendant was the secretary of the trustees; the duty of preparing and posting the roll rested on him. Applying the reasoning of Sir Wallace Graham, the burden of proof rested on him. I would grant the application for a new trial with costs.

Appeal dismissed.

THE KING v. RITCHIE; Ex parte BAXTER.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. February 14, 1919.

INTOXICATING LIQUORS (§ III D—74)—PROHIBITION ACT, N.B.—PRACTISING PHYSICIAN HAVING LIQUOR IN HIS POSSESSION—PROFESSIONAL REQUIREMENTS—QUANTITY ALLOWED.

The intention of the N.B. Prohibition Act (1916, 6 Geo. V. c. 20), is that a duly registered physician should have the right to obtain liquor from anyone holding a wholesale license, or from any retail licensee under the Act, in sufficient quantities to meet his professional requirements and to fill such prescriptions as he may consider it necessary to give, and there is no limit upon the quantity such physician may have at any one time in his possession for such purpose.

Statement.

P. J. Hughes shews cause against a rule *nisi* to quash a conviction under the Intoxicating Liquor Act, 1916, entered against the applicant by the Police Magistrate of the City of Saint John. *D. Mullin*, K.C., *contra*.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—The defendant, who is a registered physician practising in the City of Saint John, was convicted before the police magistrate of the city for having liquor in his office illegally, contrary to the Prohibition Act. The evidence disclosed the fact that the defendant's residence and office, connecting one with the other, were situated on Union St., in the City of Saint John, and that twelve bottles of gin and one of brandy were found in said office. Under the provisions of the Act, the expression "private dwelling house" means a separate dwelling and actually and exclusively occupied and used as a private residence, but it does not mean a house or building occupied or used, or partially occupied or used as an office other than a duly registered physician's or dentist's office. See s. 2 ("s") and ("t"). Sub-s. (n) of s. 2 of the Act, as amended by 8 Geo. V., 1917, defines "wholesale license" as meaning a license authorizing the chemist or druggist duly registered under the Act and licensed by the inspector, to sell *inter alia* to any duly registered practitioner, but to no other, liquor in sufficient quantities to meet his professional requirements, while s. 46 provides that any physician who is lawfully and regularly engaged in the practice of his profession, and who shall deem any liquors necessary for the health of his patient or patients, may give such patient or patients a written or printed prescription or prescriptions in the form prescribed, or may administer liquor himself, for which purpose he may

N. B.

S. C.

THE KING v. RITCHIE; EX PARTE BAXTER.

Hazen, C.J.

when visiting in the discharge of his professional duties have liquor in his possession.

A perusal of these sections is sufficient, I think, to convince anyone that the intention of the legislature was that duly registered physicians should have the right to obtain liquor from anyone holding a wholesale license, or from any retail licensee under the Act, in sufficient quantities to meet his professional requirements, and to fill such prescriptions as he might consider it necessary to give, and no limit is set upon the quantity that a physician at any one time may have in his possession for such purposes. It is, therefore, no offence under the Act for a physician to have liquor in his office, and this is the offence with which Dr. Baxter was charged. On the contrary the Act makes a distinct provision allowing him to have liquor, and the interpretation clause provides that a private dwelling house shall not be construed to include or mean any house or building occupied or used or partially occupied or used as an office, other than a duly registered physician's or dentist's office. It is perfectly clear that under the Act the liquor was not in a place other than his private dwelling house, and as it is not an offence to keep liquor in a private dwelling house, Dr. Baxter was guilty of no offence under the Act, and the magistrate had no jurisdiction whatever to convict him of the offence charged. It appears, however, from the proceedings in the police court, that the defendant on July 8 last was convicted on a charge of furnishing a prescription for liquor to a person without having visited such person professionally, and upon this charge was adjudged guilty and fined $100. In the course of his judgment, the police magistrate says:—

> Liquor may be in a private dwelling, but after a conviction the private dwelling loses the privilege of having liquor.

And also says:—

> We must remember the records of the court shew that the defendant has been convicted for the manner in which he did prescribe in one instance.

S. 48 contains a provision to the effect that if the occupant of any private dwelling house or of any part thereof is convicted of any offence against any of the provisions of this Act, committed in or in respect of such house, the same shall cease to be a private dwelling house within the meaning of this Act, during the time the person so convicted occupies the said house or any part thereof.

The effect of this section is limited by the words "committed in or in respect of such house." The offence for which Dr. Baxter was convicted was not, so far as appears by the record, or in any other way, committed in or in respect of the dwelling house and office in which he resided in Union St. in the City of Saint John at the time of his conviction which is now being considered.

In my opinion the rule should be made absolute.

Rule absolute to quash conviction.

N. B.
S. C.
THE KING v. RITCHIE; EX PARTE BAXTER.
Hazen, C.J.

ATTORNEY-GENERAL OF CANADA v. McCORMICK.

N. S.
S. C.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, and Drysdale, JJ., Ritchie, E.J., and Mellish, J. January 14, 1919.

INTOXICATING LIQUORS (§ III H—90)—LIQUOR IN BONDED WAREHOUSE—PERMISSION OF CROWN TO REMOVE TO ANOTHER PROVINCE—"DUTY SECURED BY BOND"—LIQUOR SEIZED UNDER TEMPERANCE ACT—RIGHT OF CROWN TO LIEN FOR DUTY.

The Crown having parted with its possession of intoxicating liquor by granting permission to the shipper in Ontario to remove it from his bonded warehouse as being the property of the shipper about to be transferred into the possession of a merchant in Nova Scotia, the duty having been "secured by bond" and such course being authorized by order-in-council; is not entitled to a lien on such liquor for such duty, and the liquor having been seized under the N.S. Temperance Act, is under the jurisdiction of the court to be dealt with under the Act. The Attorney-General of Canada is not a necessary party.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of the Attorney-General of Canada, substituted as plaintiff in place of E. T. McKeen, Deputy Collector of Inland Revenue at Sydney, C.B., in an action of replevin for a quantity of alcohol shipped by a firm of licensed distillers and bonded manufacturers of spirits at Prescott, Ontario, to the Mayflower Bottling Co. at Sydney, C.B. It was claimed on the part of plaintiff, that the alcohol, at the time of shipment, and during transit, and at all times up to and including the time of seizure, was subject to excise under the provisions of the Inland Revenue Act, R.S.C, (1906), c. 51, and liable for payment of excise duties, no part of which had ever been paid. The seizure was made by defendant, as inspector under the N.S. Temperance Act.

Finlay MacDonald, K.C., for appellant.

H. P. Duchemin, for respondents.

Harris, C.J.

HARRIS, C.J.:—I must confess to having some difficulty in reaching a conclusion in this case. The Inland Revenue Act seems

N. S.

S. C.

ATTORNEY-GENERAL OF CANADA v. MCCORMICK.

Harris, C.J.

to contemplate that spirits may be manufactured under license, and pending maturity or sale it provides that they may be placed in bonded warehouse, the government, through its officials, retaining one of the two keys of the warehouse and the control of the spirits until they go into consumption when the duty is paid; but it is obvious that spirits are not always consumed in the place where they are manufactured—they may be sold and the purchaser may desire to remove them to some other part of Canada, and he may still desire to leave them in bond and the duty unpaid until he is ready to use the spirits. This involves regulations which have been made by orders-in-council under the provisions of the Act.

The regulations numbered 22 to 28 are designed to cover the case of goods removed from warehouse in one inland revenue division to warehouse in another division without payment of duty.

Regulations 24 and 25 seem to point out the obvious way by which this removal should take place and at the same time preserve the rights of the Crown for the unpaid duty.

These regulations provide for a bond being given by the manufacturer or merchant owning the goods, and the goods themselves being shipped to the order of the collector of the inland revenue division to which the goods are consigned. In that case, the bill of lading is made to the collector and he alone has the right to receive the goods on their arrival at their destination.

But there is a regulation 26 which reads as follows:—

> 26. When goods removed in bond are conveyed from the place of shipment by a foreign steamer, vessel or railway—for example by Ward's line of steamers from Windsor to Port Arthur, thence by Canadian Pacific Railway to Winnipeg, or when goods so removed are not consigned to the order of the collector of inland revenue a removal bond must be given with sureties acceptable to the collector of inland revenue.

What was done in this particular case is that the spirits were shipped from Ontario consigned to the purchaser, and not to the order of the collector of inland revenue at Sydney. The bond taken in Ontario has not been produced and we must assume that it is with sureties acceptable to the collector of inland revenue.

The question is whether in the case of goods consigned otherwise than to the collector of the inland revenue division the Crown is to be considered as having accepted the bond with sureties for the unpaid duty and to have released the goods so as to make them

liable to seizure under the N.S. Temperance Act, or whether the goods are still to be regarded as subject to a lien to the Crown for the duty.

What is claimed by the Crown in this case is that the bond taken in Ontario was for the re-warehousing of the goods.

The whole Inland Revenue Act seems to be framed upon the theory of the Crown retaining a lien and control of the goods until the duty is paid, and it may very well be argued that the course taken in this case was simply one method of transferring the goods from the jurisdiction of one collector of inland revenue to that of another collector, and that the Crown still has a lien on the spirits for the unpaid duty, but I understand that all the members of the Court concur in the judgment of Mellish, J., that the Crown has lost its lien or right to hold the goods and cannot maintain replevin as against the inspector under the N.S. Temperance Act. While I have considerable doubt as to the correctness of this view I am not prepared to dissent from it.

Harris, C.J.

RUSSELL, J.:—I agree with Mellish, J.

Russell, J.

DRYSDALE, J.:—In this case the Attorney-General for Canada, as an added plaintiff, recovers on the theory that the inland revenue officers have a lien on the goods seized. If such a lien existed, and I have no doubt it did when the department had possession of the goods, the lien was lost once the possession was parted with. Apparently the goods were permitted to be taken from the bonded warehouse and shipped to the bottling company at Sydney, and nothing is proved that can be said to re-establish such lien or continue it. I think the goods in Sydney were subject to the provisions of the Temperance Act and liable to seizure.

Drysdale, J.

I would allow the appeal and dismiss the action.

RITCHIE, E.J.:—I concur in the opinion of Mellish, J.

Ritchie, E. J.

MELLISH, J.:—Under the provisions of the N.S. Temperance Act any inspector reasonably believing that any liquor on the premises of any carrier is to be sold or kept for sale in contravention of the Act may seize and remove the same. He shall then lay an information before the magistrate, who shall thereupon issue his summons calling upon the owner to shew cause why the liquor should not be destroyed or otherwise dealt with in accordance with the Act.

Mellish, J.

If no person claims to be the owner, or if the magistrate dis-

N. S.

S. C.

ATTORNEY-GENERAL OF CANADA v. MCCORMICK.

Mellish, J.

allows such claim, and finds that it was intended such liquor was to be sold or kept for sale in contravention of the Act, he may order that such liquor shall be forfeited to His Majesty and destroyed.

The liquor was seized by the defendant Anthony, who was then inspector, and by the defendant McCormick, who was then apparently a police officer, and afterwards became inspector under the Act, at the I.C.R. freight shed at Sydney.

Without at present considering the grounds upon which the judgment appealed from is based, I am unable to discover any evidence that the plaintiff or the revenue authorities had any right as against the defendants to the possession of these goods when they were seized. Indeed, it would appear that the Crown had previously parted with such possession if it ever had it, and had granted permission to the shipper of the goods at Prescott, Ontario, to remove them from his distillery in the "cars"—wrongly printed "care" in the appeal book—of the Grand Trunk Railway as being the property of the shipper and "about to be transferred into the possession of Mayflower Bottling Co., merchants, of Sydney, N.S., the duty having been secured by bond (ex. M. 2.) This permit is on the regular printed form. The words "secured by bond" are filled in and in a printed note of explanation in the back of the form it is explained that the words to be filled in are "paid" or "secured by bond" as the case may be. Under this permit, the carrier would no doubt receive these goods and deliver a bill of lading to the shipper shewing the Mayflower Bottling Co. as consignee, which the shippers would in the ordinary course send to that company at Sydney.

Counsel for respondent, on the argument of the appeal, I think, could not dispute this, but, if I understood him, suggested that the goods should have been shipped to the order of the collector of inland revenue, and that we should take that to be done which, under the law, ought to have been done under the circumstances. I am by no means satisfied with this contention, especially as I find an order-in-council expressly authorizing the course that was taken. No. 26 of the orders-in-council, M. 4. is as follows:—

26. When goods removed in bond are not consigned to the order of the collector of inland revenue, a removal bond must be given with sureties acceptable to the collector of inland revenue.

This rule is not in the printed case. It is authorized by s. 68 of the Inland Revenue Act.

Rules 27 and 28 are relevant, in addition to the rules printed. They are as follows:—

27. Collectors of inland revenue will, on the arrival of the goods examine them and ascertain whether they correspond with the removal entry, and as soon as the goods are placed in warehouse or dealt with as provided in s. 25 hereof (*i.e.*, the duty paid immediately on arrival) will certify to the fact on the removal entry and return it to the collector of the inland revenue division from which the goods were shipped.

28. Removal bonds can only be cancelled upon the receipt of the removal entry, bearing the certificate of the collector, deputy collector or the acting collector of the division to which the goods were consigned, that they have been received and re-warehoused.

The plaintiff, who was deputy collector at Sydney, received the removal entry on June 22, 1917, but did not examine them as required by the above rule, or see them, as he states, until after they were seized by the defendants on June 28. And they were not warehoused (p. 43) on June 28, 1917.

On July 10, 1917, McCormick, who was then liquor inspector, laid the required information upon which the stipendiary magistrate, Fred. G. Muggah, of Sydney, issued a summons directed to the Mayflower Bottling Co., the apparent owners of the liquor, to shew cause why it should not be destroyed, or otherwise dealt with as provided by the Act. On the hearing of the information, the Mayflower Bottling Co. appeared by counsel who stated they had nothing to say. Mr. Rowlings appeared on behalf of the officers of the inland revenue department and claimed that under the Inland Revenue Act the court had no jurisdiction to deal with the case and that the goods were in bond and so under lien to the government. The bond was not put in evidence nor was any admissible evidence given as to its contents. It did not appear on the evidence before him that the goods were marked "in bond." But the magistrate decided, and I think rightly, after hearing the evidence and the remarks of counsel that the mere fact that liquors are marked "in bond" does not protect them from the operation of the Act (ex. M-F. dated July 30, 1917.) The magistrate gave no decision as to the disposition of the liquor, and, on September 21, 1917, this action was begun, and on October 11, 1917, the goods were taken out of the custody of the magistrate (the defendant McCormick had the keys of the place where they were stored) by the sheriff under a replevin order made in the action and delivered to the original plaintiff, McKean, deputy collector of inland revenue for the district.

N. S.

S. C.

ATTORNEY-GENERAL OF CANADA v. MCCORMICK.

Mellish, J.

The plaintiff claims damages for illegal seizure and conversion and a return of the goods.

The case was tried before Chisholm, J., at Sydney, who gave judgment for a return of the goods and $5 damages for the taking and detention in favour of the Attorney-General of Canada, who was substituted as a party plaintiff after the hearing, upon the ground that the liquor seized was not "liquor" within the meaning of the Nova Scotia Act, and upon the further ground that any interference by a provincial officer, acting under a provincial statute, which would prevent the officials of the Dominion government from transferring goods in bond from a government warehouse in one province to a government warehouse in another, is such an invasion of the jurisdiction of the Canadian parliament in respect to the regulation of trade and commerce, and the raising of money by any mode or system of taxation by virtue of the B.N.A. Act, as cannot be authorized by law.

Counsel has stated that the inland revenue authorities were entitled to the possession of the goods in question, but I can find nothing in the facts or law governing the case to lead to such a conclusion. There had apparently been no breach of the Inland Revenue Act or of the regulations made thereunder which would justify the Crown in seizing the goods. On the contrary, as far as the evidence discloses, these goods were properly received out of the shipper's bonded warehouse under a proper permit after the requisite security had been given in the form of a removal bond. This bond, for some unexplained reason, was not produced and no admissible evidence of its contents has been forthcoming. One would expect it to be conditioned upon the due delivery of the goods into the possession of the Mayflower Bottling Co. and the re-warehousing of them by said company, which had a bonded warehouse, within a specified time. One would also expect it to be in an amount amply sufficient and with good sureties to cover the full duty on the goods. This bond, as reference to the latter part of regulation 24 shews, is in a different form from that to be used when the goods are shipped to the order of the collector of inland revenue. The warehouseman's bond has a statutory condition and we do not have to speculate as to its contents. It is a bond conditioned for the payment of all duties and of all penalties to which the owner

of the goods or warehouse may become liable under the Act. (c. 51, R.S.C., s. 62.)

The condition of the removal bond may very well have been broken in consequence of the seizure of the goods for alleged violation of the provincial Temperance Act, in which case the bondsmen and owners of the goods seized are the real parties interested in this action rather than the Crown, to whom ample security, we must infer, has been given.

The goods were not "in bond" in the sense of being in a bonded warehouse when seized. When the goods are in a bonded warehouse, it may perhaps be said that the inland revenue officer has, in a certain sense, possession of them. There are joint locks on such a warehouse, one of which can only be opened by the officer (c. 51, R.S.C. s. 63.) But when the goods are removed, of course such custody comes to an end. When these goods were seized they were in a sense "in bond," *i.e.*, the duty payable in respect of them was secured by bond but they were not, I think, in the possession of the Crown nor had the Crown the right to their possession as against the defendants. This phase of the case does not appear to have been very fully if at all presented to the trial judge, and if I am right in respect to it, there is no necessity of my dealing with the reasons upon which his judgment is founded. I do not, however, wish to be understood as agreeing that the "spirits" in question—the goods are so referred to in the permit—were not a "drinkable liquid containing alcohol" within the meaning of the N.S. Temperance Act. In the orders-in-council put in evidence "non-potable," that is, I suppose, non-drinkable spirits are referred to which would appear to be so classed because of their impurity. The spirits in question would also appear from the orders-in-council not to be of that class; but I express no opinion on this branch of the case.

I agree that the N.S. Temperance Act should not be used to override the provisions of the Inland Revenue Act, but if the duty be amply secured by bond, I must say I see no practical difficulty to prevent the harmonious operation of both Acts.

But even if the revenue be incidentally imperilled, that is not the fault of the officers or magistrates enforcing or administering the local law, nor, I think, a good ground why the local law, the constitutionality of which is not questioned, should not be enforced.

N. S.

S. C.

ATTORNEY-GENERAL OF CANADA v. MCCORMICK.

Mellish, J.

I say this the more freely because at the time the acts complained of were committed the Dominion parliament, by legislation, had shewn its express intention that the local law should be enforced (c. 19, Acts of 1916.)

There is another branch of the case which does not appear to have been dealt with in the court below. These goods were really, when seized, in the custody of the magistrate for the purpose of determining whether or not the same should be forfeited as the plaintiff well knew, and I do not think it was competent to take the goods out of his possession and oust him of his jurisdiction, or settle the question of his jurisdiction by replevin proceedings without at least making him a party to the action. I think the point is sufficiently pleaded in pars. 8 and 10 of the defence. I am not at all conceding that these proceedings were proper even if he were a party. I have the gravest doubts as to this, but it is unnecessary to express any opinion about it.

I do not think, for the foregoing reasons, that the Attorney-General should have been added as a party, and would dismiss the action with costs here and below against the original plaintiff and order a return of the goods seized. If the goods are not returned in compliance with this order a further enquiry as to their value may be necessary, unless it is agreed on. The value stated in the affidavit on which the replevin order was granted is clearly too small and the bond given apparently insufficient as to amount.

Appeal allowed.

SASK.

C. A.

THE KING v. BORDENINK.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Lamont, J.A., and MacDonald, J., ad hoc. March 20, 1919.

TRIAL (§ I—6)—ADJOURNMENT OF TRIAL—DISCHARGE OF JURY—DISCRETION OF TRIAL JUDGE.

The discharge of the jury and the adjournment of the trial are matters solely within the jurisdiction of the trial judge and his discretion is not open to review on appeal.

Statement.

CASE STATED as to the jurisdiction of a trial judge to adjourn the trial and discharge the jury, after it has been sworn, upon concluding that one of the witnesses did not understand the nature of an oath and refusing to have her sworn, the party calling her not being in a position to call corroborative evidence of her statement; no evidence having been given.

H. E. Sampson, K.C., for the Crown; *W. B. O'Regan*, for the accused.

HAULTAIN, C.J.S.:—I agree with my brother MacDonald that there is no foundation for an appeal in this case. S. 1014 (2) of the Criminal Code provides that the court before which any accused person *is tried* may reserve any question of law either during or after the trial, and sub-s. 3 provides that after a question is reserved the trial shall proceed as in other cases. Ss. 1014 to 1020 all seem to contemplate a trial and a judgment or verdict.

Haultain, C.J.S.

The question of the effect of the discharge of the jury might be raised on the occasion of the accused being brought to trial on the original charge, although I agree with my learned brothers that it is effectually disposed of by *Rex* v. *Lewis* (1909), 78 L.J. K.B. 722, and the earlier cases of *Reg.* v. *Davison* (1860), 2 F. & F. 250, *Reg.* v. *Charlesworth* (1861), 1 B. & S. 460, 121 E.R. 786, and *Winsor* v. *Reg.* (1866), L.R. 1 Q.B. 289.

LAMONT, J.A.:—The facts as set out in the reserved case are as follows:—

Lamont, J.A.

On January 8, 1919, at Yorkton, the accused was charged before me with having had sexual intercourse with his sister, and pleaded "not guilty." The jury were sworn, and Annatsa Bordenink was called to the witness-stand for the purpose of being sworn. On the examination of this girl I concluded that she did not understand the nature of an oath, and therefore refused to have her sworn. Mr. Graham, the agent for the Attorney-General, then stated that this girl had been sworn on the preliminary, and that as he had supposed she would be sworn at the trial he was not prepared to produce the corroborative evidence of her statement that would be required under the Code, and he therefore asked for an adjournment of the case until next court. No evidence was given.

I adjourned the trial until the next court, and discharged the jury then empannelled, but stated that I would reserve for the opinion of the court the question of whether or not at that stage of the proceedings I should have adjourned the trial. The question I submit for the opinion of the court is: Had I power to adjourn the trial and discharge the jury, or was the accused entitled to an acquittal?

The rule upon the question stated for the opinion of the court is laid down in Archbold's Criminal Pleading, Evidence and Practice, 25th ed., at pp. 213 and 214, in the following language:—

It is established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial without giving a verdict if a "necessity," that is, a high degree of need for such discharge, is made evident to his mind.

In *Rex* v. *Wade* (1825), 1 Mood. C.C. 86, the facts were almost identical with those of the case before us, and it was there held

SASK.

C. A.

THE KING v. BORDENINK.

Lamont, J.A.

that it was not a sufficient ground for discharging a jury that the material witness against the prisoner was not sufficiently acquainted with the nature and obligation of an oath to be sworn, although this appeared as soon as the jury was charged and before any evidence was given. The judges in that case thought that the prisoner should have been acquitted, and an application for pardon was therefore recommended.

The modern rule, however, is that the discharge of a jury during the course of a trial is a matter solely within the jurisdiction of the trial judge, and his discretion is not open to review on appeal.

In 9 Hals. 370, the rule is stated as follows:—

724. The judge has power, whenever he deems proper, to discharge a jury in the course of the trial, and to swear a fresh jury and begin the trial of the case again. He is the sole judge of the propriety of such a course.

In *Rex* v. *Lewis* (1909), 78 L.J. K.B. 722, after the prisoner had been given in charge to the jury and the case had been opened, it was found that some of the witnesses for the Crown were not present, owing to some unforeseen accident. The Crown applied for an adjournment of the trial. Counsel for the accused opposed the application. The adjournment was granted and a day fixed for the trial before another jury. On that trial, the accused was convicted. From the conviction he appealed on the ground that he should have been discharged on the former hearing. Channell, J., who gave the judgment of the Court of Criminal Appeal, after referring to the cases of *R.* v. *Charlesworth*, 1 B. & S. 460; *Winsor* v. *Reg.*, L.R. 1 Q.B. 289; *Conway* v. *Reg.* (1845), 7 Ir. L.R. 149, said, at p. 723:—

Stating it shortly the result of those authorities is that the discharging of a jury without giving a verdict is absolutely and entirely in the discretion of the judge at the trial when the question arises whether the jury should be discharged or not. Various circumstances arose in the particular cases to which I have referred, and it was contended that a case of necessity for discharging the jury must be made out. Crampton, J., pointed out that the question as to what amounted to necessity had been looked at in a different way in modern times from the way in which it was anciently regarded, and that a practice had been growing up of allowing the jury to be discharged, when in former times this would not have been permitted. That, however, is comment upon the practice which had grown up. The decision of the court was that this was a matter in the discretion of the judge, and that this discretion could not be reviewed by any court then in existence.

And at p. 724 he further says:—

I think it would be wrong to say nothing upon the point as to whether

the discretion was properly exercised in this case. We can say nothing judicially upon that, because the very ground of our decision is that we have no power to review the exercise of the judge's discretion; but I should like to say for myself, and my brothers agree with me, that in this case, so far as we can judge, the discretion appears to have been exercised in a way different from that which, according to our impression, has been the rule applicable to such cases. Personally I have always understood the rule to be that a jury should not be discharged to enable the prosecution to make a better case against the prisoner. I think that has been stated on several occasions, and I can find no case which departs from the rule as so stated. Where a prisoner has been put upon his trial, given in charge to the jury, and some of the witnesses are found not to be present owing to some mistake, I personally have thought that it is not right to do more than adjourn the case for a reasonable time for the prisoner to be tried by the same jury; and if that cannot be done, the verdict ought to be taken upon the case as it stands. No doubt there are cases in which it would be right to adjourn the case, supposing something has happened which could not have been foreseen at the time the prisoner was given in charge to the jury. But I have always understood that those in charge of a prosecution should ascertain whether their witnesses were present, and, if they were not, the case in all probability broke down. As I have said, the position is that in law the discretion in this matter has unquestionably been entrusted to the judges who have the conduct of criminal cases tried with a jury.

In view of these authorities, I am of opinion that the discharge of the jury and the adjournment of the trial were matters solely within the discretion of the trial judge, and the exercise of his discretion is not open to review by this court, even although that discretion may have been exercised in a way contrary to the usual practice. The question "Had I the power to adjourn the court and dismiss the jury?" should be answered in the affirmative.

Macdonald, J.

MACDONALD, J.:—The following case has been reserved for the opinion of the court:—(See judgment of Lamont, J.A.)

In my opinion, no appeal lies to this court on the facts stated. The right of an accused to appeal in criminal cases is granted by s. 1013 of the Criminal Code, which reads as follows:—

An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and seventy-seven, on the trial of any person for an indictable offence, shall lie upon the application of such person, if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the Court of Appeal are unanimous in deciding an appeal brought before the said court their decision shall be final.

3. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

In *The King* v. *Trepanier* (1901), 4 Can. Cr. Cas. 259, it is laid down as follows, p. 261:—

SASK.

C. A.

THE KING v. BORDENINK.

Macdonald, J.

The right of an accused person to appeal in criminal cases to the Court of Appeal is granted by s. 742 of the Criminal Code, which enacts that an appeal from the judgment of any court or judge having jurisdiction in criminal cases, or the trial of any person for an indictable offence, shall lie upon the application of such person *if convicted* to the Court of Appeal; but such appeal is restricted in the first place by s. 743 to questions of law which are reserved by the judge and on which a case is stated by him for the opinion of the Court of Appeal and in the next place by s. 744 to questions of law which the judge has refused to reserve, but with respect to which the Court of Appeal grants leave to appeal, and for which a case is then stated as if they had been reserved. . . . There must have been a trial, an adverse ruling or judgment on a question of law and a verdict of guilty or a conviction to give jurisdiction to the Court of Appeal, and in point of fact a verdict of guilty or a conviction is, under the provisions of s. 742 of the Criminal Code, a condition precedent to the right of appeal, by an accused person from a ruling or judgment on a question of law.

Ss. 742, 743 and 744 referred to in the above quotation are now respectively ss. 1013, 1014 and 1016.

In other words, the "cases hereinafter provided for," mentioned in s. 1013, are those where cases are stated under s. 1014 or s. 1016. There are no other sections to which the reference can apply. Stating a case is, in effect, giving leave to appeal.

A consideration of the powers of the Court of Appeal upon the hearing makes it clear to my mind that the above is the correct construction of ss. 1013 and 1014. Those powers are set forth in s. 1018 of the Code, which reads as follows:—

Upon the hearing of any appeal under the powers hereinbefore contained the Court of Appeal may:—

(*a*) Confirm the ruling appealed from; or

(*b*) If of opinion that the ruling was erroneous, and that there has been a mistrial in consequence, direct a new trial; or

(*c*) If it considers the sentence erroneous or the arrest of judgment erroneous, pass such sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; or

(*d*) If of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal, or direct a new trial; or

(*e*) Make such other order as justice requires.

Assuming, for a moment, that the trial judge should not, in this case, have granted the adjournment, then, as the Crown could not produce any evidence on which the accused could be convicted, he should have been acquitted. But under s. 1018 (*d*) of the Criminal Code, it is only in cases in *which the accused had been convicted* that the Court of Appeal, if of opinion that the

ruling was erroneous and that the accused ought to have been acquitted, can direct that the accused shall be discharged.

This court is, of course, given power in a case properly before it to confirm a ruling appealed from; but, again assuming that this court were to find that the ruling of the trial judge was erroneous, there is no power given by said s. 1018 the exercise of which would be appropriate here. It could not direct a *new* trial under sub-s. (*b*), for there has been no trial; nor pass, nor set aside any sentence under (*c*), for no trial has been had, nor sentence passed; it could not even make any appropriate order under (*e*); and it is not given power to give a merely declaratory judgment as to what is the law.

It is worthy of observation that, in all the cases I can find where the question raised by the stated case has been considered, the question was raised by writ of error, which is now abolished, or by stated case after conviction at the court to which the trial was adjourned. See *R.* v. *Lewis*, 78 L.J. K.B. 722, and cases therein cited.

Any question of law arising either on the trial or any of the proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the judge may be reserved *during* or *after* the trial. The question submitted here was, of course, not reserved *after* the trial, for the trial has not yet been concluded. When a question is reserved *during* the trial, the trial *shall proceed as in other cases.* This further strengthens my conviction that the decision in *Rex* v. *Trepanier*, *supra*, is right.

I am, therefore, of opinion that this court has no jurisdiction herein. Having no jurisdiction, I can say nothing judicially; but as the question may possibly be raised on the adjourned trial of the accused, I should like to say that, in my opinion, this court has no power to review the decision of a judge at the trial of a prisoner that a necessity has arisen for discharging the jury without giving a verdict, and adjourning the case to be heard before another jury. Such a decision is entirely within the discretion of the judge, and even if the discretion has been wrongly exercised, no objection can be taken in respect thereof at the second trial. *Rex* v. *Lewis*, 78 L.J. K.B. 722.

Incidentally, *Rex* v. *Lewis* affords me a precedent for expressing my opinion on a matter in respect of which I have no jurisdiction.

Judgment accordingly.

B. C.
C. A.

SEATTLE CONSTRUCTION & DRY DOCK Co. v. GRANT, SMITH & Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. February 11, 1919.

COSTS (§ I—19)—SEPARATE AND DISTINCT ISSUES—APPORTIONMENT OF.

Where there are separate and distinct issues involved in an appeal, the general costs thereof go to the party who succeeds, but the costs of those issues upon which the other party succeeds must be given to that party.

[*Reid* v. *Joseph*, [1918] A.C. 717, applied. See 44 D.L.R. 90.]

Statement.

APPLICATION to deprive the defendant of costs for good cause. Application allowed.

S. S. Taylor, K.C., *contra*; *E. P. Davis*, K.C., for application.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—On the appeal which was disposed of some time ago the appellants succeeded in obtaining a substantial reduction in the damages awarded in the court below (44 D.L.R. 90) and the respondents now apply for a direction that they are entitled to the costs of issues in respect of which the court upheld the judgment appealed from.

The appellants are entitled to the general costs of the appeal, which, in the absence of an order disposing of them otherwise than for a good cause, are, by the statute of 1913, c. 13, s. 6, made to follow the event.

The meaning of a like enactment in England in respect to the cost of jury trials has been exhaustively considered by the House of Lords in *Reid* v. *Joseph*, [1918] A.C. 717, and applying the law as there expounded to this case, I think the respondents' application must be acceded to.

Where there are separate and distinct issues involved in an appeal, the general costs thereof go to the party who succeeds, but the costs of those issues upon which the other party succeeds must be given to that party.

The decisions of this court in the past are consistent with the rule affirmed in *Reid* v. *Joseph*. That rule was succinctly stated by Coleridge, C.J., in *Lund* v. *Campbell* (1885), 14 Q.B.D. 821, and is quoted with apparent approval by the Lord Chancellor in *Reid* v. *Joseph*. Coleridge, C.J. said, p. 731:—

> Two principles were established by the cases: (1) that the party who, on the whole succeeds is entitled to general costs; (2) that the word "event" is to be construed distributively and that the costs of the issues as to which the party who on the whole is unsuccessful has been successful are to be allowed to him.

Now in the case at bar, the appellants, having secured a sub-

stantial reduction in the judgment, have been successful in the appeal, though they have failed to impeach the validity of the agreement for the breach of which damages were awarded.

In my view of the case there were, apart from the counterclaim and the arrears of rent, three issues, viz: (1) The validity of the contract; (2) the breach thereof, and (3) the proper sum to be awarded as damages for the breach. As regards the counterclaim and the issue involved in respect of arrears of rent, they were not seriously contested in this court, but if any costs were incurred in respect of them here, the respondent is entitled to such costs. I come back, then, to the 3 principal issues: The respondents succeeded on the first. As to the second, the respondents contended that there was a breach of covenant to insure the floating dock, and they claimed $75,000 damages for breach thereof. They also contended that there was a breach of the covenant to return the dock to the respondents, which they say was also broken and they claim damages in respect of that breach.

The court did not decide the first, the majority being of opinion that as there was clearly a breach of the covenant to return the dock, and that as the measure of damages would be the same for either breach if committed, it was unnecessary to decide whether or not the covenant to insure had been broken. On the issue, therefore, of breach of covenant to insure, the respondents have not been successful. They have been successful in proving and obtaining relief on the appellants' covenant to return the dock to them in the condition specified in the covenant. Their costs, therefore, of establishing that breach should also be taxed to them.

The third issue I have already dealt with, it being the one upon which the appellants succeeded in the appeal.

It may be useful here to refer to the argument addressed to the court in reference to a number of issues alleged to be involved in the appeal. It was submitted that fraud was an issue. Fraud undoubtedly was a question affecting the rights of the parties. It was one of the grounds of attack upon the validity of the agreement. But it is included in the larger question, the true issue, viz: the validity of the contract. So are all other grounds of attack upon the contract affecting its validity. Then again the several surveys and reports upon the hull of the dock and other

B. C.

C. A.

SEATTLE CONSTRUCTION & DRY DOCK CO. v. GRANT, SMITH & CO.

evidence relating thereto may have a bearing on both the first and third issues. They may affect the question of Patterson's knowledge of the condition of the dock when he made the alleged representations which appellants rely upon as fraudulent. They may also affect the question of the value of the dock and, therefore, the question of damages.

There should be a direction that the appellants are entitled to the general costs of the appeal, and that the respondents are entitled to the costs (if any) applicable to the counterclaim and to the claim for arrears of rent; also the costs of maintaining the breach of the appellants' covenant to return the dock, as well as those of maintaining the validity of the contract.

There will be no costs of this application.

Macdonald, C.J.A.

Martin, J.A.

MARTIN, J.A., allowed the application.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the Chief Justice.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am in agreement with the judgment of the Chief Justice.

Eberts J.A.

EBERTS, J.A.:—I agree with Galliher, J.A.

Application allowed.

CAN.

EX. C.

CANADA STEAMSHIP LINES Ltd. v. MONTREAL TRANSPORTATION Co. Ltd.

Exchequer Court of Canada, Maclennan, Dep.Loc.J. Quebec Adm. Dist., Montreal. March 2, 1918.

COLLISION (§ I A—3)—CANAL—PASSING VESSELS—LIABILITY—PROXIMATE CAUSE.

Where vessels passing one another in a canal have exchanged the proper signals, and were properly navigated, the fact that one took a starboard course to avoid collision, and in doing so struck the canal banks and was damaged, does not give her a right of action against the other; where the damage was about the bilge or bottom of the vessel it is evidence of its having been caused by an obstruction at the canal's bottom and not by its banks.

Statement.

ACTION *in personam* for damage to a ship.

Aime Geoffrion, K.C., for plaintiff.

Maclennan, Dep.L.J.

MACLENNAN, Dep. Loc. J.:—This is an action *in personam* in which plaintiff, as the owner of the steamship "Glenellah," seeks to recover damages from the defendant, owner of the steamship "Kinmount."

The plaintiff's case is that on the evening of September 1, 1913, the "Glenellah" was proceeding eastbound down the Soulanges Canal when she met the "Kinmount" going up westbound coming

up the canal; that when the two ships were about a quarter of a mile apart the "Glenellah" sounded a passing signal of one blast on her whistle; that the "Kinmount" immediately answered by one blast on her whistle, and that after exchanging these signals the master of the "Glenellah" ported her helm and the steamer was directed to the southern or starboard side of the canal, which, at the place the steamers met, is about 200 ft. in width at the top and 100 ft. at the bottom, and about 15 ft. deep; that the "Kinmount" failed to direct her course to starboard and in order to avoid a collision the "Glenellah" was forced into the canal bank on her starboard side and was damaged. Plaintiff claims that the striking on the bank by the "Glenellah" and the damages and loss consequent thereon were occasioned by the negligent and improper navigation of those in charge of the "Kinmount."

The defendant denies the material allegations of the plaintiff's statement of claim and alleges that, if plaintiff had any claim against defendant the plaintiff forfeited and lost the same by failure and neglect to present a claim within a reasonable time; that if the "Glenellah" came in contact with the canal bank it was due to her own faulty navigation, and that the "Kinmount" took all usual and proper measures and precautions to avoid a collision.

These steamships were approximately 250 ft. long and 43 ft. wide and both were loaded to capacity. The proper signals were given just before they met in the canal. The plaintiff's case is that the "Glenellah's" starboard side struck the southern bank of the canal and that she was forced into that position by the "Kinmount" not giving her sufficient room to pass safely. Some temporary repairs were made to the "Glenellah," and she did not go into drydock until some months later, when upon examination it was found that the damages which she had sustained were not to her side, but to the plates on her bottom, commencing from about 5 ft. from the turn of the starboard bilge towards the keel plate. None of the damaged plates of the bottom was closer than 5 ft. to the bilge. Whatever the obstruction was which came into contact with the "Glenellah," it is evident that such obstruction was underneath the steamer. If the point of impact had been between the "Glenellah's" starboard side and the south

CAN.

EX. C.

CANADA STEAMSHIP LINES LTD. v. MONTREAL TRANSPORTATION CO. LTD.

Maclennan, Dep.L.J.

bank of the canal the damages would have been to the side plates and not to the plates forming the bottom of the steamer. The part of the steamer which suffered damage is conclusive evidence that the obstruction must have been in the bottom of the canal and that the steamer did not strike its starboard side against the canal bank. My assessors advise me that both steamers appear to have been properly navigated.

The plaintiff has not proved the case alleged against the defendant and has not established that the damages to the "Glenellah" were occasioned by any neglect or improper navigation of those in charge of the "Kinmount." Under these circumstances it is not necessary to deal with the question of the delay on the part of the plaintiff in presenting its claim against the defendant.

The plaintiff's action is, therefore, dismissed with costs.

Action dismissed.

SASK.

C. A.

THE KING v. STEWART.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and McDonald, J. ad hoc. March 20, 1919.

SEDUCTION (§ II—5)—OF STEP-CHILD—CRIMINAL CODE—SEC. 1140—TIME FOR COMMENCING PROSECUTION.

Sec. 1140 of the Criminal Code imposes no limitation of time within which a prosecution for the seduction of a step-child or foster-child must be commenced.

Statement.

APPEAL from the refusal of the trial judge to state for the opinion of the court a question of law arising on a trial for seduction under s. 213 (*a*) Criminal Code.

H. E. Sampson, K.C., for the Crown; *D. D. McCurdy*, for the accused.

The judgment of the court was delivered by

McDonald, J.

McDONALD, J.:—On September 24, 1917, an information was laid against the accused, for that he, the said:—

J. W. Stewart, late of Simpson, on or between the 1st March, 1917, and 31st March A.D., 1918, at Briercrest, in the said Province, did have illicit connection with Sylvia Louise Stewart, who is under the age of sixteen years. This complaint is laid under s. 211, c. 146, C.C.

The accused was committed for trial for said offence.

When the case came on for trial, on January 28, 1919, the agent of the Attorney-General did not prefer a charge of said offence against the accused, but did prefer a charge:—

For that he, the said John William Stewart, did, near the village of Briercrest, in the said Province, in or about the month of November A.D. 1917, then being the stepfather of Sylvia Louise Stewart, have illicit connec-

tion with his stepdaughter, the said Sylvia Louise Stewart, contrary to s. 213 (*a*) of the Criminal Code of Canada.

The accused was found guilty and his counsel asked for a Crown case reserved on the question whether the prosecution was not barred by s. 1140 of the Criminal Code, which he submitted enacted that no prosecution for the offence charged should be commenced after the expiration of 1 year from the date of the commission of the offence. His argument was that as the charge was for an offence other than, and not included in, the offence for which the accused was committed for trial, the prosecution was commenced only when the charge was preferred, which was more than 1 year after the date of the commission of the offence. The trial judge refused to state a case, and the accused then appealed from such refusal.

On the hearing of the appeal, it was assumed by counsel that said s. 1140 provided that no prosecution for the offence charged in the indictment could be commenced after the expiration of 1 year from the date of the commission of the offence, and the argument was confined to the question when the prosecution for said offence was commenced.

I am, however, of the opinion that said s. 1140 imposes no limitation of time within which a prosecution for the offence charged in the indictment must be commenced.

Previous to the amendment in 1917, hereinafter referred to, s. 213 of the Criminal Code, R.S.C. 1906, c. 146, read as follows:—

213. Every one is guilty of an indictable offence and liable to two years' imprisonment:—

(*a*) Who, being a guardian, seduces or has illicit connection with his ward; or

(*b*) Who seduces or has illicit connection with any woman or girl previously chaste, and under the age of twenty-one years, who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar, employment with him in such factory, mill, workshop, shop or store, is, in respect of her employment or work in such factory, mill, workshop, shop or store, under or in any way subject to his control or direction or receives her wages or salary directly or indirectly from him.

And the portion of said s. 1140 in question here reads as follows:—

1140. No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced:—

. . . . . .

(*c*) After the expiration of one year from its commission if such offence be

. . . . . .

(vii.) Seduction of a ward or employee, s. 213.

SASK.

C. A.

THE KING v. STEWART.

Macdonald, J.

By s. 2 of c. 14 of the Statutes of Canada, 1917, it is enacted as follows:—

2. Par. (*a*) of s. 213 of the Criminal Code, c. 146 R.S.C., 1906, is repealed and the following is substituted therefor: (*a*) who, being a step-parent or foster parent or guardian, seduces or has illicit connection with his step-child or foster child, or ward; or . . .

S. 1140 has not, however, been amended, but still remains in the above form.

It will thus be seen that s. 213 deals with:—(1) Seduction of a step-child; (2) seduction of a foster child; (3) seduction of a ward; (4) seduction of an employee.

S. 1140 imposes a limitation on the time within which a prosecution may be commenced for the offences I have numbered (3) and (4), but imposes no limitation with respect to offences (1) and (2).

Under the common law, there is no limited time for the prosecution of proceedings at the suit of the Crown; and, therefore, the proceedings in all criminal cases, in relation to which the time is not limited by statute, may be prosecuted at any length of time after the commission of the offence. Crankshaw's Criminal Code (1915), at p. 1191.

The appeal will be dismissed. *Appeal dismissed.*

ALTA.

S. C.

CITY OF WETASKIWIN v. C. & E. TOWNSITES Ltd.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. February 8, 1919.

TAXES (§ III B—119)—C. & E. TOWNSITE TRUSTEES—VALID ASSESSMENT AGAINST—TOWNSITES LIMITED ACQUIRING LANDS—NOTICES—VALIDITY OF ASSESSMENT—ASSESSMENT COMMITTEE—TAX ROLL—PREPARATION OF.

Trustees named by the company constructing the Calgary and Edmonton Railway for the purpose of handling its townsites along the railway line, and who were commonly known as the "C. & E. Townsite" Trustees or "Townsite Trustees" were assessed for the land under the name of "Townsite Trustees" which was a valid assessment. In 1913 the defendants were incorporated and in 1915 became owners of the assessed land, there being nothing to shew that they did not hold it under the same trusts as their predecessors in title. An assessment for taxes for 1916 and 1917, in the name of "Townsite Trustees," the notice being sent to the firm which was manager of the lands both before and after the defendants became incorporated, held to be a valid assessment against the defendants.

The Municipal Ordinance (Alta. s. 123) providing for the appointment of an assessment committee by the council consisting of "the mayor or reeve, secretary-treasurer and assessor, or any two others with the assessor" does not mean that the mayor and secretary-treasurer must both be either included or excluded, but that the assessor is to be a member and some two other persons are to be associated with him.

A bound book, the left-hand page containing the information required for the assessment roll, and the right, the additional information for the tax roll in accordance with the Town Act, is a sensible method of preparing the roll under the Municipal Ordinance, and free from substantial objection, the two pages constituting a tax roll.

ALTA.

S. C.

CITY OF WETASKIWIN v. C. & E. TOWNSITES LTD.

Statement.

APPEAL by defendants from the judgment of Scott, J., for $5,803.35 for arrears of taxes for the years 1916 and 1917 upon lands owned by the defendants and situate within the plaintiff municipality. Affirmed.

S. B. Woods, K.C., and *E. D. H. Wilkins*, for appellants.

Frank Ford, K.C., and *Alex. Knox*, for respondents.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The first objection by the defendants and one which goes to the basis of the whole of the plaintiff's claim is that the defendants were not assessed for the lands in question which it is admitted they owned in the years for which the taxes are claimed. For both years the name of the firm assessed appears on the assessment roll as "Townsite Trustees" with the address "C/o Osler, Hammond and Nanton, Winnipeg."

The City of Wetaskiwin is on the line of the Calgary and Edmonton Railway, the company for the construction of which was incorporated by the Parliament of Canada in 1890. In the same year, parliament by c. 4, authorized the granting of a subsidy to the company of 6,400 acres of land per mile of the railway for its full length of 340 miles from the southern boundary of the province to Edmonton which was then considered to be at the northern end of the province. It is a matter of most common and general knowledge that new towns grew up on a new railway at the places selected by the railway for stations. It is also quite a matter of history that trustees were named by this company for the handling of its townsites. These trustees, of course, had names of their own, but probably not 1 in 50 who knew of their existence knew or cared what their names were and they were commonly known and spoken of as the "C. & E. Townsite Trustees." or more shortly the "Townsite Trustees." I can see no reason to doubt that an assessment of their lands under that name would be a perfectly good assessment.

The defendants were incorporated in 1913 and they hold their titles to the assessed lands under certificates of title issued in August, 1915.

ALTA.

S. C.

CITY OF WETASKIWIN v. C. & E. TOWNSITES LTD.

Harvey, C.J.

There is nothing whatever to indicate that they are not trustees of these lands, exactly as their predecessors in title were, though it would have been a very simple matter to prove if they hold in any other capacity. The evidence, indeed, seems to indicate the contrary. If they are, in fact, still the townsite trustees, I can see no ground for maintaining that they are not properly assessed when so described.

The plaintiffs were refused permission, improperly I think, to give evidence of the manner of previous assessments, but there seems to be ample evidence to shew that Osler, Hammond and Nanton, the well-known firm of brokers of Winnipeg, were managers of these lands both before and after the title became registered in the name of the defendants.

The notices of assessment and demands for taxes for both years, 1916 and 1917, were sent addressed to "Townsite Trustees" or "Townsite Trustees, Ltd.," in care of that firm and they were received by the defendants and produced by them for the purposes of this trial.

So much of the correspondence as was permitted to be given in evidence shews that the defendants accepted the description as a proper one of themselves. In February, 1917, Osler, Hammond and Nanton were asked for the taxes for 1915 and 1916, all then due and unpaid. In March, they sent a cheque for $600 to be applied on the taxes for 1915, stating that they hoped soon to pay the remainder of the taxes for 1915 and a part of them for 1916. The plaintiffs' first letter was addressed to them as "Managers, C. & E. Townsites Limited", but the acknowledgment of the receipt of the payment addressed them as "Managers, Townsite Trustees Ltd."

In April, Osler, Hammond and Nanton write suggesting a payment of all the arrears in three instalments if the plaintiffs would forego the penalties. The plaintiffs replied regretting their inability to do this, and a month later wrote again asking for payment. Subsequently, though when and how does not appear, the remainder of the 1915 taxes were paid, but no more. In the correspondence there is no reference to any particular lands or names and it is apparent that both parties assumed that the other quite understood what taxes were being referred to.

In June, 1917, the defendants appealed from the assessment of

ALTA.

S. C.

CITY OF WETASKIWIN v. C. & E. TOWNSITES LTD.

Harvey, C.J.

a portion of the lands "on grounds of excessive valuation." This appeal went to the district court judge who made some reduction. The defendants, of course, would have had no occasion to appeal if the lands had not been assessed to them, but they had the notice of assessment addressed to the townsite trustees and they appealed without offering any objection to the manner in which they were described.

I find it impossible to avoid the conclusion that they understood as the plaintiffs intended that the description was supposed to be a description of them. They quite clearly were in no way misled and it seems to me that there is no valid reason for objection on the ground that they were not in fact properly assessed.

It is also objected that there was failure to comply with s. 123 of the Municipal Ordinance providing for the appointment of an assessment committee by the council consisting of "the mayor or reeve, secretary-treasurer and assessor or any two others with the assessor."

There was an assessment committee appointed each year consisting of the mayor, the assessor and an alderman, but it happened that the assessor was also secretary-treasurer, as was permitted by the ordinance. It is contended that the mayor is to be excluded except when the first alternative is adopted, that both of the two to act with the assessor must be other than the two named if one is.

I consider this a rather strained construction even if "other" does mean other than those named. The mayor and one alderman would be any other two than the mayor and secretary-treasurer, and might, I think, be not improperly called "two others." Certainly it seems impossible to conceive any reason for excluding both the mayor and secretary-treasurer unless both can be included. I am, however, disposed to think that "two others" means two other than the assessor. This would seem quite clear if the order were changed and it said the "assessor with two others." That seems also to be the probable intention. The assessor must be a member and some two other persons are to be associated with him.

Another objection which goes to the whole assessment is that there was no proper tax roll. All of the information which is contained in the assessment roll is required for the tax roll. The roll is contained in a bound book, the left-hand page containing

ALTA.

S. C.

CITY OF WETASKIWIN v. C. & E. TOWNSITES LTD.

Harvey, C.J.

the information required for the assessment roll and the right the additional information for the tax roll. The Town Act authorizes the method of preparing a tax roll but the Municipal Ordinance which applies to the plaintiffs has no such provision. I fail however to see why any authority should be required. It seems a most sensible method and free from any substantial objection. It is true that the assessor, in his evidence, stated that the tax roll is contained on the right page, but it is quite apparent that that is not what he meant, and the two pages together constitute a tax roll and I have no doubt that is what he meant, but whether so or not the document speaks for itself.

Another important objection raised is to the adequacy of the description of a portion of the land assessed. This land is described simply as "179.60 acres unsubdivided." S. 122 of the Municipal Ordinance provides that the assessor shall set down in the roll the information called for in the heading on the prescribed form. The form prescribes a

> description in full and extent or amount of property against each taxable person or any interest which is liable to assessment shewing section, township and range or lot and block or other local description.

I do not think it necessary to determine whether the description mentioned is a strict compliance with that statutory provision or whether it would be sufficient to render the land liable.

The only question necessary to decide is whether as against the defendants this description is sufficient to render them liable to a personal judgment against them.

The statutory provision is, no doubt, for the benefit of the person assessed and, therefore, it seems clear that any description which he furnished to the assessor or approved of would be one to which he ought not to be allowed to take exception. It appears that this land consists of numerous parcels, an accurate description of which would be very difficult to make and involve much labour in setting out.

As I have already indicated the defendants appealed from the assessment of this un-subdivided portion in 1917, and obtained a reduction in the amount, not of the acreage, but of the valuation. No question was raised by the notice of appeal as to the sufficiency of the description or the quantity of the land and the assessor in his evidence says they agreed upon the quantity. It is suggested

that the assessor only meant that they agreed on the quantity in 1917, and that that could not affect the 1916 assessment, but that the amount was right in 1917 is of course some evidence that it was right in 1916.

Osler, Hammond and Nanton were managers for both the former and the present registered owners, and I think the plaintiffs ought to have been allowed to shew how this had been assessed in previous years, but evidence on that point was objected to and ruled out. There is, however, sufficient in the evidence of the assessor to shew that this description was in the 1915 roll and that the taxes for that year were paid.

In *City of Toronto* v. *Russell*, [1908] A.C. 493, property was described as "8 57/100 acres (1242 x 300) east side, Carlaw Ave. north of Queen St." The courts below held that the assessment was invalid because the description was insufficient. The Privy Council, however, reversed this decision. Lord Atkinson, at p. 499 said:—

> There is much to shew that the description was adequate. Its alleged insufficiency was not shewn to have misled anybody, least of all plaintiff.

That description contains more information than the present one, but it nevertheless is not sufficient to enable one to go and find the land and, therefore, in principle I cannot see that there is any distinction.

It is true the decision in that case went on a curative section, but the remark I have quoted leads to the belief that if there had been no such section the assessment would have been upheld.

Likewise, in this case, I would rest my conclusion not so much on the view that the description is sufficient for all purposes, but that it is a description which has been accepted and in effect authorized by the defendants.

The only other objection requiring consideration is that the rate for 1917 is in excess of the statutory authority.

S. 8 of the city's charter (c. 41 of 1906) fixes a maximum rate of 20 mills with the proviso that for meeting the cost of public works it may reach 25 mills. The taxes for 1917 were 12¼ mills for general purposes and 9 mills for debenture purposes, making a total of 21¼, or 1¼ mills more than the maximum authorized unless the proviso applies.

There was no direct testimony as to whether any of this is for

ALTA.

S. C.

CITY OF WETASKIWIN v. C. & E. TOWNSITES LTD.

Harvey, C.J.

the cost of any public work. Power is given to the city by its charter to construct public works and to issue debentures to raise money for such purpose.

Without examining carefully to ascertain whether there could be debentures for any other purpose, it certainly seems probable that the 9 mills is partly, if not wholly, for the cost of public works, but I am of opinion that the burden is, in any event, on the defendants to shew that the rate is unauthorized in view of the provision of s. 152 of the Municipal Ordinance which makes the copy of the tax roll *primâ facie* evidence of the debt in an action such as this.

For the reasons I have stated I consider that none of the objections raised can be sustained and I would dismiss the appeal with costs.

MCCARTHY, J., being absent, took no part in this judgment.

Appeal dismissed.

ONT.

S. C.

REX v. DI FRANCESCO.

Ontario Supreme Court, Riddell, J. November 14, 1918.

CRIMINAL LAW (§ II A—39)—TRIAL JUDGE—NO JURISDICTION TO GRANT NEW TRIAL—PROCEDURE.

The trial judge, in a criminal trial, has no power to grant a new trial. Leave to move the Court of Appeal for a new trial is given by sec. 1021 of the Criminal Code, but only on the ground that the verdict is against the weight of evidence.

[Review of authorities and practice.]

Statement.

INDICTMENT of the prisoner for murder. Verdict of guilty of manslaughter.

An application on behalf of the prisoner was made to RIDDELL, J., who presided at the trial, for a new trial or for leave to move the Court of Appeal for a new trial.

The motion was heard at the Assizes in Toronto.

T. C. Robinette, K.C., for the prisoner.

T. J. Agar, for the Crown.

Riddell, J.

RIDDELL, J.:—On an indictment for murder, the prisoner was found guilty of manslaughter by a jury of the County of York, on the 4th November, 1918.

At the trial a young girl, Gertrude Dyson, was called for the

ONT.

S. C.

REX v. DI FRANCESCO.

Riddell, J.

Crown: she had seen the beginning of the fracas between the prisoner and the deceased.

The defence was that the prisoner acted in self-defence on being threatened by the deceased with a knife—the witness swore she did not see any knife in the hand of the deceased (no knife was in fact found on the deceased when examined a few hours after his death). She had, on a preliminary investigation, sworn that she had seen a knife in the deceased man's hand; but she said at the trial that this was not true.

After the verdict of manslaughter had been rendered and the prisoner remanded for sentence, Mr. Robinette produced to me an affidavit in which the girl Dyson swore that she did see a knife in the hand of the deceased, but that she had given the evidence she had at the trial because of threats. Counsel thereupon asked me to grant a new trial—or to grant leave to move the Court of Appeal for a new trial.

I think I have no power to do either, even if I were inclined to do so, which I am not.

The power of granting a new trial is either common law or statutory.

The Province of Upper Canada began its separate provincial life with the English Criminal Law in force in its whole territory, by the combined effect of the Royal Proclamation of 1763 and the Quebec Act of 1774, 14 Geo. III. ch. 83 (Imp.); and, except as modified by legislation, the criminal side of the Common Law of England is still in force.

As is well known, the Judge in England who presided at criminal trials at "the Assizes" was a Commissioner, sitting under the authority of the two Commissions of Oyer and Terminer and of General Gaol Delivery, the former enabling him to try all indictments found before him, the latter all indictments, wherever found, against any person in the gaol of the county. Of course he also had his Commission of the Peace. These Commissioners never had any power to grant a new trial: they were *functi officii* when they had tried the case and made the orders, given the sentences etc. which necessarily followed the verdict. All applications for a new trial must be made in the Court of King's Bench.

Nor was there any power in any Court—not even the Court

ONT.

S. C.

REX v. DI FRANCESCO.

Riddell, J.

of King's Bench—to grant a new trial in a case of felony (of course manslaughter is a felony at the common law).

In one case, *R.* v. *Scaife* (1851), 17 Q.B. 238, 117 E.R. 1271, the Court of Queen's Bench did make an order for a new trial at the instance of a prisoner who had been convicted of robbery at the York Assizes before Cresswell, J. No precedent for such an order was cited or can be found, and it is plain that the order was *per incuriam*. The case was disapproved by the Judicial Committee in *Attorney-General for New South Wales* v. *Bertrand* (1867), L.R. 1 P.C. 520, where the law is carefully considered. See also the case of *Rex* v. *Inhabitants of Oxford* (1811), 13 East 411, 415 (*n.*), 104 E.R. 429, in which all the authorities up to that time are collected.

In Upper Canada the English practice was followed: there was no new trial in felonies. In 1851, an Act was passed, 14 & 15 Vict. ch. 13 (Can.), which enabled the trial Judge, in case of a conviction, to reserve a case for the consideration of either Common Law Court, but it was held that this did not empower the Court to grant a new trial: *Regina* v. *Baby* (1854), 12 U.C.Q.B. 346.

In 1857, by 20 Vict. ch. 61, secs. 1, 2, 4 (Can.)—*cf.* C.S.U.C. ch. 113, secs. 1, 3, 6, 7—Parliament enacted that a person convicted of a crime might apply for a new trial upon any point of law or question of fact, in as ample a manner as any person may apply to the Superior Courts of Common Law for a new trial in a civil action, and if the conviction be affirmed the person convicted may appeal to the Court of Error and Appeal. If the conviction was in the Quarter Sessions, the application for a new trial must be made to that Court, and if the appeal should fail, a further appeal lay to a Court of Common Law.

In 1869, by 32 & 33 Vict. ch. 29, sec. 80 (Dom.), all power was taken away from every Court to grant a new trial. Thereafter the convicted person must rely upon a case reserved for one of the Common Law Courts; the appeal from the Common Law Courts to the Court of Error and Appeal was also taken away.

When the Criminal Code was enacted in 1892, 55 & 56 Vict. ch. 29 (Dom.), power was given, on the refusal of the trial Judge to reserve a case, for the convict (with the leave of the Attorney-General given in writing) to move the Court of Appeal for such a case: when a reserved case should come before the Court of

ONT.

S. C.

REX v. DI FRANCESCO.

Riddell, J.

Appeal, that Court might order a new trial or make such order as it should deem proper. If the Judges of the Court of Appeal were unanimous, their decision was to be final; if not, an appeal might be taken to the Supreme Court of Canada.*

Some changes have been made in the practice: at the present time the "Court of Appeal" is, in Ontario, the Appellate Division of the Supreme Court; and there is no need for a convicted person to obtain the leave of the Attorney-General.

Nowhere is there any power given by statute to the trial Judge to grant a new trial, and I must refuse to order a new trial.

As respects my giving leave to move the Court of Appeal for a new trial, there is no such practice known to the Common Law: and the sole statutory authority is to be found in sec. 1021 of the Code, R.S.C. 1906, ch. 146, which permits such leave only on the ground of verdict against the weight of evidence. Not only is the verdict not against the weight of evidence, but the whole evidence, with the exception of that of the prisoner (which I did not believe and which to my mind is inconsistent with the results of the *post mortem* examination), is in favour of a verdict of guilty; the only objection which might be taken to it on that ground is that the verdict might rather be "guilty of murder."

As to the affidavit now filed, it is clear law that on an application for a new trial in civil cases, an affidavit from a witness contradicting his evidence at the trial cannot be received: *Harrison* v. *Harrison* (1821), 9 Price 89, 147 E.R. 31; *Phillips* v. *Hatfield* (1840), 8 Dowl. P.C. 882; *Berry* v. *Da Costa* (1866), L.R. 1 C.P. 331; *Cardwell* v. *Cardwell* (a decision of the Queen's Bench Division, Ontario, in 1894, unreported); *Rushton* v. *Grand Trunk R. Co.* (1903), 6 O.L.R. 425.

Even if I were to believe this affidavit, I do not think the verdict against the weight of evidence. I refuse leave to appeal under sec. 1021 of the Code.

But, at the request of the prisoner's counsel, I reserve for the opinion of the Court of Appeal the question of law: "Whether I am bound as a matter of law to give leave to move for a new trial on the ground that the verdict was against the weight of evidence."

I sentenced the prisoner to 15 years' imprisonment; but, under sec. 1023 of the Code, I suspend the sentence that the

*See secs. 742 *et seq.*

ONT.
S. C.
REX
v.
DI FRANCESCO.
Riddell, J.

opinion of the Court of Appeal may be had—the prisoner to remain in custody.

I have of course handed the affidavit to the Crown officer that he may make proper inquiries and take the proper proceedings thereon.

A somewhat full discussion of the practice in granting new trials at the Common Law and under statute will be found in two articles in the Yale Law Journal, vol. 26, pp. 49 *sqq.* (November, 1916), and vol. 27, pp. 353 *sqq.* (January, 1918).

Judgment Accordingly.

CAN.
S. C.

SCHAEFER v. THE KING.

Supreme Court of Canada, Anglin, J. February 18, 1919.

APPEAL (§ XI—720)—JUDGMENT APPEALED FROM RIGHT—APPEAL HOPELESS—COURT WILL NOT GRANT LEAVE.

Leave to appeal will not be granted, if the judgment appealed from is so clearly right that an appeal would be hopeless.

Statement.

MOTION before a judge in chambers for leave to inscribe an appeal from the Court of King's Bench, appeal side, Province of Quebec, 27 Que. K.B. 233.

R. Stanley Weir, K.C., for appellant.

Jos. Walsh, K.C., for respondent.

Anglin, J.

ANGLIN, J.:—The defendant moves for leave to inscribe an appeal from the Court of King's Bench (Quebec) on the list for the current term. He was convicted on June 20, 1916, upon an indictment charging him with having committed treason. The overt acts alleged, and to which evidence was directed, were the sale of tickets, after war was declared in 1914, to certain subjects of Austria-Hungary to enable them to leave Canada en route to Austria-Hungary for the purpose of assisting the government of that country, a public enemy, and furnishing them for the same purpose with other documents to further their transportation to Austria-Hungary, and counselling them to falsely assume the character of Roumanians. Having been refused a reserved case by the trial judge on the ground that the verdict was against the weight of evidence, the defendant applied to the Court of King's Bench (appeal side) for leave to appeal. His application was dismissed on the 4th of December, 1917 (27 Que. K.B. 233), and from that judgment no appeal was taken. When called up for

sentence on April 9, 1918, the defendant moved in arrest of judgment on the ground that the indictment did not charge any indictable offence—did not charge him with assisting a public enemy at war with His Majesty, and did not aver overt acts as required by s. 847 of the Criminal Code—and also that the trial judge had misdirected the jury by instructing them that the accused had assisted the Empire of Austria-Hungary in three ways, whereas the accused was not so charged. By his motion the defendant also asked for a reserved case on these points. That having been refused, he applied to the Court of King's Bench (appeal side) for leave to appeal and for an order directing that a case should be stated submitting these points. His application was dismissed by that court on June 21, 1918, Lavergne, J., dissenting. The alleged misdirection is not noticed in any of the judgments delivered. Indeed, the appeal on that ground was manifestly frivolous, the charge of the trial judge having been not merely scrupulously fair, but distinctly favourable to the accused. The majority of the Court of King's Bench dealt with the motion as depending solely on the sufficiency of the indictment, and the dissent of Lavergne, J., was based on the ground that the acts charged as "overt acts" are insufficient because they failed to "disclose any hostile intention or action" on the part of the accused. He construed the indictment as charging the purpose of assisting the enemy against the ticket purchasers and not against the defendant. With deference, I think the judge was hypercritical. The statement of the purpose of aiding the enemy in the indictment immediately follows the statement that war was and is being prosecuted and carried on between Great Britain and Austria-Hungary "as the said Israel Schaefer then and there well knew." It is, in my opinion, reasonably clear that the purpose was charged as that of Schaefer, and not that of the ten ticket purchasers. That the evidence was sufficient to support the finding of the existence of that purpose involved in the verdict of "guilty" is *res adjudicata* under the unappealed judgment of the Court of King's Bench of the 4th of December, 1917. When the dissenting judge adds that, "To assist persons who are not proved to have assisted the enemy in any way cannot surely be regarded as an offence," I venture to think he misapprehends the essential elements of the crime of which the defendant has been convicted. That the

CAN.

S. C.

SCHAEFER v. THE KING.

Anglin, J.

rendering of actual assistance to the enemy was prevented by the timely intervention of the Canadian authorities is no answer to the charge.

I am, with respect, unable to appreciate the force of the dissenting judge's objection to the sufficiency of the indictment. "Overt acts" and a treasonable purpose in committing them are, in my opinion, charged by it.

The appellant is admittedly in gross default in the prosecution of his appeal to this court. No sufficient reason has been shewn for his omission to inscribe it for the October Sittings. His failure to inscribe it for the present Sittings is still less excusable. While counsel for the Crown does not actively oppose, he declines to consent to indulgence being extended. Under these circumstances, I think the motion before me should be disposed of on considerations similar to those which determine the granting or withholding of special leave to appeal to this court. Such leave is not granted where, in the opinion of the court, the judgment against which it is sought to appeal is clearly right. Being of the opinion that the judgment of the Court of King's Bench in the present case is so clearly right that an appeal from it would be hopeless, it would appear to be my duty to refuse the defendant's motion.

Motion refused.

N. B.

S. C.

THE KING v. VROOM; Ex. p. McDONALD.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer ,J. February 14, 1919.

1. INTOXICATING LIQUORS (§ III I—91)—PROHIBITION ACT, N.B.—HAVING LIQUOR IN A PLACE OTHER THAN A PRIVATE DWELLING HOUSE — EVIDENCE NECESSARY TO SUSTAIN CONVICTION.

In order to sustain a conviction under the N.B. Prohibition Act (1916, 6 Geo. V. c. 20) for having liquor in a place other than a private dwelling house, it is necessary to shew that at the time the offence was said to have been committed the premises were not so used, the fact that part of such premises had previously been used as a shop, or the fact that they had the physical qualities of a shop is not sufficient for the purposes of the Act.

2. CERTIORARI (§ I A— 9) —INTOXICATING LIQUOR — PLACE OTHER THAN PRIVATE DWELLING—EVIDENCE.

On a charge of having liquor in a place other than a private dwelling, without having first obtained a license therefor, unless it is shewn that the place in which the liquor was, was a place other than a private dwelling within the meaning of the Act, the magistrate has no jurisdiction to try the case, and a conviction will be quashed on *certiorari*.

NOTE.—This case is considered important by many of the profession in N.B. as widening the scope of *certiorari* when expressly taken away by the Act, *cf.* secs. 125, 126 of the N.B. Act (1916, 6 Geo. V. c. 20) with secs. 100 and 101 of the Manitoba Temperance Act (1916, c. 112).

N. B.

S. C.

THE KING v. VROOM; EX. P. MCDONALD.

WRIT of *certiorari*, and rule *nisi* to quash a conviction against the applicant, before Charles Vroom, police magistrate for the Town of Saint Stephen, for a violation of the Intoxicating Liquor Act, 1916, were granted at the September session of the Appeal Court.

P. J. Hughes, shews cause.

D. Mullin, K.C., supports rule.

The judgment of the court was delivered by

HAZEN, C.J.:—At the last term cause was shewn against a rule *nisi* to quash the conviction of Hugh McDonald, made by Charlie N. Vroom, one of His Majesty's justices of the peace for the County of Charlotte, for violation of the Intoxicating Liquor Act, 1916.

Hazen, C.J.

The defendant resides at Milltown in the County of Charlotte, and an information was laid against him before the said justice, for unlawfully keeping liquor for the purpose of selling without the license by law required, on May 11, last. The information was laid by George L. Moore, inspector under the Act, and a search warrant was issued for entry upon the premises, and a search for liquor and the seizure of the same. The evidence given at the trial disclosed the fact that, under the authority of this search warrant, George L. Moore, the informant, accompanied by Frank A. Alward, town marshal, went to the premises of the defendant and searched the same, and that the only liquor which they found thereon was a pint bottle labeled "G. H. Mumm & Co., Rheims, France, S.B. Townsend, Limited, Montreal," which bottle had never been opened. No evidence was given as to the contents of the bottle and as to whether or not it was intoxicating, but throughout the trial it was spoken of as champagne. I doubt very much if, without further evidence, and speaking simply from the label on the bottle, the justice would have been warranted in finding that it contained intoxicating liquor, but this point was not raised, and throughout the proceedings it was treated as being such. The bottle was found on a shelf in a pantry off the kitchen of McDonald's residence. The inspector says that he entered McDonald's residence by the front door of the dwelling, that the door faced the main street in Milltown, and that there was a shop door, the shop being under the same roof as the dwelling which faced on the same street. The place described as a shop

N. B.

S. C.

THE KING v. VROOM; EX. P. MCDONALD.

Hazen, C.J.

had previously been used as such. From it there was a passage-way which connected with a sitting-room from which there was connection with the kitchen, and the pantry in which the bottle was found was off this kitchen. The inspector says he went through a door from the sitting-room to the shop, there being a small hall leading thereto, and that there was no direct entrance from the shop to the pantry. To use his own language, you have to go through the living-room to get to the pantry. In the building described as a shop, there was no beer-pump, but there was a counter across the middle of the room, and there was a street door opening into it, but whether it was locked or not does not appear from the evidence. However, when the search of the premises took place, those making it entered through the door of the dwelling. Behind the counter, there were shelves on the wall, and boxes with some cigars in them. The inspector says he saw some glasses on the shelves, but they were empty, and he did not handle them, and that there was a refrigerator in the room, but he found nothing in it and found no liquor in the room. He searched the cellar underneath what is spoken of as the shop and found a large number of empty bottles, and one bottle containing a liquid which, when analyzed, proved to be only sugar and water. He stated in the evidence that he did not claim to convict Mr. McDonald on the contents of this bottle. He had sent part of its contents to the provincial analyst, the result of whose examination was put in evidence. In cross-examination he stated that to get from the shop to the pantry, where the champagne was found, you have to pass through a small hallway, through the living-room to the kitchen, and from the kitchen to the pantry. This was the informant's case.

It was shewn in evidence on behalf of the defendant, both by his own evidence and that of two sisters, that the bottle spoken of as champagne was brought from the Chipman Hospital and put in the place where it was found, about 3 years before the trial. The defendant had a sister who was ill in the Chipman Hospital, and the champagne had been prescribed for her. In consequence of this he bought a bottle of champagne, and took it to the hospital and another sister got another bottle. The sister who was ill in the hospital died after she had used part of one bottle, and the other was brought by her sister, Mrs. Tyrell, to his home and put

N. B.

S. C.

THE KING v. VROOM; EX. P. MCDONALD.

Hazen, C.J.

in the cupboard where it remained ever since. The defendant knew of its being placed here and had seen it a number of times since. It appeared from the evidence that the defendant had, before the coming into force of the Intoxicating Liquor Act, been in the habit of selling liquor, but he stated it was not a part of his stock-in-trade, as he never kept champagne in stock and had no customers for it. There seems to be no question whatever with regard to the fact that the champagne was purchased for his sister who was ill, as above mentioned, and that it was brought from the hospital and placed in the pantry long before prohibition came into effect in New Brunswick.

It does not appear to me that there was any evidence that would warrant the conviction of the defendant on the charge laid against him, and this evidently was the opinion of the informant, for, at the conclusion of the evidence, his counsel applied to amend the information so as to change the charge from "keeping for sale" to read "did have liquor in a place other than in a private dwelling-house in which he resides, without having first obtained a wholesale license or a retail license under the Intoxicating Liquor Act, 1916, authorizing him to do so." The only liquor which he had in his dwelling, if it was liquor, was in the bottle already mentioned, which was placed in his dwelling-house under the circumstances which I have mentioned. After the information had been so amended the defendant gave further evidence. No further evidence was given on behalf of the informant, and there was not a scintilla of evidence to shew that the part of the building referred to as a shop had been used as such since the coming into force of the Intoxicating Liquor Act, 1916, or was being used as such at the time that the premises were searched by the inspector and marshal, or on the date mentioned in the information. On the other hand, the defendant again went on the stand and swore that between January 1 and May 11 no part of the building in which the bottle of champagne was found was used for purposes other than that of a private dwelling, either by himself or anyone else. A portion had formerly been occupied as a store, but neither the owner nor any other person had occupied this part as a store since the Intoxicating Liquor Act came into force. No part of the building had been used or occupied as an office within the time specified, nor as a shop nor as a place of business, nor as a club-

N. B.

S. C.

THE KING v. VROOM; EX. P. MCDONALD.

HAZEN, C.J.

house, nor for any other purpose than that of a dwelling, and that no part of the building was connected by a doorway or otherwise with any place where liquor was authorized to be sold under the Intoxicating Liquor Act, but that the entire premises were occupied by him solely as a private dwelling-house between January 1, 1918, and May 11, 1918. He further stated that he did not claim ownership in the bottle of champagne after he left it at the hospital, that it belonged to his sister, he knew it was there but considered it her property, and she had other things in the house belonging to him, in which he had no ownership; with regard to the cigars seen in the shop he said that the last he got was about November 5, and that some had been there since June 1, 1917, and that at no time since the Intoxicating Liquor Act came into force had he sold or offered for sale any cigars in the shop; that the cigars were left on the shelves when he closed the shop and had been there ever since; that he had not sold any nor kept any for sale and had done no business of any kind in that building or any part of it since the Intoxicating Liquor Act came into force. In his cross-examination he stated that since the Intoxicating Liquor Act came into force the shop had been used only to keep a refrigerator in to keep the food cool; that the few who came in and out only came to make friendly calls; that they came through the front door of the dwelling and sometimes through the shop door, and that this happened very seldom. Milford Budd, a conductor on the street railway which passes the premises, was called. He stated that, although he passed the defendant's premises "twice in one-half hour and the same thing an hour later," he had never during the present year seen anyone going in the shop entrance, although he had seen one or two going in the house entrance. Upon this evidence the court adjudged the defendant guilty of the offence charged—that is, of having liquor in a place other than in a private dwelling-house, and imposed a fine of $100 and costs, and in default of payment imprisonment in the common gaol for a period of three months.

The evidence was certainly very inconclusive, if it can be said that there was any evidence at all, the only evidence being the finding of the bottle before referred to in the pantry, the contents of which were not proved, but in spite of this it was urged that in view of the decisions in *Ex parte Daley* (1888), 27 N.B.R. 129, and

N. B.

S. C.

THE KING v. VROOM; EX. P. MCDONALD.

Hazen, C.J.

in *The King* v. *Hornbrook; ex parte Morison* (1909), 39 N.B.R. 298, the conviction should not be interfered with, the magistrate having jurisdiction over the person and the offence. I do not, however, deem it necessary to decide this point, although it was contended that these cases were distinguishable from the present, they having been decided under the provisions of the Canada Temperance Act, and it being a fully accepted rule that no case is authority for anything but what it actually decides. Under the information as amended, the magistrate would only have jurisdiction to try the case in the event of intoxicating liquor being in a place other than the private dwelling-house in which the defendant resided. It was contended by the counsel who shewed cause that this was the case, and he called the attention of the court to the interpretation clauses of the Act, s. 2, (*s*) and (*t*). Sub-s. (*s*) says that the expression "private dwelling-house" shall mean a separate dwelling and actually and exclusively used as a private dwelling. Sub-s. (*t*), without restricting the generality of the above definition as a private dwelling-house, provides that the expression "private dwelling-house" shall not include or mean any house or building occupied or used as an office, other than a duly registered physician's or dentist's office, or as a shop or as a place of business, etc. The word "shop" is defined in the dictionaries as a place where wares are usually both made and displayed for sale, or a building or a room or a suite of rooms appropriated to the selling of wares at retail, or a room or building in which the making, preparing or repairing of any article is carried on, or in which any industry is pursued, as a machine shop or a carpenter shop. There is no evidence to shew that the portion of the building was so used after the Intoxicating Liquor Act came into effect, and I cannot help coming to the conclusion that where a building or premises are entirely under the same roof as the Act uses the expression "occupied or used or partially occupied or used," it is necessary to shew at the time the offence is said to have been committed that a portion of the premises were in fact so used, and the fact that previously they had been so used, or the fact that they possessed the physical qualities of a shop is not of itself sufficient for the purposes of the Act. If, for instance, it were shewn that a man had kept a grocery store in a building, the upper flat of which he occupied as a dwelling, and which was connected by a stairway

N. B.

S. C.

THE KING v. VROOM; EX. P. MCDONALD.

Hazen, C.J.

therewith, that he had gone out of the grocery business and the shop had not been used for any purpose since, and liquor was found in his dining-room of the dwelling, upstairs, this would surely not constitute an offence under the Act, for it could not in my view be successfully contended that the part of the building which had formerly been used as a shop not being so used at the time, would bring it within the operation of s. 2, (*t*). It was contended, however, that the effect of s. 135, that,

> Any house, shop, room or other place in which it is proved that there exist beer pumps, or any other appliances or preparations similar to those usually found in hotels or shops where liquors are accustomed to be sold or trafficked in, other than those of common use in private houses, shall be *primâ facie* evidence that it is a place in which liquors are kept or had for the purpose of being sold, bartered or traded in, in contravention of this Act; and the occupant of such house, shop, room or other place shall be taken to be the person who has or keeps therein such liquors for sale, traffic or barter,

was conclusive as against the defendant. I do not so consider it. In the first place no beer-pump or apparatus of a similar kind was found on the premises. It is true that there was a counter and a refrigerator which so far as I can see would be the only appliances similar to those usually found in a hotel or shop where liquors are accustomed to be sold, but this would only be *primâ facie* evidence at the most, and the evidence of the defendant has removed, in my opinion, any presumption that might exist against him in consequence of that statute. A close examination of the section, moreover, shews that in any event such appliances shall be *primâ facie* evidence only of its being a place in which "liquors are kept or had for the purpose of being sold, bartered or traded in." This is not the charge which is made against the defendant. The charge, as I have stated, is of having liquor in a place other than a private dwelling, without having first obtained a license therefor, and there is no charge that he had it in said dwelling for the purpose of being bartered, sold or traded in in contravention of the Act. Unless it were shewn that the place in which the liquor was, was a place other than a private dwelling under the meaning of the Act, the magistrate, in my opinion, had no jurisdiction whatever to try the case, and as there is no evidence to this effect the defendant committed no offence under the statute, and I am, therefore, of the opinion that the conviction should be quashed.

Conviction quashed.

ARMSTRONG v. WATSON.

ALTA.

S. C.

Alberta Supreme Court, Stuart, J. March 22, 1919.

ASSIGNMENTS FOR CREDITORS (§ VIII A—74a)—INSOLVENT COMPANY—NOTE TAKEN FOR AMOUNT OF WAGES DUE—PRIORITY OF CLAIM.

The taking of a promissory note or other negotiable instrument for the amount of a debt does not constitute payment of the debt in the absence of proof that there was an agreement to that effect, and therefore employees of an insolvent company who have taken notes for wages due them do not lose their right to priority for such wages under the Assignments Act (1907, Alta., c. 7, sec. 28).

Statement.

APPLICATION for an order directing the assignee to allow the applicants to rank as preferential creditors for three months' wages, for which notes had been taken.

J. O. Campbell, for applicants.

H. C. B. Forsyth, for assignee.

Stuart, J.

STUART, J.:—This matter comes up by way of originating notice on the part of various employees of an insolvent company which has assigned for the benefit of creditors. The application is for an order directing the assignee to allow the applicants to rank as preferential creditors for three months' wages. The company was known as Eugene Restaurants Ltd. The character of the company was fairly well revealed by the statement of the witness Stevenson who said he was head waiter in the restaurant and also president of the company. The fact is that the employees were practically all shareholders. Five of the applicants were directors of the company.

The assignment was made on October 18, 1918. Of course financial difficulty had appeared some time before this. The applicants being interested in another capacity than as employees ventured to consent to let their claims for wages stand for a time. The difficulty arises, however, out of the circumstances that promissory notes at 6 months were signed by the company through its officers and taken by the applicants. The main point is whether these notes constituted payment of the wages or not. If they did, then the applicants' claim against the estate can be upon the notes only and not for wages, and there will then be no preference. I do not think the fact that the notes had not fallen due is very material. If they were taken in payment, then the claims for the original debts for wages are gone. If they were not so taken, then the claims for wages still exist, and may be set up in the assignment proceedings and the fact that the time for payment may have been

ALTA.
S. C.
ARMSTRONG v. WATSON.
Stuart, J.

extended does not affect the matter. Claims not yet matured are surely entitled to be proved, and if they are of such a nature as to be entitled to a preference, the fact of non-maturity can not be relevant. Indeed, at the date of the assignment, certain wages ought to have been earned but not payable until the end of the month, *i.e.*, after the date of the assignment. This circumstance would certainly not preclude a preference.

The general rule of English common law is that the taking of a promissory note or other negotiable instrument for the amount of a debt does not constitute payment of the debt in the absence of proof that there was an agreement to that effect. See 30 Cyc., pp. 1194-1196, and authorities there cited including *Nordheimer* v. *Robinson* (1878), 2 A.R. (Ont.) 305. The burden of proof was upon the assignee and in my opinion that burden was not satisfied. I could not upon the evidence find the existence of an agreement to accept these notes in payment. The consequence is that the original indebtedness for wages still exists and the applicants are entitled to the declaration of priority asked for. They should, however, produce their notes as many of them may not yet have matured.

An expression occurring in the evidence of Stevenson to the effect that Caprioglio and Maud Edwards really loaned money and took notes was too much like an interpretation by the witness or an adjudication by him of what the court is asked to decide for me to place much reliance upon it.

The preference will, of course, only be for the amounts allowed by the Assignments Act, *i.e.*, not exceeding 3 months' salary actually earned at the date of the assignment.

I do not think I ought now to consider any such question as I hinted at in the argument with regard to the liability of directors under the Companies Ordinance for wages. There might be something to be said for the theory that ordinary creditors being deferred to these wage-earners should be entitled to be subrogated to their rights under any security they hold and that the statutory liability of directors is such a security. But that matter was not argued and was indeed not strictly relevant although it might be brought up later on.

I may point out that there is no preference declared for mere salaries as directors. I understand the applicants actually worked

ALTA.

S. C.

ARMSTRONG v. WATSON.

Stuart, J.

as waiters, etc., in the restaurant. Upon principle, I can see no reason why the mere accident that they are also shareholders and even directors should deprive them of the priority given by the Assignment Act. I have no right to amend the Act and there is nothing in it excepting persons in the position of the applicants from its terms. The applicants should have their costs out of the estate. *Application granted.*

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. October 28, 1918.

LIBEL AND SLANDER (§ II E—82)—MUNICIPAL OFFICER—ALLEGED LIBEL—JUDGE'S CHARGE—GENERAL VERDICT—INTERPRETATION OF.

Where in an action for damages for libel of a municipal officer the trial judge explained the meaning of s. 5 of the Libel and Slander Act (R.S.O. 1914, c. 71), and charged them that the words were capable of a defamatory meaning and that it was their duty to find whether the words had, in fact, a defamatory meaning, and, if so, to assess damages, and the jury brought in a general verdict "for the defendant." The jury must be taken to have found either that the words were not libelous or that, if they were libelous, the damages were too trifling to warrant a verdict for the plaintiff; in either case the Appellate Court should not set aside the verdict or order a new trial.

[*Sydney Post Publishing Co.* v. *Kendall* (1910), 43 Can. S.C.R. 461; *Lumsden* v. *Spectator Printing Co* (1913), 14 D.L.R. 470, 29 O.L.R. 293, distinguished.]

Statement.

APPEAL by the plaintiff from the judgment, dated the 8th November, 1917, directed to be entered by Middleton, J., upon the findings of the jury, dismissing the plaintiff's action with costs.

The following statement of the facts is taken from the judgment of Clute, J.:—

At the time of the alleged libel the plaintiff was an alderman of the City of London. The defendants were the owners and publishers of a newspaper, the London Free Press.

The complaint is that the defendants systematically published false and malicious reports to the effect that the plaintiff was not attending to his duties as alderman of the City of London. The offence consisted in the omission of the plaintiff's name from the report of the proceedings of the council. There was evidence to the effect that the plaintiff had complained that the reports given by the defendants did not do him justice, and thereupon the defendants did not report his presence or refer to him by name in the proceedings of the council. On one occasion it was stated that the persons named, not including the plaintiff, were the only aldermen present, when in fact the plaintiff was present.

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Statement.

The defendants do not dispute that their manager had given instructions not to refer to the plaintiff in the report of the proceedings of the council, but say that it was a mistake of the reporter in the one instance when the word "only" was used.

The jury found a general verdict for the defendants, upon which judgment was entered dismissing the plaintiff's action with costs. No objection was taken to the Judge's charge.

J. M. McEvoy, for appellant.

W. B. Raymond, for defendants, respondents.

Clute, J.

CLUTE, J. (after stating the facts as above):—Counsel for the plaintiff argued that the publication complained of was clearly libelous upon its face; and that, while it would have been difficult to sustain a case against the defendants in respect to the publications other than the one in which the word "only" was used, that publication, taken with the others, clearly carried the meaning that the plaintiff was disregarding his duty as an alderman in not being present and taking part in the important matters that were brought before the council.

The learned trial Judge, in his charge, said, in part:—

"It is my duty to tell you whether, as a matter of law, the words are capable of having a defamatory meaning, and it is your duty to find whether the words have in fact a defamatory meaning. . . . The first article is an article that has been read to you in which it is said that only certain aldermen were present at a certain meeting, meaning thereby fairly plainly that Wilson was not there; and I think I shall come to the conclusion that that is in itself capable of being defamatory. It is a false statement, for Wilson was present at that meeting, and I think saying of an alderman that he was not present—and I think it is for you to determine whether the article means that—I only tell you it is capable of meaning that—if you come to the conclusion that that article means that Wilson was not present at that meeting, and that that is defamatory of him in his office as municipal councillor, because the faithful municipal councillor ought to be present at meetings."

After dealing with the other publications and stating that no evidence was given of special damage, he charged on the question of damages.

The statute R.S.O. 1914, ch. 71, sec. 5, provides:—

"On the trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; . . ."

This was first enacted by 13 & 14 Vict. (1850) ch. 60, sec. 1, which was taken from Fox's Libel Act, 32 Geo. III. ch. 60 (Imp.), which applied to criminal proceedings by way of indictment or information only. When the Act was introduced into Canada, it was made to apply "to any *action*, indictment or information."

Fox's Act "laid down no new principle; the procedure which it rendered imperative in criminal cases was already, before that enactment, the invariable rule in all civil cases, and has remained so ever since: it had, in earlier days, been the rule in criminal cases also." "Although that Act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil, in this respect. Therefore that which has been declared to be law in criminal cases is the law in civil cases:" *Baylis* v. *Lawrence* (1841), 11 A. & E. 920, at p. 925, 113 E.R. 664.

"Fox's Act was only declaratory of the common law:" *per* Brett, L.J., in *Capital and Counties Bank* v. *Henty* (1880), 5 C.P.D. 514, at p. 539.

"Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury:" *per* Lord Coleridge, C.J., in *Saxby* v. *Easterbrook* (1878), 3 C.P.D. 339, at p. 342.

See Odgers on Libel and Slander, 4th ed., pp. 575, 680, 772, and 773.

It would thus appear that our statute, at all events in so far as it refers to civil actions, was introduced into Canada as part of the common law in 1792, and in this regard the statute of 1850 above referred to was merely declaratory of the common law.

The plaintiff's counsel relied on *Sydney Post Publishing Co.* v. *Kendall*, 43 Can. S.C.R. 461, and *Lumsden* v. *Spectator Printing Co.*, 14 D.L.R. 470, 29 O.L.R. 293, urging that, inasmuch as there was proof of defamatory libel, the verdict was perverse, and there ought to be a new trial.

In the *Kendall* case a majority of the Court took the view that the verdict of the jury was clearly perverse and so unreasonabl

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Clute, J.

as to lead to the conclusion that the jury had not honestly taken the facts into their consideration. Davies and Duff, JJ., dissenting, were of opinion, under the circumstances there disclosed, that it was a question for the jury to say whether a libelous construction should be put upon the publication or not; and it was for the court of appeal to say "whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men:" *Australian Newspaper Co.* v. *Bennett*, [1894] A.C. 284, at p. 287.

In the *Lumsden* case Meredith, C.J.O., said (p. 476), after referring to *Sydney Post Publishing Co.* v. *Kendall:* "I am of opinion that the words of which the appellant complained in the case at bar are not susceptible of any construction which is not defamatory."

The same cannot be said in the present case. In my opinion, quite aside from the question of damages, the jury may have taken the view that the publications in question were not in fact libelous upon the facts as proven in this case: it was solely a question for the jury, and their verdict for the defendants ought not to be disturbed.

The appeal should be dismissed with costs.

Mulock, C.J.Ex. MULOCK, C.J.EX., agreed with CLUTE, J.

Riddell, J. RIDDELL, J.:—This is an action for libel, brought by an alderman of the City of London against a newspaper publishing company, for alleged libel contained in five (reduced by the plaintiff at the trial to four) issues of its newspaper. Questions were submitted to the jury by the learned trial Judge, my brother Middleton, as follows:—

"Do you find for the plaintiff or for the defendant? If you find for the plaintiff assess damages.

"(1) If the plaintiff can recover for publication of 9th December, 1916, $.

"(2) If the plaintiff can recover for issues of 8th December and 9th December, 1916, $.

"(3) If the plaintiff can recover for issues of 4th July, 1916, 8th November, 1916, 8th December, 1916, and 9th December, 1916, $."

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Riddell, J.

The jury returned with the answer to the first question written, "For the defendant," whereupon my learned brother said:—"Gentlemen, you find for the defendant. That saves your answering any of the other questions. You are now discharged from this case;" and he directed that judgment should be entered for the defendants, dismissing the action with costs.

The plaintiff now appeals.

The contention of the plaintiff is in substance that he was entitled to a verdict with at least nominal damages, and he relies upon *Lumsden* v. *Spectator Printing Co.*, 14 D.L.R. 470, 29 O.L.R. 293, and *Sydney Post Publishing Co.* v. *Kendall*, 43 Can. S.C.R. 461—both actions for libel.

In the former case the Chief Justice of Ontario says, at p. 299:—

"The action is one of libel, and there is no plea of justification on the record. The verdict of the jury, which was for the respondents, must, therefore, have been based on the view that the matter, the publication of which is complained of, was not a libel of the plaintiff. . . . That the plaintiff in a libel action, where the jury has found not to be libelous that which is plainly a libel, is entitled to a new trial, was decided by the Supreme Court of Canada in *Sydney Post Publishing Co.* v. *Kendall*, 43 Can. S.C.R. 461."

It should be observed that *Sydney Post Publishing Co.* v. *Kendall* was a case from Nova Scotia, which has no legislation like our R.S.O. 1914, ch. 71, sec. 5.

In the Printed Cases in the Supreme Court (in the Osgoode Hall General Library), vol. 322, the proceedings in this case are set out. At the trial Mr. Justice Longley, the presiding Judge, charged the jury, p. 14: "If you think that they (i.e., the defendants) meant, etc., etc., then I say that that article is defamatory and you are bound to find for the plaintiff. . . . In libel he has not to prove any damages." After this charge, plain, unambiguous, and unqualified, the verdict of the jury "for defendant" could mean nothing else than that the article was not a libel. There being no legislation giving any power to the jury beyond finding damages if there was a libel, the plaintiff was entitled to damages, however small, if the article was a libel, and in the opinion of the Supreme Court of Nova Scotia and the Supreme Court of Canada the article was a libel.

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Riddell, J.

Our statute, R.S.O. 1914, ch. 71, sec. 5, provides:—

"On the trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; . . ."

The terminology of this Act comes from the celebrated "Fox's Act" (1792), 32 Geo. III. ch. 60 (Imp.), the history of which is well-known.

The Judges presiding over criminal trials, whether by way of indictment or of information, had adopted a practice of leaving to the jury only two questions: (1) that of publication, and (2) that of the sense to be ascribed to the words used; reserving to themselves the right to say what the verdict should be. This gave rise to two schools of thought: the one contending that by the common law of England it was for the jury to find the verdict in libel as in all other criminal cases; the other, that the Judges had the proper view of the common law. It was to put an end to the contention and to affirm the former view that Fox's Act was passed. It is rather of antiquarian than practical interest to inquire which view was correct. Brett, L.J., in *Capital and Counties Bank* v. *Henty*, 5 C.P.D. 514 (C.A.), at p. 539, considers that the former view is sound.

Fox's Act enacted that "on the trial of an indictment or information for the making or publishing any libel . . . the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue . . . and shall not be required . . . by the Court or Judge . . . to find the defendant or defendants guilty merely on the proof of the publication . . . and of the sense ascribed . . . in such indictment or information." Obviously this Act applies to criminal cases only.

If this were but declaratory of the common law, the law was introduced into Canada, along with the remainder of the criminal law of England, by the Royal Proclamation of the 3rd October, 1763: Shortt & Doughty's Constitutional Documents, 1759-1792; Can. Archives Report, 1905, vol. 3, p. 119 *sqq.*; the provisions of which, so far as they affect criminal law, are still in force. The Act itself was not introduced, for, though passed in the second

session of the 17th Parliament of Great Britain, which ended on the 15th June, 1792—29 Hansard 1555; Statutes at Large, 12 Runnington, 16 Ruffhead—and consequently before the first session of the Parliament of Upper Canada, which began on the 17th September, 1792, and reintroduced the English Civil Law into this part of Canada, the statute (1792) 32 Geo. III. ch. 1, sec. 3, expressly confines its effect to "matters of controversy relative to property and civil rights."

It was (for reasons not necessary to inquire into here) thought advisable to introduce into this Province the provisions of Fox's Act and to extend these provisions to civil cases. There is no such extension in England. Accordingly in 1850 the Parliament of Canada passed an Act (1850) 13 & 14 Vict. ch. 60, which, in sec. 1, provided:—

"It shall . . . be lawful on the trial of any action, indictment or information, for the making or publishing any libel, on the plea of not guilty pleaded, that the jury . . . may give a general verdict of guilty or not guilty upon the whole matter put in issue in such action, or upon such indictment or information, and shall not be required or directed by the Court or Judge before whom such action, indictment or information shall be tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper alleged to be a libel, and of the sense attributed to the same in such action, indictment or information."

It seems to me that, with the exceptions due to the difference between civil and criminal proceedings (one at least of them of very great importance), this Act directed that the same principles should govern in civil as in criminal proceedings for libel. As has been said, there is no corresponding statute in England, and accordingly the English cases should be read with care in their application to our law.

I can find no case in which our statute has been considered. My brother Middleton interpreted it to the jury in the present case thus:—

"Until our statute was changed, not very long ago, if a plaintiff proved a technical libel he would be entitled to recover some damage, and it was entirely for you to say how much. The amendment that was made to the statute provides that a jury, even if a technical libel has been proved, would not be required or

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Riddell, J.

directed to find for the plaintiff merely on proving the publication by the defendant of the libel and of the disparaging sense ascribed to it. If it is a trivial matter the jury might well say, 'We are not going to sit here to give a man five cents damages, that is ridiculous, we will dismiss his action;' but, unless you take that view of the case, you will give him damages which you give as being a proper sum in your judgment for him to receive and for the defendant to pay, and it will be based partly on punishment for wrong-doing, if you think the defendant did wrong, the amount of compensation, fixing his amount of compensation as a second element that you are at liberty to take into consideration in an action for libel because it is an action based on wrong-doing as an element of punishment."

There is no case opposed to this view (unless *Lumsden* v. *Spectator Printing Co.* be considered such, and I think it is not). *Wills* v. *Carman*, 14 A.R. (Ont.) 656, decides that a finding of libel but no damages does not amount to a finding for the plaintiff so as to entitle him to a judgment even for nominal damages. *Bush* v. *McCormack* (1891), 20 O.R. 497, decides that it is not enough for the jury to find no damages, but that both parties are entitled to a finding for the plaintiff or defendant. Neither decides that, if the damages are *nil* or infinitesimal, the jury may not on that ground find a verdict for the defendant. Knowing that a plaintiff should not have a judgment unless the jury gives him damages (*Wills* v. *Carman*), I do not think a jury violates its duty by considering that the damages in any case would be trifling, and therefore they should not give the plaintiff a verdict at all; and refusing the plaintiff a verdict is, properly speaking, giving the defendant a verdict.

There is one very important difference between civil and criminal cases: in criminal cases, where the verdict was for the defendant, there was no power to grant a new trial (except in certain cases not of importance here): *Attorney-General for New South Wales* v. *Bertrand* (1867), L.R. 1 P.C. 520; but at least from 1655 the Courts exercised the power of granting new trials in civil cases: New Trial at the Common Law, 26 Yale Law Journal, p. 49 *sqq*. Fox's Act did not give the Courts power to grant a new trial in criminal cases, nor did our statutes take away the power to grant a new trial in civil cases.

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Riddell, J.

No doubt the power exists in the Court to set aside a verdict for the defendant in libel, as in any other case, but such power should be prudently exercised and not except in a very plain case such as was the *Lumsden* case. It would be an extraordinary and very unfortunate result if a jury on a prosecution for criminal libel were allowed to find a verdict of not guilty, while on the very same facts under the same law in a civil case they must find a verdict against the defendant.

There is another principle, however, which I think bars the way to a new trial. The real and indeed the only complaint is that it was said by the defendants that at a certain meeting "only the Board of Control and Aldermen Copp, Palmer, and Dyer were present to represent the city . . .;" whereas the fact was that the plaintiff, also an alderman, was present as well. (Apparently the "only" was a mistake of a reporter, but that does not assist the defendants, as they did not apologise for the mistake.) The learned Judge told the jury that this was capable of a defamatory meaning, and that they should find whether it had in fact a defamatory meaning. I cannot say, as a matter of law, that saying of an alderman that he was not present with other aldermen to represent the city on a particular occasion is necessarily defamatory. I can conceive of many cases where such an absence would not be a breach of duty on the part of the alderman, and it is common knowledge that most attentive aldermen are sometimes absent from meetings. I think it cannot be that a jury is forced to find such a statement as this libellous.

Even if the jury should regularly have found for the plaintiff, it is not imperative that the Court should grant a new trial. In *Burton* v. *Thompson* (1758), 2 Burr. 664, 97 E.R. 500, in an action for libel tried before Foster, J. at *nisi prius*, that judge reported to the Court of King's Bench in Term "that the charge was proved by the plaintiff; but that the injury done to him thereby appeared upon the evidence to be so very inconsiderable, that if the jury had found for the plaintiff, he should have thought a half-crown, or even a much smaller sum, to have been sufficient damages; but that the jury had gone too far: and instead of giving the plaintiff very small damages, had found a verdict against him; which was certainly a verdict against evidence."

Lord Mansfield, C.J., said p. 665: "It does not follow by necessary

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

Riddell, J.

consequence, that there must always be a new trial granted, in all cases whatsoever, where the verdict is contrary to evidence; for it is possible that the verdict may still be on the side of the real justice and equity of the case. . . . My brother Foster, who tried the cause. . . . thinks 'half a crown or less would have been damages sufficient, if they had given their verdict for the plaintiff'. . . . I do not think that we ought to interfere merely to give the plaintiff an opportunity of harassing the defendant . . . where there has been no real damages, and where the injury is so trivial as not to deserve above a half crown compensation. . . ."

The other Judges "all spoke in very explicit terms to the same effect."

Following the practice in *Burton* v. *Thompson* of obtaining a report from the Judge at *nisi prius*, I have asked my brother Middleton as to the damages, and he says that they were infinitesimal; and that, had he charged the jury that they must find damages, he is confident that damages would not have exceeded 25 cents or thereabouts.

I have come to the conclusion that the verdict was "on the side of the real justice and equity of the case." It would be no kindness to the plaintiff to discuss it at length. That a new trial will not be granted to enable the plaintiff to recover nominal damages is clear from such cases as *Milligan* v. *Jamieson* (1902), 4 O.L.R. 650; *Simonds* v. *Chesley* (1891), 20 Can. S.C.R. 174; *Scammell* v. *Clarke* (1894), 23 Can. S.C.R. 307. Nor will a new trial be granted because the damages are too small: *Rendall* v. *Hayward* (1839), 5 Bing. N.C. 424, 132 E.R. 1162; *Forsdike* v. *Stone* (1868), L.R. 3 C.P. 607. Of course, if the jury give a verdict from an indirect—improper—motive, e.g., to deprive the plaintiff of his costs, the verdict may be set aside: *Levi* v. *Milne* (1827), 4 Bing. 195, 130 E.R. 743, but nothing of the kind appears here.

I would dismiss the appeal with costs.

I should perhaps have explained more clearly why, in my view, the *Lumsden* case is not opposed to the opinion above expressed.

The *Lumsden* case at most says "that the plaintiff in a libel action, where the jury has found not to be libellous that which is plainly a libel, is entitled to a new trial."

Unless I have misconceived the law, the jury here has not necessarily found that the publication was not a libel—the jury

ONT.

S. C.

WILSON v. LONDON FREE PRESS PRINTING CO.

was justified in finding a verdict for the defendants even though they thought that the publication was a libel.

SUTHERLAND, J.:—This is an action for libel. The jury, on being asked the question, "Do you find for the plaintiff or defendant?" answered, "For the defendant."

Sutherland, J.

The main ground of contention on the appeal was that for the defendants to publish of the plaintiff, an alderman of the City of London, that certain aldermen "only" were present at a meeting of the city council, omitting the name of the plaintiff, who, in fact, was present, was plainly defamatory, and he was entitled to a verdict even if for nominal damages only.

The trial Judge told the jury in his charge that the statement was "capable of being defamatory," and in explaining the scope and effect of the Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 7, also said to the jury:—

[The learned Judge then quoted the portion of the charge set out by RIDDELL, J., *supra*.]

It appears to me that the verdict of the jury amounts to one of two things, either that the publications were in fact not libellous or that any damage which could result therefrom was too trifling to warrant the jury in putting any money value thereon even to the extent of a nominal sum. It may not be out of place to suggest that perhaps the jury in the present case and under our statute acted upon an unexpressed but somewhat analogous view to that of the jury in a case in England of a quite different alleged defamatory libel referred to by Viscount Alverstone in his book of "Recollections of Bar and Bench" (1914), p. 51, where he says that "the jury availed themselves of a privilege given to juries under Fox's Act, and returned a verdict of 'Not guilty,' intimating that, though the letters were most scurrilous, they did not consider that they amounted to libel."

Under our statute as now framed and the direction of the Judge, which I am of opinion was a proper one, the jury was entitled upon the evidence to bring in the verdict which was rendered, and it is impossible for us to disturb it.

The appeal should be dismissed with costs.

Kelly, J.

KELLY, J., agreed with SUTHERLAND, J.

Appeal dismissed with costs.

SASK.

K. B.

DUNNETT v. WILLIAMS.

Saskatchewan King's Bench, Brown, C.J.K.B. March 13, 1919.

1. INTOXICATING LIQUORS (§ I—5)—SASK. TEMPERANCE ACT—CONSTRUCTION—DISMISSAL OF CHARGE—APPEAL.

The word "order" as used in s. 58 of the Saskatchewan Temperance Act (1917 Stats., c. 23 first sess.) as amended by c. 64 (second sess.) is broad enough to cover a dismissal and an appeal lies from an order of a justice dismissing a complaint under the Act.

Notice of intention to appeal must be filed in the office of the local registrar of the court appealed to within 10 days after the conviction or order, but it is not necessary to serve the justice and the respondent within such 10 days.

[*Rex* v. *McDermott* (1914), 19 D.L.R. 321, 23 Can. Cr. Cas. 252; *Gallagher* v. *Vennesland* (1916), 32 D.L.R. 435, 27 Can. Cr. Cas. 360, followed.]

2. COSTS (§ I—12)—PENAL CASES—SECURITY FOR—S. 750 CRIM. CODE—CONSTRUCTION.

Section 750 of the Code as amended by c. 9 of the Statutes of 1909 (Dom.) requiring security for costs to be given by the appellant, has in contemplation only an appeal on the part of the accused. Where the Crown is appellant no security is required.

Statement. APPEAL by the Crown from an order made by a justice of the peace dismissing a complaint wherein the respondent Williams was charged with selling liquor contrary to the provisions of the Saskatchewan Temperance Act.

W. M. Graham, for appellant.

J. A. M. Patrick, K.C., for respondent.

Brown, C.J. BROWN, C.J.:—The following preliminary objections were taken by counsel for the respondent: 1. That there is no right of appeal under the Act by the informant; 2. That notice of appeal was not served on the respondent or the justice of the peace within 10 days after the order complained of; 3. That no security for costs was furnished by appellant.

The section of the Act which provides for an appeal is s. 58 (1), as enacted by s. 6 of c. 64 of the statutes of Saskatchewan, 1917 (2nd session), and it reads as follows:—

> An appeal shall lie from an order or conviction by a justice hereunder to a Judge of the Supreme Court sitting without a jury at the sittings of the court which shall be held in the judicial district in which the cause of the information or complaint arose, and the appellant shall give notice of his intention to appeal by filing, in the office of the local registrar of the court appealed to, a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the court appealed to, within ten days after the conviction or order complained of, and by serving the respondent and the justice who tried the case each with a copy of such notice, but save as is provided in this section all the provisions of Part 15 of the Criminal Code shall apply to such appeal.

It is contended that the word "order" in the phrase "order or conviction" is not intended to cover an order of dismissal, but has in view only the case where the accused is ordered to pay a sum of money.

The argument is based entirely on a reference to s. 749 of the Criminal Code, which provides for an appeal from a summary conviction, and which is worded as follows:—

> Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal.

It is contended that this section makes a dismissal something distinct from a conviction or order. I am not much impressed with the idea that the appeal provisions of the Saskatchewan Temperance Act need to be interpreted in the light of any special wording of the Criminal Code, but it is nevertheless noticeable that even this section of the Criminal Code uses the phrase "an order is made by a justice for the payment of money or dismissing an information or complaint," indicating that the act of the justice in dismissing the information is an order. It seems clear to me that the word "order" in the Temperance Act is a broad enough term to cover the act of dismissal and was so intended.

As to the second objection, the section provides that the notice must be filed in the office of the local registrar within the 10 days, but it does not provide that notice must be served on the respondent or justice within the ten days. I must confess my utter inability to see how the construction contended for by counsel for the respondent can be put on this provision.

Again reference is made to a similar provision in sub-s. *b* of s. 750 of the Criminal Code as enacted by s. 26 of c. 13 of the statutes of 1913. The wording of the two sections is identical, and, therefore, an authoritative interpretation of this section of the Code is very pertinent.

In *Rex* v. *McDermott*, 19 D.L.R. 321, 23 Can. Cr. Cas. 252, Newlands, J., gave a decision on this section of the Code contrary to the contention made by counsel for the respondent. This decision was subsequently followed by the Appellate Division of the Supreme Court of Alberta in the case of *Gallagher* v. *Vennesland*, 32 D.L.R. 435. Moreover, the reason for the amendment of 1913

SASK.

K. B.

DUNNETT v. WILLIAMS.

Brown, C.J.

was apparently just as surmised by Scott, J., in *Gallagher* v. *Vennesland*, *supra*, as I have been informed by McKay, J., who was at that time a member of the House of Commons and who was the prime mover in having the amendment made.

The counsel has called my attention to the doubts expressed by Mr. Tremeear, the learned author of the Canadian Criminal Cases as to the soundness of the judgment of Newlands, J., above referred to and which are set out in the annotations to *Rex* v. *McDermott*, *supra*, and in *Rex* v. *Hewa* (1915), 28 D.L.R. 147, 25 Can. Cr. Cas. 386. Notwithstanding the respect that the opinion of Mr. Tremeear is always entitled to, I prefer to follow the authorities above referred to, especially as such interpretation harmonises with my own view of the matter.

As to the third point, the section of the Code that applies is sub-s. *c* of s. 750 as amended by c. 9 of the statutes of 1909. In my view, a careful examination of this section shews that it has in contemplation only an appeal on the part of the accused. The section divides itself into two main divisions, first, where there is an appeal from a conviction or order adjudging imprisonment, and, secondly, where there is an appeal from a conviction or order adjudging payment of a penalty or sum of money. The second division may very properly be sub-divided again into two parts: (a) Where imprisonment is directed upon default of payment, and (b) Where imprisonment is not directed in default of payment.

The section in all its phases seems to have in contemplation only a conviction or order made against the accused, and a perusal of the following sections of the Code, in my opinion, confirms that view.

Counsel for the respondent requested that I reserve a case for the opinion of the Court of Appeal. If I had authority to do so, I would accede to that request, in order that there might be uniformity in practice. As there is no provision in the Temperance Act making applicable that portion of the Code which authorises a judge to reserve a case for the opinion of the Appeal Court, I am of opinion that I have no authority to reserve a case. When in Regina over the week end, I took the opportunity of consulting such of my brother judges as were available, and found their opinion in harmony with my own in reference to the points above dealt with, and I think, therefore, that this decision may be taken as settling the practice on these points, at least for the time being.

SASK.

K. B.

DUNNETT v. WILLIAMS.

Brown, C.J.

Coming to the merits of this case the evidence satisfies me that the accused is guilty of the crime charged. The main witness for the prosecution was Matechuck to whom the liquor was sold, and counsel for the respondent contended that, as this witness was an accomplice, his evidence should not be accepted. Assuming that such witness, being the purchaser, is an accomplice, he is nevertheless a competent witness, and if credit is given to his evidence, such evidence does not, as a matter of law, require confirmation from another witness. It is true that it is the duty of judges to warn juries that the evidence of an accomplice unless corroborated should be accepted with great hesitation and should be viewed with suspicion. Nevertheless, if, notwithstanding such instruction, a jury is impressed with the veracity of the accomplice and finds an accused guilty on the evidence of such an accomplice, such verdict cannot be disturbed. It is, therefore, equally competent for a judge to act on the evidence of an accomplice, and in view of the fact that in this case the witness has impressed me with the truthfulness of his evidence that is my justification for finding the accused guilty.

The evidence of this witness moreover is, at least to some extent, confirmed by the production of the cheque which he says he cashed for the purpose of paying for this liquor, and by the evidence of Scott, who is an independent witness and who testified to the accused wanting to sell him a similar quantity of liquor and for a similar price at about the same time. The evidence both of Scott and of Webb, together with that of Matechuck, shews clearly that the accused was making it a practice to illegally dispose of intoxicating liquors.

I, therefore, find the accused guilty of selling intoxicating liquors to Nocoli Matechuck on or about November 15, 1918, at Kamsack in the Province of Saskatchewan, contrary to the provisions of the Saskatchewan Temperance Act, and for his said offence I adjudge him to be imprisoned in the common jail at Prince Albert for a period of 2 months and in addition to pay a fine of $100. If such fine is not paid, then the accused shall be imprisoned in the said jail for a further period of 30 days.

Judgment accordingly.

CAN.

EX. C.

WALROD v. SS. "CONISTON."

Exchequer Court of Canada, Maclennan, Dep.Loc. J., Quebec Admiralty District, Montreal. February 20, 1918.

COLLISION (§ I A—3)—TUG AND TOW—STEAMSHIP—NARROW CHANNEL—RULES OF ROAD—LIGHTS.

A steamship was coming up the St. Lawrence River in ballast, at a great speed, and approaching a tug and tow in the bend of the channel changed her course with the intention of passing them starboard to starboard, contrary to art. 25 of the Rules of the Road. Thereupon the master of the tug ported his helm in an endeavour to avoid a collision. The steamer then tried to manœuvre herself into position and collided with two barges at the head of the tow.

Held, the collision resulted from the steamer's failure, "when safe and practicable, to keep to the starboard side of the fair-way or mid-channel," as required by art. 25; even if the pilot of the steamer believed the tug and tow coming down the wrong side of the channel, good seamanship required him to stop or slow up, which he failed to do; that no blame could be imputed to the tug. The length of the tow and the absence of regulation lights on the barges cannot be said to have contributed to the collision when it occurred at the head of the tow.

Statement.

ACTION for damages resulting from a collision.

Geoffrion & St. Germain, for plaintiff.

Maclennan, Dep. L.J.

MACLENNAN, Dep. Loc. J.:—The plaintiff is the owner of barges which were being towed down the River St. Lawrence and came into collision with the SS. "Coniston" coming up the river.

The plaintiff's case is that about midnight on the night of June 18, 1917, his two barges, "Estella Walrod" and "Dorothy and Harold," were, with other barges, in the tow of the tug "Virginia" descending the River St. Lawrence in the steamer channel in Lake St. Peter and collided with the SS. "Coniston." The wind was a moderate westerly breeze; the weather was fine, dark and clear, the current was running about 2½ miles an hour, and the tug and tow had a speed of about 6 miles per hour; the tug and tow carried, brightly burning, the regulation lights; the "Coniston" was coming up the river in ballast at full speed and gave a signal of two blasts and wrongfully directed her course to port with the intention of passing the tug and tow starboard to starboard, contrary to art. 25 of the Rules of the Road. On seeing the green light of the "Coniston" the captain of the tug ported his helm in an endeavour to avoid the collision and gave the signal of one blast of his whistle; the helm of the "Coniston" was then ported, but too late to avoid the collision, and she collided with the first and second pair of barges in the tow; the helm of the "Coniston" was starboarded at an improper time; there was no proper lookout on the "Coniston," and those on

board neglected in due time to take proper means to avoid a collision with the tow. The "Coniston" should have permitted the tug and tow to have passed below curve No. 2 on Lake St. Peter before attempting to pass the same; her speed was excessive and the order to reduce speed was given too late; the collision and damages in consequence thereof were occasioned by the negligence and improper navigation of those on board the "Coniston."

The case of the defendant is that the "Coniston" was coming up the ship channel with all regulation lights burning brightly, and at about ten minutes before midnight those in charge saw two masthead lights placed vertically and the green light on the tug and white lights on the tow coming down the river at a distance of four or five miles, bearing about one point off the port bow. There was a strong wind from the south south-west bearing on the port side of the "Coniston," which was in ballast, and high in the water, and was about mid-channel; the tug and tow appeared to be on the north side of the channel; the speed of the "Coniston" was about six knots over the ground. After rounding curve No. 2 the lights of the tug and tow appeared about two points off the starboard bow. Her green and masthead lights only were visible and the length of the tow appeared to be 800 feet. About two minutes past midnight, when the tug was apparently one mile distant, the "Coniston" gave one signal of two blasts, indicating that she would pass the tug starboard to starboard; there was ample room and opportunity to do so. The tug made no reply to this signal, but when at a distance of about 800 ft. the tug suddenly ported her helm, shut in her green light and opened her red and immediately thereafter gave a signal of one blast. The engines of the "Coniston" were thereupon ordered full speed astern; she ported her helm and gave a signal of one blast. The tug passed clear of the "Coniston" on her port side, but the bow of the barge on the port side of the first pair of barges struck the "Coniston's" port bow slightly. The tow was composed of 16 barges in 8 pairs of 2 each, and its total length exceeded 600 ft. The barges were not under any control, except that of the tug; they had no side lights nor lookout, and each carried one white light. The tug had only two masthead lights besides her side lights, and she was in charge of a captain, mate and engineer;

CAN.

Ex. C.

WALROD v. S.S. "CONISTON."

Maclennan, Dep. L.J.

she had no lookout, and the engineer was not on duty in the engine-room; the "Coniston" was in charge of a licensed pilot, two officers were on duty on the bridge, and there was a competent wheelsman and a lookout. The first officer, who had been relieved from duty at midnight, was still on the bridge; the collision was not due to any fault on the part of the "Coniston" nor of those in control of her. The collision and any damages caused thereby were due to the fault of the barges and of the tug for the following reasons:—(a) The barges "Estella Walron" and "Dorothy and Harold" were two of a tow of sixteen canal barges in eight tiers of two each, in violation of regulation 16 of the port of Montreal, which applies to the place where the collision occurred. (b) The "Estella Walrod" and "Dorothy and Harold" were not under control and had no one in charge of helm or rudder. They did not carry the regulation lights, having no side lights as required by International rule 5, and one white light, in contravention to said rule. (c) The "Estella Walrod" and "Dorothy and Harold" were in tow of a tug employed by them which was improperly equipped and did not exhibit the regulation lights in violation of art. 3 of the International Rules. (d) The tow of which the "Estella Walrod" and "Dorothy and Harold" formed part was over 600 ft. in length. The tug had only two mast lights. (e) The tug which was employed by the "Estella Walrod" and "Dorothy and Harold," and her tow, were on the north side of the channel. She was in a position to have passed clear of the "Coniston" starboard to starboard. When the latter was at a distance of about a mile she gave a two-blast signal, indicating that she would pass starboard to starboard. At that time the tug was bearing about two points on the "Coniston's" starboard bow. The tug gave no response. At a distance of about 800 feet she improperly ported her helm and altered her course to come across the bows of the "Coniston," and afterwards gave a one-blast signal. The tug did not slacken speed nor allow for the swing of its tow, the last three tiers of which were not loaded.

The tug "Virginia" was 115 ft. long, 24 ft. wide, and on the occasion of the collision was drawing 11½ ft. She left Sorel early on the evening of June 18, 1917, to go down the river through Lake St. Peter with a tow of 10 loaded and 6 light barges. The plaintiff's two barges were lashed side by side and were the second

pair of barges in the tow. The tow line between the tug and the first pair of barges was 250 ft. long. The barges were about 100 ft. long and there was a distance of about 15 ft. between each pair of barges. The steamer channel through Lake St. Peter is 450 ft. wide and is dredged to a depth of 35 ft. The collision happened at the upper end of a bend in the channel which is known as curve No. 2 turning to the right going down stream about two points and a quarter. The channel above this bend runs in a straight reach about 3 miles, and the reach below the bend is slightly over 3 miles in length. When the tug and tow had gone about half way through the upper reach, the "Coniston" was seen in the lower reach. The tug and tow were then in mid-channel and went a little to the right-hand, or starboard, side and continued on the south side of the middle of the channel, with the barges in tow directly behind the tug. The "Coniston" was then in the lower reach below the bend. The tug and tow continued to proceed down the right-hand, or south, side of the channel, and the "Coniston" entered the bend shewing her masthead and red sidelights. As the tug approached gas buoy No. 85-L at the lower end of the upper reach the red light of the steamer, which was then coming up the bend, was in sight, and, when at a distance of about 1,000 ft., the master of the tug saw the "Coniston" shut out her red light and shew her green. The tug immediately gave a signal of one blast, got an answer of one blast from the "Coniston," and then the tug's helm was put hard a-port and the red light of the steamer came again in view. The tug passed the steamer port to port, but the steamer came into collision with the port bow of the port barges in the first and second pair of barges about 100 ft. up-stream from gas buoy No. 85-L. The master and mate of the tug have testified that the tug and tow were in the south, or starboard, part of the channel for at least one mile above the place where the collision happened. The tug had gone past gas buoy No. 85-L at the moment of the collision, and the impact of the collision threw the barges farther south, with the result that the whole tow passed over the gas buoy, causing it to be extinguished and doing other damage to it.

The "Coniston" was a steel screw steamer of 3,544 tons gross, 337 ft. long and 47 ft. beam. According to the evidence of her pilot, he saw the green light of the tug about 1½ miles away, and

CAN.

EX. C.

WALROD
v.
S.S.
"CONISTON."

Maclennan: Dep. L.J.

about one point off the port bow of the "Coniston." The "Coniston" was then at the lower end of the bend of the channel abreast of gas buoy No. 79-L, and was in mid-channel going full speed. The pilot says that as he went up the bend the light of the tug narrowed and gradually came directly ahead of him and that the "Coniston" was then following the north side of the channel; he gave no signal that he was taking that side of the channel; the wind was on his port side and he thought the tow would be affected by it, and he decided to go to the south and gave a signal of two blasts and the helm was put to starboard. The distance between the steamer and the tug was then, according to the evidence of the pilot, about 2,500 to 3,000 ft., but the defendant's preliminary act states the distance was about one mile. The pilot swears that he was opposite gas buoy No. 81-L when he gave two blasts, which is very nearly half a mile below the place where the collision happened. The master, mate and other witnesses on the tug all swear the two-blast signal was not heard on the tug. When the "Coniston" gave the two-blast signal her helm was put a-starboard and, according to the wheelsman, was kept in that position until it was ordered hard a-port. The "Coniston" got no answer to her two-blast signal and under the starboard helm she passed to the south side of the channel. The pilot admits that he had some uneasiness because he got no answering signal from the tug. When the tug and steamer were about 1,000 ft. apart, the red light of the tug came in view and immediately afterwards the tug gave the signal of one blast. The pilot swears the tug was then one-quarter or one-half point off the starboard bow of the "Coniston." On hearing the signal from the tug, the pilot ordered the helm to be put hard a-port and the engines to be put full speed astern. No signal was given by the whistle that the engines were going astern. The steamer passed the tug opposite gas buoy No. 85-L port to port. Some of the witnesses say that they almost grazed each other, and others say they passed within 15 to 40 ft. According to the evidence of those on the tug the steamer passed it with considerable headway, and the pilot says that at the moment of the collision the steamer was almost dead in the water.

The first thing to consider in this case is, what rule of navigation should have been observed by the steamer and tug going up and down the channel. The outstanding feature is that the

dredged steamer-channel in Lake St. Peter, where the collision happened, was unquestionably a narrow channel within the meaning of the regulations for preventing collisions at sea, and that the steamer and tow came into collision very near the south side of the channel. The "Coniston" came into the south side of the channel by reason of having starboarded her helm when she was one mile away from the tug and continuing on her starboard helm until her engines were put full speed astern two minutes or two minutes and a half, according to the evidence of the chief engineer, before the collision. The plaintiff relies very strongly on the "Coniston's" failure to observe art. 25 of the Collision Regulations which reads as follows:—

In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

It is abundantly proved that the tug and tow observed this rule and kept well to the south side of the dredged channel. The "Coniston" when at a distance of one mile from the tug changed her course to port in breach of art. 25. The pilot's excuse for that change of course was that he thought the tug and tow were coming down on the north side of the channel and that the wind, which was on the steamer's port bow, would affect the tug and tow. The "Coniston" was still in the bend of the channel and her pilot and officers were not, in my opinion, in as good a position to say in what part of the channel the tug and tow were as the persons on board the latter. The evidence of the latter is accepted as establishing the fact that the tug and tow were in their own proper water to the starboard or south side of the channel and not in the north side. If the pilot then honestly believed that the tug and tow were coming down on the wrong side of the channel at a distance of about a mile away, there was nothing which rendered it dangerous for the "Coniston" to keep to her own proper side of the channel. The wind was light and, according to the evidence of the pilot and wheelsman, had no effect upon the steamer. The first officer admits that it would have been safe and practicable to keep over to the starboard side, and safer to keep in mid-channel, and further on in his evidence he was asked in cross-examination:—

If you were a mile apart there was still ample time and opportunity for both vessels to do the right thing, that is, to pass port to port, was there not?

CAN.

EX. C.

WALROD v. S.S. "CONISTON."

Maclennan, Dep. L.J.

And he answered:—

Any amount of it there was.

Art. 25 lays down the rule in imperative terms, that in narrow channels, when it is safe and practicable, vessels shall keep to the right-hand side and pass port to port. It is the duty of those in charge of vessels to observe this rule.

Lord Alverstone, C.J., in *The Kaiser Wilhelm der Grosse* (1907), 76 L.J. Adm. 138 at 141, said:—

I am disposed to think that art. 25, in providing that a vessel shall keep to its starboard side of the channel, lays down a rule which is to be obeyed not merely by one vessel as regards another, but, so far as practicable, absolutely and in all circumstances. But, however that may be, I have no doubt that where, as here, there are two vessels, each vessel, as soon as she knows by the other's lights that the other is in motion and what her course is, is bound to comply with art. 25 and keep to the starboard side of the channel.

My assessors advise me that: (1) After the "Coniston" arrived at the lower end of the bend of curve No. 2 in mid-channel, with the approaching tug and tow clearly in view above the bend, it was safe and practicable for the "Coniston" to have kept to the starboard side of the channel as she proceeded up stream through the bend; (2) that the tug did nothing which made it unsafe or impossible for the vessels to have passed port to port, and (3) that there was no danger of collision when the "Coniston" starboarded her helm and went to port, but that danger of collision arose later. This advice is in accord with my own judgment.

The law relating to the Rule of the Road at Sea, by Smith, at p. 222, observes:—

Starboarding in a narrow channel in order to avert collision with an approaching vessel will very rarely be a proper manœuvre. A vessel in her right water is justified in assuming that a vessel approaching on the same side of the channel will cross over to her own right side.

In considering the right to depart from a rule requiring a steamer when approaching another ship so as to involve risk of collision to slacken her speed or stop or reverse if necessary, Bowen, L.J., in *The Benares* (1883), 5 Asp. M.C. 171 at 174, said:—

I am of opinion that departure from art. 18 is justified when such departure is the one chance still left of avoiding danger which otherwise is inevitable.

In the case of *The Clydach* (1884), 5 Asp. M.C. 336, the narrow channel rule was applied. A steamer was going into Falmouth

harbour on the wrong side of the channel. Butt, J., at p. 337, said:—

> Her own captain says that he saw the lights of the "Clydach" coming out of the harbour somewhat more than a point on his starboard bow and about a mile distant. What was his duty under those circumstances? His imperative duty was to keep to the starboard side of the channel. There is only one way in which he could excuse his departure from following that course, i.e., by shewing that under the circumstances it was not safe and practicable for him to obey the rule.

In *The Kaiser Wilhelm der Grosse*, already cited, a collision happened just outside of the entrance of Cherbourg harbour, where the entrance is about half a mile wide, and the outcoming steamer was held liable for the collision because she improperly starboarded her helm and attempted to pass out on the wrong side across the bows of an inbound steamer. A similar non-observance of the rule was held to carry with it liability in damages in *The Tecumseh* (1905), 10 Can. Ex. 44 and 149; *R. & O. Nav. Co.* v. *Cape Breton* (1906), 76 L.J. Adm. 14; *Turret Steamship Co.* v. *Jenks*, C.R. [1907] A.C. 472; *Bryde* v. *Montcalm*, C.R. [1913] A.C. 472; *Bonham* v. *The Honoreva* (1916), 32 D.L.R. 196; 54 Can. S.C.R. 51.

I find, therefore, that the "Coniston" acted wrongfully in leaving her own side of the channel and going over to the port side into the water of the tug and tow. There was no danger of collision nor any other circumstances which would justify her conduct.

My assessors advise me that, if the pilot on the "Coniston" thought that the tug and tow were coming down the north side of the channel above the bend, good seamanship and prudent navigation would require the "Coniston" to stop or moderate her speed before entering or while proceeding up the bend.

The plaintiff urged as part of his case that the "Coniston" should have permitted the tug and tow to have passed the bend before she went up, that her speed was excessive and that the order to reduce speed was given too late. The current down the stream was about 2½ to 3 miles an hour and bearing obliquely across the channel to the south. The "Coniston" continued at full speed under its starboard helm until she had arrived quite close to the buoys marking the south side of the channel, about 1,000 ft. from the tug, which was then one-quarter or one-half

CAN.

Ex. C.

WALROD
v.
S.S.
"CONISTON."

Maclennan, Dep. L.J.

point off the starboard bow of the "Coniston." As the steamer had proceeded for three or four minutes under a starboard helm and at the end of that time had the tug a quarter or half a point off her starboard bow, it is quite apparent she was attempting to cross the bows of the tug into the water of the tug and at full speed. The advice of my assessors is shewn by the following questions and answers:—

Q. Should the 'Coniston" have stopped or slowed up when she got no answer to her two-blast signal? A. Yes, when the "Coniston" got no answer she should have stopped and navigated with caution.

Q. Was it in accordance with good seamanship for the "Coniston" to have continued at full speed with her helm a-starboard until after the tug had given the one-blast signal when the "Coniston's" helm was put hard a-port and her engines were ordered full speed astern? A. No.

Q. Did the speed of the "Coniston" before she put her engines full speed astern contribute to the collison? A. Yes.

Q. Was the order to put the engines of the "Coniston" full speed astern given too late? A. Yes.

The pilot admits he had some misgivings when he got no answering signal from the tug after he gave the two-blast signal and put the "Coniston's" helm to starboard, but he kept on under full speed. In the case of *The Earl of Lonsdale*, Cook's Adm. Rep. 153 and 163, the Privy Council confirmed the decision of the late Mr. Justice Stuart, where it was held that where a steamship ascending the river, before entering a narrow and difficult channel, observed a tug approaching with a train of vessels behind her and did not stop or slacken speed, and where she subsequently collided with the tug and tow, the steamer was to blame for not stopping before entering the channel. Similar principles were followed in *The Talabot* (1890), 6 Asp. M.C. 602, *The Norwalk* (1909), 12 Can. Ex. 434 and 459, and *The Ezardian*, [1911] P. 92.

The failure of the "Coniston" to moderate her speed and navigate the bend with caution appears to have been a departure from the rules of good seamanship, if not a breach of any positive regulation, when it is considered that the tug was hampered with its tow and the "Coniston" was unincumbered, light, quickly responsive to her helm, with the current against her, making it an easy matter to hold her head against the stream or turn in either direction. It was a neglect on the part of the "Coniston" of precautions required by the ordinary practice of seamanship which contributed to the collision. Some observations by Lord

Kingsdown, in delivering the judgment of the Privy Council in *The Independence* (1861), Lush, 270 at 278, are applicable to this case:—

> A steamer unincumbered is nearly independent of the wind. She can turn out of her course, and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is, therefore, with reason, considered bound to give way to a sailing vessel close hauled, which is less subject to control and less manageable. But a steamer with a ship in tow is in a very different situation. She is not in anything like the same degree the mistress of her own motions; she is under the control of and has to consider the ship to which she is attached, and of which, as their Lordships observed in the case of *The Cleadon* (1860), Lush. 158, "She may for many purposes be considered as a part, the motive power being in the steamer, and the governing power in the ship towed." She cannot by stopping or reversing her engines, at once stop or back the ship which is following her. By slipping aside out of the way of an approaching vessel, she cannot at once, and with the same rapidity, draw out of the way the ship to which she is attached, it may be by a hawser of considerable length—in this case of about 50 fathoms—and the very movement which sends the tug out of danger may bring the ship to which she is attached into it.

Counsel for defendant submitted that even if the "Coniston" was wrong in crossing over to the south side of the channel, the tug could have avoided the collision by passing the steamer starboard to starboard, but that instead of doing so the tug ported her helm and caused the collision. As has already been pointed out, when the tug put her helm hard a-port she was then one-quarter or one-half point off the starboard bow of the "Coniston," or in other words, almost dead ahead at a distance of about 1,000 ft. The tug was then well to the south side of the channel. As this is a question of navigation, I asked my assessors:—

> Was the master of the tug justified in putting her helm hard a-port when he saw the "Coniston" close her red light and open her green light at a distance of about 1,000 ft.?

And they answered in the affirmative, and further advised me that the tug could not have done anything else to have avoided the collision, and that the "Coniston," by the exercise of reasonable care and skill, could have avoided it. The dangerous situation which the tug had to face when the "Coniston" closed her red light and opened her green was the direct result of the "Coniston's" deliberate act in crossing to the south side of the channel into the water of the tug. In my opinion, it was the imperative duty of the tug to obey the rule contained in art. 25 of the Collision

CAN.

EX. C.

WALROD v. S.S. "CONISTON."

Maclennan, Dep. L.J.

Regulations, and the master of the tug endeavoured to carry out that rule by putting the helm hard a-port. The situation which then arose was entirely brought about by the improper navigation of the "Coniston." The master of the tug did what he considered the best thing possible, and in doing so obeyed art. 25. *The Pekin* (1897), 8 Asp. M.C. 367.

The Privy Council, in the case of *The Nor* (1873), 2 Asp. M. C. 264, held that a vessel which having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another is not to be held liable if at that moment she adopts a wrong manœuvre. This principle was followed in the Court of Appeal in the case of *The Bywell Castle* (1879), 4 Asp. M. C. 207, and later by the House of Lords in *The Tasmania* v. *The City of Corinth* (1890), 6 Asp. M. C. 517, where Lord Herschell said, p. 518:—

> In estimating the conduct of the master, it must be remembered that it was the gross negligence of the other vessel which placed him suddenly in the difficult position of having to judge when he was justified in departing from the rule, and what manœuvre he ought to adopt. In the case of *The Bywell Castle*, *supra*, Brett, L.J., said: "I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. Any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible." With this I entirely agree, though, of course, the application of the principle laid down must vary according to the circumstances.

This principle has since been followed in the Admiralty Division by Bargrave Deane, J., in *The Huntsman*, 104 L.T. 466, where he said:—

> Some latitude must be allowed to the officer of a stand-on ship who is clearly doing his utmost in a position of difficulty caused by bad navigation of those in charge of a giving-way ship.

I am, therefore, of opinion that the tug is not to blame for having put her helm hard a-port, and that in doing so her master did everything possible to avoid the collision.

The infringement of the regulations by the tug in regard to the absence of side-lights on the barges and with regard to the lights on the tug not shewing the length of the tow places the burden of proof upon the plaintiff, the employer of the tug, to establish that this infringement could not by any possibility have contributed to the collision. Evidence was given at the trial of a

custom or practice of canal barges in tow carrying only a white light and no side lights. This practice appears to be in use on the river, but it cannot override the Collision Regulations. In this case when the pilot and officers of the "Coniston" saw the lights of the tug and tow, they knew at once what they were meeting and they should have taken precautions accordingly. The collision was with the first and second pair of barges and the barges behind these escaped. Had the barges in the forward part escaped and the collision been with those at the after-end of the tow, there might be ground to say that the length of the tow had something to do with the collision, and in that case the court would have to try the question of fact whether the infringement could by any possibility have contributed to the accident. The collision here having happened at the head of the tow, I hold that the infringement as to absence of the prescribed lights and the length of the tow could not by any possibility have contributed to the collision, and following the rule laid down in the case of *Fanny M. Carvill*, I exonerate the tug and the plaintiff from all blame in that connection.

I am, therefore, of opinion that the collision resulted from the failure of the "Coniston" to observe art. 25 of the Collision Regulations, from excessive speed and failure to navigate the bend in the channel with proper caution. There is no blame imputable to the tug or the plaintiff.

There will be judgment for the plaintiff for the damages sustained and for costs, with a reference to the deputy district registrar to assess the damages.

Judgment for plaintiff.

FITZ RANDOLPH v. FITZ RANDOLPH.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. February 14, 1919.

DIVORCE AND SEPARATION (§ II—5)—JURY—PROVINCIAL COURT—B.N.A. ACT—PROVINCIAL LEGISLATION—VALIDITY OF.

The procedure in the Court of Divorce and Matrimonial Causes is civil rather than criminal and the Court is in the category of a provincial Court; under sec. 92 (14) of the B.N.A. Act the regulation of such Court is within the jurisdiction of the provincial legislature, and secs. 26 to 30 of c. 115 C.S.N.B., 1903, which provide for the summoning of a jury in divorce cases are *intra vires*, although not contained in the original Act creating the Court, and passed since Confederation.

[See also 41 D.L.R. 739.]

N. B.

S. C.

FITZ RANDOLPH v. FITZ RANDOLPH.

McKeown, C.J.

APPEAL by defendant from judgment of Crocket, J., Judge of the Court of Divorce and Matrimonial Causes, refusing application of defendant for a jury in an action in the said court.

The judgment of the court was delivered by

McKEOWN, C. J.:—This is an appeal from a decision of the Court of Divorce and Matrimonial Causes in an application made by the defendant to have the contested matters of fact in this suit determined by the verdict of a jury. The cause was noticed for trial at the last sitting of the Divorce Court, and on behalf of the defendant an application for an order for venire was duly made. The procedure concerning the matter in dispute is contained in c. 115, C.S.N.B. (1903), being the Act respecting the Court of Divorce and Matrimonial Causes. Ss. 26 to 30 inclusive provide for the summoning of a jury as required by the defendant herein, and as far as the wording of the chapter goes, the defendant is quite within her rights. It was contended, however, on behalf of the plaintiff, that the above noted sections of the Act are *ultra vires* of the legislature of New Brunswick, and in a considered judgment the judge of the court below has upheld the plaintiff's contention and refused the application. No question concerning the construction of the Act is involved. The legislature has assumed to deal with the subject, and has effectively done so, assuming that it has not over-stepped its powers.

In the distribution of legislative jurisdiction set forth in the B.N.A. Act, it is provided by s. 91 that the exclusive legislative authority of the Parliament of Canada extends to the subject of "Marriage and Divorce"—see clause 26, s. 91. S. 92 of the same Act provides that in each province the legislature may exclusively make laws in relation to

> the administration of justice in the province including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts,

see clause 14, s. 92. The question before this court is:—Does the application made by the defendant in this matter come under the provision of s. 91, or is it to be regarded as a matter of procedure in a provincial court as provided by s. 92. The view entertained from the court appealed from is, that the provisions

of c. 115, C.S.N.B. (1903), above indicated, touch the question of "Marriage and Divorce" as the same is involved in s. 91. The New Brunswick Court of Divorce and Matrimonial Causes was created by the Act of Assembly, 23 Vict. (1860) c. 37, and there was no provision for a jury in the Act as originally passed. By s. 2 thereof, provision was made for the appointment of one of the Judges of the Supreme Court of the province to be Judge of the said Court of Divorce and Matrimonial Causes, and to the judge so appointed there was given "power and authority to hear and determine all causes and matters cognizable therein, subject to appeal" as thereinafter directed. No question is raised as to the power of the provincial legislature to make whatever laws it pleased upon this subject before Confederation, and if provision for a jury had been contained in the Act passed in 1860, the power of the legislature in that regard could not have been questioned, at least upon the grounds urged in the present case. The sections, the validity of which are challenged, were passed in the year 1902, and the provisions thereof have hereinbefore lain dormant, for no litigant has previously asked that a jury be summoned to try his case in the divorce court. Inasmuch as the present is the first application ever made under the sections in question, and as the validity thereof has been sharply challenged by the plaintiff, no other course was open to the judge of the court below, but to deal with the question so raised. We have the benefit of his views, elaborated in a (to me) instructive judgment, in which he has arrived at the conclusion that the plaintiff's contention is right. He has expressed regret at the delay necessarily occasioned by the application, and remarks that:—

> In view, however, of the doubt I have felt regarding the constitutionality of these proceedings, which though enacted over 16 years ago, have never been acted upon, and the serious and far-reaching effect which the granting of any invalid decree of divorce from the point of matrimony may carry, I felt that before this cause should be tried again under provisions never before recognized by the court, it was my duty, in the interest of the parties themselves, as well as in the interest of all future litigants in this court, to have decided the question which the application involved, so far as it may be decided in this court, leaving the defendant, if she is not satisfied with the decision, to her appeal as provided by the Divorce and Matrimonial Causes Act.

N. B.

S. C.

FITZ RANDOLPH v. FITZ RANDOLPH.

McKeown, C.J.

In my opinion, no other course was open to the judge. The sections in question were formally enacted by the legislature of the province and the defendant certainly has the right to put them to the test. On being so questioned, it was the duty of the court appealed from to express its views upon the question raised. The delay consequent upon the determination of the point involved, is not a matter which any of the courts are in a position to avoid, and for which they are certainly not responsible.

The argument on behalf of the plaintiff is, that prior to the enactments of the year 1902, the full power of disposition of a cause before the Divorce Court rested in the hands of the judge; it was his duty and privilege not only to preside over the court and direct its proceedings, but to decide all disputed questions of fact; that by the provisions of the sections in question, the present power and authority of the judge in respect to suits before him in such court, have been altered; by such alteration he has been shorn of his powers as a judge of the facts involved, and it is contended that any enactment which so affects the method of administration of justice *ipso facto* affects the matter of divorce within the meaning of the B.N.A. Act, s. 91, clause 26. Remembering that the question of marriage and divorce is exclusively within the authority of the Dominion parliament the conclusion has been arrived at that the sections in question are *ultra vires*, and it is also argued that clause 14 of s. 92, passing over the administration of justice in each province and the procedure in civil matters in provincial courts, does not extend to the divorce court, which wholly and completely deals with a subject assigned exclusively to the Dominion parliament and with nothing else.

In his entire argument, plaintiff's counsel takes his stand upon the contention that the regulation or alteration of the procedure in the New Brunswick Divorce Court affects the law of divorce, a subject concerning which only the Dominion parliament has the right to speak. The matter has been presented from different standpoints, but it all comes back to the same question. It has been urged that the legislation objected to does not fall under s. 92 of the B.N.A. Act, because the

divorce court is not a provincial tribunal, but one of a special and peculiar jurisdiction, the subjects therein dealt with not being cognizable in the civil or criminal courts of the province, and it is to be regarded as a federal court of limited jurisdiction. And, it is further argued, even if it be a provincial court, and the enactments in question fall within s. 92 aforesaid, they must be considered invalid because the subject matter of the contested legislation falls also within clause 26 of s. 91; also because of the *non obstante* clause of s. 91, and the fact that clause 26 thereof deals with a specific particular subject, viz:—"Marriage and Divorce," whereas clause 14 of s. 92 has to do with a large general class from which anything affecting marriage and divorce must be considered to be excluded.

It is not necessary, I think, to further elaborate the contentions submitted on plaintiff's behalf. I have enumerated the above so that none of them may seem to have been overlooked. In my view, with the exception of one phase of the matter to be noted hereafter, they all come back to the one principal question:—Whether the provincial legislation of 1902 now before us, affects the subject matter of "Marriage and Divorce" in the sense in which the expression is used in the B.N.A. Act, s. 91 (26).

I think in the first place that there is no contradiction or confusion in regard to item 26 of s. 91 and item 14 of s. 92 of the B.N.A. Act. The former speaks of "Marriage and Divorce." The latter speaks of the administration of justice and the procedure in civil matters. It is perfectly obvious that our provincial legislature has now nothing to do with the causes for which a divorce can be granted in New Brunswick. Because the Dominion parliament, notwithstanding its present exclusive jurisdiction over the subject, has not spoken upon the question at all, it consequently follows that the statutory causes for divorce in New Brunswick law as enacted prior to 1867 stand unimpaired and in full effect. See s. 129 of the B.N.A. Act. The causes for which divorce is granted within this province were settled upon and enacted by the provincial legislature long before Confederation. It would be open to the Dominion parliament to enact another set of causes for divorce or to repeal

N. B.

S. C.

FITZ RANDOLPH v. FITZ RANDOLPH.

McKeown, C.J.

and abolish the New Brunswick law in that regard if it should see fit to do so. It is well known that the Dominion parliament has not seen fit to exercise any of its powers touching the question of marriage and divorce. Although it has the exclusive authority under the B.N.A. Act to deal with this very important subject, it has left the whole question just where it stood at Confederation, and in that particular it is most important to bear in mind ss. 129 and 130 of the B.N.A. Act:—

S. 129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this Act.

S. 130. Until the Parliament of Canada otherwise provides all officers of the several provinces, having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be officers of Canada and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities and penalties as if the Union had not been made.

I think that the effect of the two sections above quoted, as far as they bear upon the matter agitated here, is that the divorce law of New Brunswick stands, subject to appeal, abolition or alteration by the Parliament of Canada, and that the Court of Divorce and Matrimonial Causes also continues to exist for the due and proper execution of the New Brunswick divorce law. It would be competent, in my opinion, for the Dominion parliament to set up a Canadian divorce tribunal for the purpose of the execution of a Canadian divorce law applicable to the whole Dominion. This latter course not having been taken, everything stands as it did just before Confederation, and our Court of Divorce and Matrimonial Causes, which was called into existence by a provincial Act, and whose procedure is directed by such Act, continues to sit for the execution of a divorce law made by the legislature of our own province, constantly overshadowed however, by the possibility of the

Dominion parliament at any time terminating both the New Brunswick divorce court and the laws which it sits to enforce, by legislation on the part of such parliament affecting the subject matter of marriage and divorce, and by the establishment of a divorce court under the provisions of such Dominion Act. Now the abstract question of marriage and divorce is one thing, and the procedure necessary for effecting either a marriage or divorce is another thing altogether. To effect the latter, there must be a court regulated by some authority and subject to some jurisdiction. It is pointed out by the judge of the court below that it would be futile for the Dominion parliament to pass upon the subject of marriage and divorce without creating a court to carry out such law. To my mind, the view of the judge in that regard is absolutely sound, and it seems to me to carry with it the conclusion, that for the Dominion parliament to assume to make laws with reference to the procedure in a provincial divorce court, before it made any pronouncement on the subject of marriage and divorce, is premature. The plaintiff's contention is, that although the Dominion parliament has ignored the whole subject, and left the matter to be dealt with in this province under an existing law and by an existing court, it (the Dominion parliament) nevertheless, must legislate for any change in the procedure affecting such court.

The relationship between various clauses of ss. 91 and 92 of the B.N.A. Act has been frequently commented upon by various courts of Canada, as well as by the Judicial Committee of the Privy Council. We are not without light as to the method of approach in considering such matters, and I think the judgment in the case of *Citizens Insurance Co. of Canada* v. *Parsons* (1881), 7 App.Cas. 96, may well be kept in mind. Two actions were involved in that appeal, the first being to recover a sum secured by a certain policy of insurance. The defence set up was non-disclosure of previous insurance, which was alleged to be (a) a breach of the conditions endorsed on the policy, and (b) a breach of statutory conditions prescribed by the legislature of Ontario. The second case was an action on an interim receipt to recover insurance and the questions raised

N. B.

S. C.

FITZ RANDOLPH v. FITZ RANDOLPH.

McKeown, C.J.

were similar in effect to those raised in the first action. The judgment of the Committee was given by Sir Montague Smith who at p. 104 says:—

> The most important question in both appeals is one of those, already numerous, which have arisen upon the provisions of the B.N.A. Act, 1867, relating to the distribution of legislative powers between the Parliament of Canada and the legislatures of the provinces, and, owing to the very general language in which some of these powers are described, the question is one of considerable difficulty. Their Lordships propose to deal with it before approaching the facts on which the particular questions in the actions depend.

After setting out the ss. 91 and 92 of the B.N.A. Act the judge goes on to say at p. 107:—

> The scheme of this legislation, as expressed in the first branch of s. 91 is to give to the Dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If s. 91 had stopped here, and if the classes of subjects enumerated in s. 92 had been altogether distinct and different from those in s. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in s. 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of s. 91, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section," that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of s. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of s. 92.
>
> Notwithstanding this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in s. 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in s. 92, and no one can doubt, notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. . . . With regard to certain classes of subjects, therefore, generally described in s. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these

cases, it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define, in the particular case before them, the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

It will be observed in the above extract that the judge instances the subject of marriage and divorce in illustration of the principle which he lays down and points to the fact that "solemnization of marriage" is unquestionably in the hands of the provincial legislature notwithstanding that "marriage and divorce" are allocated to the Dominion parliament. Recognizing this distinction with reference to marriage and the proceedings which are called "solemnization of marriage," how can we avoid recognition of a distinction between divorce and the court procedure which amounts to solemnization of divorce—if I may use such a term? The formation of the contractual tie of marriage (*i.e.*, the solemnization of marriage), calls for certain rites and ceremonies concerning all of which the provincial legislature has to do. It (the provincial legislature) determines by whom the ceremony shall be performed, the method of its performance, the number of witnesses necessary, as well as all other requisites; and the proper observance and carrying out of all these statutory requirements results in marriage. On the other hand, the proper observance and carrying out of certain other procedure in the proper court results in divorce; such procedure does not, in the least, touch or affect the merits of the cause of the matter of the action itself; it has nothing to do with the causes for which a divorce may be granted. It is clearly pointed out in the judgment of the court appealed from that divorce being the dissolution of a contract must be effected by a court. Solemnization of marriage does not touch the subject of marriage so as to create any collision

N. B.

S. C.

FITZ RANDOLPH v. FITZ RANDOLPH.

McKeown, C.J.

between ss. 91 and 92 in that particular. How then can it be argued that the court procedure with reference to untieing the marital knot touches the question of divorce in itself? In other words, if the procedure involved in the solemnization of marriage (*i.e.*, the tieing of the marriage knot) cannot be held to infringe upon the matter of marriage within the meaning of s. 91 (26), how can the procedure with reference to the untieing of such knot, be held to touch the subject of divorce as referred to in the same sub-section? Sir Montague Smith in the quotation above made says:—

> "Solemnization of marriage in the province" is enumerated among the classes of subjects in s. 92, no one can doubt notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces.

In the case of *Harvey* v. *Farnie* (1880), L.R. 6 P.D. 35, Cotton, L.J., says at p. 47:—

> The word "marriage" is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined.

It is obvious that the word is used in the latter sense in the B.N.A. Act, s. 91 (26). In this interpretation, marriage in itself is one thing, the procedure by which the contractual tie is formed is quite another thing. The former belongs to s. 91 (26), the latter to s. 92 (12). In my view, divorce as spoken of in 91 (26) is a thing distinct in itself from the procedure by which the marriage contract is annulled. Such procedure, I think, is provided for by s. 129 and s. 92 (14).

In the case of *Watts* v. *Watts*, [1908] A.C. 573, the powers of the provinces in such matters was under consideration. The Supreme Court of British Columbia in the case of "*S.*" v. "*S.*" (1877), 1 B.C.R. 25, held, the Chief Justice dissenting, that jurisdiction to grant divorce decrees exists in the Supreme Court of that province, and could be exercised by a single judge. Notwithstanding such decision, Clement, J., refused a decree on the ground that the Supreme Court had not the power referred to, although in a later case the appeal court had followed the decision of "*S.*" v. "*S.*" In 1908, the case of *Sheppard* v. *Sheppard* 13 B.C.R. 486, was before Mr. Justice Martin of British Columbia, who adhered to the views expressed by the full bench,

repudiating Clement, J.'s view, and with the decided cases in this condition, the case of *Watts* v. *Watts*, above referred to, was carried to the Judicial Committee of the Privy Council. Lord Collins in delivering judgment of the Judicial Committee says at p. 579:

> In the opinion of their Lordships, the reasons given in the judgment of Gray and Crease, JJ., in *S.* v. *S.*, together with the recent critical survey of the ultimate situation by Martin, J., in *Sheppard* v. *Sheppard*, places the question beyond discussion; and it seems to their Lordships, with all deference to Clement, J., that his opinion to the contrary cannot be supported.

The reasoning of Martin, J., so favorably commented upon by the Committee is contained in 13 B.C.R. 486. At page 518-519 the judge observes:—

> The fact that it may be said that the Parliament of Canada can, since the Union, alone, in one sense, legislate on matters relating to divorce, and might if it saw fit, take away such a jurisdiction from the courts of a province, does not in the least detract from the significance of the declaration of the legislature of a province as to the applicability of English laws to its own residents and circumstances.
>
> Moreover, while on the one hand it is true that the legislature of a province has no power to legislate in divorce matters so far as expanding or contracting the jurisdiction in that respect possessed by its courts before the Union, yet on the other hand it is equally true that the court itself has inherent power to make rules regulating its procedure and that power the provincial legislature can take from it in divorce matters as it has in all other matters in this court, and, therefore, may in this sense, legislate by rules of court or otherwise *respecting the regulation of the procedure by which the unalterable Ante-Union jurisdiction may be exercised.*

I have taken the liberty of italicising the concluding part of the above quotation, which bears directly, and to my mind conclusively, upon the point at issue. The plaintiff's counsel pressed upon the court the view that the observations of Martin, J., were only dicta and were not necessarily involved in the determination of the matter at issue. One must agree that remarks by different members of the court upon matters not essentially involved in the discussion, are not to be taken as conclusive concerning the subject dealt with, but having regard to the several matters before the B. C. courts, and the contradictory decisions which had there been given, and having regard to the fact that the whole subject was under discussion before the Judicial Committee of the Privy Council, which expressed unqualified approval of Martin, J.'s survey of the situation,

N. B.
S. C.
FITZ RANDOLPH v. FITZ RANDOLPH.
McKeown, C.J.

I think that the observations of the judge under consideration are more than dicta, and should be regarded as authoritative. Whether this is so or not, I feel compelled to say with the utmost deference to the court below that, in my view, the observations of Martin, J. state the law with accuracy and precision. There is, it seems to me, a very clear distinction between the subject matter of divorce and the procedure by which a divorce may be obtained. I cannot conclude that an alteration in such procedure such as the one now before us affects the law of divorce. The latter, to my mind, involves the causes for which a divorce is granted, whether the separation be *a vinculo* or *a mensa et thoro*, while the procedure brings to one's mind the idea of a court clothed with authority in that regard. Whether such court consisted of one judge or a greater number does not affect the law of divorce in itself. I respectfully concur in the decision of *King* v. *King* (1904), 37 N.S.R. 204; such decision being that an amendment altering the quorum of a court of appeal that might sit in divorce matters was within the jurisdiction of the local legislature. Neither, in my view, is the law of divorce affected by an enactment that the facts at issue may be settled by a jury instead of by a judge. While no litigant in our divorce court has ever invoked the assistance of a jury, thereby assuming the validity of such enactment, yet the powers given to the court by the same Act have been exercised without question by the different judges in the matter of establishment of rules of court covering important matters; and the court has not infrequently refused to hear petitions unless accompanied by affidavits following the rules made by the court under the authority of the legislation now challenged. The authority of the court in all these matters rests upon the same foundation, and, in my view, such foundation is sound, as I think they all may be properly considered to be within the language of s. 92, clause 14:—

> The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

It is to be observed, with reference to court procedure, that by the above-quoted clauses, procedure in civil matters in provincial courts is vested in the provincial legislature, and by

N. B.

S. C.

FITZ RANDOLPH v. FITZ RANDOLPH.

McKeown, C.J.

clause 27 of s. 91, the procedure in criminal matters is vested in the Dominion parliament. The procedure in the divorce court must, I think, be classed as civil rather than criminal, and, in my view, the divorce court is in the category of a provincial court. Whatever status it might assume under Dominion legislation is another matter. As before intimated, it has carried on its work uninterrupted by the circumstance that the subject-matter of its jurisdiction has been taken from the legislative authority which established the court. Doubt is expressed by the court below as to whether it is included in the category of civil or criminal courts. The view is put forward that it is a court of special and particular jurisdiction and for such reason it stands apart from all other courts. I cannot bring myself to think that there is any foundation for such doubt. At the time of Confederation the New Brunswick Divorce Court was not an ecclesiastical court, nor were its functions ecclesiastical. Marriage is a civil contract, and such contract was dealt with by the divorce court, and such court being, therefore, in the nature of a special tribunal for the determination of questions concerning the validity of a civil contract. In Clement's Canadian Constitution (1904) p. 235, n., the author says:—

> It is submitted that, given a law permitting divorce, the administration of that law would, *primâ facie* fall to provincial courts, constituted under provincial legislation—subject always, of course, to the power of the Dominion Parliament to constitute additional courts, under s. 101, and to regulate procedure in divorce courts if so disposed.

It is only necessary to say a few words with regard to the right of the provincial legislature to pass the enactments in question in the absence of dominion legislation upon the matter. Being of the opinion that a distinction is to be observed between the subject-matter of divorce as it refers to the causes properly recognizable by a court in an action for the dissolution of the marriage contract, and the procedure by which such court effects its purpose, it would seem to me to follow that the whole matter of procedure is essentially and completely ancillary to the subject of divorce as the term is used in s. 91, and such, I think, is the proper view. In the case of the *Att'y Gen'l of Ontario* v. the *Att'y Gen'l of Canada*, [1894] A.C. 189, the Judicial Committee had under consideration an Act passed by the Pro-

N. B.
S. C.
FITZ RANDOLPH v. FITZ RANDOLPH.
McKeown, C.J.

vince of Ontario respecting assignments and preferences by insolvent persons. It was held that a provision in such Act relating to assignments purely voluntary, and postponing thereto judgments and executions not completely executed by payment, was merely ancillary to bankruptcy law, and within the competence of the provincial legislature, there being no existing bankruptcy legislation of the Dominion parliament. In discussing the matter Herschell, L. C., says, p. 200:—

> Their Lordships do not doubt that it would be open to the Dominion parliament to deal with such matters as a part of the bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such legislation would affect the bankruptcy law of the Dominion parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law, and therefore, within the powers of the Dominion parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion parliament in existence.

In my opinion, these remarks are equally applicable, *mutatis mutandis*, to the subject under discussion.

I think this appeal should be allowed with costs.

Appeal allowed.

SASK.
C.A.

STRONG v. CULVER.

Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A., and McDonald, J. ad hoc. March 20, 1919.

PLEADING (§ II C—181)—RULES OF COURT (SASK.)—DEFENDANT SUED IN REPRESENTATIVE CAPACITY—NECESSITY OF STATING.

Rule 38 of the Saskatchewan rules of court provides that "if the plaintiff sues or the defendant is sued in a representative capacity the statement of claim shall shew in what capacity the plaintiff or defendant sues or is sued." Under this rule a garnishee summons against executors in respect of a debt due from the testator must be directed to them as executors and not in their individual capacity.

Statement.

APPEAL from the judgment of a district judge in a garnishee action against administrators. Affirmed.

C. M. Johnston, for appellant; *W. H. McEwen*, for respondent.

The judgment of the court was delivered by

Lamont, J.A.

LAMONT, J.A.:—The facts of this case briefly are:—On March 14, 1918, the plaintiff, Mrs. Strong, having a judgment for $438.74 against one W. A. Culver, issued a garnishee summons directed to W. A. McCaughey and J. F. Heaslip as garnishees, calling

SASK.

C.A.

STRONG v. CULVER.

Lamont, J.A.

upon them to notify the clerk of the court whether there was any debt due or accruing due from them to the said W. A. Culver. On April 22, one Cook, who also had a judgment against the said W. A. Culver for $64.14, issued a garnishee summons directed to the said McCaughey and Heaslip as administrators of the estate of J. S. McCaughey. On the same day, the garnishees filed a statement with the clerk of the court, in the suit of *Strong* v. *Culver*, in which they denied being indebted to W. A. Culver in any sum whatever, but also stated that as administrators of the estate of J. S. McCaughey they had in their possession certain moneys belonging to the judgment debtor. The amount of this money is admitted to be $285.75. In answer to the garnishee summons in the case of *Cook* v. *Culver*, the garnishees as administrators paid $75 into court. Mrs. Strong served a notice claiming the $75 paid into court in the suit of *Cook* v. *Culver*, and launched a motion to determine the liability of the garnishees under the summons which she had served on them. The district court judge held that the garnishees were not liable, because the summons was directed to them in their individual capacity and not as administrators. Mrs. Strong now appeals.

In my opinion the District Court Judge was right. R. 38 of the Rules of Court provides that executors and administrators may sue or be sued as representing the property or estate of which they are representatives without joining any of the persons beneficially interested, and sub-s. (2) reads:—

(2) If the plaintiff sues or the defendant is sued in a representative capacity, the statement of claim shall shew in what capacity the plaintiff or defendant sues or is sued, as the case may be.

In *Stevens* v. *Phelips* (1875), 10 Ch. App. 417, it was held that a garnishee order made against the executors of a debtor of the judgment debtor ought to shew on its face that they were charged as executors. In giving judgment, Mellish, L.J., at p. 423, said:—

Another objection in this case, of a more technical nature, is that, assuming that a garnishee order can be obtained against executors in respect of a debt due from their testator, I think it ought to shew on the face of it that it is directed to them as executors and not personally. In the present case the order professes to charge them personally.

It was, however, argued on behalf of Mrs. Strong that, as the administrators acknowledged that they had money in their hands

SASK.

C.A.

STRONG v. CULVER.

Lamont, J.A.

which on distribution would belong to W. A. Culver, that admission made them personally liable for the amount.

Had they been executors, and had the money coming to W. A. Culver been a specific legacy, this contention probably would be correct. But it cannot be given effect to where a claim is made for a distributive share of an intestate's estate.

The law upon this point is stated in Williams on Executors, vol. 2, at p. 1566, as follows:—

> And an action at law for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay.
>
> But the law is different with respect to *specific* legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests in law in the legatee, upon the assent of the executor.

See also Kingsford's Executors & Administrators, 2nd ed., at p. 462.

An execution creditor issuing a garnishee summons cannot have rights higher than the execution debtor.

An action by the execution debtor Culver for the distributive share coming to him from the estate of J. S. McCaughey could not be maintained by him against the administrators. His right is to apply for an order for the administration or distribution of the estate. As the garnishees could not be sued by Culver himself for his distributive share, they cannot be garnisheed by Culver's execution creditor.

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

Appeal dismissed.

ALBERTA ROLLING MILLS Co. v. CHRISTIE.

CAN.

S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 4, 1919.

COMPANIES (§ IV—73)—SUBSCRIPTION FOR SHARES—COLLATERAL AGREEMENT—REPURCHASE OF OWN STOCK—ULTRA VIRES—SUBSCRIBER DE FACTO SHAREHOLDER.

A condition subsequent or collateral agreement annexed to a subscription for shares in a company, by which under certain circumstances the subscriber is to be entitled to surrender his shares and demand a return of his money, is *ultra vires* the company as involving an unlawful reduction of its capital.

The non-fulfilment of the agreement by the company does not prevent the holder of such shares from being a *de facto* shareholder of the company, he having retained the shares and given proxies to vote thereon.

[38 D.L.R. 488, 12 A.L.R. 445, reversed. See annotation, 36 D.L.R. 107.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1917), 38 D.L.R. 488, reversing the judgment of the trial judge, Simmons, J., maintaining the plaintiff's action. Reversed.

R. McKay, K.C., for appellant; *A. H. Clarke*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—This is what is generally known as and called a very hard case, and I regret greatly feeling myself compelled to reverse the judgment of the appellate court and to refuse to the respondent Christie the relief he has sought in the action.

I have given the case much consideration. The reasons for judgment of my brother Anglin and the authorities cited by him seem to me conclusive, and as I cannot usefully add anything to what he has said I will concur with him and allow the appeal with costs and restore the judgment of the trial judge.

Idington, J.

IDINGTON, J. (dissenting):—The respondent declined to sign the ordinary application for shares in appellant company. He never was in due form allotted such shares. Nor was he ever placed upon the register as a shareholder, which, by so many provisions in the Companies Ordinance, c. 20 of 1901, is made the test of what constitutes membership in any company incorporated thereunder as appellant was; for example, by ss. 25, 27, 34, 37, 40 and 42.

It is incorrectly stated, as I read the exhibits referred to, in support of the statement, that respondent's name appears on the register.

The ledger account, kept apparently with numbers, does not appear to me to constitute part of the register. It contains what

CAN.

S. C.

ALBERTA ROLLING MILLS CO. v. CHRISTIE.

Idington, J.

one might expect to find in relation to a conditional subscription of the character respondent's contention might require. It was not exactly an ideal ledger for that purpose, but where we meet so many irregularities as prominently appear on the part of the appellant, a trifling matter of that kind is not very surprising.

Let us assume for a moment that upon such a register and record of the transactions here in question, there had arisen a contest as to the respondent's right to vote, could his doing so have been properly entertained for a moment?

And let us go further and assume that upon its having been challenged, respondent had applied, under s. 40 of the ordinance, to the court or judge designated therein to have his name entered on the register, with nothing more in support thereof than all the material placed before us herein, and such application stoutly opposed, could such court or judge properly order rectification and, against the will of the shareholders, properly on the register, direct respondent's name to be entered thereon? I think not.

Much has been made of the issue by the president and secretary of certificates of shares to respondent, and of his signing, when asked, proxies to Pollock, the president, to vote.

Nothing is shewn of what (if any) use was made of such proxies beyond requesting and reporting them. I wholly disapprove of respondent's conduct in that regard and hope it can be attributed to nothing more than carelessness.

But testing the weight of such a series of acts, by the test I have suggested, as to the strength thereof, in supporting the supposed application on his part to be put upon the register, could he gain any support therefrom on such an application by the mere existence of such proxies and such report as made thereof?

I cannot think so, unless much more were shewn to have been done.

It is, I repeat, the question of membership which I am keeping in view.

Moreover, the conditional nature of his subscription clearly pointed to its being, when accepted, in the informal way it was, a contract that could neither constitute him a member, nor be entered into in such a sense as to have that effect unless and until the condition had been fulfilled.

It was quite competent for the parties to have so contracted

as respondent swears he thought the contract was, for him to pay ten thousand dollars to be used until the steel-making branch, among the objects for which the appellant was incorporated, had become practicable, and then be applied in payment of shares.

In this view it is unnecessary for me to follow the many well presented arguments on either side.

I may add, however, that I by no means assume that respondent could be so treated in the case of a winding-up of the company and by reason of insolvency the creditors' claims had to be met, and respondent had been placed on the list of contributories.

Nor if the case had been one of misrepresentation of which the respondent had complained and he had acted in the same way, after the full disclosure to him thereof, do I think he could claim relief.

It is the contractual nature of that which was done, with presumably an honest purpose on either side which, so long as membership not created and the provisions thereof were competent to be entered into that induces me to hold that the purpose thereof ought not to be lightly set aside or defeated.

The lapse of time might, under other conditions than those springing from a war which forbade building unless demanded by dire necessity, have led to other inferences tending to defeat respondent.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I am of the opinion that this appeal should be allowed with costs.

Anglin, J.

ANGLIN, J.:—The plaintiff sues for the rescission of an agreement to take 100 shares of the capital stock of the defendant company, and for a return of the purchase price thereof, $10,000, paid by him in instalments, and, in the alternative, for damages. He bases his action on the non-fulfilment of a term of his subscription—that the company would proceed to erect a steel plant at the City of Medicine Hat. The learned trial judge dismissed the action on the ground that by becoming, and exercising rights of, a shareholder, the plaintiff had waived this condition of his subscription. This judgment was reversed in the Appellate Division, 38 D.L.R. 488, 12 A.L.R. 445, that court holding that the non-fulfilment of what was in its opinion a condition subsequent, which had not been waived, entitled him to the relief of rescission and a return

CAN.

S. C.

ALBERTA ROLLING MILLS CO. v. CHRISTIE.

Anglin, J.

of his money. The facts so far as not hereinafter stated may be found in the reports cited.

If the terms relied on by the plaintiffs should be regarded as a condition precedent, I would be disposed to concur in the dismissal of the action upon the ground taken by the learned trial judge. But, while the language of the plaintiff's letter of subscription and of the defendants' letter of acceptance might be open to that construction, the conduct of the parties makes it perfectly clear that this was never intended to be its character, or, if it was, that by mutual consent it was converted into a condition subsequent or a collateral agreement. Taking all the circumstances in evidence into account, my view of the legal effect of the arrangement made is that the term relied upon partook of the nature of a condition to the extent that if the erection of a steel plant should become impossible or if the company should definitely evince its purpose not to proceed with it while the contract was still *in fieri*—before the plaintiff had become a shareholder—he would be entitled to withdraw his subscription and demand a return of his purchase money, but that if such a state of facts should arise only after the plaintiff had acquired the status of a shareholder the term invoked would be enforceable, if at all, only as a collateral agreement by the company thereupon to accept a surrender of his shares and to return whatever money he had paid on account of their purchase.

At the close of the argument I was satisfied that the subscription of the respondent for shares in the appellant company was given subject to the term that the company would erect a steel plant, that it was so accepted and that there was never any abandonment by him of whatever rights the non-fulfilment of that term gave him. Its non-fulfilment is indisputable. The only defence which, in my opinion, calls for consideration is the contention that such repayment would involve an illegal depletion or reduction of the company's capital and therefore cannot be demanded—that because the term attached by the plaintiff to his subscription contemplated such a withdrawal of capital it is void as *ultra vires* of the company, and since he attained and acquiesced in his holding the position of a shareholder he must be treated as if his subscription had been absolute and unqualified. This defence involves two important questions of law. Did the respond-

ent ever actually become a shareholder? If he did, is the condition attached to his subscription, which must in that event operate, if at all, as a collateral agreement, valid and enforceable?

The material facts bearing on the first question appear to be that although the sale of the shares in question, as part of a large quantity of stock, was authorized by the directors, there is no direct evidence of a formal allotment of shares to the respondent, nor of any notice of allotment having been sent to him. The sending of notices of meetings, however, probably supplied the latter omission. *Traders Trust Co.* v. *Goodman* (1917), 37 D.L.R. 31, 43-47, 28 Man. L.R. 156. Moreover, the respondent's name was not entered in the list or register of shareholders kept and produced by the company. It appears, however, in a ledger account in the book which contains elsewhere what purports to be the list or register of shareholders. He is debited in this account with $10,000, the price of 100 shares, and is given credit for the several payments which he made, amounting in all to $10,000. While the share register was not kept in the form required by s. 27 of the Companies Ordinance (1901, c. 20; Con. Ord. N.W.T., 1915, c. 61), its deficiencies would probably not be fatal to its evidentiary value. *East Gloucestershire R. Co.* v. *Bartholomew* (1867), L.R. 3 Ex ch. 15. Other authorities are collected in Lindley on Companies (6th ed.), p. 76.

By s. 25 of the Companies Ordinance:—

> Every person who has agreed to become a member of the company under this ordinance and whose name is entered on the register of members shall be deemed to be a member of the company.

The statute does not proceed, however, as did the English Act, 19 & 20 Vict., c. 47, s. 19, to declare that no other person should be deemed to be a shareholder. Under such an Act as this latter, or under an Act making the register conclusive evidence of membership or non-membership, registration would, of course, be essential. But by s. 40 of the ordinance now under consideration the Supreme Court is empowered to correct the register even in winding up (*Winstone's* case (1879), 12 Ch.D. 239, at p. 249), and by s. 42 it is only made *primâ facie* evidence of any matters directed to be inserted therein. A person whose name appears on it may shew that it ought not to have been there (*Waterford, Wexford, R. Co.* v. *Pidcock*, 8 Ex. 279, 155 E.R. 1352), and it may

CAN.

S. C.

ALBERTA ROLLING MILLS CO. v. CHRISTIE.

Anglin, J.

likewise be shewn that a person whose name does not appear on it was in fact a member. *Portal* v. *Emmens* (1876), L.R. 1 C.P.D. 201, at 212-3; *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64, at p. 77, *per* Lord Westbury. The inconsistent dictum of Fry, L.J., in *Nicol's* case (1885), 29 Ch.D. 421, at p. 447, cited by Mr. Clarke, cannot be successfully invoked against such eminent authority.

Nicol's case was decided on the great lapse of time—"fourteen years after the holders of all the shares (25,000) had been shewn on the register," in which the names of the persons sought to be held as contributories did not appear. There had been a new allotment of shares from which they were excluded: *Re Macdonald, Sons & Co.*, [1894] 1 Ch. 89, also cited by Mr. Clarke, is likewise distinguishable. The persons whom it was there sought to hold as contributories were not only not registered, but they had never "done anything as shareholders, and the transaction was therefore never a completed transaction. It was in my opinion competent for the applicants," says Lord Davey, at p. 107, "to revoke the authority to place their names on the register." An admission of a shareholder that he is such is in itself sufficient proof of his membership.

On the other hand, on September 26, 1914, some 4 months after the respondent had made his final payment, three certificates —one for 25 shares, dated October 31, 1913, another for 25 shares dated December 31, 1913, and the third for 50 shares dated February 1, 1914—were sent to him. They reached his office in his absence. While there is no evidence to shew how these certificates came to be issued or that the respondent actually received them, in view of the retention of them for two years and his other acts as a shareholder, the only reasonable inference seems to be that he knew of their existence and presence amongst his papers. Under s. 36 of the statute a certificate is *primâ facie* evidence of the title of a *member* to the stock it represents. I do not overlook the fact that this section proceeds on the assumption that the holder named in the certificate is a member of the company. Although he never personally attended a meeting of the company, the respondent admits having received notices of such meetings accompanied by proxies which he filled in and sent to Mr. Pollock, the president and promoter of the company, who had obtained his

subscription. He candidly states in his evidence that he regarded himself as a shareholder during 1914 and 1915 and up to August, 1916. He adds that he would have expected to be paid dividends had they been declared, but that he nevertheless thought that if the company decided to abandon the steel project it would cancel his shares or he could withdraw. Under these circumstances I have no doubt that he would have been made a contributory on winding up (*Levita's* case (1867), L.R. 3 Ch. 36; *Spackman* v. *Evans* (1868), L.R. 3 H.L. 171, at page 208; *Fisher's* case (1885), 31 Ch.D. 120, at 128; *Challis's* case (1871), 6 Ch. App. 266, at 271), and, notwithstanding the more favourable position which a person whom it is sought to hold as a shareholder occupies before there is a winding up, I think the plaintiff must be regarded as having become a shareholder. His retention of the share certificates and his giving of proxies to vote upon his shares are consistent only with his being a *de facto* shareholder. The condition annexed to his subscription being not precedent but subsequent, it was his intention to become a shareholder *in presenti*. That he may have thought himself entitled to withdraw afterwards does not prevent his having acquired that status. *Re Railways Time Tables Publishing Co.* (1888), 42 Ch.D. 98; *Re Jas. Pilkin & Co. Ltd.*, 85 L.J. Ch. 318. The case falls within the principle of *Bridger's* case (1870), 5 Ch. App. 305; *Elkington's* case (1867), 2 Ch. App. 511, 522; and *Thomson's* case (1865), 4 DeG. J. & S. 749, 46 E.R. 1114, rather than within that of *Pellatt's* case (1867), 2 Ch. App. 511, 527, or *Rogers'* case (1868), 3 Ch. App. 633. *Pellatt's* case appears to be the strongest authority in the respondent's favour on this branch of the case.

The register is only evidence of an application for shares and its acceptance, or of an allotment in the nature of an offer and its acceptance, constituting in either case membership: Lindley on Companies, 6th ed., p. 77. It is the contract that creates the membership, not the registration. Allotment is no doubt essential in the ordinary case. But the entry of it in the directors' minutes is merely evidentiary. The absence of such an entry and of a formal notice of allotment are not conclusive against membership. The evidence they would afford may be supplied, as I think it was in this case, by the issue and delivery of share certificates and the sending of notices of meetings followed by the giving of proxies.

CAN.

S. C.

ALBERTA ROLLING MILLS CO. v. CHRISTIE.

Anglin, J.

Fisher's case, 31 Ch. D. 120, was decided in 1885, two years before the House of Lords reversed the decision of the Court of Appeal in *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, and the suggestion of Fry, L.J., at p. 128, relied on by the respondent, can scarcely be regarded as now entitled to weight. The same observation applies to a remark of Giffard, L.J., in *Crawley's* case (1869), 4 Ch. App. 322, at page 330, decided in 1869.

My conclusion on this branch of the case is that under all the circumstances in evidence the plaintiff *de facto* became a shareholder of the defendant company. We must, therefore, proceed to consider the validity and effect of the term which he attached to his subscription and subject to which, as far as the directors could bind it to do so, the company accepted him as a shareholder.

As already stated, this term was not a condition precedent. The conduct of the plaintiff as well as of the company's officers makes this perfectly clear. If it were a condition precedent it would have been abandoned by the plaintiff's acceptance of membership. As a condition it ceased to be operative when the plaintiff became a shareholder. Thereafter it could operate, if at all, only as a collateral agreement entitling him to surrender his shares and demand the return of the money paid for them.

Is such an agreement *intra vires* of the defendant company? I think not.

In *Guinness* v. *Land Corporation of Ireland* (1882), 22 Ch. D. 349, at 375, Cotton, L.J., after referring to s. 38 of the English Companies Act of 1862, corresponding to s. 47 of the Consolidated Ordinance of 1915, said:—

> From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid.

This passage is quoted with approval in *Trevor* v. *Whitworth*, 12 App. Cas. 409, by Lord Herschell, at p. 419, and by Lord Macnaghten, at p. 433. The defendant company in accepting a surrender of the plaintiff's shares could have only one of two purposes, either to extinguish them—an unlawful reduction of capital, or to

re-issue them—an unlawful trafficking in its shares, an illegal use of its capital.

The law on these points as laid down in *Trevor* v. *Whitworth*, has been consistently followed ever since. The Companies Ordinance contains very strict provisions as to the conditions on which and the methods by which the capital of a company subject to it may be reduced—ss. 78 *et seq.* There is, of course, no pretence of compliance with these provisions. As put by Lord Macnaghten in a passage of his speech in *Trevor* v. *Whitworth*, at p. 437, quoted by Lord Herschell in *British and American Trustee and Finance Co.* v. *Couper*, [1894] A.C. 399, at 403:—

> When parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.

In *Bellerby* v. *Rowland & Marwood's Steamship Co.*, [1902] 2 Ch. 14, it was held that:—

> A surrender of shares in a limited company, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth*, 12 App. Cas. 409.

The court was there dealing with shares partly unpaid. The surrender of fully paid-up shares with a return of the money paid therefor is, of course, equally obnoxious. Both alike involve reduction of capital. While a surrender of shares which involves no reduction of capital may be supported (*Rowell* v. *Jno. Rowell & Sons, Ltd.*, [1912] 2 Ch. 609), a surrender involving such a reduction, not made under circumstances which would have justified a forfeiture, clearly cannot be unless effected under sections 78 *et seq.* of the Consolidated Ordinance. How strictly the right of forfeiture, and of surrender to take its place, is viewed is illustrated in the recent case of *Hopkinson* v. *Mortimer, Harley & Co. Ltd.* [1917] 1 Ch. 646, at 653.

If then a return of the capital subscribed by the plaintiff is *ultra vires* what is the result? I fear it must be the dismissal of this action. That the plaintiff made a mistake as to the legal effect of what he did cannot entitle him to relief. *Ex parte Sandys*, 42 Ch.D. 98, at 115; *Re James Pilkin & Co.* (1916), 85 L.J. Ch. 318, at 320. Having paid his money as the purchase price of shares in the company and become a shareholder he cannot now require that the money so paid should be treated as a loan made to the

CAN.
S. C.
ALBERTA ROLLING MILLS CO. v. CHRISTIE.
Anglin, J.

company to be applied in the purchase of shares if and when it should erect a steel plant, or should it fail to do so, to be returned to him. That in effect is the position he seeks to take. But that was not his contract.

While it was the obvious purpose of the parties that the stipulation invoked by the plaintiff should operate as a condition subsequent or collateral agreement, non-fulfilment of which would give rise to a right of withdrawal on his part, it was not their intention that the company should bind itself to erect a steel plant or to pay damages for its failure to do so. The plaintiff's evidence of his understanding that if the company should decide to abandon the steel project it could cancel his shares or he could rescind and withdraw puts that beyond doubt. Moreover, whether any damage actually resulted to him from that abandonment would seem to be a question so problematical as to be almost, if not quite, a matter of pure speculation. But it is not necessary to enter on that field. Breach of a contract to erect a steel plant entitling the plaintiff to damages has not been established. Breach of a collateral agreement that upon its failure to erect such a plant the company would accept a surrender of his shares and repay the money which it received from him undoubtedly has. But that agreement is unenforceable because *ultra vires*.

I would allow the appeal with costs in this court and in the Appellate Division, and would restore the judgment of the learned trial judge.

Brodeur, J.

BRODEUR, J.:—I would allow this appeal for the reasons given by my brother Anglin. *Appeal allowed.*

ONT.
S. C.

BASIL v. SPRATT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 6, 1918.

1. CHARITABLE INSTITUTIONS (§ I—1)—ROMAN CATHOLIC EPISCOPAL CORPORATION—ACT CREATING — EFFECT OF ACT — POWERS OF BISHOP OF TORONTO AND KINGSTON.

The Act of 8 Vict., c. 82, by which The Roman Catholic Episcopal Corporation of the Diocese of Kingston was created, in effect created the Bishops of Kingston and Toronto corporations for the purpose of acquiring and holding land for the general use, eleemosynary, ecclesiastical, or educational, of the Church of Rome or of the religious community or any part of it within their respective dioceses, with the right,

having obtained the consent provided for by s. 5, to sell, exchange, lease, or otherwise dispose of the land. The Act does not vest in the corporation any spiritual jurisdiction or ecclesiastical rights, nor are such rights conferred upon the Bishops in the corporate status which the Act gives them.

2. ASSAULT AND BATTERY (§ II—5)—BENEVOLENT SOCIETIES—SISTERS OF CHARITY—CONTROL OF BISHOP OVER—RIGHTS CONFERRED BY PROVINCIAL LEGISLATION—UNLAWFUL ASSAULT BY OFFICERS—LIABILITY OF SOCIETY.

The society of the Sisters of Charity of the House of Providence at Kingston was incorporated under the authority of the Act respecting benevolent societies (37 Vict., c. 34). The society is a self-governing one, and with certain minor exceptions the Bishop of Kingston has no legal right to interfere in the management of its affairs; the constitution makes no provision for the disciplining of a member or her expulsion from the society. The rights which the members possess are conferred upon them by provincial legislation, and those rights cannot be taken away by the application of the canon law or by any ecclesiastical authority of the Church of Rome. The law will not imply against the society that it gave to its officers authority to do that which it itself had no right to do. A resolution of the society authorizing an act to be done must be construed as authorizing it to be done by lawful means.

Statement.

APPEAL by defendants from a judgment of Britton, J., on the findings of a special jury in an action by plaintiff who was a member of the defendant society, the Sisters of Charity of the House of Providence against the plaintiff, who was a member of the defendant society, the Sisters of Charity of the House of Providence, against M. J. Spratt, Archbishop of Kingston, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, the Sisters of Charity of the House of Providence, Daniel Phelan, John Naylon, Mary Vincent, Mary Magdalene, and Mary Alice, to recover damages for conspiracy to deprive the plaintiff of her rights as a member of the defendant society, for assault, false and malicious arrest, etc.

The action appealed from is as follows:—

BRITTON, J.:—This is an action for damages for alleged false and malicious arrest of the plaintiff for the purpose of having her placed in an hospital for the insane or in some other institution in the Province of Quebec.

This is a somewhat singular case, and one of considerable importance.

The plaintiff, in leading up to the assault upon and arrest of her, begins with her report to the Mother Superior, made on the 18th April, 1916, in reference to alleged maladministration of the affairs of the Orphanage at St. Mary's-on-the-Lake, and in reference

ONT.
S. C.
BASIL
v.
SPRATT.

to other matters, and she alleges that, by reason of this report and of her informing the Archbishop of its contents, she incurred the ill-will of the Archbishop and Mother Mary Francis Regis, and that the Archbishop and Mother Mary Francis Regis entered into a conspiracy with Dr. Daniel Phelan and others to "damnify" her and to "nullify" the effect of her communication, and to accomplish this they caused the plaintiff to be arrested, and attempted to take her away, with a view to putting her into an insane asylum in or near Montreal.

The first part, therefore, of the plaintiff's complaint was for the assault upon her and for the unlawful arrest; then she branches out into how she lived and what was done at Belleville.

At the trial, on the opening of the case, the defendants' counsel moved, on notice, for an order striking out a great part of the plaintiff's statement of claim, because, as alleged, it was embarrassing.

It was my opinion that the different allegations in the statement of claim were somewhat embarrassing; but, inasmuch as a special jury had been selected and empanelled and a large number of witnesses on both sides had been subpœnaed and were present in Court, and as the statement of defence was only a general denial, in the exercise of my discretion I dismissed the application, and the trial proceeded.

At the close of the plaintiff's case, Mr. McCarthy moved for a nonsuit or a dismissal of the action as against the Roman Catholic Episcopal Corporation of the Diocese of Kingston and the Archbishop of the Diocese of Kingston and Dr. Daniel Phelan. I reserved my decision. Counsel for the defendants then called witnesses and gave evidence, subject to his objection. At the close of the evidence Mr. McCarthy renewed his motion; for further particulars of the said motion and arguments thereon, see the notes of the reporter, which no doubt set out the matter fully.

I decided to submit certain questions to the jury, and the questions put and the answers are as follows:—

"1. For what purpose was the plaintiff being taken from Kingston to Montreal? A. To confine her in an insane asylum.

"2. Which, if any, of the defendants authorised the removal? A. M. J. Spratt and the Roman Catholic Episcopal Corporation

of the Diocese of Kingston, Mary Francis Regis, and the Sisters of Charity of the House of Providence.

"3. Was there any justification or excuse for such removal? A. No.

"4. If so, what was the justification or excuse? A. None.

"5. Was the defendant Phelan in any way responsible for the attempted removal of the plaintiff? A. Yes.

"6. If so, in what way did he make himself responsible? A. As an accomplice, by issuing the alleged authority and arranging with Chief of Police to have Constable Naylon on hand when the time came for the removal of plaintiff to asylum.

"7. Did the defendant Naylon, at the time he entered the plaintiff's room, have reasonable grounds for believing the plaintiff was insane? A. Yes. Q. If so, did he later know, or should he have known, that she was not insane? A. Yes. Q. If so, when? A. After she quieted down in the room on the promise of being allowed to see Father Mea.

"8. How do you assess the damages? A. Twenty thousand dollars ($20,000.00) on the defendants as named in clause No. 2. Four thousand dollars ($4,000.00) on the defendant Dr. Phelan. Policeman Naylon, *nil*."

These questions were submitted and agreed to by counsel on both sides.

The point raised is of considerable importance; the objection itself is based upon the statute incorporating the Roman Catholic Episcopal Corporation of the Diocese of Kingston, ch. 82, 8 Vict., statutes of Canada 1845—it being contended that, the statute of incorporation having been passed for the purpose of enabling the corporation to hold, buy, sell, lease, and otherwise deal with lands, there was no power on the part of the Archbishop to do anything in reference to such matters as the plaintiff complained of, so as to bind the corporation itself.

Section 6 of the Act is as follows:—

"Nothing in this Act contained shall extend or be construed to extend in any manner to confer any spiritual jurisdiction or ecclesiastical rights whatsoever upon either of the said Bishops hereinbefore mentioned, or upon his or their successor or successors, or other ecclesiastical person of the said Church or Churches in communion with the Church of Rome aforesaid."

ONT.
S. C.
BASIL
v.
SPRATT.

Upon the whole case and as it stands, I am of the opinion that there was evidence to go to the jury of such action by the Archbishop as would bind the Roman Catholic Episcopal Corporation of the Diocese of Kingston.

I have not overlooked the limited rights and powers of a corporation sole.

I speak now only as to the right of action of the plaintiff for the assault committed upon her; she had unquestionably a right of action against any one who joined or assisted in the assault committed, and there was evidence as to a part taken in it by the Archbishop.

He may, as the administrator of the affairs of the diocese, in dealing with the plaintiff, be asserting rights of the corporation itself, and in so asserting rights have incurred liabilities.

A mere holding corporation could not successfully put forward the proposition of non-liability for acts of wrongdoing, when such acts had been performed with the sanction of the officers of the corporation, although beyond the express powers of the corporate body.

All this was covered, and perhaps more, by the questions submitted to and answers given by the jury.

It appears to me that there is some evidence that should be submitted to the jury, and so the case should not be withdrawn, by me, from them.

There will be judgment upon the answers to the questions submitted to the special jury.

Judgment will be for the plaintiff against the defendants M. J. Spratt, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, and the Sisters of Charity of the House of Providence, for $20,000 damages with costs, and against the defendant Dr. Daniel Phelan, for $4,000 without costs, and dismissing this action as against the defendants John Naylon, Mary Vincent, Mary Magdalene, and Mary Alice, without costs.

The defendants M. J. Spratt, the Roman Catholic Episcopal Corporation of the Diocese of Kingston. Mary Francis Regis, the Sisters of Charity of the House of Providence, and Daniel Phelan, appealed from the judgment of Britton, J.

ONT.

S. C.

BASIL v. SPRATT.

Meredith, C.J.O.

D. L. McCarthy, K.C., and *T. J. Rigney*, for appellants.

A. B. Cunningham, for plaintiff.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 8th December, 1917, which was directed by Britton, J., to be entered upon the findings of the special jury at the trial at Kingston on the 13th, 14th, 15th, 16th, and 17th days of November, 1917.

The action is brought to recover damages from the defendants, who are M. J. Spratt, Archbishop of Kingston, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, the Sisters of Charity of the House of Providence, Daniel Phelan, John Naylon, Mary Vincent, Mary Magdalene, and Mary Alice.

The case made by the respondent in her pleadings is that she was a member of the Sisters of Charity of the House of Providence, and that a conspiracy was entered into between the appellants or some of them to deprive her of her status as a member of the society and to compel her to leave it, and that in pursuance of and carrying out the conspiracy she was assaulted with the view to taking her by force to a lunatic asylum in Montreal, and was by the conduct of these appellants compelled to leave the house of the society in which she lived, and as a member of the society was entitled to live, and that the result has been that the respondent has been deprived of her rights as a member of the society, including her right to be supported and maintained during the remainder of her life.

Questions for submission to the jury were prepared by counsel and were adopted by the learned trial Judge in substitution for questions which he had himself prepared.

These questions and the answers of the jury to them were as follows (set out above).

Upon these answers judgment was directed to be entered against the appellants for the amount of the damages assessed against them respectively, with costs; and the action was dismissed as against the defendants Naylon, Mary Vincent, Mary Magdalene, and Mary Alice; and against the judgment entered against the other defendants, their appeal is brought.

ONT.
S. C.
BASIL
v.
SPRATT.
Meredith, C.J.O.

The grounds of appeal are:—

1. That there was no evidence to connect the defendants M. J. Spratt and the Roman Catholic Episcopal Corporation of the Diocese of Kingston with the acts as alleged in the plaintiff's statement of claim.

2. That there was no evidence to connect the defendant Phelan with the acts as alleged in the plaintiff's statement of claim.

3. That there was no evidence to connect the Sisters of Charity of the House of Providence with the acts as alleged by the plaintiff in her statement of claim, and the defendant Mary Francis Regis had no authority to act on behalf of the defendants the Sisters of Charity of the House of Providence in authorising the said acts, and the plaintiff's action as against the above-named defendants should be dismissed with costs.

4. That the damages were excessive, and unwarranted by the evidence.

5. In the alternative the defendants complain that under the circumstances it was impossible to obtain a fair trial before a jury, for the following reasons:—

(a) That a jury could not distinguish the evidence which was applicable to one defendant as distinct from another, and the learned Judge failed to properly point out to them and distinguish between the evidence which was applicable to one as distinguished from those portions of the evidence which were applicable to others.

(b) That the plaintiff's statement of claim was embarrassing and irrelevant, and the publication of the same in full in the local papers prejudiced the defendants in obtaining a fair trial of the action, and the action should have been disposed of without a jury.

(c) That the demonstrations in the court-room were prejudicial to the fair trial of the action as against the defendants, and the publication in the local papers during the course of the trial warranted the learned Judge in striking out the jury notice, and that the learned trial Judge improperly submitted (*sic*) evidence which was irrelevant and embarrassing and which must have prejudiced the defendants in the eyes of the jury and prevented a fair trial of the action.

(d) And upon grounds appearing in the objections taken by counsel on behalf of the defendants during the course of the trial.

I will deal first with the question of the liability of the appellant

ONT.

S. C.

BASIL v. SPRATT.

Meredith, C.J.O.

the Roman Catholic Episcopal Corporation of the Diocese of Kingston.

The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada was created by 8 Vict. ch. 82, and it was contended by counsel for the respondent that the effect of it was to vest in the corporation all the ecclesiastical and sacerdotal powers and authority of the Bishop of Kingston—in other words, that everything done by the Bishop in the exercise of his episcopal authority or functions was an act done by the corporation.

I am of opinion that that is not the effect of the Act, but that its purpose and effect were to create a corporation for the purpose of exercising the powers conferred by the Act. It is true that the Bishop of Kingston and his successors in office are created a corporation and are to have perpetual succession, but sec. 6 provides that "nothing in this Act contained shall extend or be construed to extend in any manner to confer any spiritual jurisdiction or ecclesiastical rights whatsoever upon either of the said Bishops hereinbefore mentioned, or upon his or their successor or successors, or other ecclesiastical person of the said Church or Churches in communion with the Church of Rome aforesaid."

While the language of sec. 6 is not well-chosen, it appears to me that it was designed to prevent that which it is contended by the respondent's counsel the Act does—the vesting in the corporation any spiritual jurisdiction or ecclesiastical rights; and that, although it is said that they are not to be conferred upon "either of the said Bishops," what is meant is, that they are not to be conferred upon them in the corporate status which the Act gives them. Any other reading of the section would, in my opinion, render it useless, if not, indeed, senseless.

In effect the Act creates the Bishops of Kingston and Toronto corporations for the purpose of acquiring and holding land for the general use, eleemosynary, ecclesiastical, or educational, of the Church of Rome or of the religious community or any part of it within their respective dioceses, with the right, having obtained the consent for which sec. 5 provides, to sell, exchange, lease, or otherwise dispose of the land.

I am of opinion, therefore, that the respondent's action as against the corporation fails, and that it should have been dismissed.

The question as to the liability of the Sisters of Charity of the

ONT.
S. C.
BASIL
v.
SPRATT.
Meredith, C.J.O.

House of Providence at Kingston for the acts of which the respondent complains, presents other considerations.

This society was incorporated under the authority of the Act respecting Benevolent Provident and other Societies (37 Vict. ch. 34).

As these Sisters of Charity had been established before the passing of the Act, they, in conformity with the provisions of sec. 5 of the Act, annexed to the declaration which they filed, a copy of the constitution of the society.

The society is practically a self-governing one, and there is nothing in its constitution which vests any control over it in the Bishop of Kingston, save only that his consent to the resignation of the Superior General of her office is necessary (article 11 (10)); that no one under the age of fifteen or over the age of twenty-five can be admitted a member of the society "except by order of the Bishop of Kingston" (article 3 (2)); and that neither a professed novice nor a sister of the community shall dispose of her estate without his permission (article 3 (13)).

It is clear, I think, that the Bishop of Kingston, except as to these matters, has no legal right to interfere in the management of the affairs of society. Article 4 (1) of the constitution provides that the society is to be governed by a Superior General assisted by a council of three or four members, and I find no warrant for subjecting the members of this Ontario corporation to the rules of the canon law of the Church of Rome or to the authority of the Bishop of Kingston, except in so far as authority is conferred upon him by the constitution itself.

The constitution makes no provision for the disciplining of a member or her expulsion from the society; and, if any such power exists, it must be found in the ordinary law of the land, and not in the canon law of the Church of Rome.

The rights which the members of the society possess are conferred upon them by provincial legislation, and those rights they are entitled to enjoy, and they may not be taken away by the application of the canon law or by any ecclesiastical authority of the Church of Rome.

The question as to the liability of the society for the acts of which the respondent complains is one of some difficulty. It was contended by counsel for the society that those acts were *ultra*

ONT.

S. C.

BASIL v. SPRATT.

Meredith, C.J.O.

vires the corporation, that it had no power to remove the respondent from the house in which she was living, and still less to take her by force from it, in order to remove her to Montreal.

Although the English cases do not go so far, I should be prepared to adopt the rule established in the United States, that "if a corporation or its managing body *bonâ fide* believing that a particular transaction is within its powers direct an act which turns out to be *ultra vires*, still the corporation is liable to any person thereby damnified:" Brice on Ultra Vires, 3rd ed., p. 439.

The difficulty in the way of the respondent appealing to this rule is that her case is that the governing body of the society, assuming it to have authorised what the appellant Regis did, and the appellant Regis were not acting *bonâ fide* within the meaning of the rule, but their action was taken, as the respondent contends, in order to gratify their own feelings and in pursuance of a conspiracy entered into by them to force her to leave the society; and for such acts I think that it is clear that the corporation is not liable, even if what they did had been apparently done in the course of and about their duties. There is the further difficulty that it would appear that the act done was clearly one that the society had no authority to do, and there is for that reason no ground for applying the rule which has been suggested. There is no evidence—at least direct evidence—of any express authority given by the society to the appellant Regis to do that which she did. A resolution adopted at a meeting of the council held on the 6th July, 1916, was relied on by counsel for the respondent.

The resolution is as follows:—

"The matter of Sister Basil's vicious conduct was discussed, also the advisability of removing her from St. Mary's-on-the-Lake to the Sisters' Hospital, Montreal. Her ill-treatment of the Sisters, disrespect of authority and for the constitution in the past, convinced the council that this step was necessary."

This resolution, in my opinion, affords no ground for holding that it conferred or assumed to confer upon the appellant Regis authority to remove the respondent by force from the house of the society in which she was living to Montreal, or to commit the acts of violence of which she was guilty. Fairly read, it means only that the council was of opinion that the removal of the respondent to Montreal was necessary, and, if it authorised anything to be done, it was to be done, not by force, but by lawful means.

ONT.

S. C.

BASIL v. SPRATT.

Meredith, C.J.O.

Assuming, contrary to my view as to what the law is, that the society would be liable if it had expressly authorised what was done to be done, what I have said, if I am right, shews that no express authority was given, and it is clear that the law will not imply against the society that it gave authority to its officers to do that which itself had no right to do. See *Ormiston* v. *Great Western R. Co.*, [1917] 1 K.B. 598, 601, 602.

Upon the whole my conclusion is that the case as against the society failed and that as to it the action should have been dismissed.

I come now to the question whether there was evidence for the jury to fix the appellants Spratt and Phelan with responsibility for the wrongful acts of the appellant Regis. It was argued by counsel for these appellants that there was no evidence for the jury against them—nothing to shew that either of them was a party to the wrongful acts of the appellant Regis, but I am not of that opinion.

There was evidence which, if believed, warranted the jury in coming to the conclusion that both of these appellants were active participants in the wrongful act of the appellant Regis in assaulting the respondent with a view to taking her against her will to Montreal, an object which would probably have been accomplished but for the intervention of Father Mea.

The Archbishop was not called as a witness, but a part of his examination for discovery was read. It appears from it that Dr. Gibson had an interview with him with reference to the mental condition of the respondent: and it is evident that the discussion was with regard to the preliminary steps to be taken to warrant the committal of the respondent to an insane asylum. It was shewn that the Archbishop, after Father Mea had prevented the forcible removal of the respondent to Montreal, reprimanded him for having interfered with "my" (the Archbishop's) "administration," and the jury may well have taken this to mean that the act that was being done was being done by the Archbishop's authority. It was also shewn that in a discussion between the Archbishop and Father Mea as to some post-cards that had been sent, as the Archbishop insisted, by the respondent, the Archbishop said that the person who sent them was insane, and directed Father Mea to tell the respondent that she would find herself in a lunatic asylum

ONT.

S. C.

BASIL v. SPRATT.

Meredith, C.J.O.

It was also shewn that the respondent had sent to Rome a complaint which reflected upon the conduct of the Archbishop when he was a parish priest. We have then the view entertained by the Archbishop that the respondent was a proper subject for internment in a lunatic asylum, followed by a discussion with Dr. Gibson as to preliminary steps to be taken to that end, and that followed very soon by the assault on the respondent with the view of taking her against her will to Montreal, and the circumstance that, in the view of the parties to that act, when Father Mea intervened with a view to its prevention, the person to be communicated with was the Archbishop.

I am of opinion that in this there was evidence for the jury of the Archbishop's active participation in the wrongful acts of which the respondent complains.

There was also, in my opinion, evidence against the appellant Phelan sufficient to warrant the case as to him being left to the jury. He knew that it was contemplated to remove the respondent to Montreal and to do so against her will. He knew, according to his own admission, that she was not insane, and he it was who arranged with the Chief of Police of Kingston to provide a member of his force to take the respondent to Montreal, and there was evidence that he informed the police authorities that he would accompany the party to Montreal.

It was further contended by counsel for the appellants that evidence was improperly admitted of the acts committed after the assault upon the respondent.

This objection, though not specifically mentioned in the notice of appeal, is probably covered by clause (d) of the fifth ground stated in the notice.

The evidence was, I think, relevant for two reasons. In the first place, the respondent was entitled to shew what happened, after, on the advice of Father Mea, she remained in a house of the society after the assault, instead of, as she had purposed to do, going to the house of a friend in Kingston. Without explanation, it might have been urged against her that no great harm had been done to her by the assault, and her answer to that was that she was desirous of avoiding the scandal that would have arisen if she had left, and was willing to remain in a house of a society if her treatment in it was such that she could live there in peace and in the enjoyment of her rights as a member of the society.

ONT.
S. C.
BASIL
v.
SPRATT.
Meredith, C.J.O.

The other ground upon which the evidence was, in my opinion, admissible, is that the respondent was entitled to shew, if she could, that the assault was but one act in carrying out a scheme designed to deprive her of her status and rights as a member of the society, and to establish malice on the part of the appellants, and to meet the contention that what was done was done from the best of motives, viz., the respondent's own good, by having her properly treated in an institution in which the mentally afflicted were cared for.

It was also argued that the ruling of the trial Judge as to the admission in evidence of the examination for discovery of the appellant Spratt was erroneous; that the whole of the examination, so far as it related to a conversation the appellant Spratt had had with Dr. Gibson, parts of which had been read, should have been read: that was the contention of counsel at the trial, but it was not well-founded. The admission of an examination for discovery is regulated by Rule 330, which provides that "any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part of it is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence."

The practice under this Rule is that when a part of the examination is being read, if counsel for the opposite party thinks that the case is one in which the provisions of the Rule should be applied, he points out to the presiding Judge the other parts which he contends should be read. The learned trial Judge more than once expressed his willingness to consider whether any other part of the examination than that which was being read should be read, but counsel for the appellants made no request that that should be done, and did not suggest what, if any, questions and answers, according to the provisions of the Rule, should be read, but apparently was content to rely upon his contention that the whole examination, so far as it related to the conversation with Dr. Gibson, should be read.

There remains to be considered the question as to the damages. They are, no doubt, large; but, if the jury, as they must have done, agreed with the contention of the respondent that the parties were

not acting in good faith or under a belief that they were doing what they had a right to do, but were acting with the object which she attributed to them, not so large as to warrant our interfering with the jury's assessment. The case was one which, in that view of the appellants' conduct, warranted the jury in awarding punitive damages, and what those damages should be was a matter as to which, if the jury acted honestly and with a full appreciation of the facts, was a matter entirely for them, and to set aside their award would be, in the circumstances of this case, to usurp the functions of the jury and to substitute for their judgment the judgment of the Court in a matter as to which, subject to certain well established limitations, the jury are supreme.

It is to be noticed also that the jury was a special jury selected by the parties, though at whose instance it was struck does not appear.

No point was made by counsel for the appellants of the fact that the damages were separately assessed, and it is not necessary for the determination of this case, therefore, to decide whether, if objection had been taken on that ground, the objection would have prevailed. As at present advised, I am of opinion that it would not, and that we should follow what was done by this Court in *McLean* v. *Wokes*, (1914) 7 O.W.N. 490, notwithstanding the dictum of Lord Atkinson in *London Association for Protection of Trade* v. *Greenlands Limited*, [1916] 2 A.C. 15, at pp. 32, 33, to the effect that "a jury has no power, authority, or jurisdiction whatever to apportion between joint wrongdoers . . . the damages which they found the plaintiffs had sustained," and that "this is a matter of want of jurisdiction which no consent can cure."

I respectively dissent from this expression of opinion. The rules to which the learned Law Lord refers depended upon the technicalities of the common law, and ought not to obtain under the more elastic system which now prevails, and I see no reason why, if all parties—plaintiff and defendants—consent to that being done, the jury may not assess the damages separately against the several defendants as they may deem just.

The result then is that, in my opinion, the appeal of the appellants the Episcopal Corporation of the Diocese of Kingston and the Sisters of Charity of the House of Providence should be allowed without costs, and the action as against them be dismissed without

ONT.
S. C.
BASIL
v.
SPRATT.
Ferguson, J.A.

costs, and that the appeals of the other appellants, Spratt, Regis, and Phelan, should be dismissed with costs.

MACLAREN, MAGEE, AND HODGINS, JJ.A., agreed with Meredith, C.J.O.

FERGUSON, J.A.:—I have had the advantage of perusing the opinion of my Lord the Chief Justice, but am unable to agree in his conclusions that there is not evidence on which the jury might find that the defendants the Sisters of Charity had authorised the removal of the plaintiff from St. Mary's Orphanage by force, or that the defendant corporations were both without corporate capacity to authorise such a removal.

The defendants the Sisters of Charity were incorporated under the Benevolent Societies Act (37 Vict. (Ont.) ch. 34), and by that Act empowered to hold and possess lands for the purpose of establishing and maintaining thereon homes for their members and charitable institutions.

It is provided by the Act (sec. 4) that a society incorporated under it may appoint officers for conducting and managing its affairs, and for maintaining discipline; and may also from time to time make by-laws, rules or regulations for the government and conduct of the society; and may alter and rescind such by-laws, rules or regulations.

On the 6th July, 1916, and while the defendant society was in possession and occupation of the premises known as St. Mary's Orphanage, the society, at a meeting of the officers appointed to manage its affairs, resolved:—

"The matter of Sister Basil's vicious conduct was discussed, also the advisability of removing her from St. Mary's-on-the-Lake to the Sisters' Hospital, Montreal. Her ill-treatment of the Sisters, disrespect of authority and for the constitution in the past, convinced the council that this step was necessary."

When the resolution was passed, the plaintiff, as a member of the society, was residing at St. Mary's Orphanage, and it was in removing her from the Orphanage that force was used, and the assault complained of committed, but it is urged that, as the resolution does not say how the removal was to be made, authority to use force cannot be implied, and consequently there is not suf-

ficient evidence to justify the jury in holding that the acts complained of were in law the acts of the society. True, nothing is said in the resolution as to how the removal thereby directed was to be effected; and, in the absence of any evidence to the contrary, the law would presume that the removal was intended to be effected in a lawful manner, but at the trial much evidence was placed before the jury going to shew that, when the resolution was passed, it was by the governing council intended that the plaintiff should be removed by force, and without recourse to due process of law. On its face the resolution authorised not only a removal from St. Mary's, which might have been lawful if carried out according to law, but also the further removal to a Montreal insane asylum of a person admittedly not insane. It must be admitted that a part of this resolution could not have been intended to have been carried into effect by due process of law, and it seems to me that such a provision in the resolution and the other evidence of the circumstances leading up to and surrounding the making of the resolution, coupled with the subsequent acts of the members of the council who took part in the removal, afforded sufficient evidence to justify a finding that the society intended to and did authorise the removal of the plaintiff from St. Mary's Orphanage against her will and if necessary by force.

It is not without significance that the assault was carried out under the direction and supervision of the Superior, i.e., the general manager of the society, and it seems to me that this is a material fact distinguishing this from such cases as *Ormiston* v. *Great Western R. Co.*, [1917] 1 K.B. 598, and *Coll* v. *Toronto R. Co.* (1898), 25 A.R. (Ont.) 55, where the Court was asked to imply that a subordinate servant had authority from the corporation to do something beyond the scope of his employment.

Whether the defendant Regis acted for the corporation, or for herself alone, is not, I think, a question of law, but was a question of fact for the jury.

But it is urged that, even if it be found that the removal by force was intended, such a resolution would direct something to be done which it was beyond the corporate capacity of the society to authorise, and that it was impossible for the members of the society, by any resolution or other acts of theirs, to confer upon the society power to approve or direct an *ultra vires*

ONT.

S. C.

BASIL v. SPRATT.

Ferguson, J.A.

act. I cannot follow the reasoning for the conclusion that it was beyond the corporate capacity of the defendant society to authorise the removal of the plaintiff from St. Mary's. I have already pointed out that the defendant society was expressly empowered to own and possess lands and premises, and thereon to establish, maintain, and manage houses for its members, also charitable institutions, and it seems to me that corporate capacity to direct or authorise the removal of any other person from its premises is a necessary incident to the expressly conferred powers of ownership, possession, and management. See Palmer's Company Precedents, 7th ed., vol. 1, p. 278.

The forcible removal of the plaintiff from the defendant society's premises was, in the circumstances of this case, contrary to the general law of the land and illegal, but I cannot see that it was not under any circumstances possible for the defendant society to have directed and authorised the removal of the plaintiff from its premises by force; and, if that be true, the fact that its officers or agents effected the removal in an illegal manner does not render the act done or authorised to be done in an illegal manner, or even for an illegal purpose, an *ultra vires* act. It is on this principle, I think, that corporations have been held liable for such torts as libel, malicious prosecution, and assault. See the cases collected in the recent case of *Pratt* v. *British Medical Association* (1918), 35 Times L.R. 14, 23; also in Palmer's Company Law, 10th ed., pp. 73 and 75.

I do not, however, base my conclusions as to the corporate capacity of the Sisters of Charity on the Benevolent Societies Act alone—for, in my opinion, the corporate capacity of that society, as well as the corporate capacity of the defendant the Roman Catholic Episcopal Corporation of the Diocese of Kingston has, by recent legislation, been materially altered and enlarged.

In the judgment pronounced by the Privy Council in *Bonanza Creek Gold Mining Co. Limited* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, it is stated, at p. 285 :—

"The words 'legislation in relation to the incorporation of companies with provincial objects'" (British North America Act, sec. 92) "do not preclude the Province (Ontario) from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a

natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. . . . " And at p. 284: "In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter."

Following the *Bonanza Creek* judgment, the Legislature of Ontario, in the year 1916, by 6 Geo. V. ch. 35, sec. 6, added sec. 210 to the Ontario Companies Act, R.S.O. 1914, ch. 178, as follows:—

"210. Every corporation or company heretofore or hereafter created, . . .

"(*b*) By or under any special or general Act of the Parliament of the late Province of Canada, which has its head office and carries on business in Ontario, and which was incorporated with objects or purposes to which the authority of this Legislature extends; . . .

"(*c*) By or under any general or special Act of this Legislature, "shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter."

Both the defendant corporations come within the purview of that Act of 1916, and it follows that they must, in the words of the statute, be deemed to have and to have had, from their incorporation, all the general capacity which the common law ordinarily attaches to corporations created by charter, except in so far as that capacity is limited by express provision of the Act or instrument creating them.

Neither corporation was created by an exercise of the prerogative rights of the Crown, and in that respect they both differ from the corporation whose charter was under consideration in the *Bonanza Creek* case, but that difference can only be material when considering the effect of express restrictions, if any, appearing in the instrument creating the corporations. The meaning of the words "the general capacity which the common law ordinarily attaches to corporations created by charter" was considered, and the authorities in respect thereof were collected and reviewed, by the learned Chief Justice of the Common Pleas

ONT.
S. C.
BASIL
v.
SPRATT.
Ferguson, J.A.

and myself, in our respective pronouncements in *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280. We did not agree either as to the result of the authorities or as to the application of the Act, but in that case I expressed the opinion that the authorities collected determined that the common law attached to a corporation created by charter a general capacity analogous to that of a natural person, and I have not changed my opinion, nor have I changed my opinion as to the intent of the Act of 1916, preferring to arrive at the intent of the Legislature from the words of the Act, rather than by attempting to read into the Act words of limitation, for the purpose of arriving at a result which, though it appealed to my judgment as a desirable result, was not according to the intent expressed; in adopting that course I endeavoured to follow the rule laid down by the House of Lords in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, and stated by Lord Watson as follows (p. 38):—

"'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

I am therefore of opinion that both the defendants have under the Act of 1916 a corporate capacity analogous to that of natural persons, except in so far as expressly restricted. It is not claimed that there is any express restriction affecting the capacity of the society to commit the act complained of; but it is said that the provision of the Act incorporating the Roman Catholic Episcopal Corporation expressly prohibits the exercising of any spiritual jurisdiction or ecclesiastical rights; that, I think, may be conceded, for in my view the acts complained of were not acts of that nature, but acts interfering with the civil and contractual rights of this plaintiff. The Chief Justice has pointed to the evidence justifying, in his opinion, the jury in finding against the Bishop in his personal capacity. It is clear that he purported to act in his capacity of Bishop, but whether the acts were or were not done by him in his corporate capacity also was, I think, a question for the jury, on

which they have found, and I am not prepared to say that there is no evidence to support their finding. I agree that the canon law and the rules for the government of societies of the Church which were put in evidence cannot, unless adopted by the society under its power to make by-laws, rules, and regulations, affect the rights and status of this society or its members, and while the parties to the action seem to have considered themselves bound by these laws and rules of the Church, they cannot, in the absence of the corporate action I have indicated, be looked at to determine the right and status of the parties.

Mr. Tilley contended that the doctrine of *ultra vires* did not apply to a corporation sole, such as the Bishop, arguing that, while a corporation aggregate was an artificial being, invisible, intangible, and existing only in the contemplation of the law, a corporation sole was the existing natural being of the person endowed with the attributes of a corporation. In the view I have taken, it is not necessary to decide the question, but I doubt the correctness of Mr. Tilley's contention. Brice, in his work on Ultra Vires, 3rd ed., p. 11, says:—

"In all cases, and whatever its other incidents, a corporation is a legal entity, separate from and additional to the members composing it."

Thompson on Corporations, 2nd ed., vol. 1, sec. 15, says:—

"A corporation sole . . . consists of a single individual, having an artificial or legal personality distinguished from his natural character," in support of which definition he cites a number of authorities, including 1 Blackstone Comm. 477.

I would dismiss all the appeals with costs.

In the result, the appeals of the two defendant corporations were allowed (FERGUSON, J.A., dissenting), and the appeals of the defendants Spratt, Regis, and Phelan were dismissed.

ALTA.

S. C.

BOLSTER v. CLELAND.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Simmons, JJ. March 29, 1919.

NEW TRIAL (§ II—8)—MALICIOUS PROSECUTION—ERROR OF JUDGE IN INSTRUCTING JURY AS TO MALICE.

Error on the part of the trial judge in instructing the jury as to the elements necessary to constitute a cause of action founded on malicious prosecution so that jury may have found for the plaintiff without in fact finding any malice whatever, is ground for a new trial.

[*Scott* v. *Harris* (1918), 44 D.L.R. 737, referred to.]

Statement. APPEAL by defendant from a judgment of Ives, J., upon the verdict of a jury in an action for malicious prosecution. New trial ordered.

A. Stuart, K.C., for appellant; *G. B. O'Connor*, K.C., for respondent.

Harvey, C.J. HARVEY, C.J.:—The grounds of the appeal are founded on the trial judge's instructions to the jury.

In the latest case before this Division, *Scott* v. *Harris*, 44 D.L.R. 737, the elements necessary to constitute the cause of action founded on a malicious prosecution were pointed out. It was there shewn that there must be such acquaintance with the facts as could be obtained by reasonable inquiry as well as an honest belief in the charge on the part of the informant in order to constitute reasonable and proper cause, and that if such reasonable and proper cause existed he could not be liable to an action, but that even if it did not exist he would still not be liable unless also he were actuated by malice, or in other words some improper motive.

In the present case, the trial judge plainly said to the jury:—

> If you find at that time that there was an absence of belief in the mind of the defendant as to Bolster's intention of theft then you will find a verdict for the plaintiff.

It is clear from what I have said that this was an error, and although he did direct them on the subject of malice or improper motive it may be that the jury found for the plaintiff without finding any malice whatever. The absence of an honest belief is something from which malice may be inferred, but it is not malice, and there is no liability unless malice exists in fact.

I think also that the jury may have been misled by the trial judge's statement that defendant did not make a full disclosure to the police officer. It is within the province of the judge to

determine whether there is reasonable and probable cause, the jury having determined the facts upon which that rests.

Now it is quite clear that whether there was a full disclosure to the police officer is one of the facts which it is for the jury to determine and not for the judge, but from what the trial judge said the jury would probably consider that they had nothing to do with it because he did not intimate to them that he was merely expressing his opinion, which was not binding on them, and the evidence is not all one way.

Without considering any other objection, I think for the reason I have stated we cannot be satisfied that the verdict is one which a jury properly instructed would have given.

I would, therefore, allow the appeal with costs and direct a new trial, the costs of the present trial to abide the result.

Beck, J.

BECK, J.:—This is an action for malicious prosecution and for conversion of four head of cattle.

The case was tried before Ives, J., and a jury.

The jury found three of the four head of cattle to be the defendant's and one to be the plaintiff's. All four were the subject of the criminal proceedings which were the ground of action for malicious prosecution. On that claim the jury gave the plaintiff $350 damages. The defendant moves to set aside the verdict on a number of objections taken to the judge's charge. In the course of his address to the jury he said:—

> The only proper motive for such an act is that the ends of justice may be secured in reference to the crime. If the defendant had any other motive in laying that information than to secure the ends of justice in reference to the theft, then his motive was an improper one, and from the fact that it was improper, if you so find, you may infer that it was malicious. If his motive was to detain the cattle simply or to recover his own cattle, it was an improper motive and you may from it infer malice, if you find that was the motive.

Something like this has been said by more than one judge. Cave, J., for instance, in *Brown* v. *Hawkes*, [1891] 2 Q.B. 718, at p. 723, says:—

> In this country we rely on private initiative in most cases for the punishment of crime; and while, on the one hand, it is most important firmly to restrain any attempt to make the criminal law serve the purposes of *personal spite or any other wrongful motive*, on the other hand, it is equally important, in the interests of the public, that where a prosecutor honestly believes in the guilt of the person he accuses, he should not be mulcted in damages for acting on that belief, except on clear proof or at all events reasonable suspicion, of the existence of some other motive than a desire to bring to justice a person whom he honestly believes to be guilty.

ALTA.

S. C.

BOLSTER v. CLELAND.

Beck, J

Elsewhere it is said that malice includes any "improper" or "indirect" motive.

Instances given of indirect or improper motives are "spite or ill will"; "obstinacy or feelings of wounded pride"; "to stop plaintiff's mouth"; "to punish some one in order to deter others." Assuming, what I doubt, that if a good motive has associated with it in the mind of the defendant some such indirect motive as instanced above, the jury ought to be directed to find malice, I think it was not necessarily an improper motive on the part of the defendant "to detain the cattle simply or to recover his own cattle" and that, under the circumstances proved, it was not in fact an improper motive, and that the jury ought to have been so instructed, or at least to have had their attention called to the evidence so that they could deliberately pass upon it. The defendant said he was under the impression that the plaintiff's act was not theft, because it was done openly in his presence; that from the inspector of police he got the impression that that circumstance would not prevent its being theft and that it was proper for him to lay a charge of theft. If the jury, having considered this evidence, had believed it, I think they ought to have been instructed that they were at liberty to find absence of improper motive: I think it comes within the correct meaning of the expression, as used by judges in relation to cases of malicious prosecution: "to bring to justice a person he honestly believes to be guilty"; an expression which there has been too much inclination to interpret as having the too altruistic meaning solely of vindicating the public order by bringing the offender to punishment by means of the sanctions of the criminal law, and as excluding the vindicating of the public order by compelling the offender to fulfil his obligations of justice by restitution as well as punishment.

I think that if the jury had been properly instructed they might well have found an absence of malice.

On this ground I think the verdict of the jury ought to be set aside and a new trial directed; costs to abide the result; the appellant to have the costs of the appeal.

Simmons, J.

SIMMONS, J.:—Two claims of the plaintiff against the defendant were tried together before Ives, J., and a jury.

The first arose out of the disputed ownership of four head of cattle, and on this branch of the case the judgment awarded three of the cattle to the defendant and the remaining one to the plaintiff. The second branch of the case was based upon an allegation of malicious prosecution, and this is the only one raised in this appeal.

Both parties claimed the cattle in question and discussed their respective claims. The plaintiff knowing the defendant claimed them, advised the defendant that he was about to take them with other cattle of his to the C.N.R. stock yards at Edmonton under circumstances which warranted the defendant in believing the cattle were soon to be shipped out of the district. The defendant protested against this.

The defendant saw the cattle in question while they were being taken to Edmonton and telephoned the provincial police at Edmonton. The police requested the defendant to come to Edmonton and interview them. He did so and at the request of the police officers the defendant laid a charge of theft against the plaintiff, upon which a summons was issued and the plaintiff was brought before the police magistrate at Edmonton, who dismissed the charge against him.

The only material question of fact in dispute is what took place between the defendant and Schurer, the inspector of provincial police, when the defendant purported to inform the officer of the facts at the time the information was sworn to. The trial judge told the jury that "it is quite clear that the defendant did not make a full disclosure of the facts when he spoke to Mr. Schurer."

I am not satisfied that is a fair inference to be drawn from the evidence.

Counsel for the plaintiff objected to evidence being tendered as to this, but the evidence was properly admitted by the trial judge. Schurer says:—

> I told him—of course there was no talk of disputed ownership—I told him if the man was taking his cattle away it was cattle thieving and the proper course to take was to lay an information against him for theft.

It is quite clear from other extracts from Schurer's evidence that the defendant made it very plain that Bolster was claiming

ALTA.

S. C.

BOLSTER v. CLELAND.

Simmons, J.

the animals in question and that there was an acute question of disputed ownership.

Earlier in his evidence Schurer said that the defendant told him

when he was passing by in a rig he had noticed some of his cattle in this big bunch and he went in and told Bolster that certain cattle belonged to him and that Bolster claimed that they did not belong to him and refused to give them up.

Also after the inspector had requested his own memoranda for refreshment of his memory he said: "Bolster claimed the cattle belonged to him and was going to take them and did take them." It is quite evident from these admissions that the inspector was clearly informed that it was peculiarly a question of ownership and that the defendant told him so. In addition to this the defendant says that he objected to laying a charge of theft and the officer to whom he was talking said: "What else can I call it? You can put in a charge no other way."

Now then, admitting for the purpose of this appeal that the trial judge was right in finding inferentially an absence of reasonable and probable cause, the question of malice is for the jury.

What the defendant said and did when he consulted the police officers has an important bearing upon this question and the jury should have been told this. The jury should have been instructed also that whether the defendant gave the police such complete and correct information was an inference of fact to be determined by them, and that the determination of this fact one way or the other should be weighed by them very carefully in determining whether the defendant honestly believed the offence of theft had been committed.

While the fact that he consulted the officers of the law and acted upon their suggestion and advice would not necessarily excuse him it is a most important circumstance in determining his state of mind.

The jury were told that "the only proper motive for such an act is that the ends of justice may be secured in reference to the crime." "If the defendant had any other motive in laying the information than to secure the ends of justice in reference to the theft then his motive was an improper one and from the fact that it was an improper one if you so find you may infer that it was malicious."

ALTA.

S. C.

BOLSTER v. CLELAND.

Simmons, J.

I think probably that the trial judge meant *sole motive* when he speaks of motive, and in that sense no doubt the instructions would be correct. I am not satisfied, however, that the jury would understand it in this sense. I think the jury might reasonably infer that a motive to get back his property was an improper one.

This is not an improper one if there co-exists along with it an honest belief that a theft of the property has been committed.

Furthermore, I am of the opinion that the jury should be instructed that if the facts are such as justify a reasonable and careful person in coming to the conclusion that theft was committed, that the defendant should succeed, and if the opposite conclusion was reached the plaintiff should succeed.

I am of the opinion there should be a new trial, and costs to be disposed of in accordance with the terms of the judgment of the Chief Justice. *Appeal allowed; new trial ordered.*

ADOLPH LUMBER Co. v. MEADOW CREEK LUMBER Co.

CAN.

S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 3, 1919.

CONTRACTS (§ II A—128)—AMBIGUOUS—CONSTRUCTION BY CONDUCT OF PARTIES—ACCEPTATION OF BY COURT.

A contract being ambiguous in its terms and a construction having been placed upon it by the conduct and language of the parties, that construction will be accepted by the court as the true one.

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1918), 25 B.C.R. 298, reversing the judgment of the trial judge, Clement, J., and maintaining the plaintiff's action.

The appellant and the respondent entered into an agreement in October, 1915, whereby the respondent was to supply 2,000,000 ft. of lumber and load it on cars from its mills for shipment. It was agreed that the respondent was to "continue shipping regularly." Later on, the shipments being slowly made, the appellant wrote the respondent cancelling the contract. The respondent's manager acknowledged receipt of the letter; and going afterwards to the appellant's establishment, he declared to two of appellant's employees, according to evidence accepted by the trial judge, that he could not blame the appellant for cancelling the contract. On the same occasion, the respondent asked the appellant to take neverthe-

CAN.

S. C.

ADOLPH LUMBER CO. v. MEADOW CREEK LUMBER CO.

Davies, C.J.

less three carloads of lumber he had on hand, which was agreed to. Some months after, the respondent claimed damages for breach of the contract in the sum of $4,985.

Lafleur, K.C., for respondent.

DAVIES, C.J.:—In my opinion the contract on which this action was brought was so ambiguously worded that it was almost impossible to determine from its language what the parties really intended and meant to express.

In these circumstances, we have the right and the duty, as by their subsequent conduct, the parties have themselves put a construction upon the contract, to adopt and apply that as the proper construction.

I think the trial judge has reached the right conclusion that there was a cancellation of the contract by consent of the parties, or, to put it in another way, that the cancellation by the appellant was accepted and approved of by the respondent company.

The trial judge says:—

> I think the matter may be put in either one of two ways: either that what took place was a cancellation by consent or that the plaintiff company is estopped from denying that the cancellation or repudiation by the defendant company was justified. I think myself that at the time both parties were contented to drop the contract and did so by mutual consent.

The contract being ambiguous in its terms and a construction having been placed upon it by the conduct and language of the parties, that construction will be accepted by the court as the true one. That construction justified the cancellation of the contract and the acceptance by the respondent company of the lumber Murphy's company had on the cars at Gateway was a concession to Murphy made, as the trial judge finds, at his solicitation, after he had expressed himself as being under the circumstances unable to blame the respondent company for cancelling.

The appeal should be allowed and the judgment of the trial judge restored with costs.

Idington, J.

IDINGTON, J. (dissenting):—Having regard to the fact that the respondent refused to be bound to a regular shipment of a specific quantity of lumber per day, and that both parties agreed to adopt instead thereof the ambiguous term of "shipping regularly" without defining either the length of time over which the contract was to run, or the quantities contained in each shipment so long as shipped in car loads of not less than twenty-five thousand feet in

a car, I do not think the appellant was entitled under the circumstances in evidence abruptly to cancel the contract.

I think the judgment appealed from is right for the reasons assigned by the Chief Justice and Galliher, J., respectively.

The appeal should, therefore, be dismissed with costs.

ANGLIN, J.:—I would allow this appeal and restore the judgment of the learned trial judge substantially for the reasons assigned by him and by McPhillips, J.A. I incline to think that, having regard to the circumstances known to both parties necessitating punctuality in deliveries, there was such substantial default by the plaintiff as entitled the defendant to cancel the contract between them. But, if not, I am satisfied that the plaintiff's representative, Murphy, believed this to be the defendant's legal right. The trial judge's acceptance of the evidence of Morrow and Griffiths puts that practically beyond question. Counsel for the plaintiff frankly admits his client's urgent need of inducing the defendant to take the two cars of lumber shipped to it after its notice of cancellation and of obtaining money from it to meet pressing obligations. Moreover, Mr. Murphy expected to dispose more advantageously of the greater part of the lumber which he had contracted to sell to the defendant. Under these circumstances, it seems to me quite probable that he was prepared to, and did in fact, acquiesce in the cancellation of his company's contract by the defendant upon receiving the assurance that it would take and pay for the two cars of lumber then standing on its railway siding. At all events, I am, with respect, convinced that the finding of the trial judge to that effect is so well supported by the evidence that it should not have been set aside. The delay in bringing this action makes it reasonably certain that it was an afterthought.

Anglin, J.

BRODEUR, J.:—The first question is concerning the right of the Adolph Lumber Co. to cancel the contract it had with the Meadow Creek for a quantity of lumber which the latter sold. It was stipulated in the contract that the vendor would start shipping by November 10, 1915, and would "continue shipping regularly." The vendor started to deliver in due time; but his mill required repairs and he had to stop for a few days to have those repairs made. He had, however, taken the necessary steps to procure the logs from its own lumber limits and from some

Brodeur, J.

CAN.

S. C.

ADOLPH LUMBER CO. v. MEADOW CREEK LUMBER CO.

Brodeur, J.

others. He had shipped six cars, when, on November 30, the purchaser, without any previous notice and without inquiry, cancelled the contract on the ground that he had not shipped the quantity contemplated by the agreement.

The contract in that respect is somewhat indefinite. When the negotiations took place, the purchaser wanted to stipulate a car a day, but the vendor would not agree to that because his mill was small and had not been in operation for two years. He said that in cold weather it was impossible to have such a small mill run at its full capacity, that the train sometimes only ran three times a week and that the cars might not be billed out or picked up for days after they were loaded, all circumstances well known to the purchaser.

The lumber, after being sawn at the vendor's mill at a thickness of two inches, had to be finished at the purchaser's planing mill, which was rather large and which, in order to be run properly, had to be supplied with a much larger quantity than the vendors' saw mill, even running at its full capacity, could supply. The purchaser had then a supply of lumber which came from some other mills, but the supply of this became exhausted on November 27. He was at the same time in negotiation with some other saw mill owners in the vicinity to buy from them, but he was unsuccessful; so he was, on November 30, getting short of the quantity of lumber to run his planing mill properly, even if the respondent had delivered 20,000 ft. a day, viz., the whole quantity that his saw mill could cut because the planing mill of the appellant had a capacity of 50,000 ft. a day.

The way the Adolph company proceeded in cancelling the contract without giving to the vendor notice of its intention to do so and without making any inquiry as to whether the vendor could fulfil his contract proves to me conclusively that the motive which determined the purchaser to cancel the contract was not due to the insufficient delivery by the vendor but to the fact that he could not get the necessary supply of lumber from other contractors to keep his mill running. The contract was very indefinite as to the dates and quantity of delivery. It simply provided that the vendor would continue shipping regularly.

Suppose there had been a breach on the part of the vendor, it would not be such a breach as would justify the purchaser to

rescind. The non-performance goes only to a part of the contract and it must imply a virtual failure of consideration to authorize the rescission.

This is a contract providing for delivery at certain intervals. In the event of breach of one of them the general rule is that the remedy must be by action unless the parties expressly agree that breach of a single shipment shall entitle the other party to treat the contract as abandoned or unless the party shews by his acts an intention to no longer be bound by his contract. *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; *Withers* v. *Reynolds* (1831), 2 B. & A. 882, 109 E.R. 1370; *Simpson* v. *Crippin* (1872), L.R. 8 Q.B. 14; *Honck* v. *Muller* (1881), 7 Q.B.D. 92.

In the case of *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434, Lord Blackburn said, p. 443:—

> The rule of law . . . is that where there is a contract in which there are two parties, each side having to do something . . . if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it."

In the present case, there is nothing to shew that it went to the root of the matter, and I fail to see how the defendant company could be justified in cancelling the contract, as it has done.

The trial judge, who decided in favour of the Adolph Lumber Co., on another ground, stated positively that the cancelling letter was absolutely unjustifiable.

The other question at issue is whether the respondent company acquiesced in the cancellation and released the purchaser from any liability arising out of the cancellation.

The trial judge has come to the conclusion that the plaintiff company acquiesced. It is true that after the notice of cancellation was received, the manager of the respondent company went to see the appellant to induce him to take delivery of two cars which had been shipped; and later on to obtain payment of the money which was due to him. He says that in those interviews the cancellation had not been discussed.

On the other hand, the witnesses of the defendant company say that the question of cancellation was taken up and that the representative of the respondent company stated that he could not blame the appellants for cancelling the contract. The trial

CAN.

S. C.

ADOLPH LUMBER CO. v. MEADOW CREEK LUMBER CO.

Mignault, J.

judge accepts the evidence of those witnesses. It is a question of credibility; and in that respect I should concur in the finding of the trial judge who saw the witnesses and could form a better opinion as to their veracity than a Court of Appeal.

On that ground, I would reverse the judgment of the Court of Appeal and restore the judgment of the trial judge.

The appeal should be allowed with costs throughout.

MIGNAULT, J.:—That this is a case where there is room for doubt is shewn by the equal division of opinion among the judges who so far dealt with it. The trial judge dismissed the respondent's action and his judgment was reversed by the Court of Appeal with two dissenting judges. While I have not felt entirely free from doubt, I have nevertheless come to the conclusion that the judgment of the learned trial judge should be restored, for I cannot think that under any reasonable construction of the contract the respondent made regular shipments to the appellant.

It seems also difficult to hold under all the circumstances of the contracting parties, well known to each other, that this stipulation of regular shipments was not of the essence of the contract, and Mr. Murphy, the respondent's manager, frankly admitted that he was to ship to the appellant the entire cut of his mill, which amounted to 20,000 ft., or substantially one carload, per day. This he lamentably failed to do up to the date of cancellation.

But what entirely satisfies me is Murphy's conduct after the cancellation. He acknowledged receipt of the letter of cancellation without a word of complaint, he went to the appellant's establishment and declared to two of the appellant's employees, whose testimony the trial judge believed, that he could not blame the appellant for cancelling the contract, but he asked them to take, nevertheless, three carloads he had on hand, which they agreed to do. Subsequently, Murphy went to Fernie to get some money from Adolph, the appellant's manager, to pay a note, and he does not think that he said anything about the cancellation of the contract, having then, he explains, a deal on with another concern covering a million feet of lumber, and finally, it is only on February 8 that his solicitor wrote to the appellant threatening suit. I cannot help thinking that, even if the appellant has not (and I believe it has) made out a case for the exercise of the right

of cancellation, it has at least shewn that the respondent fully acquiesced in the cancellation of the contract. Viewing all the circumstances of the case, I have come to the firm conclusion that the Court of Appeal should not have disturbed findings of the trial judge.

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

Appeal allowed.

Re BAILEY COBALT MINES Ltd.

BAILEY COBALT MINES Ltd. v. BENSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Middleton, J. January 29, 1919.

PARTIES (§ II A—85)—COMPANY—WINDING UP—JUDGMENT—PERSON PRIVY IN ESTATE TO PARTY LITIGANT.

A person cannot be affected, still less concluded, by any evidence, decree or judgment to which he was not actually or in consideration of law, privy.

In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to shew that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment, or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived.

Statement.

APPEAL from an order of Masten, J., setting aside an interim report of the Master-in-Ordinary and referring the matter back to him. Varied.

The order appealed from is as follows:—

MASTEN, J.:—Appeal from an interim report of the Master in Ordinary, dated the 22nd December, 1917, stating that he had refused to permit the appellants to receive any distributive share of the fund arising from the assets of the Bailey Cobalt Mines Limited in liquidation, unless and until the amount of a judgment held by the Bailey Cobalt Mines Limited against one Benson, the claimants' assignor, has been contributed, by or on behalf of Benson, to the assets of the company.

The facts in brief are as follows:—

Benson and others promoted the Bailey Cobalt Mines Limited, and were the directors of the company. It is alleged that in this connection Benson was guilty of misfeasance and became liable to the company for damages.

ONT.

S. C.

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

On the ground of such misfeasance the Bailey Cobalt Mines Limited and its liquidator sued Benson, and, judgment having been entered by default, the damages were assessed by the Master at the sum of $424,560.

Prior to this time, viz., on the 11th June, 1914, Benson, claiming to have advanced moneys to the Bailey Cobalt company, had, prior to the liquidation, brought an action against it and had recovered a judgment for $90,788.89, which judgment was subsequently assigned to the Profit Sharing Construction Company, and it is upon the claim of that company to prove and rank in the liquidation for this judgment that the present question arises.

The decision is based on the ground that as against Benson there was a right either to set off the dividend on his claim against the judgment of $424,560 which the Bailey Cobalt company holds against him, or, in the alternative, an equity to retain the dividend until the amount of such claim against Benson has been contributed to the fund; and on the ground that the present appellants, as assignors of Benson's claim against the Bailey Cobalt company, take the claim subject to all equities.

In this connection the dates are of importance and are as follows:—

Benson's judgment for $90,788.89.....11th June, 1914.

Order for winding up the Bailey Cobalt company .....
.....26th June, 1914.

Assignment of Benson's judgment to the appellants.....
.....15th February, 1915.

Writ by Bailey Cobalt company and liquidator, as plaintiffs, issued in action against Benson and others for misfeasance.....29th June, 1915.

Judgment in last-named action on motion for default in defence and referring to Master to assess damages.....15th September, 1915.

Master's report on assessing damages at $424,560.....14th February, 1917.

Master's certificate as to proceedings to determine certain questions first.....3rd October, 1917.

Master's interim report now appealed from.....22nd December, 1917.

No stenographic report of the proceedings in the Master's office is filed before me; all that appears, apart from the report itself, is the following note in the Master's book:—

"Mr. Laidlaw states his contention as he did before me before the unsuccessful appeal. Mr. Robertson objects to certain documents cited by Mr. Laidlaw, being proceedings in the action and in the winding-up proceedings, being received. I think, under the order of Mr. Justice Masten, the proceedings had both in the action and in the winding-up are properly put in as evidence of such proceedings, and if Mr. Robertson objects he can answer any of them as he sees fit, and that the three points of law now and formerly submitted by Mr. Laidlaw are the matter now before me. Mr. Robertson says the judgment in the action by Meredith, C.J.C.P., is not binding on his clients, and that there is and was no jurisdiction to proceed against Benson in the action, as he was outside the jurisdiction. The claim by the liquidator against Benson arises only on the report establishing a debt. It was after the assignment. Argument concluded. Report to be settled on the 22nd instant at 11 a.m."

It does not appear from the proceedings whether any notice of the assignment from Benson to the Profit Sharing Construction Company was, or was not, given to the Bailey company or its liquidator prior to the lodging of the present proceedings, nor does it appear when the proceedings asserting this claim were begun. This point was not discussed by counsel; but, as the situation presents itself to me at the present time, I do not think that these circumstances make any difference in the result.

The first question raised by the appellants is this: Have the respondents given legal proof of facts establishing as against the appellants a set-off or an equity to prevent them ranking in the liquidation?

As I have said above, nothing appears on the record shewing what evidence was actually adduced before the Master; but I understand it to be agreed by counsel that no oral evidence was tendered; that the appellants tendered in evidence, as proof of their claim to rank as creditors, the judgment in Benson v. Bailey Cobalt Mines Limited, and the assignment thereof from Benson to the appellants; and the respondents tendered, in proof of the set-off or equity which they assert, the judgment which they

ONT.

S. C.

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

hold against Benson, dated the 15th September, 1915, pronounced by Meredith, C.J.C.P., and the Master's report made in pursuance of that judgment, dated the 14th February, 1917; and the matter rests on the evidence so tendered.

Upon this the Master has ruled that the judgment against Benson and the report founded thereon in the action of Benson v. Bailey Cobalt Mines Limited are, under the circumstances, admissible in evidence against the Profit Sharing Construction Company and establish the equity which the liquidator asserts.

The Profit Sharing Construction Company appeal from that ruling, relying on the maxim "*Res inter alios acta alteri nocere non debet*," and counsel refers to the discussion of that subject in Broom's Legal Maxims, 8th ed., p. 748, and, as illustrations, to the cases of *Zimmerman* v. *Kemp* (1899), 30 O.R. 465; *Ex p. Young, Re Kitchin* (1881), 17 Ch. D. 668; *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1894] 1 Ch. 578.

I think that the rule applicable to this case is well expressed by Romer, J., in the last-mentioned case, at p. 593, where, in the course of the argument addressed to him by Cozens-Hardy, he says: "Judgment in an action between A. and B. could not *primâ facie* affect C. But it does affect C. if he is privy in estate, claiming through B. The only other exception to the general law appears to be the case of an express indemnity from C. to B., and that appears to be limited to a case where the subsequent proceedings are between the person who indemnifies and the person indemnified. Is there any other exception?" To which Cozens-Hardy replies: "I do not know of any other."

In Broom's Legal Maxims, p. 748, it is said that a person cannot be affected, still less concluded, by any evidence, decree, or judgment to which he was not actually, or in consideration of law, privy.

The cases where the parties are privy within the meaning of this rule are discussed and set forth in para. 478 of the 13th volume of Halsbury's Laws of England, and I have considered the cases there set out, and am of opinion that Benson and the Profit Sharing Construction Company are not privies within the meaning of the rule; even if they were privies, I think that the liquidator is precluded from asserting the right which he here puts for-

ward, by another rule which is summarised in the same volume of Halsbury, para. 480:—

"In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to shew (apart from his taking with a notice of a *lis pendens*) that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment, or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings commenced after the purchase; and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the action."

From the list of dates above set forth it appears that the proceedings in which the judgment has been recovered by the insolvent company and its liquidator against Benson were commenced after the purchase by the Profit Sharing Construction Company of the judgment in question.

In his reasons for judgment the learned Master says, dealing with this point: "Under the latter clause of the first paragraph of the order of the 24th January, 1917, I regard all the proceedings in the action as also in the winding-up matter, the same having been put in by Mr. Laidlaw, as properly before me and as evidence for the plaintiffs' liquidator."

The judgment in question was a judgment pronounced by myself when presiding at the non-jury sittings in Toronto, and the clause relied upon by the Master is as follows:—

"It is ordered that all questions and accounts arising in this action between the plaintiff and the defendant the Profit Sharing Construction Company be referred to the Master in Ordinary to be heard and determined by him in the winding-up proceedings, and as part thereof, and that in such inquiry and on the trial of such questions all proceedings heretofore taken in this action may be used and availed of in the same manner and to the same extent as though they had been taken in the winding-up proceedings."

I do not understand that this judgment in its terms creates or was intended to create any different situation from that which would have arisen if the case had been tried out before me at the

ONT.

S. C.

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

non-jury sittings; and I am of opinion that, if it had been so tried, the judgment in default which had been already recovered in the action against Benson would not have constituted any evidence against the Profit Sharing Construction Company, but that the Profit Sharing Construction Company would have been entitled to require the plaintiffs to prove as against them, by proper evidence other than that adduced, the facts upon which they base their claim.

I am therefore of opinion that the Master in this respect has been misled, and that the respondents have failed to establish, by any evidence admissible against the appellants, the facts on which to found their claim.

The second ground of appeal is that, on the assumption that the evidence is admissible and adequately establishes the facts, yet the appellants as assignees of a chose in action stand in a better position than Benson, and against them the equity does not exist.

As regards set-off proper, I think no such right ever arose. It is a fundamental principle of the law of set-off that the right shall be mutual, and a misfeasant cannot set off money due to him from the company against sums due for misfeasance: *Re Anglo-French Co-operative Society, Ex p. Pelly* (1882), 21 Ch. D. 492. I refer also to the recent case of *Crain* v. *Wade* (1917), 55 Can. S.C.R. 208, 37 D.L.R. 412, as shewing the narrow character of the right of set-off which exists under the Winding-up Act. But here the right is claimed on a wider principle of equity.

In the case of *Re Rhodesia Goldfields Limited*, [1910] 1 Ch. 239, Swinfen Eady, J., at pp. 246 and 247, says:—

"Various cases on the subject of set-off were referred to in order to shew that an unliquidated demand cannot be set off against a liquidated debt, or a debt not due against one that is due; but this rule is of much wider application than the doctrine of set-off. In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund

Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him."

The most recent decision to which my attention has been directed is *Re National Live Stock Insurance Co. Limited*, [1917] 1 Ch. 628, where Astbury, J., refers to many of the earlier decisions which have consistently maintained the view above stated.

If the claim to rank as a creditor on the assets of the Bailey Cobalt company were made by Benson, it seems clear that he would not be entitled to receive any share of the fund without paying that which he has been found liable to contribute to the fund.

Then arises the question whether the transfer to the Profit Sharing Construction Company places it in a better position than its transferor with respect to this equity. In considering this question it is to be borne in mind that the assignment from Benson to the Profit Sharing Construction Company is dated the 15th February, 1915, and that the judgment of the Bailey Cobalt company, declaring Benson guilty of misfeasance, is dated the 15th September, 1915. No evidence has been brought to my attention shewing the date when the assignment from Benson to the Profit Sharing Construction Company was notified to the Bailey Cobalt company or its liquidator, nor has any question been raised or determined as to whether the assignment from Benson to the Profit Sharing Construction Company is or is not *bonâ fide*. Apart from statutory enactment, there is nothing to interfere with the right of a creditor to assign his claim pending the winding-up, and I have examined the sections of the Winding-up Act referred to by the respondents' counsel, and I can find no provision in our Winding-up Act forbidding such a transfer.

In the case of *In re Milan Tramways Co., Ex p. Theys* (1882), 22 Ch. D. 122, at pp. 125 and 126, Kay, J., said, in a case where the facts were somewhat similar to the facts of the present case (the cross-claim being for misfeasance):—

"The liquidator resists this application upon the ground that he is, as he insists, entitled to set off the £2,000, for which he has obtained an order against Mr. Hutter. But this order was not obtained until long after the assignment by Mr. Hutter to Alfred

ONT.

S. C.

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

Theys, and the notice of that assignment given to the liquidator. Assuming that what the liquidator has recovered was damages and not a debt, there was not at the date of the assignment and of the notice any right of set-off either at law or in equity.

"Was then the £2,000 damages? It was recovered, as I understand, by a summons under sec. 165 of the Companies Act, 1862, and was, according to the order of the 28th July, 1880, 'the nominal value of eighty-five shares in the company received by Mr. Hutter from Charles Bernard, the promoter of the company.' The ground of the order was, I presume, that this was in the nature of a bribe which it was a misfeasance on Mr. Hutter's part to receive. According to *Pearson's Case* (1877), 5 Ch. D. 336, the right of the company was to elect whether they would take the shares, and their proceeds if they had increased in value, or the value of them at the time when they were presented to him. The company have elected to take the value. This was not money in his hands. I am not informed whether he ever had any of the value of these shares in the shape of money, but if he had I must suppose it was less than what the company elected to take. As they have not taken the specific shares it seems to me that the company have insisted on their right to damages or compensation, and that the £2,000 was in the strictest sense of the word damages and not a debt. If this be so, then taking the assignment to be subject to equities, it seems to me that there was no equity to which it could be made subject. This is not the case of a liability for a call made in the winding-up which, according to *Ex p. Mackenzie* (1869), L.R. 7 Eq. 240, constitutes a debt from the time of the commencement of the winding-up, but the case seems to me to fall entirely within the decision in *Watson* v. *Mid-Wales R. Co.* (1867), L.R. 2 C.P. 593, where it was held that neither at Law nor in Equity would a set-off be allowed 'against the assignee of an equitable *chose in action* . . . . of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed nor in any way referring to it.'"

The decision of Kay, J., was appealed to the Court of Appeal, and the appeal came on for hearing before the Earl of Selborne, L.C., Cotton, L.J., and Fry, L.J. The report is to be found in (1884) 25 Ch. D. 587. In the course of the argument, when the

ONT.

S. C.

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

Court seemed somewhat against him, counsel put forward the suggestion that, if there was not a right to set off the debts, there was a right to retain the dividends until the claim due the company was paid. Dealing with this question, Fry, L. J., says (p. 594):—

"Then, as to the claim to retain the dividends, the appellant forgets that the dividend was not declared till after the order for payment of the £2,000, and that the order for that payment was not made till after the assignment of the debts to Theys. We cannot hold that the fact of Hutter having once been the owner of these debts created an inchoate equity to set off whatever might be found due from him against the dividends to become payable in respect of these debts. No right to retain the dividends could arise unless at the time when they were declared they belonged to a person who was indebted to the company."

The rule deduced from this line of decisions is summarised in Lindley on Companies, 6th ed., p. 1027, as follows:—

"As regards debts which have been assigned, it is settled that a debtor cannot set off against the assignee of a debt due from him, any claim against the assignor which has arisen since the assignment was completed by notice to the debtor, unless such claim arises out of the same contract as that from which the debt assigned arose, and is intimately connected with it. This rule applies to debts proved against a company and afterwards assigned, and prevents the liquidator from setting off against the assignee a claim against the assignor founded on a breach of trust."

It appears to me that I am bound to follow the express ruling of the Court of Appeal, followed as it was in *In re Goy & Co. Limited*, [1900] 2 Ch. 149; and, accordingly, with some hesitation (having regard to the language of Swinfen Eady, J., in the case of *In re Rhodesia Gold Fields Limited*, [1910] 1 Ch. at p. 247, and to the decision of Buckley, J., in *In re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743), I hold that, if due notice was given to the company by the assignees, the Profit Sharing Construction Company, before the declaration of any dividend and before recovery of the judgment against Benson, and if the assignment from Benson to the Profit Sharing Construction Company is *bonâ fide*, then no right of set-off and no right to retain

ONT.

S. C.

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED. v. BENSON.

the dividend, as claimed, arises, but meantime and until those questions are determined no dividend should be paid to these claimants.

In the view which I have thus expressed, I must be understood as deciding no more than the preliminary questions directly raised before the Master, and as leaving open and untouched all other issues, both those set forth in the action of Bailey Cobalt Mines Limited v. Benson and the Profit Sharing Construction Company, and all other issues, if any, relating to the rights of the appellants and respondents.

The appeal is allowed with costs, the interim report of the Master set aside, and the whole matter is referred back to him.

H. J. Scott, K.C., for the appellants.

R. S. Robertson, for the Profit Sharing Construction Company, respondents.

At the conclusion of the hearing the judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—It is common ground that it is essential for the success of Mr. Scott's client that there was a debt existing anterior to the assignment by the judgment debtor, Benson, to the respondent, of Benson's judgment. We do not think that the judgment against Benson proved more than the existence of a debt at the date of the judgment, and that, we think, was not sufficient to warrant the application of the equitable rule which Mr. Scott invokes, the judgment having been recovered after the assignment to the respondent of the Benson judgment.

The proper course is, we think, not to express any opinion as to the application of the equitable rule until the nature of Benson's indebtedness has been determined, but to refer back the matter to the Master in Ordinary for determination.

Upon the reference back, the opinion expressed by Masten, J., as to the application of the rule, is not to be binding upon the Master or upon the parties.

The costs of this and of the former appeal will be reserved to be dealt with when the matter has been determined by the Master, or, in case of an appeal from his report, by the Judge who hears the appeal.

Judgment Accordingly.

STACK v. The BARGE "LEOPOLD."

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EX. C.

Exchequer Court of Canada, Maclennan, Dep.Loc. J., Quebec Adm. Dist., Montreal. July 11, 1918.

ADMIRALTY (§ I—1)—JURISDICTION—NECESSARIES AND REPAIRS—TOWAGE—MARITIME LIEN.

By virtue of ss. 4 and 5 of the Admiralty Court Act, 1861, where a ship is not under arrest and its owner is domiciled in Canada, the Exchequer Court of Canada has no jurisdiction over an action for repairs or necessaries supplied to the ship.

2. Towage performed in connection with the repairs, not at the owner's special request, is not within the purview of "claims and demands for services in the nature of towage," within the meaning of s. 6 of the Admiralty Court Act, 1840, as would give the Court jurisdiction over the claim; neither claim for towage nor for necessaries is the subject of a maritime lien.

3. An objection to the jurisdiction will hold good even if made after the trial.

Statement.

ACTION *in rem* and claim for $959.92 for work done, materials furnished, towing and guarding barge "Leopold" from June, 1916, to the date of the institution of the action, and costs.

Alphonse Décary, K.C., for plaintiffs; *Lucien Beauregard*, for *mis en cause*.

Maclennan, Dep. L.J.

MACLENNAN, Dep. L.J.:—The plaintiffs were contractors for the construction of a portion of the Montreal and Quebec highway, under contract from the government of the Province of Quebec. The barge "Leopold" and certain other plant were leased by the Quebec Government to the plaintiffs in connection with the said contract and were used by the plaintiffs during the seasons of 1915 and 1916, when plaintiffs' contract was completed. The plant belonged to another contractor, who had undertaken to construct a considerable portion of the highway, but failed to complete the whole of his work, whereupon the government took possession of the plant and gave the balance of the work to the plaintiffs, who paid a rental to the government for the plant. When the plaintiffs completed their contract they notified the government and offered to surrender the plant, including the barge "Leopold." The government declined to take the plant off the plaintiffs' hands, and the claim in this action is to recover the alleged costs of certain repairs to the barge, materials furnished, towing the barge to a dry dock in order to have the repairs made, towing the barge from the dry dock and the costs of a guardian looking after the barge for a considerable time.

After trial, and in a written argument submitted by the counsel for the defendant, the question of the jurisdiction of the court

CAN.

EX. C.

STACK
v.
THE BARGE
"LEOPOLD."

Maclennan, Dep. L.J.

was raised. It is well settled law that the jurisdiction of this court to hear an action for necessaries supplied to a ship depends entirely upon statute. By the Colonial Courts of Admiralty Act, 1890, a Colonial Court of Admiralty has, subject to the Act, jurisdiction over the like places, persons, matters and things as the High Court in England has, and any enactment in an Act of the Imperial Parliament referring to the admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty, shall be read as if the name of that possession were substituted for England and Wales. By the Admiralty Court Act, 1861 (24 Vict., c. 10, Imp.), s. 4:—

The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping or repairing of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court.

Sec. 5:

The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

By the Admiralty Court Act, 1840 (3 and 4 Vict., c. 65, s. 6), the High Court of Admiralty was given jurisdiction to decide all claims and demands for services in the nature of towage and for the necessaries supplied to any foreign ship.

At the trial it was proved that the barge "Leopold" was registered at the port of Montreal on August 5, 1891, and that the registered owner since March 17, 1914, is Samuel Charland, of Montreal. The Provincial Building and Engineering Co. Ltd., a body politic and corporate, having its principal place of business in the City of Montreal, claims that, at the date plaintiffs' services are alleged to have been rendered, it was and ever since has been the real owner of the barge. At the time of the institution of this action, the barge was not under arrest of the court and the owner was either Charland or the said company. It, therefore, follows that under ss. 4 and 5 of the Admiralty Court Act, 1861, this court has no jurisdiction over the plaintiffs' claim for repairs or necessaries. *The Garden City* (1901), 7 Can. Ex. 94. The plaintiffs' claim includes two items for towing, one for $10 for bringing the barge to the dry dock at Sorel, in order to make some repairs considered necessary by plaintiffs, and an item of $20, for towing the barge from Sorel to Berthier, where the plaintiffs

retained the barge in their possession. This towing was not done at the request of the owners of the barge, but was for the convenience of the plaintiffs themselves, and was incidental to the repairs and retention of the barge by plaintiffs. In my opinion this was not the kind of towage which, under the Admiralty Court Act of 1840, s. 6, would give the court jurisdiction. In my opinion, the items for towage were incidental to plaintiffs' claim for necessaries and are to be treated in the same way: *The St. Lawrence* (1880), 5 P.D. 250. Neither claims for towage nor for necessaries are the subject of a maritime lien: *Westrup* v. *Great Yarmouth Steam Carrying Co.* (1889), 43 Ch. D. 241; *The Henrich Bjorn* (1886), 11 App. Cas. 270.

The plaintiffs submit that the defendant's objection to the jurisdiction having been raised after the trial came too late. Dr. Lushington, in *The Mary Anne*, 34 L.J. Adm. 74, said:—

> If at any time the court discovers and the facts shew that the court has no jurisdiction, it cannot proceed further in the cause; the delay of one or both parties cannot confer jurisdiction.

The objection raised by defendant is not a mere technical objection which could be waived by appearance and proceeding to trial, as under the statute there is absolute absence of jurisdiction: *The Louisa* (1863), Br. and L. 59; *The Eléonore* (1863), Br. and L. 185; *The Barbara Boscowitz* (1894), 3 B.C.R. 445.

The defendant could have raised the question of jurisdiction before trial, and if that had been done some expense for both parties would have been avoided. The defendant tendered and deposited with the registrar the sum of $250 with the defence. As at the time of the institution of this action the barge was not under arrest of the court, and its owner was domiciled in Canada, it is clear that the court has no jurisdiction. There will be judgment dismissing the action, each party paying their own costs, and the registrar is directed to return the deposit of $250 to the party from whom he received it. *Action dismissed.*

AMSON v. TOWN OF RADISSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. March 20, 1919.

MUNICIPAL CORPORATIONS (§ II G—231)—TOWN ACT (SASK.)—EXERCISE OF POWERS UNDER—INJURIOUS AFFECTION OF PROPERTY—DAMAGES. Under s. 340 of the Town Act (Sask. stats. 1916, c. 19) the owner of property is entitled to damages for injurious affection to the property by the exercise of the powers conferred by the Act upon the town although no property has, in fact, been taken.

SASK.

C. A.

AMSON
v.
TOWN OF
RADISSON.

The effect of s. 343 of the Act is that the town may, if it sees fit, give notice in a local newspaper of the completion of the work, and in such notice may state the last day on which a claim for damages may be filed, and claims must be filed within the time limited by the notice. In the absence of such notice by the town, notice within a year as provided by s. 342 is sufficient.

Statement.

APPEAL from an order of MacDonald, J., appointing an arbitrator to determine the amount of damages for injurious affection to property, in the exercise of powers conferred by the Town Act (Sask.). Affirmed.

H. M. Allan, for appellant; *C. M. Johnston* and *J. E. McDermid*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—Certain land of the respondent in the Town of Radisson is alleged to have been damaged by the construction of a sidewalk by the Town of Radisson.

The work was completed on or about September 1, 1917, and on July 24, 1918, the respondent served the town with a notice of claim for damages. On November 14, on the application of the respondent, an order was made by MacDonald, J., appointing an arbitrator to determine the amount of such damages.

The appellant appeals from this order on the following grounds: (1) That the Town of Radisson did not take any lands of the said Mary Ellen Amson in the exercise of any of the powers conferred by the Town Act. (2) That the said Mary Ellen Amson failed to establish that she had sustained any damage by the exercise by the Town of Radisson of the powers referred to in s. 340 of the Town Act. (3) That the said Mary Ellen Amson has not established that she is one of the persons to whom compensation is payable under the provisions of the Town Act. (4) That the Town of Radisson, not having taken any lands of the said Mary Ellen Amson in the exercise of any of the powers conferred by the Town Act, is not liable to pay compensation for any lands of the said Mary Ellen Amson, injuriously affected by the works carried on by the said town under the provisions of the Town Act.

S. 340 of the Town Act (c. 19 of the statutes of 1916) is as follows:—

340. The council shall make to the owners of land taken by the town in the exercise of any of the powers conferred by this Act due compensation therefor, and shall pay damages for any land injuriously affected by such exercise.

(2) Such compensation or damages shall be the value of the land taken

or the amount of the injury done, as the case may be, less any increased value which the contemplated work may give to the remaining lands of the claimant beyond the increased value common to all the lands in the locality.

(3) Any claim for such compensation or damages, if not mutually agreed upon, shall be determined by arbitration under this Act.

(4) Where part only of the land of an owner is expropriated, there shall be included in the award a sum sufficient to compensate him for any damages directly resulting from severance.

The section, in my opinion, makes provision for two distinct and separate things, (1) compensation for land taken by the town in the exercise of any of the powers conferred by the Act, and (2) damages for any land injuriously affected by "such exercise," that is, the exercise of any of the powers conferred by the Act.

Throughout the Act—in subs. (2) of s. 340, s. 342, subs. (1) of s. 343, and ss. 346, 348, 351 and 352, the distinction is clearly drawn between compensation and damages. This point was decided in *Vachon* v. *City of Prince Albert* (1916), 9 S.L.R. 80, where the effect of an almost similar section of the City Act was under consideration.

Another point taken by the appellant was, that there was no notice of a claim for damages filed with the clerk of the town in accordance with the provisions of s. 343.

That section reads in part as follows:—

343. The council shall authorize the town clerk to give notice in a local newspaper of the completion of any municipal work forthwith after the person in charge of the work has given his final certificate. Such notice shall state the last day on which a claim for damages in respect of land not taken but injuriously affected by the work may be filed with the clerk.

(2) The notice shall also state that the owner of such land must file with the clerk within three months after publication of the notice his claim for damages, stating the amount and particulars of such claim. . . .

(4) Except in the cases mentioned in the next following section, any claim not made within the period limited shall be forever barred, unless upon application to a Judge of the Supreme Court, made not later than one year from the publication of the notice, and after seven days' notice to the town, the judge allows the claim to be made.

There is no evidence to shew that the notice required by sub-s. (1) was ever published.

The notice served in this case was served within the time fixed by s. 342, which provides that the notice shall be made within one year after the injury was sustained. This notice, in default of action by the council under s. 343, is, in my opinion, sufficient.

The appeal should be dismissed with costs.

LAMONT, J.A.:—Both before and after 1917 the respondent

Lamont, J.A.

SASK.

C. A.

AMSON v. TOWN OF RADISSON.

Lamont, J.A.

conducted a general store business in a building situate on lot 7, block 1, in the Town of Radisson, of which she was the owner. In front of said land and building and contiguous thereto was a board sidewalk on Main St. of said town which afforded immediate and easy access to the said building. In the summer of 1917 the town, in the exercise of the powers conferred on it by the Town Act, removed the board sidewalk, excavated in front of said land and building to a depth of 27 inches, and laid a new concrete sidewalk on the bottom of said excavation with its inner side contiguous to the said building, with the result, so the respondent claims, of seriously interfering with the access to the said building, and thus injuriously affecting the said lot. The construction of the concrete sidewalk was completed September 1, 1917. In July, 1918, the respondent forwarded to the said town a claim for damages resulting from her land being injuriously affected by said excavation and construction. She then made an application in chambers for the appointment of an arbitrator to assess the damages suffered. Her application was granted, and an order appointing an arbitrator was made. From that order the town now appeals.

Two arguments are advanced on behalf of the town: (1) That under the Town Act an owner of land was not entitled to damages for injurious affection thereto, unless some of his land had been taken by the town; (2) that even if the respondent was entitled to recover, no order for the appointment of an arbitrator should have been made in the absence of evidence that the town had not by notice, under s. 343, fixed the last day for filing a claim for damages at a date prior to the receipt of the respondent's claim.

The first of the above arguments was disposed of adversely to the town by the court *en banc* in *Vachon* v. *City of Prince Albert*, 9 S.L.R. 80. In giving the judgment of the court my brother Elwood, at p. 87, said:—

> It was argued before us that the compensation payable for land injuriously affected was only payable when some land had been taken and other land injuriously affected. I am of opinion, however, that the clear meaning of the above section is that the council shall pay damages for any land injuriously affected by the exercise of the powers conferred by the City Act upon the city.

Counsel for the town sought to distinguish that case on the

ground that the language of s. 340 of the present Act was not identical with s. 235 of the Act, under which the case was decided.

So far as the point before us is concerned, I can see no difference in meaning between the sections.

The other argument on behalf of the town is equally untenable. S. 342 provides that a claim for damages for injurious affection to land shall (with certain exceptions) be made in writing within 1 year after the injury was sustained, or after it became known to the person entitled.

S. 343 reads as follows:—

343. The council shall authorize the town clerk to give notice in a local newspaper of the completion of any municipal work forthwith after the person in charge of the work has given his final certificate. Such notice shall state the last day on which a claim for damages in respect of land not taken but injuriously affected by the work may be filed with the clerk.

(2) The notice shall also state that the owner of such land must file with the clerk within three months after publication of the notice his claim for damages, stating the amount and particulars of such claim.

Sub-s. (4) provides for the barring of any claim not made within the period limited, unless upon application to a Judge of the Supreme Court he allows the claim to be made.

The respondent having given notice of her claim within the time specified in s. 342, is entitled to have it adjudicated upon unless the town shews—"and the onus is on the town"—that the time specified in s. 342 has been abridged by notice properly given under s. 343. The town having failed to shew that the notice therein provided for was given, the respondent was entitled to the order made.

The appeal should be dismissed with costs.

ELWOOD, J.A.:—The respondent is the owner of lot 7 in block 1, according to plan E.A. of the Town of Radisson. During the year 1917 the said Town of Radisson, exercising the powers conferred upon it by the Saskatchewan Town Act, being c. 19 of the statutes of Saskatchewan for the year 1916, constructed a concrete sidewalk abutting directly on said land. The construction of said sidewalk in front of said land was completed by the said town on or about September 1, 1917.

Elwood, J.A.

The respondent claims that, in the construction of said sidewalk, it was necessary for the said town and the said town did make an excavation in front of said land and the building thereon to a depth of 27 inches and that said sidewalk was laid in said

SASK.

C. A.

AMSON v. TOWN OF RADISSON.

Elwood, J.A.

excavation, with the result that the building on said land, which was a store building, was considerably above the sidewalk, to the damage of the respondent. On or about July 24, 1918, the respondent, through her solicitors, forwarded to the said town a notice of claim for such damages. On or about October 19, 1918, the respondent caused to be served on said town a notice of motion returnable on October 24, 1918, to be made before the presiding Judge of the Court of King's Bench in Chambers, at the City of Regina, to appoint an arbitrator to determine the amount of said damages: and on November 14, 1918, MacDonald, J., made an order appointing A. E. Bence, of the City of Saskatoon, to be an arbitrator to determine the amount of such damages. From the above order this appeal is taken.

S. 340 of the Town Act is as follows:—(See judgment of Haultain, C.J.)

It was argued before us that the damages payable for land injuriously affected were only payable when some land had been taken and other land injuriously affected, and that, as in the present case no land was taken, the respondent is not entitled to recover damages for work done by the town under its statutory powers.

This question came before us—under s. 245 of the City Act, being c. 84 of R.S.S. (1909)—in the case of *Vachon* v. *City of Prince Albert*, *supra*, and it was there held that the meaning of s. 245 of the then City Act was that the council shall pay damages for any land injuriously affected by the exercise of the powers conferred by the City Act upon the city, quite irrespective of whether land has or has not been taken.

S. 245 of the then City Act is as follows:—

245. The said council or commissioners shall make to the owners or occupiers of or other persons interested in any land taken by the city in the exercise of any of the powers conferred by this Act due compensation therefor and pay damages for any land or interest therein injuriously affected by the exercise of such powers, the amount of such damages being such as necessarily result from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation or damages if not mutually agreed upon shall be determined by arbitration under this Act.

It was argued before us that s. 340 of the Town Act is different in meaning from s. 245 of the City Act, and that the concluding words of sub-s. 1 of s. 340, "affected by such exercise," refer to the taking of land.

SASK.

C. A.

AMSON v. TOWN OF RADISSON.

Elwood, J.A.

I am of the opinion that that is not the proper construction of the sub-section, and that the words "such exercise" refer to the exercise of any of the powers conferred by the Act, and that, therefore, the respondent is entitled to damages if her land has been injuriously affected by the construction of the sidewalk in question.

It was further contended that the appeal should be allowed because no evidence was given that the town had been given the notice referred to in s. 343 of the Town Act, or that the respondent had filed notice of her claim within the time mentioned in that section.

S. 342 of the Town Act is as follows:—

342. Except where the person entitled is an infant, a lunatic, or of unsound mind, a claim for damages resulting from his land being injuriously affected shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to such damages shall be forever barred,

and a notice was given on behalf of the respondent to the town of her claim within the year mentioned in s. 342.

I am of the opinion that the effect of s. 343 is that the town may, if it sees fit, give notice in a local newspaper of the completion of the work, and in such notice may state the last day on which a claim for damages may be filed, and that, if that is done, notice of claims must be filed within the time limited by s. 343.

There was no evidence before us that the town had ever caused any such notice to be published, and if the town wished to cut down the time given by s. 342 for giving notice of a claim for damages, evidence should have been brought before MacDonald, J., on the application before him to shew that the town had given the notice under s. 343.

In the absence of evidence that the town had given a notice under s. 343, I am of opinion that the respondent is entitled to rely on the notice which she gave under s. 342.

In my opinion this appeal should be dismissed with costs.

Appeal dismissed.

N. B.

S. C.

LEMON v. CHARLTON.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. February 14, 1919.

WILLS (§ I A—5)—WILLS ACT—BEQUEST OF "CERTAIN AMOUNT" TO A "CERTAIN PERSON" SECRETLY CONFIDED TO EXECUTOR—VALIDITY.

Provision 4 of the Wills Act (C.S.N.B. 1903, c. 160), which enacts that "no will shall be valid unless it be in writing . . ." and executed in a certain formal way, does not mean that every bequest contained in or under a testament must be reduced to writing in order to have validity; a bequest, if otherwise valid, may be made to "a certain person" of "a certain sum," the testator confiding the name of the beneficiary and the amount of the bequest secretly to the executor, who, upon accepting the executorship, becomes trustee for the unnamed beneficiary.

[*Lemon* v. *Charlton* (1916), 34 D.L.R. 234, McLeod, C.J., affirmed.]

Statement. APPEAL by defendant from an order of Sir E. McLeod, retired Chief Justice, and White, J., in an action for declaration and decree under a will.

M. G. Teed, K.C., supports appeal.

G. H. V. Belyea, K.C., *contra*.

The judgment of the court was delivered by

McKeown, C.J. MCKEOWN, C. J.:—William McLean, late of the City of Saint John in the Province of New Brunswick, departed this life at the City of Saint John aforesaid on September 21, 1912, having first duly made and executed his last will and testament dated November 6, 1909, whereby he appointed the defendant William Charlton, sole executor thereof.

This appeal has to do with the construction of a certain clause of said will which, being brief, may be set out in full. It reads as follows:—

This is the last will and testament of me William McLean of the City of Saint John in the Province of New Brunswick, and I do hereby declare this to be my said last will and testament and do hereby revoke all former wills by me at any time heretofore made. I nominate, constitute and appoint my partner and son-in-law, William Charlton, to be the sole executor of this my said last will and testament.

I direct my said executor, after paying all my just debts, funeral and testamentary expenses to pay a certain person whom I have made known to him and whose name I otherwise desire to be kept strictly secret, a certain sum of money, as soon after my decease as can conveniently be done, the amount is to be kept secret but has been made known to him by me, and I can rely upon my said executor to faithfully carry out this said trust.

All the rest, residue and remainder of my property of every nature and kind whatsoever situate of which I shall die seized, I give, devise and bequeath to my daughter, Elizabeth M. Charlton, the same to become and be her own absolute property.

In faith and testimony whereof I, the said William McLean, have here-

unto subscribed my name and affixed my seal to this my last will and testament at the City of Saint John aforesaid the sixth day of November, A.D., 1909.

Signed, sealed, published and declared by the said testator as and for his said last will and testament in the presence of us who in his presence and in the presence of each other all being present at the same time and at his request have hereunto subscribed our names as witnesses, the letters "Charl" on the fourth line from the top having been first scored out.

(Sdg.) Wm McLean (L.S.)

(Sdg.) Jas. A. Cooper.
(Sdg.) H. H. Pickett.

The defendant, William Charlton, executor of said will, is a son-in-law to the deceased testator; and his wife, testator's daughter, has, by amendment, been made a defendant with her husband in this suit. The decree appealed from sustains the claim put forward by plaintiff, namely, that she (plaintiff) is the person referred to in the said will, and that the sum of $2,000 was the sum made known to the executor by the testator and so directed to be paid to plaintiff, she being the "certain person" named to the executor by the testator.

On application made to the late Chief Justice, Sir E. McLeod, it was ordered that the questions of law involved should be set down for argument and disposed of prior to the trial of the issues of fact. Hearing upon the legal matters was had before him, and by his judgment he held the bequest valid, and that plaintiff was entitled to shew by evidence the amount of money to be paid, and to whom it should be paid.

After the retirement of Sir E. McLeod as Chief Justice of the province, trial of the disputed facts was had before Mr. Justice White, who in a considered judgment made the following findings:—

I find as a fact that the person referred to in said last will as a "certain person whom I have made known to him and whose name I otherwise desire to be kept strictly secret," is the plaintiff in this action, and that the money therein referred to as a "certain sum of money, the amount of which is to be kept secret but has been made known to him by me," is the sum of $2,000, and that, at the time of the making of the said will, the testator informed the defendant William Charlton that he had that amount of money then in deposit in the bank, as the fact was.

I find that on September 17, 1912, the defendant Elizabeth M. Charlton, in fraud of the plaintiff, withdrew moneys, which, prior to that date, had been on deposit in the Marsh Bridge branch of the Bank of New Brunswick in the name of her father and herself, but which were really the sole property of her father, and fraudulently converted and applied the same to the use of

N. B.

S. C.

LEMON v. CHARLTON.

McKeown, C.J.

herself and her said husband, and that her husband had knowledge of, and acquiesced in, such fraudulent conversion, probably prior to, but certainly shortly after the death of the said testator, and that he connived at and participated in, such fraudulent appropriation and conversion of said moneys.

I, therefore, find and adjudge that the plaintiff is entitled as a legatee under said last will to be paid the sum of $2,000 together with interest thereon at the rate of 5% per annum from September 17, 1913, out of so much of the testator's personal estate as shall remain after payment of all his just debts and funeral and testamentary expenses.

In order to give effect to the provisions of the will, White, J., has ordered that the estate of the testator, and all property whereof he died seized or entitled, should be administered in the Chancery Court, and also has directed that the necessary accounts thereof be taken before a Master, and report be made by him as particularly specified in the judgment appealed from; with leave reserved for either party from time to time to apply for further order or directions—

and that the defendants do forthwith, upon settlement and entry of decree hereunder, pay to the plaintiff all her costs of this action down to and including such interim decree, including all costs of the hearing had before Sir E. McLeod, C.J., upon the question of law determined by him as aforesaid and the costs of the uncompleted trial before him of the issues of fact herein, etc.

The only part of the testimony I think necessary to be particularly referred to in considering the appeal, is that upon which the judge's finding of fraud rests. In my view, such finding has not a little to do with the general aspect of the case. It was shewn by the testimony of the defendant Elizabeth Charlton, that about 4 days before her father's death, she drew all his money ($1,991.19) from the Bank of Nova Scotia and deposited it in her own name and in that of her husband, a joint account, in the Bank of British North America. Her explanation of this action is upon the record, but the judge finds that it was in fraud of the plaintiff, connived at by the defendant William Charlton; and I presume it was because of such finding that he considered the Chancery Court to be the proper tribunal in which the estate of the testator should be administered.

The defendants' appeal is grounded upon the provision 4 of the Wills Act (C.S.N.B. 1903, c. 160) by which it is enacted as follows:—

S. 4. No will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned, that is to say, etc.

The section goes on to particularly describe the method of execution and there is no dispute that the testamentary document admitted to probate was executed in the way the section requires. In the determination of this matter, the court has now got to a point at which it has been established that the testator directed his executor, the defendant William Charlton, to pay the sum of $2,000 to the plaintiff. It is also established that the said executor connived at the fraudulent misappropriation by his wife of the money set apart by the testator for such purpose. Also with full knowledge of the trust reposed in him, and having agreed to carry it out, the defendant William Charlton accepted the office of executor of William McLean's estate, by virtue of which he knew that all the property of William McLean would come under his (the defendant's) control. Having assumed such position, he now urges upon the court that the testator's whole action in this regard amounts to nothing, and that such misappropriation cannot be disturbed—and that is the point at issue.

It was remarked during the argument by counsel upon both sides of the controversy, that no reported case exactly similar to the one before us can be found. That is to say, there is no reported decision, in which a direction to an executor to pay an unnamed amount to an unnamed person, has been adjudged a good bequest. It is fully established, I think, that a bequest to a named legatee, with instructions to apply such bequest to the benefit of a party unnamed in the will is valid, and that such legatee takes the bequest subject to the trust involved in favor of such unnamed party. I will take occasion a little later to remark upon one or two such cases, but I refer to such decisions at present in order to say, that, to my mind, the effect of such holding is to impair the argument addressed to us on defendant's behalf as founded upon the fourth section of the Wills Act. It is true that this section says that the "will" must be in writing and executed in a certain formal way. It does not say, however, that every bequest contained in or under a testament, must be so reduced to writing in order to have validity. If (as seems to be the case) a bequest is valid, concerning which the beneficiary is unnamed as far as the will shews, but privately com-

N. B.

S. C.

LEMON v. CHARLTON.

McKeown, C.J.

municated to the legatee named therein, it seems to follow that the proper interpretation of section four of the Wills Act does not mean that every bequest shall be detailed in the will. But it is argued that, in the will before us, we have not only an unnamed beneficiary, but an unnamed amount. As a question of construction of the statute, if one of these two matters can be secretly confided to a legatee who thereby becomes a trustee for the unnamed beneficiary, there seems to me to be no logical reason for saying that both of them can not be confided to the executor, who is primarily responsible for carrying out the testator's wishes. I cannot avoid recognizing the potential abuses of such a method of making a bequest. It imposes upon the one claiming against a residuary legatee, or against the named legatee, the heavy burden of satisfying the court in the matter involved, a burden palpably so onerous that only under most exceptional circumstances does it ever come into existence. But, in some instances, an individual bequest might very properly be worded in the way suggested, and the case before us seems to be one of them, and such a one, that, unless the court concludes that the wording of the Wills Act is a complete bar to plaintiff's recovery, there would seem to be no trouble in giving effect to the testator's well ascertained intention. After giving the matter serious consideration I am of opinion that the judgment of Sir E. McLeod, C.J., should be sustained and this appeal dismissed. There being presumably no decisions to guide us, regard must be had to the principles which are involved in the construction of the statute, and to whatever assistance can be gathered from cases nearest to the present one.

Before discussing the authorities, I desire to make reference to a point that was strongly urged on the court by counsel on defendant's behalf, namely, that here there is no gift provided in the will in regard to which a trust can be created, or concerning which it can arise. It was pointed out, and forcibly insisted upon, that the cases discussed by plaintiff's counsel were those in which a specified bequest had been made to some person, and as to said bequest the contention was, that an unnamed third person was to be the beneficiary. It was pointed out that, in the will before us, there is no such devise, and the present

N. B.

S. C.

LEMON v. CHARLTON.

McKeown, C.J.

case is thus, in principle, different from the ones so discussed; that there is here no bequest or legacy to the executor, and consequently no trust can operate as contended by plaintiff. If I may presume to say so, I very respectfully concur in the remarks of Sir E. McLeod, C.J., upon this branch of the case. He says as follows (34 D.L.R. 236-7):—

> In this case the bequest is specific in that it directs the executor to pay to a certain person, who is made known to the executor by the testator, a certain amount of money, which is also made known to the executor by the testator. So that when the defendant took out a probate of the will and took upon himself the administration of the estate, he knew that the testator by that clause in the will had directed him to pay this sum of money to the person named to him. And I think it must further be taken, at all events at this hearing, that the executor, when the testator told him the person and the amount he wished paid, that he assented and agreed to do so when he was appointed executor. . . . It was strongly claimed that in order to create a trust, the bequest must be made to the trustee. I had said I do not treat this so much as a trust as a bequest. But if this bequest is good, Charlton becomes a trustee. When he took out the probate of the will, and becomes possessed of the property, he then has the legal title to all the personal property and must hold it subject to the disposition of the will. It does not seem to me that it makes any difference how he becomes a trustee, that is, whether he is a trustee because the property is willed directly to him with oral instructions to pay it to someone else, or becomes a trustee by virtue of taking out probate of the will, having previously received instructions to pay a certain sum of money to a certain person.

In the case of *Attenborough* v. *Solomon*, [1913] A.C. 76. Haldane, L. C., had occasion to remark upon the status of an executor. He says at p. 82:—

> The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator, which vests him with the *plenum dominium* over the testator's chattels. He takes that, I say, by virtue of his office. The will becomes operative so far as its dispositions of personality are concerned, only it and when the executor assents to those dispositions. . . . So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent.

In my view the defendant William Charlton, having obtained possession of the property to which, or concerning which he had promised to carry out the testator's request, must be considered a trustee for that purpose. I think that he became "a

N. B.
S. C.
LEMON
v.
CHARLTON.
McKeown, C.J.

trustee by virtue of taking out the probate of the will," to use the expression of Sir E. McLeod, C.J. I consequently think that the objections urged against the plaintiff's claim upon the ground that there is nothing concerning which a trust can operate or be declared, cannot be sustained, also that the contention of uncertainty has been met by the findings of White, J.

In vol. 2 of Vernon's Reports, p. 99, the case of *Pring* v. *Pring* (1689), 23 E.R. 673, is briefly reported. The testator appointed three executors in trust for an unnamed beneficiary. By the admission of two of the executors it was revealed that the testator's wife was the person so unnamed in the will, and whom he desired to benefit.

> The will declaring that the executors are only in trust, and not declaring for whom, the person may be averred, and two of the executors having by their answer confessed the trust, and it being likewise fully proved, that it was the intent of the testator, and that he declared it a trust for his wife, decreed the trust for the plaintiff, with costs, etc., p. 100.

And the court thereupon declared a trust accordingly. The cases are not wholly similar, because in the year 1689, when the *Pring* case was decided, executors had far more beneficial interests in estates than they now have, although, in that case, they received a legacy of only twenty shillings each. But there still remains the fact that the testator confided to his executors the carrying out of the trust for the unnamed party, which is similar to the case before us. And I think it will be conceded that no special words are necessary to create a trust. The language of the section of the will before us, which is a direction to the executor to pay to the party indicated, and also an expression of reliance upon the executor "to faithfully carry out this said trust"—coupled with the acceptance of the executorship by the defendant, well knowing that this clause was in the will and exactly what it meant—all this, I say, to my mind, creates a trust of which the courts will take notice.

Par. 1, s. 2 of c. 8, of Lewin on Trusts, 12th ed., upon implied trusts, reads, p. 148:—

> Wherever a person having a power of disposition over property, manifests any intention with respect to it in favour of another, the court where there is sufficient consideration, or in a will where consideration is implied, will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed.

It will thus be seen that where an implied trust arises from the words used by the testator in his will,

> the intention of the testator is considered imperative, and the devisee or legatee is bound and may be compelled to give effect to the injunction, p. 132.

It is true that it is the "devisee" or "legatee" who is expressed to be "bound," but it is not with the legatee, *qua* legatee, that the court deals, it is with the legatee, *qua* trustee, that the court has to do; and whether such trustee has been clothed with his trust by the operation of a legacy, or of an executorship, seems to me to make no difference at all in his standing before the court, and when we have, as here, a like direction to the executor, no reason suggests itself to me why he should not be equally bound to carry it out. As before explained, it is the executor who passes the property over to the legatee. He is directed in the will before us to give the property to his wife as residuary legatee, after the payment of the necessary expenses, and the certain sum of money to the plaintiff.

At p. 132 the same author refers to Lord Alvanley's rule enunciating the correct principle with reference to the creation of a trust, which is—that a trust is created "where a testator points out objects, property, and the way in which it shall go."

In the case of *Re Fleetwood* (1880), 15 Ch.D. 594, the testatrix having made no less than three codicils to her will, finally executed a fourth in the following words:—

> I hereby bequeath to B. (to whom I have willed my landed property) also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do.

Upon the question as to the nature of the request and how the same was worked out, B. the legatee testified that, before executing this codicil, Miss Elizabeth Fleetwood, the testatrix, had acquainted him with the desired alterations, and that he took a note of them and repeated them to her. The memorandum was not signed by the testator, and the court held that the nature of the trust with which B. had been clothed by the testatrix, by her giving to him the personalty to be applied as she had requested him to do, was sufficiently established by B.'s evidence, and that having been so established, the court would decree that effect be given to it.

Hall, V. C., in his judgment at p. 607 says:—

N. B.

S. C.

LEMON v. CHARLTON.

McKeown, C.J.

The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud on him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself, etc.

The above case is one in which the trust was attached to a bequest, but I can see no difference in principle in a trust attached to a bequest and therefore binding upon the legatee, and a trust attaching to property in the hands of an executor who has full power over the same, and without whose assent the legatee cannot take. In *Riordan* v. *Banon* (1876), 10 Ir. R. Eq. 469, a legatee was directed to dispose of a pecuniary legacy in the manner specified by a memorandum to be left with him by the testator. It was established by parol testimony, that, prior to the execution of the will, the legatee had been verbally informed by the testator that the legacy in question was to be in trust for a person then named, and it was also shewn that the legatee agreed to take the bequest for such purpose, and promised to so apply it. Under these facts, the Vice-Chancellor held that a valid trust had been created for the benefit of the person indicated by the testator, and that verbal evidence was admissible to show that a legacy had been bequeathed upon a trust partially undisclosed upon the face of the will, when at the time or before its execution, the trust had been communicated by the testator to the legatee and had been accepted by the latter. He further said at p. 477:—

> The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by the statute, or by parol, but that when, at the time of making his will, he has formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner, not thereby disclosed, but communicated to the legatee and assented to by him, at or before the making of the will, or probably, according to *Moss* v. *Cooper* (1861), 1 J. & H. 352, 70 E.R. 782, subsequently to the making of it, the court will allow such trust to be proved by admission of the legatee or other parol evidence, and will, if it be legal, give effect to it.

This case is cited and relied upon by Hall, V.C., in the *Fleetwood* case:

It will be noted from the above quotation that the court speaks of a legacy being "disposed of by the legatee in a particular manner not thereby disclosed, but announced to the legatee and assented to by him, etc." If this be a correct

summary of the result of the cases, there seems to be no restriction either because of an unnamed legatee, or because of an unnamed amount, or because of both. The words are broad enough to enable a trust to be directed in favor of more than one person for different amounts of the legacy in question. In other words, suppose the legacy concerning which the trust is established, amounted to $1,000, it is open, I take it, under the authority of the above case, to shew that this $1,000 is to be split up among any number of persons, in any amounts which could be proven. Here then we would have the court confronted with a trust in favor of an unnamed person for an unnamed amount, which is the difficulty urged against its validity in the case before us. There still remains, however, the point of difference that in the above instance an original bequest was made by the testator to a named legatee, thereby distinguishing between such a case and one where, as here, the executor takes the testator's property directly burdened with the trust, but if both must be considered trustees, as I think they must, no difference in principle exists for such reason.

In *Podmore* v. *Gunning* (1836), 7 Sim. 644, 58 E.R. 985, a testator devised his estate to his wife absolutely:—

> Having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease.

In a suit brought by the plaintiffs, they prayed a decree based on allegations that they, the plaintiffs, were the persons communicated by the plaintiff to his wife as beneficiaries after her decease. The Vice-Chancellor decided that if the plaintiff's allegations had been established, the court would have declared a trust as probated, but he held that the claim had not been proven and the case was, therefore, dismissed.

In Lewin on Trusts the author says, p. 63:—

> 7. So if a person before the Executors' Act, 1830 (11 Geo. IV. & 1 Wm. IV., c. 40), had been simply appointed executor, which conferred upon him a title to the surplus beneficially, averment was not admissible to make him a trustee for the next of kin. But apparently the authorities established that if, from any circumstances appearing on the face of the will, as the gift of a legacy to the executor, the law presumed only that he was not intended to take the surplus beneficially, the executor might rebut that presumption by the production of parol evidence, when, of course, the next of kin might fortify the presumption by oppressing parol evidence in contradiction. But where

N. B.

S. C.

LEMON v. CHARLTON.

McKeown, C.J.

the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee," expressly, the *primâ facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention. By the Act referred to an executor is made *primâ facie* a trustee for the next of kin. Where there are no next of kin the title of the executor, as against the Crown, is not affected by the statute, and the old law applies. But if the executor be stamped by the will with the character of trustee, and there are no next of kin, the Crown will take. And, of course, whether there be next of kin or not, if it appear from the whole will that the executors were intended to take beneficially, the statute is excluded.

8. An exception to the rule, that parol trusts cannot be declared upon an estate devised by a will, exists in case of fraud. The court will never allow a man to take advantage of his own wrong, and therefore, if an heir, or devisee, or legatee or next of kin, contrive to secure to himself the succession of the property through fraud, the court affects the conscience of the legal holder, and converts him into a trustee, and compels him to execute the disappointed intention.

In the case of *Hetley* v. *Hetley* (1902), 71 L.J.Ch. 769, Joyce, J., held that parol evidence was not admissible to explain a testator's wishes where his widow had been appointed sole executrix and given a life interest in his property, and it was sought to give effect to a clause in the will which read as follows:—

> I desire and empower her by will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her.

The judge took the view that, inasmuch as the widow only had a life interest in the property, no parol evidence was admissible for the purpose of giving her power of disposition which would enable her to deal with more than her life interest.

In the case of *Re Huxtable*, reported in the same volume at p. 876, a testatrix by her will gave £4,000 to C. "for the charitable purposes agreed upon between us." The Court of Appeal consisting of Vaughan Williams, Sterling and Cozens-Hardy, L.JJ., held that evidence was admissible for the purpose of shewing what the charitable purposes so agreed upon were. Without multiplying authorities, I think it can be taken as thoroughly decided that particular evidence is admissible for the purpose of explaining an uncertain term in a will. In other words that the true interpretation of the section of the Wills Act to which reference has been made, does not involve the necessity of every individual bequest in a testamentary disposition being set out in full, and I can see no difference in principle

between admitting evidence to determine both the person intended and the sum bequeathed, and the admission of like testimony to show only one of such uncertain matters. It was argued before us that the gift is uncertain. So it is on the face of the will; so it was in the *Huxtable* case and many others referred to. But the element of uncertainty was removed by parol evidence in these cases above cited; and by the decision in the court below all uncertainty has been removed in the present case. Courts will not establish a trust if there be uncertainty as to the subject-matter, that is, of the property claimed to be bound by the trust; or where the objects of the trust are uncertain, as a trust for the testator's friends. But in cases like those heretofore cited, where the testator's intention can readily be ascertained by evidence, I can see no difficulty in holding the bequest a valid one.

I have not dealt with this matter from the standpoint of fraud, but in the quotation from Lewin on Trusts, p. 64 above cited, it is remarked that:—

> The court will never allow a man to take advantage of his own wrong and, therefore, if an heir, or devisee, or legatee, or next of kin, contrives to secure to himself the succession of the property through fraud, the court affects the conscience of the legal holder and converts him into a trustee and compels him to execute the disappointed intention.

From the finding of the court below it is established that the two defendants are equally guilty of fraud, and, therefore, I take it, the Chancery Court has assumed further disposition over this matter. To my mind, the defendants would be taking advantage of their wrongdoing if they were allowed to keep this money, and, for that reason also, I think the judgment of the court below should be affirmed.

I have no doubt that the severe terms with reference to costs have been imposed by reason of the fraud which the judge has found, and to which both defendants are parties; but nevertheless, I think that the defendant Elizabeth M. Charlton should not be condemned to pay costs of any part of the proceedings prior to her being made a party to the suit. Neither do I think that the costs of the uncompleted trial before McLeod, C.J., in which judgment was not given, and all proceedings con-

N. B.
S. C.
McKeown, C.J.

nected therewith being rendered of no effect by the retirement of the presiding judge, should be taxed against either defendant.

With the exceptions above noted, the judgment appealed from will stand, and this appeal is dismissed with costs.

Judgment of White J. varied; appeal dismissed.

CAN.
S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 3, 1919.

TRUSTS (§ I A—1)—CO-DEBTORS—DIRECTION BY PRINCIPAL TO AGENT TO PAY—RESPONSIBILITY OF AGENT—TRUSTEE AND CESTUI QUE TRUST.

An agent directed by his principal to pay to a third person money sent to him for that purpose (the direction or authority not amounting to an assignment of or charge upon the fund) is not in general responsible to such third person should he fail to execute his mandate. He may become so by assenting to the direction and communicating his assent to the intended payee or by undertaking with him to pay the money to him or to hold it for him, but even then the agent does not become a trustee for the intended payee, nor the latter a *cestui que trust*, nor is the fund impressed with a trust so that it becomes in equity the property of the intended payee as it would be if the relation of trustee and *cestui que trust* were established.

[*Merchants Bank* v. *Thomson* (1918), 39 D.L.R. 664, reversed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 39 D.L.R. 664, affirming the judgment of the trial judge maintaining the plaintiff's action.

H. C. Macdonald, for appellants; *S. B. Woods*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—The reasons for the judgment of the Appeal Court in this case stated by Beck and Stuart, JJ., from which judgment the present appeal has been taken, so fully and fairly represent my own views that I feel there is little or nothing I can add to them. I am satisfied to adopt these reasons as my own and would dismiss this appeal.

Counsel, however, for the appellant, pressed very strongly the argument that both Evans and Cairns paid these moneys in dispute before they were compellable to pay them and that their only liability was to the Canadian Agency and not to the Merchants Bank, the assignee of the Eby agreement. He contended there was no evidence of any trust having been created, or of any intention to create a trust, on the part of the agency in receiving the moneys.

I am of opinion that this argument is based upon an incorrect appreciation of the evidence and of all the facts. We should not

look to the form but rather to the substance of the transaction, and I think in so doing we must reach the conclusion that a trust was created when the moneys of Evans and Cairns were paid over to the Canadian Agency before they were due under the agreement, and that trust was to transmit these moneys to the plaintiff respondent, the Merchants Bank, in payment of their share of the instalment of the purchase money of the lands Eby had sold to Biggar and which instalments of purchase money had been assigned by Eby to the bank and one of which fell due the following day.

Biggar had executed a declaration of trust that he had purchased in trust for the agency, but as a fact there was no assignment of the agreements of sale to Canadian Agency, Limited.

The Canadian Agency, on whose behalf Biggar had purchased these lands, had assigned 50% of their interest in them to one Cairns, who in turn assigned 10% interest to Evans subject in each case to payment of a proportionate share of the purchase-price.

During the years 1911, 1912 and 1913, payments of principal and interest were made by the Canadian Agency to the vendor Eby and his assignee the respondent bank, and Evans and Cairns (the latter through the Western Mortgage Co.) had paid through the Canadian Agency their 10% and 40% respectively of these instalments.

In 1913 Eby assigned his vendor's interest in the lands and unpaid purchase moneys to the bank respondent. On June 7, 1914, an instalment of principal and interest, $8,554.90, was due to the respondent bank by Biggar, the purchaser from Eby.

Evans at the time filled the dual positions of manager of the Canadian Agency in Alberta and of president of the Canadian Mortgage Co., and on June 6, the day before the above instalment fell due, he made out his own personal cheque for $855.49 in favour of the Canadian Agency, being his 10% share of the instalment and interest, the cheque stating on its face that it was for "share Eby payment due 7th June, 1914," and as president of the Western Canada Mortgage Co. directed its cheque to be drawn and issued in favour of the Canadian Agency for the sum of $3,421.09, the cheque stating on its face "that it was in payment of 40% due to S. Eby on the 7th June." The two together made up $4,277.45, the 50% of the instalment due the following day on the Eby agree-

CAN.

S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Davies, C.J.

ment. Instead of forwarding these two cheques to the Merchants Bank direct endorsed by Canadian Agency, Evans sent that bank a cheque of the Canadian Agency for the whole sum of $4,277.45 enclosed in a letter which misrepresented the true facts, and two days later the personal cheque of Evans and that of the Canada Mortgage Co. were deposited in the Canadian Agency's general account in the Bank of Montreal to its credit.

When the cheque in favour of respondent was presented for payment the Bank of Montreal refused payment on the wrongful ground that a receiver for the assets of the Canadian Agency had been appointed in England by the court.

Under the state of facts proved at the trial beyond dispute, I do not doubt that the Canadian Agency received the two cheques, Evans' personal one and the Canada Mortgage Co.'s cheque in trust to forward them to the plaintiff the Merchants Bank, the assignee of the Eby agreement, and to whom the instalment of the purchase money was payable.

The fact that the general manager of the security company misrepresented the facts for the purpose of concealing the critical financial position of the Canadian Agency Co., Ltd., is established.

But that misrepresentation cannot in any way alter or change the substance and essence of the transaction as proved by the oral and written evidence at the trial which were that the moneys were paid to the Canadian Agency, Ltd., the day before an instalment of the purchase money due on the Eby agreement fell due, by the Canadian Mortgage Co. on behalf of Cairns and by Evans personally to transmit to the Merchants Bank, the assignee of the Eby agreement, in payment of 40% of that instalment due by Cairns and 10% due by Evans and for no other purpose.

For these reasons I would dismiss the appeal and confirm the judgment of the Appeal Court.

Idington, J.

IDINGTON, J. (dissenting):—The Canadian Agency, Ltd., rested under a double obligation to pay respondent the money in question. Firstly, as the purchaser bound to pay the entire purchase money for lands bought by others as its trustees, and secondly, as the actual recipient from Evans and Cairns to whom it had resold a half interest of their shares of the half of the instalment of purchase money then falling due, and which shares in the respective proportions of 10 and 40% had been so paid it for the

express purpose of the transmission thereof to respondent as the assignee of the obligation that the Canadian Agency, through its trustee, had given Eby, the vendor in question.

Moreover, it owed a duty to its own trustee who had so bought for it and had been indemnified by it against the covenants he had on its behalf entered into with the vendor Eby.

Not one of these several parties thus concerned ever interposed to prevent the payment of the cheque in question unless the dubious letter of Evans can be said, on his behalf, to savour of such interposition.

The cheque, however, was for the exact sum of the total which was paid the agency for the express purpose of remitting to respondent in order to discharge such obligations, and became the property of respondent upon and by virtue of which it was entitled to receive the money from the Bank of Montreal.

No matter how much of falsehood the letter accompanying it may have contained, the agency had parted with the symbol of control of property which entitled the respondent thereby to get the money, and it was entitled to have the agency and all others enjoined from executing any fraudulent purpose that may have been involved in the attempted misdirection and misappropriation of the money?

If the money had been received by the respondent on its presentation of the cheque, as admitted now, it should have been, and applied as originally destined, could the agency company or any of its creditors have insisted on the terms of such a letter being observed under all the circumstances in question?

On such a state of facts as disclosed in the evidence I have no doubt the judgment below is right.

And quite apart from the view I thus present, even if there had never been any cheque sent, there exist in the maze of inter-related obligations so many grounds upon which the respondent could, as assignee of Eby, have enforced some of the several obligations of trusteeship which constituted the fund a trust and bound the Canadian Agency to apply the money in the way it was destined to be applied, the moment it was received by it. That I have no doubt it could not, nor could its liquidator, lawfully apply it otherwise than by paying it to respondent.

The appeal should be dismissed with costs.

CAN.

S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Anglin, J.

ANGLIN, J.:—Mr. O. M. Biggar, nominally on his behalf, but in reality as trustee for Canadian Agency, Ltd. (as evidenced by a declaration of trust), bought a parcel of land from one Eby, the purchase money being payable in instalments. Eby assigned his interest in the agreement to the plaintiff, the Merchants Bank (Battleford branch). Canadian Agency transferred 40% of its interest to one Cairns, and 10% to one Evans, who was its Alberta manager and was also president of the Western Canada Mortgage Co. Cairns and Evans undertook to furnish money as required to meet, or to recoup Canadian Agency for their proportion of Biggar's liability to the vendor, and the Western Canada Mortgage Co. agreed to make advances to meet Cairns' payments.

An instalment of purchase money with interest, amounting in all to $8,554.90, fell due on June 7, 1914. Of this sum, while Canadian Agency owed it all, it was entitled to be recouped by Cairns $3,421.96 and by Evans $855.49. In the case of earlier instalments the whole amounts thereof had in fact been paid by Canadian Agency, Cairns and Evans recouping it for their shares. In June, 1914, Canadian Agency was short of money. Evans' personal cheque for $855.49, and a cheque on the Western Canada Mortgage Co.'s account for $3,421.96, both good, were handed to Canadian Agency on June 6 in order that it should pay these sums by its own cheque to the Merchants Bank to cover Cairns' and Evans' shares of the instalment due on the 7th. The two cheques were deposited, as undoubtedly was intended, to the credit of Canadian Agency's current account in the Bank of Montreal at Edmonton on June 8. On the 6th, a cheque of Canadian Agency drawn on that account for $4,277.45 was sent to the Merchants Bank at Battleford, but accompanied by a letter written by Evans stating in unmistakable terms that it was a payment on behalf of Canadian Agency itself and intended to cover its share of the instalment due on the 7th and that its co-owners had not provided funds to meet their shares of that obligation. Whatever may have been the purpose of this deliberate falsehood, it at least does not lessen the difficulty in which the Merchants Bank and Cairns and Evans now find themselves.

On presentation by the Merchants Bank payment of Canadian Agency's cheque was refused by the Bank of Montreal on the ground that a receiver had been appointed in England of the assets

of the company; and, so far as this record shews, it still remains unpaid. An order for the winding-up of Canadian Agency has since been made and the liquidator defends this action, to which the Bank of Montreal is also a party defendant. But for some reason not disclosed the trial proceeded against the liquidator alone, and he as appellant and the Merchants Bank as respondent are the sole parties to this appeal.

The liability of Canadian Agency to the plaintiff as payee of its dishonoured cheque is not questioned. The object of this action, however, is to obtain the fund itself in the hands of the Bank of Montreal, the relief prayed for being

> a declaration that of the sums now standing to the credit of the defendant, the Canadian Agency Limited, No. 1 account, in the defendant, the Bank of Montreal, at Edmonton, $4,277.45 is the property of the plaintiff.

The evidence establishes probably with sufficient clearness that the $4,277.45 on deposit with the Bank of Montreal, at the time that the dishonoured cheque was presented, to the credit of the account on which it was drawn, was the proceeds of the Cairns' and Evans' cheques, and I shall assume that payment of it was wrongfully refused. *Re Maudslay, Sons and Field*, [1900] 1 Ch. 602.

The plaintiff's claim on the fund is based on two grounds—that the money was impressed with a trust of which Canadian Agency was the trustee and it (the Merchants Bank) the *cestui que trust*; that, since the Bank of Montreal should have paid Canadian Agency's cheque on presentation and equity will treat that as done which ought to have been done, the position is the same as if the proceeds of the Cairns' and Evans' cheques had actually reached the Merchants Bank through the Bank of Montreal or had been sent to it directly by Canadian Agency.

On the second hearing of this appeal counsel for appellant strongly pressed the argument, not before presented, that, having regard to the terms of the agreement of May 25, 1911, between Canadian Agency, Cairns and the Western Canada Mortgage Co. the payments in question by Cairns and Evans to Canadian Agency should be regarded not as payments of money by principals to their agent to be forwarded on their account but as payments by debtors to their creditor actual or about to be. If this view be correct, the case of the appellant is, in my opinion, unanswerable.

CAN.

S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Anglin, J.

But facts which militate against it are that Evans was not a party to the agreement of May 25, 1911, that he knew the financial position of Canadian Agency when he handed the cheques for the Cairns' and Evans' payments to it, and that the agreement contains no express covenant by Cairns, and, of course, none of any kind by Evans, who was not a party to it, to pay respectively 40% and 10% of the instalments of purchase money due to Eby. This much, moreover, seems to be clear—that it was contemplated by the parties that Canadian Agency should place the Cairns' and Evans' cheques to its own credit and should make the payment in question to Eby (the Merchants Bank) on its own account and in fulfilment of the contractual obligation of its trustee, Biggar, against which it was bound to indemnify him. Cairns and Evans were under no contractual obligation either to Eby or to Biggar. Payment was made, not as Eby's debtors, but under contractual obligation with Canadian Agency to make it.

I prefer, however, to deal with the question on the assumption that Evans intended, when he gave to Canadian Agency cheques for his own 10% and Cairns' 40% of the instalment falling due to Eby, to put that company in funds to pay Cairns' and Evans' share of the instalment as their agent. Mr. Woods' contention, as I understand it, was that Canadian Agency received the Cairns' and Evans' cheques in the capacity of their agent to forward the proceeds, with Canadian Agency's own share of the instalment due, to the vendor's assignee, the Merchants Bank. How did this initial agency for Cairns and Evans develop into the trust for the Merchants Bank which Mr. Woods argued it became, and which he must establish in order to succeed? There is not a vestige of intention on the part of Cairns and Evans or either of them to create a trust, or on the part of Canadian Agency to assume the position of trustee. That an agent directed by his principal to pay to a third person money sent to him for that purpose (the direction or authority not amounting to an assignment of or charge upon the fund), is not, in general, responsible to such third person should he fail to execute his mandate is trite law. He may become so by assenting to the direction and communicating his assent to the intended payee or by undertaking with him to pay the money to him or to hold it for him. The law on these points is conveniently collected in 1 Hals. par. 469; see, too, cases

cited in Bowstead on Agency, 5th ed., 426, and Godefroi on Trusts, 4th ed., pp. 62-3. But even then the agent does not become a trustee for the intended payee nor the latter a *cestui que trust*; nor is the fund impressed with a trust so that it becomes in equity the property of the intended payee as it would be if the relation of trustee and *cestui que trust* were established. The prayer of the statement of claim that the fund be declared the property of the plaintiff recognizes this to be the necessary result of the creation of a trust. But the agent so undertaking merely assumes a personal liability to the intended payee. His obligation is contractual or quasi contractual. The payee's right is legal, not equitable. In the event of default by the agent the payee's right of action against him is not to recover the fund but for damages for breach of contract.

The distinction between trusts for the payment of the settlor's creditors generally and trusts for the payment of one or more named creditors, properly insisted upon by Mr. Woods in distinguishing the authorities cited by counsel for the appellant (*Johns* v. *James* (1878), 8 Ch.D. 744, and *Synnot* v. *Simpson* (1854), 5 H.L.C. 121, 10 E.R. 844), is well established. See Underhill on Trusts, 7th ed., p. 36. *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19, is a comparatively modern illustration of the application of the rule stated by Turner, V.-C., in *Smith* v. *Hurst* (1852), 10 Hare 30, at p. 47, 68 E.R. 826, that a trust for particular creditors is effective and irrevocable without communication to or assent by them.

But the foundation of a trust, whether expressly so termed, or arising from apparent intention to create a trust, as distinguished from a mere contractual agency, is present in both classes of cases alike. The trust for creditors generally is sometimes compared to an agency, Lewin on Trusts, 12th ed., 607. It resembles agency in that it is revocable until communication and that such communication is essential to give the creditor a status to make a claim against the agent in the one case, or against the trustee and upon the trust fund in the other. But in the absence of any evidence of intention to create a trust, I find nothing to support the respondent's contention that what was clearly established as an agency became a trust.

Nor can I regard the giving to, or the receipt of, the cheque

CAN.

S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Anglin, J.

by the Merchants Bank, followed by a presentation upon which it should have been accepted and paid as equivalent in legal or equitable effect to a transfer or payment of the money itself to that bank. To do so would be, in my opinion, to give to the dishonoured cheque the effect and operation of an assignment of money in the drawee's hands belonging to the drawer, or at least of a charge upon it. It has neither. Its wrongful dishonour gives no right of action to the payee against the drawee either for the money itself or for damages for such wrongful dishonour. *Schroeder* v. *Central Bank*, (1876) 34 L.T. 735; *Hopkinson* v. *Forster* (1874), L.R. 19, Eq. 74. There can be no charge in equity without an intent to charge. The cheque is merely a bill of exchange payable at the banker's. The giving of it implies neither an intention to assign the drawer's money in the banker's hands nor an intention to charge it. Unless the cheque be treated as amounting to an assignment of, or constituting a charge upon, these moneys, I cannot understand on what footing it can be successfully urged that its receipt and presentation and dishonour would produce the same legal situation as would result from the receipt of the money itself by the payee or a declaration by the banker that such money would be held in trust for him.

The maxim that "equity looks upon that as done which ought to have been done," though of very extended, is certainly not of universal application. Equity will not thus consider things in favour of all persons, but only of those who have a right to pray that the thing should be done. *Burgess* v. *Wheate* (1859), 1 Eden 177, at p. 186, 28 E.R. 652; Story's Equity, 13th ed., p. 68. The Merchants Bank was not in that position. The Bank of Montreal owed no duty to it out of which there might arise an equity entitling it to pray that the Bank of Montreal should be made to accept and pay the dishonoured cheque. The banker's only obligation in respect of a cheque drawn on him is to his customer, the drawer, and it arises out of their contractual relations. The drawer alone, if interested in collateral consequences and incidents, may invoke the maxim under consideration. *Re Anstis Chetwynd* v. *Morgan* (1886), 31 Ch.D. 596, at pp. 605-6; *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609, at p. 619. With deference, wholesome and useful as this doctrine of equity undoubtedly is within the sphere of its legitimate application, it cannot be invoked here.

If it could the money in the Bank of Montreal to the credit of the drawer must be deemed to have become the property of the Merchants Bank just as if it had been actually paid to it on the presentation of the cheque, which would thus be given the effect of an assignment of that money by the drawer to the payee—which it certainly cannot have. *Schroeder* v. *Central Bank*, 34 L.T. 735. Another equitable maxim, which, although likewise by no means of universal application, may not be ignored, is that equity follows the law. It is not a consequence of the dishonour of the Canadian Agency's cheque having been wrongful that the payee's rights in equity are the same as if that cheque had been paid.

That neither Canadian Agency nor the Bank of Montreal was a trustee, that there was no trust fund and that the Merchants Bank was not a *cestui que trust* is, I think, indubitable. Neither did the latter ever attain a position in any sense equivalent to what it would have occupied had the money itself actually reached its hands whether on payment by the Bank of Montreal of Canadian Agency's cheque or directly from that company.

Whatever rights of control Cairns and Evans may have as principals over the disposition of the fund to their agent's credit in the Bank of Montreal, the Merchants Bank has none. Cairns' and Evans' rights, too, are subject to all equities of set-off as between them and the Canadian Agency and its creditors. These rights are not in question here.

I would for these reasons, with respect, allow this appeal and dismiss this action as against the liquidator with costs throughout.

BRODEUR, J.:—I concur with my brother Anglin. Brodeur, J.

MIGNAULT, J.:—So far as they need be stated, the pertinent facts are as follows:— Mignault, J.

In June, 1911, Mr. O. M. Biggar purchased from one Eby certain lands in the Province of Saskatchewan for the price of $47,134.50 on account of which he paid $11,783.62, and the balance was payable by instalments of $7,070.17 on June 7, 1912, 1913, 1914 and 1915, and the remaining balance in 1916, with interest at 7 per cent. to be paid with each instalment. This purchase was made by Mr. Biggar on behalf of the Canadian

CAN.

S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Mignault, J.

Agency, Limited, a corporation having its head office in London, England, which furnished the cash payment made to Eby and Mr. Biggar, on July 15, 1911, executed a declaration of trust in its favour.

The rights of Eby under his sale to Mr. Biggar now belong to the respondent to whom they were assigned by Eby.

At some date subsequent to this purchase an agreement, incorrectly dated of May 25, 1911, was entered into between the Canadian Agency, Ltd., one J. F. Cairns of Saskatoon, and Western Canada Mortgage Co., Ltd., a corporation having its head office in Edmonton, Alberta, whereby it was stated that it had been agreed between the Canadian Agency, Ltd., and Cairns that the latter should take and hold an undivided one-half interest in the lands purchased from Eby and in some other lands acquired from other individuals, Cairns to pay one-half of the costs thereof and of the expenses incurred in connection with the same. It was also stated that Cairns had conveyed one-fifth of his one-half interest to H. M. E. Evans, who was the manager at Edmonton of the Canadian Agency, Ltd., and also the president of Western Canada Mortgage Co., Ltd. The agreement was that the Canadian Agency, Ltd., should hold the lands in trust for the owners thereof as follows: the Canadian Agency, Ltd., an undivided five-tenths interest; Cairns, an undivided four-tenths interest; and Evans, an undivided one-tenth interest in the said lands. It was further agreed that the Canadian Agency, Ltd., should on its own behalf pay one-half of the cost of the said lands and of the expenses of surveying, grading, improving, advertising and developing, and all taxes and assessments, and should collect from Evans 10% of the cost of the said lands and of such expenses, Cairns being bound to pay or cause to be paid 40% of the cost of the lands and expenses. It was also stipulated that the Canadian Agency, Ltd., should do all acts, matters and things required for the improving, developing, advertising and placing upon the market of the said lands and should, on behalf of itself and Cairns, advance all moneys that should be required and should immediately apply to the Western Canada Mortgage Co., Ltd.—which was financing the venture for Cairns—for the 40% share thereof payable by Cairns.

The instalments and interest on the purchase price were paid in 1912 and 1913, these payments, as I read the evidence, being

made by the Canadian Agency, Ltd., Cairns and Evans paying, or causing to be paid, their shares to the latter company. On June 7, 1914, another instalment of $7,070.17 and of $1,484.73 of interest, in all $8,554.90 came due, and it is in connection with this payment that the controversy has arisen.

Taking now the different documents relating to the 1914 payment in the order in which we find them in the case, there is first a cheque, dated June 6, 1914, to the order of the Canadian Agency, Ltd., for $855.49, signed by Evans, for his tenth share of the 1914 payment.

Next there is a cheque dated June 6, 1914, of the Canadian Agency, Ltd., to its own order, for $3,421.96, drawn on its account No. 3, which is said to have been the account of Western Canada Mortgage Co., Ltd. Both of these cheques were deposited to the credit of the Canadian Agency, Ltd., in the Bank of Montreal at Edmonton.

An order dated June 6, 1914, was addressed to the accountant of the Canadian Agency, Ltd., for the issue of a cheque signed "Western Canada Mortgage Co., per H. M. E. Evans."

Then there is a letter to the Merchants Bank of Canada, Battleford, Sask., dated June 6, 1914, and signed by the Canadian Agency, Ltd., per H. M. E. Evans. This letter is as follows:—

Re W. S. Eby.

Enclosed please find our cheque for $4,277.45. This is just half the amount which is due to Mr. Eby on June 7 and which you have given notice to Mr. O. M. Biggar has been assigned to you. It is really a syndicate that is interested in this property and the owners of the half interest in that syndicate have not yet put us in funds to meet their share of the payment. We presume you will grant us a reasonable extension while we are communicating with them on the subject.

THE CANADIAN AGENCY, LIMITED,
Per H. M. E. EVANS.

Then we have the cheque here in question, drawn on June 6, 1914, by the Canadian Agency, Ltd., on its account No. 1 (which was the account of its own moneys), to the order of the Merchants Bank of Canada, Battleford, for the sum of $4,277.45, one-half of the payment of $8,554.90 due to the Merchants Bank as assignee of Eby. Payment of this cheque was refused by the Bank of Montreal, a receiver having been named in England to the Canadian Agency, Ltd.

Finally, there is an exhibit dated June 8, 1914, purporting to

CAN.

S. C.

THOMSON v. MERCHANTS BANK OF CANADA.

Mignault, J.

be a receipt by the Canadian Agency, Ltd., to the Western Canada Mortgage Co. for $3,421.96, "40% of payment due W. S. Eby."

The questions now to be decided are: (1) whether the cheque for $4,277.45, sent by the Canadian Agency, Ltd., to the respondent represents moneys belonging to the Canadian Agency, Ltd., in so far as the funds drawn on and the proceeds of the cheques of Evans and the Western Canada Mortgage Co. are concerned; or (2) whether these funds are funds belonging to Cairns, or the Western Canada Mortgage Co., Ltd., and Evans personally, and subject, in the hands of the Canadian Agency, Ltd., to a trust in favour of the respondent? The judgments rendered by the two courts below amount to an affirmative answer to the second question and to a negative answer to the first question.

With all possible respect, and inasmuch as there is no dispute as to the facts, and the only question is with regard to the inference to be drawn therefrom, the judgments of the Alberta courts are open to review—I think the answer should have been in the negative to the second question and in the affirmative to the first. There is certainly no express trust here and, in my opinion, no trust can be implied from the circumstances I have stated above. The letter written by Mr. Evans to the appellant, above quoted, no doubt contained a false statement, but it certainly would shew that Mr. Evans did not treat the cheques of $855.49 and $3,421.96 as having been given to the Canadian Agency, Ltd., for a specific purpose or as trust moneys, although the former cheque mentioned that it was for "share Eby payment due June 7, 1914." Moreover, the instalment of $8,554.90 due to the appellant on that date, was the debt of the Canadian Agency, Ltd. The latter had sold an undivided one-half interest in the Eby lands to Cairns, and Cairns had sold one-fifth of his interest to Evans. Whatever Cairns or Evans paid to the Canadian Agency, Ltd., on account of these lands was money due by them to this company and not money due by them to Eby or to his assignee, the appellant. Therefore the moneys paid by them to the Canadian Agency, Ltd., and represented by these cheques, were moneys belonging to this company and not trust moneys which came into its possession for a specific purpose.

The appeal should consequently be allowed with costs throughout, and the respondent's action dismissed.

Appeal allowed.

GROSSENBACK v. GOODYEAR.

MAN.

K. B.

Manitoba King's Bench, Galt, J. March 10, 1919.

VENDOR AND PURCHASER (§ I E—29)—AGREEMENT TO PURCHASE LAND—LAST INSTALMENT DUE—VENDOR UNABLE TO GIVE TITLE—REPUDIATION OF CONTRACT.

If at the time the last instalment of the purchase price becomes due and payable under an agreement of sale of land there is a defect in the vendor's title which cannot be removed without the concurrence of a third party, whose concurrence the vendor has no power to require, the purchaser may repudiate the contract and such repudiation is a bar to any subsequent relief by way of specific performance being given, even though the defect be removed before the trial.

The circumstances in each case must be looked at in deciding whether the repudiation has been sufficiently prompt, where time is declared to be of the essence of the contract.

Statement.

ACTION for the repayment of certain moneys paid under an agreement of sale of lands and a lien for the amount or in the alternative specific performance. The defendant denied liability to return the moneys paid and counterclaimed for specific performance. Judgment for plaintiff.

A. E. Hoskin, K.C., and *E. R. Siddall*, for plaintiff; *W. H. Trueman*, K.C., for defendant.

Galt, J.

GALT, J.:—The agreement in question is dated March 18, 1912, and under it the defendant agrees to sell to the plaintiff lots numbered 3 to 10 inclusive in block 45 D.G.S. 17 St. Boniface, for the sum of $2,500, payable $250 in cash upon the execution of the agreement, and the balance in 8 equal consecutive half-yearly instalments, the first being due and payable on September 18, 1912, with interest at the rate of 6%, payable half-yearly.

The following provisions of the agreement have been specially relied upon by one or other of the parties:—

(2) The purchaser covenants with the vendor that he will pay to the said vendor the said sum together with interest thereon as aforesaid on the days and time and in the manner above set forth.

(3) The purchaser covenants with the vendor to pay taxes from and after January 1, 1912.

(4) In consideration whereof, and on payment of all sums due hereunder as aforesaid, the vendor agrees to convey the said lands to the purchaser by transfer under the Real Property Act or deed without covenants other than against encumbrances by the vendor and for further assurance and subject to the conditions and reservations contained in the original grant from the Crown, such transfer or deed to be prepared by the vendor's solicitors at the expense of the purchaser.

And it is further agreed that the purchaser hereby accept title of the vendor to the said lands, and shall not be entitled to call for the production of any abstract of title or proof or evidence of title or any deeds, papers or docu-

MAN.

K. B.

GROSSENBACK v. GOODYEAR.

Galt, J.

ments relating to the said property other than those which are now in the possession of the vendor.

(10) Time shall be in every respect the essence of this agreement.

The plaintiff made his payments from year to year, including taxes, with the exception of the last instalment, which fell due on September 18, 1916, and the taxes for 1917 and 1918. (See answers 7, 8 and 9 in defendant's examination for discovery.) The condition of the title to the said lands at the date of the agreement was as follows:—One Alfred Hoddell was the owner, but, on February 19, 1912, he had executed an agreement of sale, in which he was described as of the City of Los Angeles in the State of California, U.S.A., cook, in favour of one Alexander Wassell Dawnay, for the lots in question and other lots.

On March 1, 1912, Dawnay had executed an agreement of sale of the lots in question to Zach Goodyear, the defendant, for the sum of $1,500.

When the time came for payment by the plaintiff to the defendant of the last instalment on March 18, 1916, the state of the title was in the same condition as it was when the agreement was made.

Neither Dawnay nor Goodyear had completed their payments or obtained title from Hoddell to the lots in question. It does not appear exactly when the plaintiff ascertained the state of the title, but if on March 18, 1916, he had gone to the defendant with the last instalment, the defendant was wholly unable at that time to comply with his agreement and convey the lots. The plaintiff probably discovered this lack of title shortly after his payment became due, because, instead of going to the defendant with his money and asking for a transfer of the lots, he employed Mr. Gregory Barrett (now His Honour Barrett, J.) to investigate the position of affairs.

On September 26, 1916, Mr. Barrett writes to Goodyear as follows:—

Dear Sir: Re Lots 3 to 10, block 45, plan 276, etc.

The above lots were purchased by Samuel Grossenback from you under agreement for sale and Grossenback is now prepared to make his final payment. Before doing so we would like to know how you propose to give him title.

At present the title stands in the name of Alfred Hoddell, with a caveat filed by A. W. Dawnay, and a judgment registered against the latter. Kindly let me hear from you at an early date as my client is anxious to obtain his title.

On September 29, 1916, the defendant writes in reply:—

Dear Sir: In reference to the lots I sold to Mr. Samuel Grossenback, I purchased the same through a friend of Mr. Grossenback's, and I did not know anything of Hoddell until lately when I searched at the Titles Office. I wrote to Mr. Hoddell, but got the letter returned. I will find him out and make enquiries and communicate with you.

On November 2, 1916, Mr. Barrett again writes to the defendant:—

Dear Sir: It is now over a month since I heard from you in reply to my former letter and my client is getting impatient. Be good enough to let me know now what advancement you have made towards getting title, and when you expect to be able to give my client a clear title.

On January 2, 1917, Mr. Barrett again writes the defendant:—

Dear Sir: Re lots 3 to 10, etc., I have waited for over 3 months on behalf of my client Samuel Grossenback to hear what you have done towards perfecting the title to above lots. We cannot allow the matter to go on indefinitely, so let me know at once what is being done, or I will be obliged to bring action for specific performance of the agreement or for return of the purchase price, etc.

Shortly after this Mr. Barrett was appointed County Court Judge and the matter was handed over to Mr. Gunn. Then for some months in 1917, Mr. Hilson, the auctioneer, endeavoured, on plaintiff's behalf, to secure title. The plaintiff gave him money to pay the last instalment. Hilson told the defendant that he was ready to pay the money, but defendant merely said he had not yet got title.

On January 30, 1917, the defendant writes to Mr. Hilson:—

Dear Sir: In reference to Mr. Grossenback's letter I have been very busy of late, but will attend to the matter right away. I have had to wait at times for his money due to me, and I guess he ought not to kick if he has to wait a short time. I have had to pay some on this property, so has he, so please inform him accordingly.

The defendant does not appear to have taken any pains whatever to procure title which he had agreed to give to the plaintiff, nor to pay what he owed to Dawnay. He allowed matters thus to drift along until October 12, 1918, when the plaintiff, through Thomas McKay, tendered to the defendant $317.20 and requested a transfer of the lands. McKay states that the defendant then said he was not in a position to give title because he was not paid up under his agreement with Dawnay, and that Dawnay was not paid up either.

On October 16, 1918, Messrs. Pitblado & Co., solicitors for Grossenback, wrote to Goodyear as follows:—

MAN.

K. B.

GROSSENBACK v. GOODYEAR.

Galt, J.

Dear Sir: In reference to the agreement of March 18, 1912, by which you agreed to sell to Mr. Samuel Grossenback of the Town of Carberry, lots three to ten inclusive in block 45 D.G.S. 17 St. Boniface in the City of Winnipeg, according to plan 276. We have tendered you the balance due by Mr. Grossenback under this agreement and demanded title, and you have informed us that you are not able to get title to this land. A search in the Land Titles Office disclosed that the title to the property does not stand in your name, and is subject to a caveat and judgment. On behalf of Mr. Grossenback we therefore object to the title and repudiate and rescind the contract and demand a return by you forthwith of all moneys paid by Mr. Grossenback under the contract.

The plaintiff commenced this action on October 21, 1918. Even after having been served with a statement of claim the defendant waited until the time for his defence had almost expired before consulting a solicitor. Then for the first time he took steps which he ought to have taken before the last instalment of purchase money fell due on March 18, 1916.

The solicitor, Mr. Sutherland, made the necessary enquiries and searches, and at length succeeded shortly before this case came on for trial in obtaining title in the defendant to the lots in question.

The defendant then obtained leave to amend his defence and file a counterclaim in which he asks for specific performance of the contract.

Upon the facts above stated the defendant's inexcusable delay and lack of title had, in my opinion, entirely deprived him of any right to specific performance before the commencement of this action. *Re Head's Trustees* (1890), 45 Ch. D. 310, *per* Fry, L.J., at p. 317.

The plaintiff bases his claim for a return of the moneys paid and for a lien, on the defendant's want of title, down to the commencement of the action, and on the plaintiff's repudiation of the contract for this reason on October 16, 1918. The counsel on both sides shewed great research in presenting their views, and cited many authorities illustrating the views taken by the courts in England and in several provinces of the Dominion; but each case depends so largely upon its own particular facts, that it would serve no useful purpose to refer to these decisions in detail.

Mr. Trueman, for the defendant, relied upon two main arguments: (1) That a party who has a right to repudiate a contract must do so promptly or he loses such right. (2) Where time is not,

or has ceased to be, of the essence of the contract, a party is not entitled to repudiate his contract, without giving notice to the other party to enable him to remedy the defect after a certain reasonable time.

In support of these propositions, reliance was largely placed upon *Halkett* v. *Dudley*, [1907] 1 Ch. 590. That was a decision by Parker, J., a judge of first instance. It was an unusual case. The purchaser was doing his utmost to get rid of his contract. The alleged defects of title were apparently insignificant and a decree for specific performance had been pronounced by consent of counsel for both parties, at the suit of the vendor.

It was only upon a reference under the decree that the purchaser endeavoured to repudiate his contract. The case has apparently received more notoriety than it deserves.

In Williams on Vendor and Purchaser, 2nd ed., 185, n. 1, the learned editor severely criticizes some portions of the judgment, and the case has been expressly dissented from in more than one decision of the Appellate Division in Alberta. (See McCaul's Supplement, p. 278.)

But I have seen no criticism of the following extract from the judgment of Parker, J., at p. 596, which I think is a correct statement of the law applicable to the present case:—

> Now I think it is reasonably clear on the authorities quoted to me that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party, whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the Court would, at the vendor's instance, treat as matters of compensation or abatement of purchase money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial.

When the plaintiff tendered his last instalment on October 12, 1918, and when he repudiated and rescinded the contract on October 16, 1918, he had become aware, by the defendant's own admission, of most substantial defects in the defendant's title, which could not be removed without the concurrence of a third party, namely, Hoddell, whose concurrence the defendant had no power to require.

The position of a vendor who has not yet obtained title is dealt with by Cottenham, L.C., in *Tasker* v. *Small* (1837), 3 My. & Cr., 63 at 70, 40 E.R. 848 at 851:—

MAN.

K. B.

GROSSENBACK v. GOODYEAR.

Galt, J.

But it was argued at the Bar that the plaintiff was, in equity, invested with all the rights of Mrs. Small upon the principle that by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.

Mr. Trueman points out that in the present case the agreement contained the following provision:—

And it is further agreed that the purchaser hereby accepts title of the vendor to the said lands, and shall not be entitled to call for the production of any abstract of title or proof of any deeds, titles or documents relating to the said property, other than those which are now in the possession of the vendor.

But a provision of this kind only casts upon the purchaser a duty which otherwise would devolve upon the vendor, namely, to shew and prove a good title.

If the purchaser ascertains the defects of title for himself, he is not concluded by any such a clause. See *Baskin* v. *Linden* (1914), 17 D.L.R. 789, 24 Man. L.R. 459.

As regards the necessity for prompt action in repudiating the contract, it must be borne in mind that the defendant was under a double duty to acquire title. (1) Under his agreement with Dawnay his own vendor. (2) In order that he would have title to convey to the plaintiff on March 18, 1916.

I am wholly unable to see the justice of imposing upon such a purchaser as the plaintiff the necessity of promptly repudiating his contract at the risk of losing his right to do so; but assuming, in accordance with some of the decisions, that prompt repudiation was necessary, I think it may fairly be said, in the present case, that the repudiation was prompt. It is true that a search had been made by Mr. Barrett in September, 1916, which disclosed certain defects, but it was expected that when these were pointed out to the defendant, he would cure them. For all the plaintiff knew, the defects had been cured long before October, 1918, and the defendant was merely negligent in carrying out his part of the bargain, but on October 12, 1918, the defendant himself admitted that he was not in a position to convey, and the plaintiff's letter of repudiation was written on October 16.

Next, it was argued by Mr. Trueman that time having ceased to be of the essence of the contract, the plaintiff was obliged to

give a reasonable notice to the defendant within which time the defects might be remedied, before he could repudiate the contract. We know that the defects in this case were pointed out by the plaintiff to the defendant in September, 1916, although of course the defendant was well aware of these defects of title from the commencement.

He was continually urged to remove the defects and after more than 2 years his title was as defective as ever.

I cannot think that any Court of Equity would hesitate, under such circumstances, to grant the plaintiff rescission at once, and judgment for the return of his money.

The rule, if so it may be called, requiring notice to be given, is purely a judge-made rule, and is only properly applicable to cases when a vendor possesses an imperfect title, which he is willing and anxious to complete. To apply it to a case where a vendor has neither title nor power to compel the owner to give him title, and where the vendor shews no willingness or anxiety to complete it, is wholly outside the requirements of either law or equity.

Mr. Hoskin, in his reply, argued that the plaintiff's rights were completely and satisfactorily supported by our own highest Appellate Tribunal in *Simson* v. *Young* (1918), 41 D.L.R. 258, 56 Can. S.C.R. 388. The action was practically the same as the present one; the plaintiff claiming rescission and repayment of purchase moneys, while the defendant, by counterclaim, asked for specific performance.

The defendant resided in Ireland and, through a real estate broker, she sold the lands in question to the plaintiff. When the last payment became due in March, 1914, the plaintiff went to the broker to complete the purchase, but was told that the conveyance had to be sent to Ireland for execution, and to return in 6 weeks, which he did, but found the situation the same.

Subsequent enquiries succeeded no better, and in December, 1914, he formally tendered payment to the broker, and shortly afterwards wrote to the defendant, repudiating the agreement and demanding the return of the money paid under it. Receiving no reply, in January, 1915, he commenced an action for rescission and the repayment of the moneys, in which the defendant by counterclaim asked for specific performance. In February after the commencement of the action, the defendant, who possessed a good

MAN.

K. B.

GROSSENBACK v. GOODYEAR.

Galt, J.

title throughout, tendered the conveyance of the land to the plaintiff. It was held by the Supreme Court of Canada (41 D.L.R. 258), reversing the decision of the Appellate Division of the Supreme Court of Alberta (33 D.L.R. 220, 10 A.L.R. 310), that the plaintiff was entitled to the relief claimed.

The question as to whether time was, or was not of the essence of the contract, was argued before the court. In that case, as in this, time was originally made of the essence of the contract.

In the present case, when the eighth and last instalment of the purchase money fell due on March 18, 1916, the defendant was wholly unable to deliver title. Whether the plaintiff was aware of this or not does not appear in the evidence, but he certainly was not bound to part with any more money until the defendant put himself in a position to deliver title.

The plaintiff for instance might have maintained all his rights by taking proper steps and paying the last instalment into court, but he did not do so, and there is evidence that seems to shew that he was not ready with his money at that time. Several months elapsed before Mr. Barrett took the matter up. Notwithstanding the absolute default of the defendant in March, 1916, which of itself would be a good defence to any claim by him to specific performance, and the very slight and excusable default of the plaintiff on that day, I must hold that, from that time onwards, the expressed provision as to time was waived by both parties. See *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599. But I am not satisfied that the plaintiff thereby lost his right to insist, if necessary, on any rights he would have had if this particular clause of his agreement had not been waived. The subject-matter of the contract was land of a speculative value, and was dealt with on that footing by all parties concerned. It is at least arguable that for this reason, time remained of the essence throughout; and that the plaintiff had the right, on any day after March 18, 1916, to offer payment (as he did more than once) and demand title. But for the purposes of my judgment I assume that time ceased to be of the essence after March 18, 1916. In *Simson* v. *Young*, *supra*, this question of time being of the essence was dealt with, but the judgment is based upon the assumption that time had ceased to be of the essence of the contract.

Idington, J. (with whom Brodeur, J., agreed), says this, at p. 267:—

Then alternatively, I am of the opinion that even if there is no effect to be given the clause as to time being the essence of the agreement, yet on general principles, by the failure of the vendor to prepare and tender within a reasonable time the transfer, she was to have prepared, she has lost her right to specific performance, especially under the conditions of a speculative market such as had developed in Calgary. . . .

If the situation created by respondent's conduct is such a breach of the contract as to disentitle her to specific performance thereof, then, if not before, she becomes clearly liable at common law for the breach of the contract, in failing to have the transfer ready for delivery at the time named, and to repay the money paid her or paid on the faith of her contract, as to meet tax bills for example. She has no answer to such a claim, unless in equity, of which the right of specific performance is the test. Thus, I submit, rescission with all its incidents is in the net result of the operation of law and equity, but the counterpart as it were to the claim for specific performance.

Anglin, J., says, at p. 275:—

I am, with respect, of the opinion that this is not a case for specific performance (as claimed by the defendant in her counterclaim) and that the right to rescission has been established.

No doubt the granting of rescission does not ensue as of course, because the relief of specific performance is denied: *Gough* v. *Bench* (1884), 6 O.R. 699.

The circumstances sometimes make it proper to leave the parties to their common law remedies. But if, as seems probable, time continued to be of the essence of the contract, the plaintiffs' right to rescission is unquestionable. If, on the other hand, time ceased to be of the essence of the contract, having regard to the circumstances, I think the purchasers are entitled to be placed in the same position as if they had duly given notice of intention to rescind, should the vendor fail to deliver a transfer within a named reasonable time. Since they paid a substantial sum on account of the purchase money, recovery of which they would otherwise be obliged to seek by way of damages, and are themselves free from blame, equity and an application of the maxim *ut sit finis litium* alike require that rescission and the return of the money paid on account of the purchase price and for taxes should be decreed.

The decision in the *Simson* case applies *a fortiori* to the facts of the present case. No formal notice, reasonable or otherwise, was given by the purchaser to the vendor, before she repudiated the contract, and the court held that none was necessary. The delay of the vendor was not nearly so long as the delay of the defendant in the present case.

Judgment will accordingly be entered in favour of the plaintiff for the amount claimed, together with taxes paid, and he is entitled to a lien on the lands in question for that amount. Also, under the prayer for further and other relief, the plaintiff is entitled to a declaration that the contract in question was duly and properly

MAN.
K. B.
Galt, J.

repudiated on October 16, 1918. The plaintiff is entitled to his costs of action.

The counterclaim is dismissed with costs.

Judgment for plaintiff.

CAN.
S. C.

BANK OF HAMILTON v. HARTERY.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 17, 1919.

LAND TITLES (§ III—33)—CHARGES—REGISTRATION OF—PRIORITY—DATE OF APPLICATION—LAND REGISTRY ACT (R.S.B.C. c. 127.)

Under s. 73 of the Land Registry Act (1911, R.S.B.C., c. 127) a judgment registered in the Land Registry Office on an application made after the date of execution of a mortgage, but before the application for the registration of the mortgage, takes priority over the mortgage.

[*Bank of Hamilton* v. *Hartney*, (*Hartery*) (1918), 43 D.L.R. 14, affirmed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 43 D.L.R. 14, affirming the judgment of the trial judge, Clement, J., 25 B.C.R. 150, and dismissing the plaintiff's action.

The appellant holds a mortgage upon certain lands executed by Harper between the 10th and the 16th of March, 1916, and registered in the Land Registry Office on an application dated July 12, 1916. The respondents are the holders of a judgment against Harper, which was duly registered on an application made on some date between March 16 and July 12, 1916. The question in issue is which of these charges is entitled to priority.

W. C. Brown, for appellant; *G. E. Housser*, for respondent.

Davies, C.J.

DAVIES, C.J.:—I think the judgment appealed from correctly interprets the meaning of s. 73 of the Land Registry Act of British Columbia on which this appeal depends. That section gives priority to charges according to date of their registration, not of their execution. As put by Martin, J., could there possibly be any doubt as to the meaning and effect of that section in a dispute between two charges of the same kind, *e.g.*, mortgages, or as to the priority that ought to be declared between them? I think not, and am unable to see how a contrary conclusion could be reached as to charges of a different kind.

I agree with the Chief Justice that the cases relied upon by McPhillips, J., *Entwistle* v. *Lenz* (1908), 14 B.C.R. 51, and *Jellett* v. *Wilkie* (1896), 26 Can. S.C.R. 282, do not govern or apply to the case before us, which is simply one as to the priority of charges under s. 73 of the Land Registry Act and the rule which should

govern in a contest on that point, and is not one as between an equitable right to the fee as against a charge.

I would dismiss the appeal with costs.

IDINGTON, J. (dissenting):—The decision of the courts below, that, by prior registration, a judgment destroys, as against him, an existent though unregistered mortgage, is supported by a rather plausible way of putting forward the alleged premises and drawing the conclusion reached.

Nevertheless, I think the premises are not well founded. The only charge a judgment creditor gets by virtue of his judgment is upon such interest as the debtor may have at the time of registration or issue of execution.

In this case, that is subject to whatever rights the mortgagee may have acquired by virtue of its mortgage.

Suppose I see fit to charge one-half of my interest in any land with a burden of some sort, and then give another charge expressly subject thereto, could priority in registration of the latter give its holder any advantage over the former? No one, I venture to think, would say it could. Yet when we have regard to the language of the last part of s. 27 of the Execution Act, par. 1, defining what is acquired by registration of a judgment, the lien or charge created thereby on the lands of the judgment debtor is expressly declared to operate

> in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of such judgment the judgment creditor may, if he wish to do so, forthwith proceed upon the lien and charge thereby created.

Surely that means only such interest in any lands as the judgment debtor has and no more.

Because the words "lands of a judgment debtor" are used they cannot be held to mean the entire fee in same, but only the interest he may happen to have therein.

This is not only in accord with common sense, and the law as it stood before the enactment of these registration provisions, but is in accord also with the provisions in sub-s. (*b*) of s. 137 of the Land Registry Act, which reads as follows:—

> No judgment shall form a lien upon any lands as against a registered owner thereof, or the holder of a registered charge thereon, where the registration of such person as owner or as holder of a charge has been effected after a notice, of not less than fourteen days, has been given by the registrar to the

CAN.

S. C.

BANK OF HAMILTON v. HARTERY.

Idington, J.

judgment creditor, either personally or at his registered address, of the registrar's intention to effect registration of the aforesaid fee or charge free of such judgment. If the judgment creditor claims a lien upon the said lands by virtue of his judgment he shall within the time fixed by the registrar's notice, register a certificate of *lis pendens* in accordance with s. 34 of the Execution Act, otherwise the registrar may register such fee or charge free from such judgment.

As I read this, it makes a clear provision for the adjustment of the priority of the respective rights of the judgment creditor and the holder of another charge.

If the judgments below are to be taken literally surely there never was any need for the adjustment thus provided for.

Again, s. 104 of the Land Registry Act reads as follows:—

No instrument executed and taking effect after the 30th day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the 13th day of June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefitted thereby, and on those claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments.

What does this section mean? Respondents urge that it means a good deal more than it says. For we must read the whole and not drop the last few lines as giving nothing. Whilst by the drastic language of the first part of the section every right of a vendor or chargee seems swept away, clearly the last few lines give a right to have something registered.

The right thus given clearly cuts down or renders liable to be so, the judgment creditor's right by rendering it subject to the possibility of the registration by vendee or chargee or those claiming under him of any instrument which is designed to convey or charge the land.

That is the right of the appellant and the mode of enforcing it was supplied by s. 137 of the Land Registry Act, as well as what is indicated herein.

My only difficulty in this case is whether or not the appellant lost its opportunity by the registration it made of its mortgage in July, 1916, six months before bringing this action for prosecuting the specific remedy given by these sections. And my difficulty has not been helped much by what I respectfully submit are the

extreme views taken by the court below depending entirely upon a construction of s. 73 of the Land Registry Act with which I cannot agree.

The dissenting judgment of McPhillips, J., failing to observe the effect I find in said sections, or indeed to notice them at all, further increases my difficulties. Such omission suggests there may be something else in the Acts in question which counteracts said effect or prevents reliance upon said sections at all under the peculiar circumstances of the appellant's registration of its mortgage.

However, I have been unable to discover anything else than such registration by appellant.

It seems to me that act was done in error by the appellant; that it has not misled any one; that nothing has been done by anyone concerned in reliance thereon, and that under the authority of *Howard* v. *Miller*, 22 D.L.R. 75, 20 B.C.R. 227 at 230, [1915] A.C. 318, the mistake may be rectified, and that being possible the rights of the parties hereto may be declared as if nothing had happened. We were told in that case when before us that there could be no rectification unless for fraud. I was not then of those who accepted that doctrine and, seeing the court above has discarded it, am less inclined to act upon it.

The principles therein involved and applicable to the peculiar circumstances there in question are somewhat analogous, but the actual decision helps herein no further than holding it possible to rectify an error when no countervailing equity intervenes.

The findings of fact, so far as they go, do not suggest any other difficulty. In the *Howard* case there was an error not only on the part of the party applying for registration but also the registrar or someone in his office. Here the mistake seems wholly the appellant's own. Though otherwise alleged in the declaration I can find no proof bearing out the allegations in that regard.

I am of opinion the appeal should be allowed and the appellant held entitled to a declaration as prayed.

It is not a case for costs, and the error of appellant being the primary cause of the litigation the fee of five dollars fixed by the statute would have been payable to respondent if the right proceeding had been taken.

CAN.

S. C.

BANK OF HAMILTON v. HARTERY.

Anglin, J.

ANGLIN, J.:—S. 27 of the Execution Act provides that upon registration a judgment shall form a lien or charge on land of the debtor "in the same manner as if charged in writing by the judgment debtor under his hand and seal."

Under s. 2 of the Land Registry Act a "charge" includes a judgment. Amendments to the Land Registry Act made by c. 43, s. 3, of the statutes of 1914, read as follows:—

"Mortgage" means and includes any charge on land created for securing a debt or lien, or any hypothecation of such charge;

"Mortgagee" means the owner of a mortgage registered under this Act;

"Mortgagor" means and includes the owner of land or of an estate or interest in land pledged as security for a debt.

S. 73 of the same Act provides that:—

When two or more charges appear upon the register affecting the same land, the charges shall, as between themselves, have priority according to the date at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

The respondent's judgment was registered before the appellant's mortgage. Indeed, although the appellant's mortgage was executed before the registration of the respondent's judgment, the certificate of acknowledgment or proof required by s. 77 of the Land Registry Act to obtain registration was procured only some 3 months after the registration of the judgment. The appellant, therefore, became entitled to apply for registration of its mortgage only after the respondent's judgment had become a charge on the land by registration.

S. 104 of the Land Registry Act reads as follows:—(See judgment of Idington, J.)

By s. 2 "instrument" includes any document dealing with or affecting land.

Notwithstanding the very plain and explicit language of s. 104 (formerly s. 74 of the Act of 1906), the Supreme Court of British Columbia *en banc*, reversing Martin, J., held in *Entwistle* v. *Lenz*, 14 B.C.R. 51, that a prior unregistered deed has priority over a registered judgment, I agree with Martin, J., that this decision is logically irreconcilable with the judgment now under review. Only because the legislature has re-enacted s. 74 *in ipsissimis verbis* in the revision of 1911 as s. 104, and because we are here dealing not with a deed or transfer but with a mortgage or charge, do I hesitate to hold that *Entwistle* v. *Lenz* should be overruled,

CAN.

S. C.

BANK OF HAMILTON v. HARTERY.

Anglin, J.

unless, indeed, it can be distinguished on the ground that the transfer in that case was actually deposited for registration but owing to a mistake in the description was not recorded against the debtor's land. When a statute declares that an instrument "shall (not) pass any estate or interest either at law or in equity" until registered, the reason by which the conclusion is reached that the transferor in an unregistered deed to which that statute applies is nevertheless merely a dry legal trustee and that he retains no estate or interest, but that the entire beneficial interest is vested in the transferee, is, I confess, quite too subtle for me to follow.

But the case now before us may, I think, be disposed of under s. 27 of the Execution Act and s. 73 of the Land Registry Act without actually overruling *Entwistle* v. *Lenz*, by merely declining to apply it to facts not absolutely identical with those there dealt with. Even if some estate or interest was created in the debtor's land by the appellant's unregistered mortgage upon its execution, as against another chargee who had registered his charge before that mortgage was registered, the interest or estate so created could not avail. S. 73 in terms so provides, unless it be entirely meaningless. As Martin, J., says:—

> If this were the case between two "charges" of the same kind, *e.g.*, mortgages, would there be any doubt as to the "priority" that ought to be declared?

But by s. 27 of the Execution Act the lien created by a judgment when registered is the same as if such judgment had been "charged in writing by the judgment debtor under his hand and seal," *i.e.*, is the same as the lien created by a registered mortgage. Reading these two statutory provisions together, as they must be read, I entertain no doubt that the judgment appealed from is correct and should be upheld.

Yorkshire v. *Edmonds*, 7 B.C.R. 348, is necessarily overruled by this judgment. *Chapman* v. *Edwards* (1911), 16 B.C.R. 334, on the other hand, may be supported as depending on the consequences of fraud. Neither fraud nor actual notice is present in the case now before us. As to the latter, however, sub-s. 2 of s. 104, as enacted in 1912 (c. 15, s. 28), must be taken into account. It indicates how far the legislature is prepared to go in support of the rights created by prior registration.

BRODEUR, J.:—In March, 1916, the appellant had a mortgage

Brodeur J.

CAN.
S. C.
BANK OF HAMILTON v. HARTERY.
Brodeur, J.

executed in its favour by McArthur and Harper of lands which they possessed. That mortgage was registered only on July 12, 1916. In the meantime, *i.e.*, between March and July, 1916, the respondents, who are the holders of a judgment against McArthur and Harper, had that judgment duly registered.

The question is: Which is the mortgage held by the bank, or the charge arising out of the judgment, entitled to priority?

By s. 73 of the Land Registry Act (R.S.B.C., c. 127) it is enacted that:—

> When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

There is no doubt that the mortgage constituted a charge upon the property, and there is no dispute as to that.

As to the judgment, s. 2 of the same Land Registry Act declares that the word "charge" includes a judgment.

But it is contended by the appellant that a judgment can affect only the interest which the judgment debtor actually had in the lands, relying, in that respect, on a judgment rendered in this court in the case of *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282.

In that case of *Jellett*, Sir Henry Strong, C.J., p. 288, stated that the common law rule is that "an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor"; and he adds that this law has become the law in the North West Territories "unless it has been displaced by some statutory provision to the contrary."

The provisions of the Land Registry Act which I have quoted above shew conclusively that the registration of the mortgage and of the judgment creates two charges upon the land; that those charges are to be treated alike; and there is no distinction made in that statute with regard to the beneficial interest of the judgment debtor or not as it was under the common law. The statute has superseded the old rule and the priority of the charge is to be determined by the dates at which they are registered.

Besides, by s. 104 of the same Land Registry Act, it is provided that no instrument purporting to affect land shall pass any estate in such land until it shall be registered. The effect of that provision is that the appellant's mortgage should be considered as

being an instrument dated July 12, 1916, and until then the estate which the mortgage would have passed has remained in the mortgagor and the judgment duly affected all the estate he had at that time in the land.

I am of opinion that the appeal should be dismissed with costs.

MIGNAULT, J.:—I concur with my brother Anglin.

Appeal dismissed.

CAN.
S. C.
BANK OF HAMILTON v. HARTERY.
Brodeur, J.
Mignault, J.

McCULLOUGH v. MARSDEN.

ALTA.
S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. February 28, 1919.

TRUSTS (§ V—75)—TRUST MONEY—MISAPPROPRIATION BY TRUSTEE—CESTUI QUE TRUST—RIGHT TO FOLLOW—PRIORITY OF MORTGAGE OVER LIEN.

Where a trustee misappropriates trust money by using it to pay off a mortgage on land owned or partly owned by him the *cestui que trust* is entitled to follow such moneys and to be subrogated to the right of the mortgagees to the extent of the payments.

The mortgagor, being the sole registered owner, although entitled only to an undivided interest in the property mortgaged, the other owner having, subsequently to the date of the mortgage, taken a vendor's lien on the lands for the amount of his interest, such lien is not entitled to priority over the mortgage.

APPEAL from the decision of Walsh, J., in an application by way of originating summons to determine the plaintiffs' rights of subrogation with respect to certain mortgages as against a vendor's lien upon mortgaged lands. Affirmed, with variation as to costs.

Statement.

W. S. Gray, for appellant Marsden; *A. H. Clarke*, K.C., for appellant Cross; *D. S. Moffatt*, for respondent.

HARVEY, C.J., concurred with Beck, J.

Harvey, C.J.

BECK, J.:—This is an appeal from the decision of Walsh, J., by the executrices of the last will of Henry Marsden, Sen. Mr. Justice Walsh's reasons for judgment are reported in [1918] 3 W.W.R. 725.

Beck, J.

The case raises questions of following trust funds and of subrogation. Moneys of the plaintiffs were misappropriated by Henry Marsden, Jun., and wrongfully applied by him in reduction of two mortgages. These mortgages were upon two sections of land. At the time of the giving of the first mortgage, one to the Guelph and Ontario Investment Society, the land was owned by both Henry Marsden, Sen., and Henry Marsden, Jun., and the

ALTA.

S. C.

McCULLOUGH v. MARSDEN.

Beck, J.

mortgage was made by both of them. Subsequently, the father transferred his interest in the land to his son, who became the registered owner, but in reality held his father's interest as a trustee for him. Then the son, for a debt of his own, gave a mortgage to one Hamilton as a trustee for the Canadian Bank of Commerce.

Walsh, J., held that the plaintiffs were entitled to follow their moneys wrongfully paid by their agent Henry Marsden, Jun., on account of these two mortgages and were entitled to be subrogated to the right of the mortgagees to the extent of these payments. In other words, that $1,500 odd of the plaintiffs' money having gone in partial discharge of the Guelph company's mortgage, that mortgage will still stand as a subsisting charge against the land in favour of the plaintiffs for that amount, subject to the prior charge of the company for the unpaid balance remaining owing to the company; likewise that $7,000 of the plaintiffs' money having gone in partial discharge of the Hamilton (Bank of Commerce) mortgage, that mortgage will still stand as a subsisting charge against the land in favour of the plaintiffs for that amount, subject to the prior charge of the bank for the unpaid balance remaining owing to the bank.

The contention is naturally made with respect to this second mortgage that, inasmuch as an undivided half interest in the land was in reality and beneficially the property of Henry Marsden, Sen., the equities of the case do not justify the application of the principles of subrogation further than to charge the interest of Henry Marsden, Jun., the one who misappropriated the plaintiffs' funds.

It seems to me, however, on the other hand, that the interest of Henry Marsden, Sen., ought to be charged, because, in truth, neither of the mortgagees paid the $7,000; that sum was, in truth, paid by the plaintiffs; if what happened had been carried out by Henry Marsden, Jun., honestly instead of dishonestly; if, with the view of inducing the bank to delay proceedings upon its mortgage, he had arranged that the plaintiffs should advance the money, it would not have been difficult to have effected a plan whereby the plaintiffs, to the extent of their advance, should stand in the shoes of the mortgagee, or in other words to be substituted or subrogated to the rights of the mortgagee. The

equities are, I think, in favour of the plaintiffs being recognized as having the same right as if their agent had acted honestly, and with their approval, instead of dishonestly and against their intention, and the father's estate ought not to be relieved, at the expense of the plaintiffs in the one case, when it would not have been relieved in the other.

For the reasons indicated, the decision of Walsh, J., was right.

A good deal of discussion took place before us with respect to the limitations upon the application of the doctrine of subrogation. To some extent, it is a question of words and their definition. Personally I think the word "subrogation" a suitable and satisfactory one to denote the principle with which we are dealing. It is a kind of substitution. The topic "substitution" in the civil law embraces other kinds of substitution than that designated "subrogation."

The doctrine of subrogation is certainly not confined to cases of "following trust funds" and being substituted to the rights of the parties investing those funds in property or securities.

The earliest reported English cases, in which the doctrine was recognized, a doctrine which has ever since been, and still is, in the progress of development, were not cases of following trust funds.

In *Harris* v. *Lee* (1718), 1 P. Wms. 482, 24 E.R. 482, the court said:—

> Admitting the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her cure and for necessaries, the plaintiff, that lent this money, must in equity stand in the place of the persons, who found and provided such necessaries for the wife; and, therefore, as such persons would be creditors of the husband, so the plaintiff shall stand in their place and be a creditor also.

In *Marlow* v. *Pitfeild* (1719), 1 P. Wms. 558, 24 E.R. 516, the court said, p. 559:—

> Though the law be, that if one actually lend money to an infant, even to pay for necessaries, yet as an infant in such case may waste and misapply it, he is, therefore, not liable. . . . It is, however, otherwise in equity; for, if one lend money to an infant to pay a debt for *necessaries*, and in consequence thereof, the infant does pay the debt, here although he (the father) may not be liable at law, he must nevertheless be so in equity; because, in this case, the lender of the money stands in the place of the person paid, viz., the creditor for necessaries, and shall recover in equity as the other should have done at law.

Later English cases are: *Jenner* v. *Morris* (1861), 3 DeG.

ALTA.

S. C.

MCCULLOUGH v. MARSDEN.

Beck, J.

F. & J. 45, 45 E.R. 795; *Deare* v. *Soutten* (1869), L.R. 9 Eq. 151. Quite recent cases, in addition to those mentioned by Walsh, J., are *Brocklesby* v. *Temperance Blg. Soc'y.*, [1895] A.C. 173; *Thurstan* v. *Nottingham Benefit Blg. Soc'y.*, [1902] 1 Ch. 1; *Fry* v. *Smellie*, [1912] 3 K.B. 282.

I take occasion to note a number of Ontario cases: *Brown* v. *McLean* (1889), 18 O.R. 533; *Abell* v. *Morrison* (1890), 19 O.R. 669; *McLeod* v. *Wadland* (1893), 25 O.R. 118; *Coursolles* v. *Fookes* (1889), 16 O.R. 691; *Maclennan* v. *Gray* (1889), 16 A.R. (Ont.) 224, reversed 18 Can. S.C.R. 553; *Goldie* v. *Bank of Hamilton* (1899), 31 O.R. 142, 27 A.R. (Ont.) 619; *Jack* v. *Jack* (1885), 12 A.R. (Ont.) 476.

In addition to the case *Ex parte Grace*, 38 D.L.R. 149, in this court, mentioned by Walsh, J., the question of subrogation was briefly referred to in *Riddell* v. *McRae* (1917), 34 D.L.R. 102, 11 A.L.R. 414, where I took occasion to say, p. 105:—

> Though a right of subrogation will not, it is sometimes said, be enforced in favour of a mere volunteer, this, it seems, is to be interpreted as meaning a mere officious intermeddler.

Walsh, J., in dealing with the question of costs, gave the plaintiffs the costs of the application and ordered that they might add these costs to the claims for which they were given the right of subrogation. The administrator of the estate of Henry Marsden, Jun., appeals against this on the ground that the order has the effect of giving the plaintiffs priority in respect of these costs over the administrator's costs of administration, which is a matter of moment because the estate is insolvent. It seems that there has been a misapprehension as to the position of the administrator with respect to his general costs of administration, a misapprehension which has attached itself to the effect of the order of Walsh, J., which we now affirm.

The administrator took in hand for administration the estate of Henry Marsden, Jun. That estate consisted, in part at least, of certain property subject to certain specific legal charges such as mortgages, "lien-notes," etc. So far as such properties are concerned the margin only was assets in the administrator's hands, and if in any case the margin was of no value there was, so far as that particular piece of property was concerned, nothing to administer. If the margin was of some value, it would constitute one

of the items of assets which it became the duty of the administrator to administer. If a creditor, or class of creditors, of the estate set up a claim to rank as a privileged creditor, or creditors, in priority over all other creditors, or as being entitled to a specific charge upon a specific item of the assets of the estate, and thus to have priority over all other creditors so far as the proceeds of that item of assets is concerned, and the claims of these creditors are not legally effective by reason of some instrument or process under which the creditor is entitled, without more, to proceed directly against the specific item of assets, as for instance a mortgage conforming to the Land Titles Act or a distress for rent, but is one which the administrator is entitled to insist that the creditor should establish by a declaration of the court, then, it seems clear to me that, as in the present case of the plaintiffs establishing a right to subrogation, the legal title of the administrator and consequently his right to the proper costs of administration, these having been incurred on the faith of the legal title of administrator, prevail over the rights of the creditors, and that not only the general body of creditors, but also such privileged creditors and creditors who have been declared entitled to charges, must look only to the net assets remaining after payment of the costs of administration; and that in the ultimate distribution of the assets these creditors would be entitled to add any costs properly chargeable against the estate to their preferred claims and as against the general body of creditors, be entitled to have both claim and costs satisfied out of the specific property upon which it has been established they have a specific charge so far as it will extend.

To do otherwise than this would, while doing equity in favour of the creditor as far as circumstances will permit, to do an inequity to the administrator, who in reality is in a position similar to that of a *bonâ fide* purchaser or mortgagee for value without notice.

I think, therefore, that the order of Walsh, J., with regard to the plaintiffs' costs was right, but that not only these costs but also the charges declared in favour of the plaintiffs must be declared to be subject to the prior payment of the proper costs of administration.

Walsh, J.'s, order now confirmed, to which should be added a declaration in the sense just indicated, leaves unconsidered the

ALTA.

S. C.

McCULLOUGH v. MARSDEN

Beck, J.

question of the right of the estate of Henry Marsden, Sen., to making a claim against the estate of Henry Marsden, Jun., for indemnity and marshalling. This question was not argued before us and we, therefore, do not deal with it. In the result, the appeal of the estate of Henry Marsden, Sen., should be dismissed with costs. The appeal of the Toronto General Trusts Co. should be dismissed; but, as the result of the appeal was to bring before the court the important question of the entire costs of the administrator, and that has been determined in favour of the appellant, I think there should be no costs of this particular part of the appeal.

Simmons, J.

SIMMONS, J.:—Prior to 1911, Henry Marsden, Sen., and Henry Marsden, Jun., were owners as tenants-in-common in sections 2 and 11, in township 14, range 23 west of the 4th meridian in the Province of Alberta, subject to a mortgage in favour of the Guelph and Ontario Investment and Savings Society.

On January 23, 1911, Henry Marsden, Sen., conveyed to his son Henry Marsden, Jun., his interest in said lands, and the latter became the registered owner thereof. Marsden, Sen., died on May 21, 1911, and probate of his will was granted to his son in the District Court of MacLeod, Alberta.

Henry Marsden, Jun., became indebted to the Canadian Bank of Commerce at Carmangay in the sum of $25,000, and on April 14, 1913, he executed a mortgage under the Land Titles Act on said lands for $25,000 as security for the past due indebtedness in favour of Gerald Hamilton, as trustee for said bank, said Gerald Hamilton and said bank having no notice of the interest of Henry Marsden, Sen., in said lands. At the same time he executed a chattel mortgage as further security for said debt to said Hamilton as trustee for the bank. The real property mortgage was registered in the Land Titles Office at Calgary on May 26, 1913.

The plaintiffs McCullough and Forster employed Henry Marsden, Jun., to sell for them on commission certain lands. Marsden, Jun., misappropriated certain of plaintiffs' money thus coming into his hands. He made a payment of $1,506.20 to the Guelph and Ontario Investment and Savings Society on a mortgage in their favour on above lands executed by him and by Marsden, Sen. He also made a payment of $7,000 to the Canadian Bank of Commerce upon a mortgage upon these lands in favour of the bank executed by him after Marsden, Sen., had con-

veyed to Marsden, Jun., his interest in said lands. The defendants Marian Marsden and Pauline Ashwell are executrices of the estate of Henry Marsden, Sen., appointed since the death of Henry Marsden, Jun. In the year 1917 these executrices brought an action for a declaration that as to an undivided one-half interest in said lands that Marsden, Jun., was a trustee for his father, and succeeded. In lieu of taking the accounts of the trusteeship the parties to the action agreed that the estate of Marsden, Sen., should have a vendor's lien on said lands for the amount of purchase price admitted unpaid of $12,000.

In a subsequent action by the plaintiffs against the executors of Henry Marsden, Jun., judgment was given in which the plaintiffs were subrogated to the rights of the Guelph and Ontario Savings and Investment Co. for the amount paid on their mortgage and also to the rights of the Canadian Bank of Commerce under their mortgage for the amount paid on their mortgage with plaintiffs' moneys by Marsden, Jun. The trial judge in this judgment confined the relief to the estate of Marsden, Jun., and suggested that the claims of any other parties interested should be brought up by originating notice. This was done, and on this issue judgment was given allowing plaintiffs' claim in priority to the vendor's lien on the estate of Marsden, Sen. From this judgment the executors of the estate of Marsden, Sen., appeal.

At the hearing of the appeal, a great deal of argument was focussed upon the question of whether subrogation could be invoked in the absence of intention upon the part of the plaintiffs that their moneys should be applied in this way. This view arises from a confusion of thought and a failure to appreciate the foundation of the principles upon which relief in such cases is granted by courts applying equitable remedies.

It was urged upon argument that one of the principles underlying the foundation of the doctrine is that the person seeking substitution, that is to say, the person paying the debt, must have done so under necessity, to protect himself from loss which might arise by enforcing the debt in the hands of the original creditor.

The cases of principal and surety and guarantors and creditors paying off prior mortgages, liens and executions are examples of the application of the doctrine in this way.

ALTA.

S. C.

MCCULLOUGH v. MARSDEN.

Simmons, J.

See *The Queen* v. *O'Bryan* (1900), 7 Can. Ex. 19, and American cases cited thereunder.

That the term subrogation is properly used to describe that form of relief is undoubted, but it does not in any way limit the equitable doctrine so clearly defined in *Re Hallett's Estate*, 13 Ch. D. 696, and approved in the House of Lords in *Sinclair* v. *Brougham*, [1914] A.C. 398.

If property has been misappropriated by a trustee then as between him and the *cestui que trust* and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in nature or character, and all the fruit of such property whether in its original or in its altered state, continues to be subjected to or affected by the trust. The property must be capable of being ascertained. *Hallett's* case, *supra*, p. 733. In the present case there is no difficulty in tracing the moneys. These were applied in discharging or partially discharging valid securities then existing as charges against the lands. The only question which raises any difficulty is the claim that the estate of Marsden, Sen., had an equitable interest in the lands prior to the creation of the equity upon which plaintiff relies and should, therefore, have priority. The foundation of the principle is that the moneys were at all times the plaintiffs' moneys. If the moneys purchased bonds, mortgages or other securities and these can be identified in the hands of the trustee, they are declared to be in his hands as trustee for the *cestui que trust*. If the trustee applies the money in discharging a mortgage or partially discharging a mortgage, whether he is the mortgagor or a stranger is the mortgagor, the *cestui que trust* will have the benefit of the mortgage or that part of the mortgage which is discharged by his moneys.

Marsden, Sen., by the conveyance put in the power of his son to create a statutory mortgage which was a first charge upon these lands, irrespective of and having precedence over any beneficial interest of the father in the lands. Since the plaintiffs' rights, to the extent of his moneys which were paid upon the mortgage, are co-equal and co-extensive with that of the mortgagee, his rights must consequently take precedence over the lien of the estate of Marsden, Sen.

It is said, however, that since the bank took the security for the personal debt of Marsden, Jun., they must exhaust his interest in the land before resorting to the interest of the senior estate. The bank is authorized under the Bank Act to take securities upon real estate for past indebtedness. Henry Marsden, Jun., was legally capable of executing a valid mortgage creating a statutory charge upon the lands in the absence of notice to the bank of the beneficial interest of the father. The mortgage must be *bonâ fide* for a good consideration. There is absolutely nothing in the material before us suggesting the absence of any of the requirements of mortgage under the Land Titles Act creating a charge upon the lands co-extensive with and applicable to the whole interest in the lands appearing on the register as the interest of Marsden, Jun. To hold anything less would be tantamount to eliminating the register as indicia of the state of title when the mortgage was registered and as an indicia of the capacity of the registered owner to execute a valid mortgage binding all the interest appearing in the register in the name of the mortgagor.

Keeping in view the principle laid down by Jessel, M.R., in *Hallett's* case, *supra*, namely, the right of following the trust funds into their ultimate destination whether that is in the form of specie, securities or interest in chattels or real property and the right of the *cestui que trust* to this identical specie, securities, chattel or interest in real property, or in lieu thereof a lien upon the same, it is manifest that the plaintiffs' money is ascertained as in substance and fact the actual moneys advanced upon a mortgage to father and son by the Guelph and Ontario Investment Society and as to $7,000, the actual money advanced to the Canadian Bank of Commerce on their $25,000 mortgage.

It is here that the equitable remedy applies in placing the *cestui que trust* on the same footing as the mortgagees who really received the moneys of the *cestui que trust* and in equity must surrender their securities for the benefit of the latter to the extent in which the plaintiffs' moneys were applied upon the mortgages. Finally, it is claimed that if the plaintiffs are entitled to this remedy that there should be a marshalling of assets in the following order: namely, (1) as against a certain chattel mortgage given to the bank collateral to the real estate mortgage, (2) to the interest of Marsden, Jun., in the above land, and (3) on the interest of Marsden, Sen., in said land.

ALTA.

S. C.

McCULLOUGH. v. MARSDEN.

Simmons, J.

I do not see how such a claim can be recognized as consistent with the remedies to which the plaintiffs are entitled. As soon as it is established that their moneys have been earmarked as to destination thereof, their lien arises with the resulting remedy of proceeding against any or all of the properties in which these moneys have been placed and to realize the misappropriated funds to the extent to which these securities will avail subject always to the rights of intervening claimants *bonâ fide* for valuable consideration without notice of plaintiffs' claims. In the result the appeal should be dismissed with costs.

The Toronto General Trusts Co., administrator of the estate of Marsden, Jun., appeal against that part of the judgment which gives the plaintiffs a prior lien for their costs.

As this was really a contest between two claimants, namely, the appellants executrices of the estate of Marsden, Sen., and the plaintiffs respondents, I think the lien of plaintiffs should not have priority of the administration costs of administration. This is in accord with the principle above set forth as to *bonâ fide* intervening interests. The executrices came into possession of the legal estate in these lands without knowledge of the trusts and assumed the expense of administration on this basis, and should, therefore, I think, be entitled to priority over the plaintiffs' claim.

The trial judge has informed us he did not intend that the plaintiffs should have this priority and that part of the judgment dealing with costs should be disposed of as directed by my brother Beck, J.

McCarthy, J.

McCARTHY, J.:—I concur.

Judgment accordingly.

CAN.

S. C.

DEVALL v. GORMAN.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 3, 1919.

FRAUD AND DECEIT (§ IV—17)—FINDING OF TRIAL JUDGE—RECKLESS CARELESSNESS AS TO TRUTH OF REPRESENTATIONS—APPEAL.

A finding of fact by the trial judge that certain misrepresentations as to condition and capacity of goods sold, which induced the purchase of such goods were "at least made with reckless carelessness as to their truth" is a sufficient finding of fraud to sustain an action for deceit, and brings the case within the principle laid down in *Derry* v. *Peek*, 14 App. Cas. 337.

[*Devall* v. *Gorman* (1918), 42 D.L.R. 573, 13 A.L.R. 557, reversed.]

CAN.

S. C.

DEVALL v. GORMAN.

Statement.

Davies, C.J.

Idington, J.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 42 D.L.R. 573, 13 A.L.R. 557, affirming the judgment of the trial judge, Ives, J., and dismissing the plaintiff's actions. Reversed.

C. C. McCaul, K.C., for appellant; *S. B. Woods*, K.C., for respondent.

THE CHIEF JUSTICE:—I concur with Anglin, J.

IDINGTON, J.:—The appellant complains that respondent, acting as agent for the owner of a steam log-hauler, had induced him by false and fraudulent representations to buy same at the price of $6,625. The learned trial judge held that he had been so induced and entered judgment accordingly directing an assessment of damages by a referee. That judgment the Court of Appeal for Alberta set aside and dismissed the action.

The owner had offered the outfit in question for $5,000 cash, and then raised the price, owing to some slight addition of sleighs to the outfit as originally offered, to $5,875, which included a commission to respondent of 5% on the actual price the owner was getting on the basis of that increased price.

The purchase-money was to be paid into the Northern Crown Bank at Red Deer.

The respondent, not satisfied with such gain, conceived the idea of getting $750 more from the appellant as purchaser.

An involved history of negotiations with others brought about by respondent as part of the scheme I need not enter upon.

The result of the misrepresentations so found to have been false and fraudulent was that the appellant, before he ever saw, or had any one for him see, the outfit, agreed to pay and did pay, the $6,625 into the Northern Crown Bank, which was a condition precedent to the removal of the outfit from the place where situate.

The property in question was forty miles away from any railway. The appellant and respondent were dealing in Edmonton, a considerable distance further than the railway station nearest to the place where the property was. The appellant, of necessity, had to rely upon the knowledge of someone else, as respondent well knew, or go to the expense of going all that distance with an outfit capable of testing the truth of the representations made by respondent.

Having deposited the said price as required, the appellant

CAN.
S. C.
DEVALL
v.
GORMAN.
Idington, J.

went with the necessary help to take possession of his purchase and, on attempting to drive it by means of the power it was represented to possess, found that he had been deceived not only in that regard but in many other respects as to the condition of the outfit.

Having been thus induced to go to the place where the machine and outfit were, and moved it part of the way before realising how badly he had been deceived, he had no alternative except to abide by his purchase or recover from the respondent the amount which he had by virtue of its misrepresentations been thus defrauded of. Such, at least, is the effect in plain language of the findings of the trial judge.

Under the peculiar circumstances in evidence the appellant had no right of action against the owner, who had never authorised such misrepresentations to be made as the learned trial judge finds *were* made.

I am not disposed to think that the law is so impotent that there is no remedy to be found for such a condition of things.

By no means do I think there is anything improper in an agreement between an owner of lands or goods and a sales agent providing for the latter getting all beyond a named price as his reward or part of his reward for bringing about a sale.

I do suggest, however, that when we find an agent given such an opportunity and he has availed himself of it to the extent of obtaining a bargain with a purchaser at a cash price exceeding by one-fifth that which the owner—to the knowledge of such agent—was willing to accept in cash, we naturally ask how that came about? And when a trial judge finds as a fact that the misrepresentations of such an agent respecting the quality and conditions of the article sold were an inducing cause of such remarkable success, and that they were made in such manner as to induce the belief that they were founded upon and made from the knowledge of those making them, we are bound to ask ourselves whether or not they had been honestly made.

When we find it distinctly stated that no such personal knowledge existed or had been procured on behalf of the agent, or any assurances of such a nature given by the principal, or authority given by him to make representations so false and fraudulent as found by the learned trial judge, what is the inevitable inference

to be drawn but that of some dishonest representations having been made?

It is quite apparent from the absolutely conflicting evidence of the appellant with that of those he accuses who acted for respondent that the learned trial judge who alone had the best opportunity of deciding between them must, from what he has expressed, have found the former reliable and the latter not so reliable.

Are we to discard such an important finding of fact? Or must we not rather accept it and apply it so far as practicable to guide us in trying, if possible, to fit it into the other admitted surrounding facts and circumstances and apply the relevant law, even if he may have failed to state same as fully and accurately as we might desire? This is not the case of a trial where, as sometimes happens, there are outstanding circumstances of evidential force which conflict with the finding and relying thereon we can say the learned trial judge must have failed to recognize the force thereof and set aside his finding of fact and its consequences.

The misrepresentations charged all bore directly or indirectly upon the value of the outfit offered for sale, and the findings of fact by the learned trial judge relative thereto cannot be attributable to anything else.

It seems to me the inevitable conclusion that to the extent at least of the $750 added to the price named by the owners, conversant as the respondent well knew with the value and condition of that offered at half its original cost, there was no possible justification for so adding to the price asked, and that there existed no foundation of fact for the misleading description given by respondent. How can such false representations made under such attendant circumstances be held as conceivably made in an honest belief in their truth?

And that seems amply confirmed by the refusal of the owner to touch the $750.

That also carries with it a finding that the money in the Northern Crown Bank was not money belonging to the respondent, but money fraudulently procured by it to be deposited in said bank by the appellant.

The result must be in that way of looking at the case presented, that there never was any ground for an issue; that the

CAN.

S. C.

DEVALL v. GORMAN.

Idington, J.

respondent should pay the costs of that issue, both of the Northern Crown Bank and of the appellant, throughout, and, as another consequence, I think should be made to bear the entire costs herein. The whole litigation has been caused directly or indirectly by reason of the devious course of conduct the respondent saw fit to pursue.

The appeal to that extent should be allowed and the costs paid by the respondent throughout.

Anglin, J.

ANGLIN, J.:—The plaintiff appeals from an adverse judgment in two actions—one, an action for deceit; the other, an action to determine the ownership of a sum of $750 on deposit with the Northern Crown Bank which comes before us in the form of an interpleader issue. The judgment of the Appellate Division of the Supreme Court of Alberta is reported in 42 D.L.R. 573.

After carefully reading the entire evidence it is apparent to me that the trial judge intended by the opening paragraph of his judgment to inform an appellate court, without bluntly saying so, that he disbelieved the evidence given on behalf of the defendants and that his unfavourable opinion of their veracity was largely based upon his observation of them in the witness box. I need only say that the reading of their testimony—especially that of Gorman, Edwards and McPhee—is not calculated to lead one to think that the judge made a mistake.

He then proceeds, without putting his conclusion in a form unnecessarily harsh or offensive, to find that the plaintiff bought the log-hauler and sleighs in question on the faith and under the inducement of misrepresentations fraudulently made by Edwards, and strengthened by Gorman, in such a way as led, and, I take it, in his opinion was intended to lead "the plaintiff to believe that they were made from the knowledge of Edwards and Gorman of themselves," by which the judge no doubt meant knowledge gained from the inspection on their behalf which Devall states they represented had been made. Several of the representations, most material in character, were false in fact. Admittedly neither Gorman nor Edwards had any personal knowledge of the condition or capacity of the log-hauler, nor had any inspection been made of it on their behalf. According to Devall's testimony, accepted by the judge, he was induced to purchase without making the personal inspection which he had contemplated by Edwards'

assurance that the time spent on such an inspection would be wasted—that the "outfit" was as he represented it.

The finding of fraud necessary to sustain an action of deceit might, no doubt, have been made more explicit. The success of the defendants before the Appellate Division indicates that in cases such as this it is probably better "to call a spade a spade" in plain language. Short, however, of stating in direct terms that the defendants had induced the plaintiff to purchase the log-hauler and sleighs by wilfully and dishonestly making material misrepresentations known to them to be untrue, the judge could scarcely have made more clear his intention to convict them of deliberate deceit. He adds that "the misrepresentations as to condition and capacity, which induced him (the plaintiff) to purchase, were at least made with reckless carelessness as to their truth." He obviously meant to make a finding which would bring this case within the alternative ground of liability pointed out in *Derry* v. *Peek* (1889), 14 App. Cas. 337—that the misrepresentations were made without real belief in their truth and with reckless indifference as to whether they were true or false. I cannot place any other construction on the phrase "with reckless carelessness as to their truth."

With profound respect I am unable to accept what I understand to be the view of the Chief Justice of Alberta, concurred in by the other appellate judges, that the trial judge misdirected himself as to the essentials of the action of deceit or failed to make the necessary finding of absence on the part of the representors of an honest belief in the truth of their representations.

The judge allowed damages under two heads; as to the first—the difference between the actual value of the log-hauler and sleighs as they were and where they were when purchased and the sum of $6,625 paid for them by the plaintiff—I think it may not unfairly be assumed that the latter figure represents what would have been the salable value of the property at Coal Camp if in the condition and of the capacity represented by the defendants, and that no substantial wrong will be done the plaintiff by allowing this portion of the judgment of the trial court to stand. In the second head of damage, however, there seems to be a duplication. When allowed the difference in value as above, the plaintiff is already awarded the reasonable cost of repairs necessary

CAN.
S. C.
DEVALL
v.
GORMAN.
Anglin, J.

to put the engine into the condition represented. His recovery under this head should be restricted to the expenses of the first futile trip from Edmonton to Coal Camp, including wages of men and an allowance for his own time, except so much of them as were incurred in making repairs necessary to move the log-hauler and sleighs into Olds, *i.e.*, he is entitled to recover so much of these expenses as is not included in the cost of necessary repairs. They were thrown away as the direct result of the defendants' misconduct.

The earning of profits on the tie contract undertaken by the plaintiff, however, was too uncertain and speculative to afford a basis for a further allowance of special damages. The learned judge properly refused to entertain this claim.

The judgment of the trial court in the action for deceit should, in my opinion, be restored with the modification indicated.

As to the $750 involved in what has been termed the minor action it must be borne in mind that the question at issue in it is not whether the plaintiff is liable to pay such an amount to the defendants as the price of their interest in the property which he purchased or otherwise, but whether the sum of $750 paid into the Northern Crown Bank by the plaintiff as part of the purchase price payable to the Great West Lumber Company is the property of the plaintiff or that of the defendants. The object of the interpleader issue on which the question is presented is to determine the ownership of this specific sum of money remaining on deposit—who is entitled to demand and receive it from the Northern Crown Bank? The issue as defined by the order directing it makes that clear. The statement of claim properly followed it. The statement of defence, in my opinion, improperly sought to alter and enlarge it. *Canadian Pacific R. Co.* v. *Rat Portage Lumber Co.* (1905), 5 O.W.R. 473, at p. 476.

This money, forming part of a larger sum deposited with the bank, was the money of the plaintiff. He parted with it to the bank solely for the purpose of its being paid to the Great West Lumber Co. as the purchase-price of its property bought by him. The Great West Lumber Co. might, no doubt, have taken the whole sum paid in from the bank and paid over $750 of it to the defendants, or it might have directed the bank to pay that sum to them. It declined to do either, and disclaimed all right to, or

over the disposition of, the $750. The defendants have obtained no title to it either from the plaintiff or from the Great West Lumber Co. It seems clear that, whatever other legal rights (if any) the defendants may have against the plaintiff as a result of the transaction under consideration, the money now in question is not their property. On the issue ordered to be tried it should be declared to be the property of the plaintiff upon a resulting trust in his favour arising from the partial failure of the trust on which he deposited the larger sum, of which it formed a part, with the Crown Bank.

But, as the trial judge points out, in that event the $750 cannot be treated as part of the purchase-money paid by the plaintiff and his damages in the deceit action must be based on the payment of $5,875, not $6,625, as purchase-money. In the result it is really not material, except possibly on the question of costs of the minor action, whether the plaintiff recovers the $750 as his property in that action or as part of his damages in the deceit action, the fund being held to answer *pro tanto* the judgment in the latter. I therefore agree with the disposition made of this part of the case by the learned trial judge.

Brodeur, J.

BRODEUR, J. (dissenting):—I am satisfied that if there had been no dispute as to the $750 issue the action of deceit which has been instituted by the appellant would never have been taken.

It appears that the Great West Lumber Co. were the owners of a log-hauling outfit for several years, and that they had used it only for a very short time (about four months) from 1912, when they bought it, until 1917, when it was sold to Devall. In December, 1916, a man named McFee, who had a large tie contract with the Canadian Northern R. Co., tried to acquire that outfit in order to carry out more expeditiously and more economically his tie contract. Those negotiations were carried out partly by him and partly by the respondent, who seemed to be a respectable firm doing business in Edmonton.

McFee went with an engineer and a boiler inspector, to visit the outfit which was in a lumber camp at a great distance from Edmonton. He seemed to be satisfied that the price which was quoted for the machine was a reasonable one and, in fact, the Great West Lumber Co. were willing to sell the machine for 50% of its original cost. McFee, however, did not seem to be able to raise the money.

CAN.
S. C.
DEVALL
v.
GORMAN.
Brodeur, J.

It appears, however, at the same time, that Mr. Ewing, a reputed barrister of Edmonton, was interested in some way in McFee's contract; and as he had a case for Devall he suggested to the latter the idea of purchasing the outfit or advancing the money to McFee to purchase it; and he advised him to go and see a man named Edwards, sales agent of the respondent company.

Edwards described to him the machine, told him the work it could carry out and told him that the machine had been recently inspected by the boiler inspector and by an engineer.

There is a dispute here as to whether Edwards stated that it was their own engineer, namely, the engineer of the respondent firm, or some independent engineer. Devall, in his evidence, repeats frequently that Edwards represented to him that the inspection had been made by their own engineer. However, in cross-examination, he was asked:—

Q. When he (Edwards) talked to you about having their engineer or the boiler inspector there, you did not understand that by their engineer he meant himself, but you understood it meant someone else?

A. It sounded as if they had sent someone else, an engineer, down there, and the boiler inspector.

There is no doubt that an engineer had gone there with McFee and the boiler inspector to inspect the engine. There is no doubt either that this expedition was organized to a certain extent by the respondent company and it did not matter very much whether the engineer sent at that time was paid by the company itself or by McFee. There is one fact very sure and it is that an engineer had been sent and that his report seemed to be favourable.

There is also some statement made by Edwards in this conversation with Devall to the effect that the hauling power of the engine could be increased by some dome being put on it.

Interviews then took place between the father of Devall and Devall himself with Gorman, the principal partner in the respondent company; but the latter did not say anything more than repeat what had been said by their sales agent, Edwards. The plaintiff was informed that the respondent company had an option upon the outfit; and the price mentioned was $6,625. Then Devall saw McFee and they agreed to form a partnership for the purchase of the machinery.

It was agreed, however, that the machine would be purchased by Devall himself and that when McFee would have made enough

money out of his tie contract, and out of the use of the machine, to reimburse his share, then the machine would become the property of both. Devall then discovered that the Great West Lumber Co. were the real owners of the property, and on January 24, 1917, he deposited with the Northern Crown Bank, who were the bankers of the Great West Lumber Co., the sum of $6,650, which was to be handed over to the Great West Lumber Co. when the delivery would have taken place and when the bill of sale would have been properly drawn and Devall then started for the camp to view the machine and to take delivery of it, and he was accompanied by a representative of the Great West Lumber Co.

After much trouble, he saw the machine, saw in what condition it was, and as he had an engineer and man with him, he started to raise the steam and to make it run. It appears, however, that the horse-power did not seem sufficient to make it run, so he telephoned to Edmonton and got the authorization from the authorities to raise the steam pressure and he succeeded in loading up the machine at the next station and sent it to Edmonton to get it properly fitted up and absolutely repaired.

In the meantime, he seemed to be dissatisfied with the test which he had made, because he gave instructions to his solicitor to write the bank not to give the money; but later on he gave a release and gave permission to the bank to hand over the money and he began to work with the machine when, after a few days, a shaft broke.

In the meantime, it was discovered that the Great West-Lumber Co. did not sell the machine for $6,625, but only $5,875, leaving a balance of $750 which the Great West Lumber Co. declined to claim as belonging to them. The respondent company wanted to have this sum and stated that as they had an option for the sale of that machinery that sum really belonged to them. The money then was deposited into court by the bank and the court directed an issue to have it determined to whom that money would belong, whether to Devall or to Gorman, Clancey & Grindley.

It looks to me as if Devall had been greatly dissatisfied on finding out that the respondent company were not only being paid a commission of 5% on the purchase-price, but that they were also getting $750 above the purchase-price stipulated by the Great West

CAN.
S. C.
DEVALL
v.
GORMAN.
Brodeur, J.

Lumber Co. He thought, I suppose, that it was not very fair on the part of the respondent company to get a sum of $750 above the purchase-price, so he entered an action to get that sum of $750, as he had been directed by the court to do, started a big action in damages for $14,000 for deceit. He alleges that this sale was made through the false and fraudulent representations of Gorman, Clancey & Grindley and that they should be held liable to that extent.

The trial judge gave judgment in favour of the plaintiff on account of the false representations and he said in his judgment that "the representations made to him (Devall) as to the condition and capacity of that machine, which induced him to purchase, were at least made with reckless carelessness as to their truth," and he maintained the action of deceit instituted by the appellant Devall but dismissed plaintiff's action as to the $750 and declared that that money belonged to the respondents.

The Court of Appeal reversed that decision and dismissed the two actions.

A great deal depends in this case upon the construction of the findings of the trial judge. The law on the question is to be found in the case of *Derry* v. *Peek*, 14 App. Cas. 337, where it was held that:—

> In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.
>
> A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement being made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

The trial judge speaks of the carelessness with which some statements were made by the respondent company as to the truth of those statements. But it had to be also demonstrated that the statements were made in the belief that they were not true. There is no such finding in the reasons of judgment of the trial judge. Besides, I do not see anything in the evidence, which I have read very carefully, to shew that there were such fraudulent statements as were required to maintain the action of deceit.

The machine was represented as having been in use only for a short time, and it is true. It was represented that it had been

inspected by an engineer, and it is true, it does not matter very much by whom the engineer was paid. As a question of fact, it was inspected. It was represented that it had been visited by a government boiler inspector and it is true. The plaintiff says that it was represented to him that it was brand new, that there was no scratch. Well, he saw the thing himself and became aware himself of the condition in which it was.

Now, having himself inspected the machine, having seen it, having accepted and paid for it, I do not see how he could take this action for deceit. My conclusion is that it was the result of an afterthought when he heard that the company was making $750 above the price mentioned.

Now, as to this $750, I agree with the trial judge that this money belongs to the respondent company.

The appeal, therefore, should be dismissed with costs of this court.

Mignault, J.

MIGNAULT, J.:—With great respect I am of the opinion that the Chief Justice of Alberta has misconstrued the findings of fact of the trial judge. The latter said that he thought "that the representations made to him (the plaintiff) as to the conditions and capacity of that machine which induced him to purchase it were at least made with reckless carelessness as to their truth."

This finding of fact, in my opinion, brings the present case within the rule laid down by the House of Lords in *Derry* v. *Peek*, 14 App. Cas. 337, where it was held that in an action of deceit the plaintiff must prove actual fraud, and that fraud is proved when it is shewn that a false representation has been made knowingly, or recklessly without belief in its truth, or without caring whether it be true or false. (See also *Angus* v. *Clifford*, [1891] 2 Ch. 449.) The evidence here fully justifies the finding of the trial judge, and would even shew that the respondents made a false representation knowingly, to wit, that their engineer had examined the machine which they were endeavouring to sell to the appellant. This is emphatically a case where the appreciation of the oral testimony by the trial judge should not be lightly disturbed. I think, therefore, that the main action, by which I mean the action for deceit, should be maintained, and I concur in the opinion of my brother Anglin, concerning the damages which should be granted to the appellant.

CAN.

S. C.

DEVALL v. GORMAN.

Mignault, J.

In the other action, that for $750, I think the appellant should succeed. This sum, which the real vendors of the machine absolutely refused to accept as being in excess of the price for which they were selling the log-hauler, is the property of the appellant, and the attempt made by the respondents to have it paid over to them is on a par with their conduct in making the fraudulent misrepresentations of which the appellant complains.

The appeal should, therefore, be allowed with costs throughout.

Appeal allowed.

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Grimmer and Barry, JJ. February 14, 1919.

INSURANCE (§ VI A—245)—FIRE INSURANCE ACT (N.B. 1913, 3 GEO. V., C. 26)—NOTICE OF LOSS—VERBAL NOTICE TO AGENT—AGENT NOTIFYING COMPANY IN WRITING—SUFFICIENCY OF.

The statutory provisions in the N. B. Fire Insurance Act (1913, 3 Geo. V., c. 26) requiring the assured to give notice in writing forthwith after the loss has occurred is substantially complied with, where the assured verbally notifies the agent who solicited the insurance, and such agent notifies the company in writing, especially when the giving of such verbal notice may be ascribed to a mistake on the part of the assured resulting from the acts and statements of such agent.

[*Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1910), 44 Can. S.C.R. 40, followed.]

Statement.

APPEAL by defendant company from a verdict entered for the plaintiff, before McKeown, C.J. K.B.D., in which it is moved to set aside the verdict for the plaintiff and to enter a verdict for the defendant, or for a new trial.

M. G. Teed, K.C., for appellant.

Hazen, C.J.

HAZEN, C. J.:—The plaintiff in this action on December 16, 1915, took out a policy of insurance in the appellant company on a building occupied as a dwelling, for the sum of $350. The policy contained the statutory conditions as found in 3 Geo. V., (1913), c. 26, and on April 8, 1916, the property was destroyed by fire. The action was tried by McKeown, C.J. K.B.D., without a jury, and he rendered judgment for the plaintiff for the full amount of the claim.

For the reasons given by the trial judge, I concur in the conclusion at which he arrived, to the effect that at the time the policy was taken out there was no misrepresentation or omission to communicate material circumstances necessary to be known

to the insurer to enable it to judge the risk, and that there was no waiver by the insurer of the necessity for notice and proofs of loss. In par. 14 of the schedule to the Act Respecting Conditions in Policies of Fire Insurance, cited above, it is enacted as follows:—

14. Any person entitled to make a claim under this policy shall observe the following directions:—

(a) He is forthwith, after loss, to give notice in writing to the insurer.

(b) He is to deliver, as soon after as practicable, as particular an account of the loss, as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration declaring: That the said account is just and true; when and how the fire originated, so far as the declarant knows or believes; that the fire was not caused by his wilful act, or neglect, procurement, means or contrivance; the amount of other insurances; all liens and incumbrances on the subject of insurance; the place where the property insured, if movable, was deposited at the time of the fire.

No notice in writing was given and no proofs of loss were furnished by the insured, but the Chief Justice of the Court of King's Bench decided that, under the facts and circumstances of the case, he was justified in applying the remedial provisions contained in s. 7 of the Act, and that it would be inequitable that the insurance should be considered forfeited because of imperfect compliance with the statutory conditions of the policy in respect of notice and proofs of loss. The section is as follows:—

7. In any of the following cases:—

(a) Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurer after the occurrence of a fire, have not been strictly complied with; or,

(b) Where, after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract, the insurer, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or,

(c) Where, for any other reason, the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended or supplemental statements or proof (as the case may be) shall, in any such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Hazen, C.J.

The important question to my mind in this case is as to the application of this section and the exercise of the judge's discretion, having regard to all the facts of the case, which were substantially as follows:—A few days after the fire took place the insured saw Mr. Kinsman, agent of the company, who had effected the insurance on his premises, and told him that there had been a fire, and that the building was totally destroyed, and asked him at the same time what he had to do in reference to it, if he had to make out any papers or anything of that sort, and Kinsman informed him that he would notify the company, through his office, and that they would probably send somebody to view the remains, and would fix it up in a few days.

Kinsman, in his own evidence, practically substantiates this statement of the plaintiff's. He says that the insured told him of the fire, and he (Kinsman) then informed him that he had arranged to have an adjuster go out and look at it. He also said that he notified the company of the loss. He states, however, that he did not say anything to him with regard to the making out of forms or proofs, or tell the insured that he would look after them, nor did he tell him that it was necessary to make out or put in proofs. It appears, therefore, by the evidence, that while the insured did not himself give notice in writing to the company, he informed the agent who had solicited the insurance from him, and that agent notified the company in writing. In my opinion, that is a substantial compliance with the provision that any person entitled to make a claim under the policy should forthwith, after loss, give notice in writing to the insurer. In any event, it is a partial compliance or attempt at compliance with that provision, and I think it might be fairly regarded in that light by the trial judge, but if he was of opinion that the condition had not been strictly complied with he had full authority under the provisions of s. 7 to regard it as having been made by mistake and refuse to allow the objection to the sufficiency of the notice. It was strongly contended that there was no compliance, as a notice had not been given in writing by the insured, but for the reasons I have given such a view should not prevail, and while I am not prepared to say that a case might not arise—as for instance where the insured was illiterate

and uneducated, unable to read the policy or give a notice in writing—where verbal notice would be sufficient, and could be regarded as an imperfect compliance, I do not think that that arises in this case, as the insured notified the agent and the agent in writing notified the company, and I think might be regarded as having acted as the agent of the insured for that purpose. In any case, the company was notified in writing of the loss.

It was held in the case of the *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.* (1910), 44, Can. S.C.R. 40 that a statutory condition similar in effect to that contained in s. 7 of the New Brunswick Act applied to the statutory condition in the schedule to the Act, being that every person entitled to make a claim is forthwith after loss to give notice in writing to the company. In delivering judgment in that case Idington, J., said, at p. 58:—

I certainly do not think the writing must of necessity be that of the insured or signed by him if framed so as to identify the parties concerned.

He also says at p. 58:

Let us consider further that the writing in this case was sent by wire. Is that sufficient? Can anyone say if done by the appellants it was not in writing, but by wire, and the writing was not transmitted to the company? Where is the end to be of all such wretched subterfuges if we pass by the reason for the thing and the substantial purpose of the parties?

In this case, undoubtedly, the substantial purpose of the insured in going to the agent, and of the agent's communicating with the company was to give notice to the insurer, and undoubtedly the insurer was informed of the fact that the fire had taken place, and had every possible opportunity of looking into it and ascertaining the facts with regard to it, and for that very purpose placed the matter in the hands of an adjuster.

Anglin, J., in the same case, was of opinion that a notice such as is called for should be regarded as a part of the proofs of loss, and reached the conclusion that the requirement of the notice in writing was one of the conditions as to the proof to be given to the insurance company on the occurrence of a fire. At p. 63 he says:—

Its (the insurance company's) officers had, through the telegram from its own agents, all the benefit which they could derive from a notice in writing given personally by the insured. . . . The

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Hazen, C.J.

omission of the insured to give the notice in writing was obviously due to accident or mistake.

Viewed in this light, I cannot, as contended by appellant's counsel, come to the conclusion that there was no compliance with the provisions contained in the schedule of the Act, and already cited, with respect to the proofs of loss. In my view of the matter, there was an imperfect compliance with those conditions, and in the exercise of his discretion, the trial judge had an absolute right to refuse to allow the objection to the sufficiency of such proofs to prevail and thus prevent the plaintiff recovering, as, having heard all the evidence and the arguments of counsel, he was of opinion that it would be inequitable that the insurance should be forfeited.

In my opinion also this case is one in which it would be inequitable that the insurance should be deemed void by reason of imperfect compliance with the conditions referred to.

The judge states in his judgment, and having read and considered the evidence I agree with his conclusion when he says:—

> I cannot discern that the slightest prejudice has been occasioned to the company by lack of written notice and other proofs or statements of loss.

And with his further statement that:—

> There is not the slightest ground for concluding that the loss was not an honest one.

I am of opinion that the appeal should be dismissed with costs.

Grimmer, J.

GRIMMER, J.:—The appellant company resists the plaintiff's claim on at least three distinct grounds. The first is that the plaintiff was not the real owner of the property. From the return, it appears that no question was raised as to any improper description of the subject-matter of the insurance in the policy, and as it has been often held, if this be rightly described, it is not necessary to specify the interest of the assured. See *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36; *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478, 110 E.R. 172; *Marks* v. *Hamilton* (1852), 7 Exch. 323, 155 E.R. 970, and the authorities therein cited. However, I am quite satisfied from the evidence, the plaintiff had an insurable interest in the property, upon which he was fully justified in placing insurance and this objection fails.

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Grimmer, J.

The second objection is that the statutory condition requiring notice of the loss was not observed, and, third, that the statement and proofs of loss required by the same conditions were not furnished. These may be treated together, as under the decision in *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.* (1910), 44 Can. S.C.R. 40, the enactment, under which it was decided, being similar to that under which this suit was brought, applies to "notice of loss" wherever it applies to "proofs of loss." Under the statute then, is the failure to give the notice and put in the proofs of loss attributable under the circumstances of this case to accident or mistake? I think the evidence shews it may very properly be ascribed to a mistake on the part of the insured, directly resulting from the acts and statements of the agent of the company who had placed the insurance. Soon after the fire the plaintiff met the agent through whom as stated, the insurance was effected, and notified him thereof. He said:—

I told him we had a fire, the building was destroyed, and I asked him what I had to do with reference to it, to make out any papers or anything, and he said that he would notify the company through his office and they would probably send somebody to view the remains and would fix it up in a few days. He also said he would look after the making out of the papers or forms.

He did notify the company and an adjuster was put upon the matter, and apparently all the usual and customary formalities save the actual making out of the notice and proofs were attended to. There was some dispute about these facts, but the learned trial judge has found upon them, and there was quite sufficient evidence to justify his finding.

From all this I think the proper inference is that the plaintiff assumed what he had done and what the agent stated he would do to be a sufficient compliance with the conditions of the policy, either as having been done on his behalf by the agent or as being within the terms of the conditions themselves. The plaintiff allowed his interests to become the particular care of the defendant company, and left the same entirely in its hands, and it will be encroaching closely upon the domain of fraud to permit the acts of the agent or defendant to deprive the plaintiff of the benefits of the policy and the objects for which the insurance was placed It seems almost certain the defendant, probably

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Grimmer, J.

acting upon some information from their adjuster, made objection to the payment of the loss on other grounds than for improper compliance with the statutory conditions as to notice and proofs, and the fact that they had prompt notice from their own agent of the loss and could have suffered no prejudice from the omission of the assured also to give them notice, and the further fact that the agent who placed the insurance told the plaintiff he had so notified the company, (from which the inference is patent that the plaintiff concluded personal notice from himself was not required or necessary) that he would attend to the papers and forms, etc., and would fix the loss up, brings the case, in my opinion, clearly within the decision in *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co., supra,* which as well as the later decision *Bell Brothers* v. *Hudson Bay Insurance Co.* (1911), 44 Can. S.C.R. 419, is binding upon this court, and the plaintiff must get the full benefit of the remedial qualities of the conditions of the policy, which are spoken of by a judge in one of the above cases as the "absolution which the law sanctions."

Barry, J.

BARRY, J. (dissenting):—Although the amount involved in this appeal is small, the questions arising for determination are matters of considerable importance. The action is upon a policy of insurance containing the New Brunswick statutory conditions, issued by the appellants, insuring against loss or damage by fire, a building of the respondent in the sum of $350. The policy was issued on December 16, 1915, and on April 8, 1916, the insured property was totally destroyed by fire.

On the 14th of the following August, the respondent commenced this action for the recovery of the amount insured by the policy, and on April 18, 1917, more than a year after the fire, delivered his statement of claim. The statement of defence was delivered 20 days afterwards. The company pleaded a number of defences, only five of which it is necessary to refer to here. These were:—A denial of the making of the policy and of the happening of the loss; a denial of the plaintiff's title to the property; that the assured did not, forthwith, after loss, give notice in writing to the insurers; that the assured did not, as soon after as practicable, deliver to the insurers a particular account of the loss; and that no statutory declaration, as re-

quired by the conditions of the policy, was ever furnished. To the last three of these defences the plaintiff replied, waiver.

The case was tried without a jury before the Chief Justice of the King's Bench Division, who found as facts, as was indeed admitted, that no written notice of the loss had ever been given, and that no statement or proofs of loss, as required by the conditions, were ever furnished. As to the question of waiver raised by the respondent, the trial judge made no distinct finding upon the disputed facts, which if true, the respondent relied upon as constituting a waiver, but held that as a matter of law, accepting the respondent's evidence as uncontradicted, and as giving an accurate account of what took place between himself and the local agent of the company and between himself and its adjuster, it would be impossible to say that there was a waiver; it being established beyond question that neither an agent such as Mr. Kinsman was, nor an adjuster such as Mr. Fairweather was, has any power to waive compliance with the conditions in a policy.

The trial judge also held and found that, although no written notice in accordance with statutory condition 14 (a) of the Fire Insurance Policies Act was given, nor any particular account of the loss in accordance with sub-sections (b) and (c) of the same statutory condition, furnished, under the remedial provisions of s. 7 of the Act it would be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the conditions of the policy in respect of notice and proofs of loss, excused and absolved the respondent for such non-compliance, and entered judgment in his favor for $350 with interest at 5% per annum from the date of the issue of the writ. From this judgment, the appeal is taken.

There being no statutory enactments in England which interfere with the freedom of contract between the insurer and the insured, the parties are at liberty to make any contract they please. And the same was true in Canada also until 1876, when, as is said by Idington, J., legislation originated in Ontario as the result of a commission, designated to put an end to the unjust advantages taken by virtue of the conditions that insurance companies inserted in their policies. This legislation took the form of statutory conditions, which were thenceforth to be deemed

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Barry, J.

to be a part of every fire insurance contract entered into in Ontario, and these conditions have remained substantially the same in that province ever since. They are now to be found, with some few amendments, it is said (Cameron, Ins. 3) in R.S.O. 1914, c. 183. One by one, the other provinces adopted the Ontario legislation, New Brunswick being the last, I believe, to join the procession, and passing in 1913, the Fire Insurance Policies Act. The several provincial statutes being all *in pari materiâ* ought to receive a uniform construction, notwithstanding any slight variation of the phrase, the object and the intention being the same. *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204, 106 E.R. 1167, *per* Abbott, C.J., at p. 215.

In the main the legislation generally has everywhere been received with favor by the judiciary, although its interpretation by the courts of the several provinces and by the Supreme Court of Canada, seems to have given rise to a very wide divergence in judicial opinion, most of which has arisen upon the proper construction of the remedial clauses which were introduced for the protection of the assured against inequities.

The fourteenth statutory condition of the Fire Insurance Policies Act, 3 Geo. V., c. 26 (N.B.) provides:—

Any person entitled to make a claim under this policy shall observe the following directions:—

(a) He is forthwith, after loss, to give notice in writing to the insurer.

(b) He is to deliver, as soon after as practicable, as particular an account of the loss, as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration declaring:

That the said account is just and true.

When and how the fire originated, so far as the declarant knows or believes.

That the fire was not caused by his wilful act, or neglect, procurement, means or contrivance.

The amount of other insurances.

All liens and incumbrances on the subject of insurance.

The place where the property insured, if movable, was deposited at the time of the fire.

(d) He is, in support of his claim, if required, and if practicable, to produce books of account, warehouse receipts, and stock lists, and furnish invoices and other vouchers; to furnish copies of the written portion of all policies; to separate, as far as reasonably may be, the damaged from the undamaged goods, and to exhibit for examination all that remains of the property which was covered by the policy.

(e) He is to produce, if required, a certificate under the hand of a justice of the peace, notary public, commissioner for taking affidavits or municipal clerk, town clerk or city clerk, residing in the county in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has, by misfortune and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount certified.

S. 7 of the Act, under which the court or judge is given jurisdiction to relieve against inequities, is set out in full in the judgment appealed from, and need not be here repeated.

All policies require the assured to give notice of a loss within a limited period after it has occurred, so as to enable the insurer to investigate the circumstances. The conditions vary in different policies, but are usually so framed as to make a strict compliance with their requirements a condition precedent to the right to recover, unless such compliance has been waived. Sir Charles Fitzpatrick, C.J., says that this "is the well settled jurisprudence" of the Supreme Court of Canada, and he cites three cases from that court and one from the Privy Council which make it so. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 44 Can. S.C.R. 40, at p. 44. And see per Wetmore C.J., in *Bell Bros.* v. *The Hudson Bay Ins. Co.* (1909), 2 S.L.R. 355. In *Shera* v. *Ocean Accident and Guarantee Corp.* (1900), 32 O.R. 411, it was held that the giving of the notice forthwith was not a condition precedent to the right of recovery. And Cockburn, C.J., says at p. 471:—

> The question is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case. The *Queen* v. *Justices of Berkshire* (1878), 4 Q.B.D. 469; followed in *Accident Ins. Co. of North America* v. *Young* (1892), 20 Can. S.C.R. 280.

Before the New Brunswick legislation was enacted, a case arose in Manitoba and went to the Supreme Court of Canada, which involved the construction of legislation similar to the legislation of this province. The assured did not forthwith give notice of the loss in writing, as he was required to do by a statutory condition similar to 14 (a) of the New Brunswick Act,

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Barry, J.

but did, 17 days after the fire, deliver to the insurers a statutory declaration giving particulars of the loss in conformity with the condition in that behalf; and it was held that the remedial section (corresponding to s. 7 of the New Brunswick Act) is wide enough to cover any mistakes, of which the omission to give the notice required by sub-condition (a) is one. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co., supra.* At p. 53 of the report of the case, Davies, J., says:—

That the legislature intended the equitable jurisdiction it vested in the court or judge to extend to and cover as well the written notice required by sub-section (a) as to the fire having occurred as the more particular subsequent of the loss required by sub-sections (b), (c), (d), and (e).

And Anglin, J., at p. 64, says:—

That the notice in writing under clause 13 (a) is part of the proof mentioned in s. 2. It follows that the company's plea that the insured had failed to give this notice . . . should not be deemed an answer to the plaintiff's claim.

And judgment was entered for the full amount of the plaintiff's claim, with costs.

In a case which arose in Saskatchewan, the policy was subject to the statutory condition requiring prompt notice of loss by the assured to the company; by another condition the insured was required, after making proofs of loss, to declare how the fire originated, so far as he knew or believed. Upon the occurrence of the loss, the company's local agent gave notice thereof to the company, and informed the insured that he had done so, and that the company had acknowledged receipt of his notice. The insured gave no further notice to the company. Forms were then supplied by the company for making proofs of loss, and they were completed by an agent of the company, and signed and sworn to by the insured, the origin of the fire being therein stated to be unknown. On examination for discovery the insured stated that, at the time he signed the declaration, he entertained an opinion as to the origin of the fire, and the company's adjuster reported a similar opinion as to its origin. An adjustment of the amount of the loss was then proceeded with by the several companies carrying insurances on the property in which the defendant company took part, but, after payment by the other companies of their proportionate shares according to the adjustments, the defendants repudiated liability on the grounds of

want of notice as required by the statutory condition and non-disclosure of the opinion entertained by the insured as to the origin of the fire.

It was held, reversing the judgment appealed from, and following *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, *supra*, that in respect of both conditions, the default was the result of mistake on the part of the insured, and, in the circumstances of the case, s. 2 of N. W. Ter. Ord., 1903, c. 10, similar to s. 7 of the New Brunswick Act, should be applied, and the insurance held not to be forfeited by reason of default of notice or imperfect compliance with the condition as to proofs of loss. *Bell Bros.* v. *Hudson Bay Ins. Co.* (1911), 44 Can. S.C.R. 419.

In an action upon a policy of fire insurance, the statutory declaration furnished by the assured pursuant to a condition of the Ontario Insurance Act, similar to statutory condition 14 (e) of the New Brunswick Act, was not made by the assured, but by his two representatives on the board of inspection and valuation. In other respects the proofs of loss were in proper form; no objection was made to them by the insurance company, nor were further or other proofs of loss asked for. The assured's failure to make the statutory declaration was found to have been caused by a mistake and it was also found that the company was not prejudiced. And the trial judge held, applying s. 199 of the Ontario Act (which for present purposes may be regarded as exactly similar to s. 7 of the New Brunswick Act) that it would be inequitable that the insurance should be deemed forfeited by reason of imperfect compliance with the condition as to proofs. *Gabel v. Howick Farmers Mutual Fire Ins. Co.* (1917), 38 D.L.R. 139, 40 O.L.R. 158.

The three cases which have been immediately under review are the authorities relied on by the respondent in this appeal. It will be observed that in all of them, notice of loss and proofs of loss more or less complete had been furnished the insurers, and a *bonâ fide* attempt made by the assured to observe the directions given in the conditions requiring proofs of loss. Here, there was none. This is the central and outstanding circumstance that differentiates the judgment from which this appeal is taken, from the cases cited in support of it. It was some months after

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Barry, J.

the fire that the claim for loss was put into the hands of a solicitor. One would have thought that even at that late date, ordinary prudence would have suggested the advisability of putting in, or of making an honest attempt to put in, some written proofs of loss. I do not say that such a deferred proof of loss would have satisfied the condition; but what I do say is, that with the belated proofs to his credit, the assured could with a much better grace, have invoked the aid of the remedial provisions of the Act, than he exhibits now in coming into court to assert his claim, with not the scratch of a pen to shew that he made any attempt to comply with the directions of the condition.

There are stated in the judgment of the trial judge some conclusions of fact drawn from the evidence, with which I regret to find myself in complete disagreement. I am referring to where he says:—

> I cannot discern that the slightest prejudice has been occasioned to the company by lack of written notice, and "The delivery of particulars, and of the declaration called for by (b) and (c) were never given, and in my view such particulars could not, in the nature of things, have given any information to the insurers. I say that, because, I have now before me under oath, elicited by examination and cross-examination, all that the plaintiff knew concerning the fire, as well as a particular account of the loss, as far as he could furnish it.

With every deference I cannot think that that is a correct view to take of the legislation. The Act requires that all that the assured knows concerning the origin of the fire as well as a particular account of the loss is to be furnished not at the trial of an action instituted for the recovery of a loss arising under the policy but before action brought, and as a condition precedent to his right to recover. And I must confess my inability to see how the insurer who, perforce, is obliged to pay the expenses of an action at law in order to obtain the very information to which, under the Act, he is entitled without suit, can be said to be unprejudiced. If all the information to which the insurer is entitled can be furnished just as well at the trial of an action brought to recover for the loss, then conditions 13 to 18, both inclusive, are valueless, and might just as well have been omitted from the Act. Judges, it should be remembered, are interpreters of the law, and not law-makers, and some effect

must, I think, be given to this legislation—legislation, it is to be borne in mind too, that was placed upon the statute book, not for the benefit of insurance companies, but for the protection of the insured.

The insurers in the case before us, even after an exhaustive trial, are still without a certificate of the *bonâ fides* of the claim and the genuineness of the loss to which, under statutory condition 14 (e) they are clearly entitled. And this is a certificate, the procuring and furnishing of which, it has long been held in England, is a condition precedent to the assured's right to recover. *Worsley* v. *Wood* (1796), 6 T.R. 710, 101 E.R. 785; *London Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911, 916; *Logan* v. *Commercial Union Ins. Co.* (1886), 13 Can. S.C.R. 270. It would seem but reasonable to assume that, had they had the opportunity, the insurers would, in a case like this, have insisted upon the production of such a certificate, because the adjuster swears that he wasn't satisfied in regard to the origin of the fire, and that the fact that the assured's son had been in the building a few minutes before the fire was discovered, was to him a suspicious circumstance that required explanation.

In the exercise of the equitable jurisdiction conferred by s. 7, we are obliged to go as far as the decisions of the Supreme Court of Canada carry us, but speaking for myself, I cannot see my may clear to go as far as the judgment appealed from goes.

It seems to be a growing fashion (remarks Chief Justice Meredith of Ontario), for plaintiffs in actions against insurance companies, to imagine that all that need be done by them to obtain a judgment in their favor, is to refer the court to some insurance enactment; and to feel aggrieved when required to bring their cases, by evidence, within the provision of the enactment, the benefits of which they claim; and a fashion which, I have no doubt, receives quite too much encouragement from the jury-box, if not also from the Bench.

Beury v. *Canada National Fire Ins. Co.* (1917), 37 D.L.R. 105, 39 O.L.R. 343. And Wetmore, C.J., of Saskatchewan, says in regard to the same matter:—

I think that, with all the respect I have for the legislation, there must be a limit. People must not run away with the idea that no matter how slipshod they make their proofs, and no matter what they do, or omit to do, the courts will throw the doors wide open and give them relief. *Bell Bros.* v. *The Hudson Bay Ins. Co.* (1909), 2 S.L.R. 355, at 364.

It may be said, and perhaps said truly, that the value of the

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Barry, J.

above opinions of contemporary Canadian judges is somewhat minimized by the circumstance that the former is a passage from a dissenting judgment, and the latter an extract from a judgment which was afterwards reversed on appeal to the Supreme Court of Canada; but, notwithstanding all that, and because they represent so accurately the views which I myself entertain upon the question we are called upon to determine, and because, further, in the present appeal we are asked to go very much further afield than any decision which has been brought to our attention would warrant us in going, I would, if I may be permitted to do so, refer to them here as embodying most apposite reasons for declining to extend the remedial provisions of the Act further than they have already been carried.

It is objected by the respondent that "the defendants having pleaded a denial of the making of the policy, are estopped from requiring proofs of loss or relying upon the objection that none were given." And we are referred to *Beury* v. *Canada National Fire Ins. Co.* (1917), 35 D.L.R. 790, 38 O.L.R. 596, as an authority supporting the objection. In that case, Britton, J., says, at p. 791:—

> Even without formal proofs before trial, of loss, it is not open to the defendants to put forward the non-delivery of proofs as a defence, because they dispute their liability and deny that they have any insurance on the property, and deny their liability in any respect for the loss by fire.

The report of the case shews that this dictum of the judge was *obiter* of weight, no doubt, but not of the same weight as it would have been had it been the *ratio decidendi*—because he says, at p. 591:—

> The plaintiffs put in formal proofs of their loss; these proofs were, I think, in substantial compliance with the statutory condition in regard to proofs.

The case went on appeal to the Appeal Division, 37 D.L.R. 105, where the judgment of the trial judge was affirmed, but nothing was said there upon the question of estoppel. *Morrow* v. *Lancashire Ins. Co.* (1898), 29 O.R. 377; 26 A.R. (Ont.) 173, is, however, an authority for the doctrine. So, also, the converse of the proposition has been held to be true, that is that the calling for the proofs of loss may estop the company from claiming that there was never any contract. *Smith* v. *City of London Ins.*

Co. (1886), 11 O.R. 38; and so, also, it has been held in the United States. *Steamship Samana Co.* v. *Hall* (1892), 55 Fed. Rep. 663; *German Ins. Co.* v. *Frederick* (1893), 58 Fed. Rep. 144.

In an endeavor to find a generally recognized rule upon this branch of the law of fire insurance, I have examined a great many of the Canadian, United States and English cases, with the result that the further the investigation has been pursued the more perplexing has become the quest. The United States decisions are not uniform, and in many instances differ fundamentally from the Canadian decisions, amongst which also there is often found the widest divergence. A Canadian writer upon the subject of Fire Insurance has said that:—

> **The jurisprudence in the United States is so inharmonious, that** in many branches of insurance law . . . authority can be found **both ways for most propositions of law which arise. (Cameron, Insurance, V.) (Preface).**

Without wishing at all to detract from the value of the many decisions upon the subject to be found in the Canadian reports, I should venture to think that the criticism might with equal appropriateness be applied to the jurisprudence of this country.

Having regard to the rules of pleading and the rules of practice that have been crystallized into rules of law in Ontario, the dictum in *Beury* v. *Canada National Ins. Co.*, *supra*, may, with respect to that province, be sound enough doctrine, and I am not to be understood as disputing it. But I do not think that in this province, the rule has ever obtained a footing.

The estoppel here relied on arises, if at all, from the pleadings. The fire occurred on the 8th of April, 1916. The pleas which it is said create the estoppel, were pleaded and delivered on May 8, 1917, or 13 months afterwards. It is not contended that before the latter date, there was either by words or conduct any misrepresentation of fact, or any such conduct as would induce a reasonable man to understand that a representation of fact was intended, acted upon by the assured whereby he altered his position. At the time the pleas were pleaded the assured had been in default for more than a year, in respect of notice and proofs of loss, and it would, it seems to me, produce a strangely anomalous state of things to say that pleading a denial of the making of the policy, or of the insurer's liability

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Barry, J.

more than a year after the proofs were due would cure the default and put the assured in as good a position as if he had furnished full and perfect proofs of loss within the terms of the conditions of the policy. The assured's position was not altered in any way by reason of any representations of the insurers. From the beginning he refused or neglected to furnish proofs of loss, and maintained that position to the end.

By way of reply to the three defences of the company in regard to absence of notice, proofs of loss and the statutory declaration, the assured set up waiver; but that issue has been found, and as I think, quite properly found, against him. The trial judge found that neither Kinsman nor Fairweather was such an agent as had any power to waive compliance with the conditions of the policy. And since no estoppel can arise from the representation of an agent unless it is within his actual or ostensible authority to make it, it would seem to be clear that if either of the two gentlemen named had either by words or conduct made any representation intended to be acted on by the assured such representation would have been no more binding on the company than would have been an attempt by either of them to waive compliance with the conditions of the policy.

Let the rule elsewhere be what it may, under the practice which obtains in this province, moulded as it is upon the English Judicature Rules, any number of defences may be pleaded together in the same action although they are obviously inconsistent.

A defendant may "raise by his statement of defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained," O. XIX, r. 27, as to striking out embarrassing matter. *Per* Thesiger, L.J., in *Berdan* v. *Greenwood* (1878), 3 Ex. D. 251, 255. And a defence is not embarrassing merely because it contains inconsistent averments (*Child* v. *Stenning* (1877), 5 Ch. D. 695), provided such averments are not fictitious (*Re Morgan* (1887), 35 Ch. D. 492, at p. 496.) Odgers on Pleading, 7th ed., 215.

It is argued for the respondent that the statutory declaration mentioned in s. 14 (e) is not required by the statute to be in writing, and we are referred to the Interpretation Act, C.S. N.B. 1903, c. 1, s. 8 (29), as an authority which supports that proposition. But that sub-section of s. 8 does not in my opinion, touch the question. All it provides is, firstly, that where the

legislature has failed to designate the officer before whom any oath, affirmation, declaration or affidavit is required to be made, the same may, with certain exceptions, be made before a justice of the peace; and secondly, where evidence, authorized to be taken under oath, the person, court or commissioner authorized to take the evidence may administer and certify the oath so taken.

While the constitutionality of federal legislation touching the subject-matter of insurance contracts has been doubted, so far as my observation has gone, the authority of the Parliament of Canada to pass ss. 36 and 37 of the Canada Evidence Act (R.S.C. 1906, c. 145) has never been questioned. The former of these two sections deals with the subject-matter of statutory declarations and the language employed in as well as the form prescribed by the section makes it clear, I think, that a statutory declaration is a written declaration signed by the declarant and by the officer before whom the declaration is made And in s. 37, which specifically deals with insurance proofs, the officers before whom may be taken any declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of property insured therein are named, and such officers are required to take the declaration.

The only "statutory declaration" known to our provincial law is, I think, the declaration authorized and prescribed by the Dominion statute. That, at all events, is the only one to which our attention has been drawn. It would seem then that when the legislature employed that term in clauses 14 (e) and 16 of the statutory conditions, it meant the statutory declaration authorized and prescribed by the Canada Evidence Act, because there is no other. Moreover, the word "deliver" would, it seems to me, be a most inept expression to use, if the provisions of clause 14 (e) were intended to be satisfied by a mere verbal statement; and the expression "proof" found in several of the sub-clauses of the same clause surely must mean something more than a mere off-hand, unsworn, *viva voce* statement. Such a statement could not, in my opinion, be regarded as proof at all.

The word "proof" seems properly to mean anything which serves either immediately or mediately to convince the mind of the truth

N. B.

S. C.

WETMORE v. BRITISH AND CANADIAN UNDERWRITERS OF NORWICH, ENGLAND.

Barry, J.

or falsehood of a fact or proposition; and as truths differ, the proofs adapted to them differ also. Thus the proofs of a mathematical problem or theorem are the intermediate ideas which form the links in the chain of demonstration; the proofs of anything established by induction are the facts from which it is inferred, etc.; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents and the like. Best on Evidence, 11th ed., sec. 10, p. 5.

It is only where (a) by reason of "necessity, accident or mistake" the condition as to proofs of loss have not been strictly complied with; or (b) where, after proofs of loss have been given, the insurer objects to the loss on other grounds than for imperfect compliance with the conditions as to proofs; or (c) does not after receiving proofs, notify the assured in writing of his objections to the proofs, and point out wherein they are deficient; or (d) where for any other reason—that is, I take it, for any other reason *ejusdem generis* with the reasons already stated—the court or judge considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the conditions, that the extraordinary remedial jurisdiction conferred by s. 7 is to be exercised. No necessity has been disclosed to us, and no accident or mistake can be discovered which would justify the absolution which the section sanctions. The whole context of the section implies that there should be some attempt made at compliance. The words "imperfect compliance" found in sub-sections (b) and (c) would, it seems to me, carry with them the plain inference that before the assured should be afforded the equitable relief contemplated by the section it should be shewn that there was at least some attempt made at compliance. Imperfect compliance must mean that while there has been a compliance, it has not been altogether free from fault, or in other words that it has been imperfect. It would be a misuse of language to speak of a non-existent thing as imperfect. Obviously, there must be a great difference between a case where there has been an attempt made at compliance and proofs of some kind have been sent in, although it may turn out that these proofs are faulty in many respects, and therefore imperfect, and a case where the assured simply lies on his oars and does nothing. In the former case the assured would, doubtless, within reason, be afforded relief, but there is nothing in

the statute to warrant the conclusion that in the latter case the legislature ever intended that he should be.

I would allow the appeal with costs, and dismiss, with costs, the action in the court below.

Appeal dismissed.

N. B.
S. C.
Barry, J.

HANKIN v. JOHN MORROW SCREW AND NUT Co.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 23, 1918.

EVIDENCE (§ VI E—535)—CONTRACT IN FORM OF LETTER—PREVIOUS LETTER REFERRED TO—PREVIOUS LETTER CONTAINING EXPRESS REFERENCE TO PRICE LIST—ORAL EVIDENCE ADMISSIBLE TO EXPLAIN CONTRACT—JUDICIAL NOTICE OF PROVINCIAL LAWS.

Parol evidence is admissible to prove that the discount mentioned in a contract, in the form of a letter, to purchase steel drills, which merely quotes sizes and rate of discount, but does not mention any price, referring, however, to a previous letter which contains an express reference to a standard drill price list, means, according to the usage of trade, discount off the standard drill prices, and so proves that the written contract contains all essential terms. A term of the contract being that "The value of this contract to be from $25,000 to $35,000 net," the court further held that the purchaser was bound to purchase goods to the value of $25,000, with an option to purchase a further $10,000 worth, which the vendor was bound to supply if ordered.

Statement.

Appeal by defendant from the judgment of the Superior Court of Quebec, sitting in review at Montreal (1918), 54 Que. S.C. 208, affirming the judgment of the trial court and maintaining the plaintiff's action with costs. Affirmed.

Eug. Lafleur, K.C., and *Weldon*, for respondent.

Davies, C.J.

DAVIES, C. J.:—This action was one brought in the Superior Court of the Province of Quebec by the plaintiff, respondent, Francis Hankin, against the defendant, appellant, to recover damages alleged to have been sustained by him owing to the refusal of the defendant to carry out an alleged contract made by him with plaintiff to manufacture and deliver to plaintiff a stipulated quantity of "twist drills of cast steel."

The Superior Court sustained the plaintiff's action and awarded the plaintiff $10,032.31 as damages, which judgment was confirmed "in all things" by the Court of Review, and from which latter judgment this appeal is taken.

From the evidence at the trial, it appeared that the appellant, defendant, issued to the trade periodically a catalogue accompanied by a standard twist drill price list, which is a list in use

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Davies, C.J.

by all manufacturers of twist drills in the United States and Canada. On this list the gross prices remain unchanged from year to year. As net prices are constantly fluctuating, they are quoted by way of discounts of greater or less amount from these standard gross prices. This manner of quoting the plaintiff contended, and the trial judge found, was well established in the trade so that dealers, when buying or selling, quote merely the kinds or sizes of the drills referred to and the rate or rates of discount which is understood as referring to the standard list and thus establish the prices agreed on.

Plaintiff, through his manager Hill, had, several times before the contract in question here, entered into contracts with defendant for the purchase of drills, the negotiations being made and concluded either with Coulter, the president, or with Horton, who styled himself variously as "assistant to the president" or the "manager," or as "acting for the president."

One of these earlier contracts was still in force and partially completed in August, 1915, when the contract now in question was made.

On August 21, 1915, plaintiff's manager, Hill, went to Ingersoll and entered into negotiations with Horton for the purchase of cast steel twist drills of the net value of from $25,000 to $35,000. The negotiations were closed at the same meeting and a written contract was at once prepared in the form of a letter from plaintiff to defendant signed by Hill for plaintiff, marked "accepted" at the foot and signed by the defendant company per Horton. This contract is the basis of plaintiff's suit and is in the following terms:—

Ingersoll, Ontario, Aug. 21, 1915.

The John Morrow Screw & Nut Co. Ltd.
Ingersoll, Ont.

As per my conversation with your Mr. Horton this morning you will enter our contract as follows:

Best quality cast steel twist drills, neither drills, packages or cases to bear any other mark excepting size.

The value of this contract to be from twenty-five thousand ($25,000) to thirty-five thousand dollars ($35,000) net. Specifications to commence about three weeks hence and shipment of the whole lot is to be made before the end of March, 1916.

Discounts as follows:

Straight shank jobbers drills, inch sizes	80, 10, 3½%
Taper shank jobbers drills, inch sizes	80, 10, 3½%

Straight shank taper length drills, inch sizes	80, 10, 3½%
Drills ½" shanks (both right and left hand twist)	80, 10, 3½%
Drills ⅝" shanks (both right and left hand twist)	80, 10, 3½%
Bit stock drills	80, 10, 3½%
Number sizes	80, 10, 3½%
Letter sizes	80,10, 3½%
Taper square shanks (both right and left hand twist)	76%

Delivery F.O.B. Montreal.

Terms of Payment—Spot cash against invoice with original inland Bill of Lading attached.

Our shipping instructions, invoicing instructions, etc., given on July 10th, 1915, to hold good unless modified by us later.

FRANCIS HANKIN & CO.

Accepted Per A. H. Hill.

JOHN MORROW SCREW & NUT CO. LIMITED,
Horton,
For President and Manager.

The letter of July 10, 1915, referred to at the close of the above letter or contract, embodied the terms of one of the earlier contracts between the parties for the purchase and sale of drills and contained with the shipping and invoicing instructions an express reference to the standard twist drill price list on which all discounts are placed.

After plaintiff sent in his first order or specifications within the stipulated three weeks, defendant began expressing its fears that it would not be able to "live up" to the contract, and asking plaintiff to consent to cancel it, which plaintiff refused to do, whereupon, defendant, by its letter of October 15, formally declared it would not carry the contract out.

Plaintiff thereupon invited tenders from other manufacturers, for the same quantities and kinds of drills, and eventually closed a contract with the Cleveland Twist Drill Co. for the kinds and quantities the defendant had undertaken to supply. The defendant was kept advised of the calls for tenders and of the Cleveland company's quotations, and was formally put in default again by the plaintiff before closing with this latter company.

The amount paid by plaintiff to the Cleveland company for the kind and quantity of drills the plaintiff had contracted to supply was $10,032.31 above that which the contract, if binding, with the defendant provided for and this amount is the damages claimed by him and adjudged by the court.

Counsel for the appellant contended first that the alleged contract was an offer or option merely and was withdrawn, but

CAN.
S. C.
HANKIN
v.
JOHN MORROW SCREW AND NUT CO.
Davies, C.J.

I really do not think that such a construction is at all reasonable if it is once held that the contract is in other respects valid.

He further submitted that Horton had no authority to enter into the contract, but I am also of opinion that under the evidence, there is no reasonable doubt of his authority to do so. It may be observed that Horton himself was not called as a witness and the only evidence given on defendant's part was that of the president himself which fell far short in the face of the proved facts of shewing want of authority on Horton's part. I think it clearly shewed that the company always recognized Horton, at any rate in the president's absence, and held him out as having full authority to transact such business as was involved in the entering into of such contracts as the one in question.

There remained his main contention that the contract was one required by the Statute of Frauds to be in writing and that oral evidence of the bargain to supply what was wanting in the written instrument could not be given.

Both parties, he said, agreed that there was no substantial difference between the law of Quebec and that of Ontario on the subject. The "prices" to be paid under the alleged contract were not stated in it nor was there any reference in it to the "standard list of prices" from which the prices of each class of articles stipulated for in the contract could be ascertained.

But I do not think such absence is necessarily fatal, provided it can be supplied either by another document to which direct reference is made in the contract so that the two can be read together and so constitute a complete memorandum, or in the absence of direct reference in one to the other, if the two documents can be connected together by reasonable inference.

In the case of *Doran* v. *McKinnon* (1916), 31 D.L.R. 307; 53 Can. S.C.R. 609, I had to examine fully the authorities on the point and to express my conclusion from them and it was as above stated.

Applying this rule to the case before us we have the following facts proved: That in the twist drill trade there is only one price list on the whole North American continent; when either buyers or sellers quote discounts on drills in their orders or acceptances of orders they have this price list in their minds and both parties understand that, when they refer to discounts on

prices, they mean discounts on the gross prices given in the standard drill price list—necessarily in use by all manufacturers of twist drills and all dealers in the same. This is made abundantly clear by this uncontradicted evidence of Hill.

The discounts quoted in the contract above set out manifestly refer to some amounts or prices. The letter of July 10, 1915, referred to in the last paragraph of the contract, does mention the standard list along with the prices on which the discounts were to be made. The result is that the standard list of prices from which the discounts mentioned in the contract are to be deducted should and must be connected together by reasonable inference as having necessarily been in the mind of both parties to the contract when entered into and could not possibly have reference to anything else and that being so it is sufficient under the authorities to satisfy the statute.

As to the contention with respect to the meaning of the words "inch sizes" which I remark were not "inch size" merely, I think in the connection in which they were used they were trade terms known and well understood in and by the trade and that the weight of testimony as to their meaning was strongly in favour of the contention that "inch sizes" included drills in fractions of an inch or more than an inch. In the respondent's factum it is stated and was not challenged on the argument that "of the three kinds of drills described in the contract as of 'inch sizes' the first two were known as jobbers drills."

The price list shews and Mr. Young, a witness called by appellant, swore that jobbers' drills were only listed in "fractional" sizes and run up to only half an inch in diameter. If, therefore, appellant's interpretation of the meaning of the term is the correct one he was offering and agreeing to sell jobbers drills of one inch in diameter, a thing which it did not manufacture and which did not exist in the trade.

It must be remembered that this objection was never raised until the trial, when the defendant applied to amend his plea so as to cover it. I think the learned trial judge correctly found the trade usage of the words to be that they covered fractional sizes.

Counsel for the appellant contended with respect to the

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Davies, C.J.

damages that in any event they could only be estimated on the failure of the defendant to deliver the $25,000 value of the goods up to which the plaintiff bound himself to order; and did not cover the other ten thousand in value which was only an option given to the plaintiff; a minimum and a maximum figure was stated. The plaintiff was bound to order $25,000. He had the right to order another $10,000, but there was no right on the vendor's part to refuse to supply the $35,000 value if ordered, the option was one entirely with the purchaser.

The defendant repudiated the contract absolutely on October 16 and in a letter of that date suggested that plaintiff purchase the drills in the United States. The plaintiff replied on the 19th saying that in order to protect his interests he would proceed to purchase the drills elsewhere, charging the difference to defendant.

He called for tenders for from $25,000 to $35,000 of drills in value and notified the defendant of the result of the tenders in letter of October 27.

Later, on November 16, he again wrote defendant as follows:—

> In reference to our letter of 27th October, we find that in covering for only $25,000 to $35,000 of drills with Cleveland Twist Drill Co., on account of the increased price which we have had to pay this will not enable us to purchase the same quantity of drills as would be the case against your contract. We have therefore covered for an extra ten thousand to fifteen thousand and desire you to be notified of the fact.

In other words, plaintiff substantially notified the defendant that he had exercised his option up to the $35,000 and that as the defendant had definitely and absolutely repudiated the contract he would go into the market and purchase up to that figure for the best price he could and hold the defendant responsible for any loss he would sustain.

Under these circumstances, I think the assessment of the plaintiff's damages was made on a correct basis and the appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—When the terms used in the alleged contract have been, as they were, duly and correctly interpreted, we ought, I submit, to find it quite intelligible and answering all the requirements of the Statute of Frauds.

But if it is attempted to so extend that as to incorporate

something which is not obviously intended to be incorporated therewith, a difficulty arises in the way of him making the attempt, but not in our finding a contract.

There is a contracting letter of a date anterior to this contract which is referred to in the last sentence thereof. So far as same can, clearly and reasonably, be held to have been indicated thereby as the subject of incorporation, I see no difficulty in doing so. I refer to the "shipping instructions," "invoicing instructions," &c.

The "&c.", may, not unreasonably, be taken to mean the like kind of terms and thereby include the sentence in the letter referred to, and that falling therein under the heading "Re invoicing" "Drills to be billed at 80, 10, 3½% of your standard lists," and thus make clear that it was the appellant's standard lists of all sorts of inch sizes whether single or multiples or fractions thereof, which were had in view in contracting.

When that is done appellant says confusion is produced thereby of such a nature that you cannot find a definite contract, or at least one such as necessary to find in order to cover or lay a foundation for assessing a great part of the damages in question.

The sizes of the drills named in the contract falling under the phrase "inch sizes" being of doubtful import led to the introduction of evidence of experts and I cannot say there is error in doing so or in that accepted by the learned trial judge. Indeed if that evidence is admissible, which did not seem to be seriously questioned, I should say it is quite unnecessary to raise such issue as started upon the question of inch sizes unless to lead the court into the wilderness of confusion and succeed thereby.

For my own part, I incline to think that the question so raised is of no consequence when we find in law that the measure of damages is the difference between the price or prices agreed upon and the market price at the time when the buyer was entitled to get delivery, and that seems to have been the same proportionate rise, or so nearly the same, in all the classes of tools in question, that the result of the breach of contract would be the same if measured by any selection the respondent saw fit to make.

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Idington, J.

It is not his buying or bargain that is the measure of damages, though that may be some evidence of market price and in some circumstances he may be bound to avert or minimize loss.

His power of selection under such a contract as this of course gives, or is liable to give, rise to confusion of thought, and had there been in fact a substantial deviation of the percentage of rise in the respective market values of the different classes of goods in the list which the respondent was entitled to select, a difficult question might have arisen. But in regard to drills up to an inch and a half sizes at least, there would seem to have been no difference of percentage of rise in any class and respondent bought quite enough below that margin to fulfil his right to damages on the $35,000 limit of his bargain without coming into the field of variation of percentages of rise and thus is eliminated any question turning upon the multiple of inches.

There was a contract definitely binding respondent to buy at least up to $25,000 worth, and the appellant to sell not only that much but also up to $35,000 worth if respondent should so select.

It seems, at first blush, that it is unfair to have the seller bound to such an extent when the buyer is not.

If the market accidentally goes one way there is a possibility of the one party to a contract suffering thereby, having to bear a heavier load than the other party might have to bear in case of the market going the other way.

That, however, is the result which the parties agreed to observe and in the light of which they must be held to have deliberately bargained to meet the consequences. The vendor in consideration of a supposed certainty of anticipated profit, coupled with a wider profitable possibility, saw fit to bind itself and so end all question.

There are numerous cases to be found in Blackburn on Sales, 3rd ed. at pages 236-244, illustrating incidentally the law on the subject.

As to the alleged want of authority on the part of Horton, I should have hardly thought it arguable in light of all that had transpired between the parties thereto before and after the making of the alleged contract so clearly recognizing his ostensible authority.

The questions of a contract, and of the measure of damages being determined against the appellant, there seems, therefore, no alternative but a dismissal of the appeal with costs.

ANGLIN, J.:—The defendants appeal from a judgment of the Court of Review affirming a judgment of the Superior Court holding them liable in damages to the extent of $10,032.31 for breach of contract. The grounds of appeal are that the alleged contract was not such in fact but a mere revocable option; that it was not "good" because of the omission from the writing evidencing it of the element of prices; that, although the plaintiff is claiming damages for failure to supply goods of sizes of fractional parts of an inch "inch sizes" only are specified in the letter of August 21, and they do not include sizes of fractional parts of an inch, and the price list relied upon and put in evidence contains no prices for sizes of an inch or multiple thereof, and that the agent of the defendants, who signed the document relied on, exceeded his authority.

Upon the whole evidence I have no doubt that the plaintiff's letter of August 21, 1915, with the defendant's acceptance upon it, was intended by the parties not to be a mere option, revocable until acted upon, but to be an actual agreement entailing mutual obligations. The obligations were that the plaintiff on the one hand would order not less than $25,000 worth of goods of the descriptions therein set forth and that the defendants on the other would supply goods so to be ordered, up to, but not exceeding, the value of $35,000. The plaintiff was to send in specifications of the quantities of each of the classes of goods set forth that he might require in sufficient time to enable the defendants "to ship the whole lot before the end of March, 1916."

The prices, subject to the discounts specified, were to be those stated in the "standard drill price list," which the evidence shews is used by the whole drill trade of North America. The consideration for the defendants assuming an obligation to furnish such drills as might be ordered, within the limits specified, was the plaintiff's undertaking to order, within a period capable of ascertainment, at least $25,000 worth of such drills.

I have so far dealt with the case apart from any difficulty presented by s. 17 of the Statute of Frauds. While the proof of a contract within art. 1235 C.C., must, as a matter of pro-

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Anglin, J.

cedure, be made according to the *lex fori*, its validity depends upon the *lex loci contractus*, which in this case is Ontario. Appellant's counsel's contention that the laws of Ontario and Quebec in regard to the requirement of writing in the case of contracts such as that under consideration are the same in effect is not quite correct, although article 1235 C.C. is no doubt founded on the Statute of Frauds. *Munn* v. *Berger* (1884), 10 Can. S.C.R. 512. Under s. 17 of the Statute of Frauds, an absence of the prescribed memorandum, if it does not affect the validity of the contract itself (*Leroux* v. *Brown* (1852), 12 C.B., 801 at 810, 138 E.R. 1119, presents the same obstacle to the enforcement of it by action as arises under the 4th section. *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 at p. 488. Under article 1235 C.C., the question would appear to be purely one of evidence and the Quebec courts, quite logically, do not require a defendant to plead a mere absence of evidence which the law obliges the plaintiff to supply. He may *ore tenus* object to the admissibility of parol evidence when offered by the plaintiff. Art. 110 of the Code of Civil Procedure is not regarded as applicable. English and Ontario practice is to the contrary. English Rule 211, O. 19, r. 15; Ont. Con. Rule (1915) No. 143.

Another difference is suggested by decisions of the Quebec courts (as to the soundness of which it is of course quite unnecessary now to express an opinion), that an admission of the contract by the defendant either in his pleadings or in giving evidence will satisfy art. 1235 C.C., *Guay* v. *Guay* (1902), 11 Que. K.B. 425, at p. 427.

> A judicial admission is complete proof against the party making it.
>
> Art. 1245 C.C. See too *Sheppard* v. *Perry* (1907), 13 Rev. Leg. 188.

A plaintiff in an English or Ontario court cannot avail himself of a like admission against a defendant who sets up the statute as a defence. *Lucas* v. *Dixon*, 22 Q.B.D. 357 at p. 360. Still another difference arises from the use of the words "accepted or received" in article 1235 C.C., in lieu of the words of s. 17 of the English statute: "Accept . . . and actually receive." Mr. Justice Fournier discusses this important departure in *Munn* v. *Berger* (1884), 10 Can. S.C.R. 512, at p. 521.

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Anglin, J.

But a defence of invalidity according to foreign law must be pleaded under each system alike (Lafleur, Conflict of Laws, 23). Here the only plea is that their acceptance of the plaintiff's letter of August 21, directing the booking of his contract in the terms therein stated, does not by the law of Ontario constitute a valid contract enforceable against the defendants. Two professional gentlemen called as expert witnesses for the defence based their opinions that the contract was invalid under Ontario law—or rather that there was no contract—solely upon absence of mutuality of obligation. They regarded the document sued upon as a mere option. They were neither asked for, nor did they give, evidence as to s. 17 of the Statute of Frauds. The professional gentleman called by the plaintiff in rebuttal upheld the contrary view. Merely incidentally he said on cross-examination:—

> A contract for the sale of goods does not require to be in writing. It can be oral.

(No doubt he meant, in cases within s. 17 of the statute, if it be not pleaded or if its alternative requirements be fulfilled.) He added that the element of price missing from the letter in question was sufficiently supplied by implied reference and by the evidence explanatory of the meaning of the discounts stated which was received subject only to an objection based neither on the requirements of the Statute of Frauds nor on those of art. 1235 C.C. There was no attempt to meet this evidence by calling testimony in sur-rebuttal. The trial judge apparently did not regard the validity of the contract under s. 17 of the Statute of Frauds as being an issue. He treated the omission of direct reference to the standard price list from the letter as raising an issue of contract or no contract independently of and apart from any question as to the sufficiency of the written evidence, and he found upon it in my opinion quite rightly, against the defendants. He makes no allusion to the sufficiency or insufficiency of the letter of August 21 to satisfy s. 17 of the Statute of Frauds; nor is that question touched upon in the judgment of the Court of Review.

Yet in this court, counsel for the appellants chiefly relied upon the absence of a reference to the standard drill price list in the letter of August 21 as affording his clients a defence under

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Anglin, J.

s. 17 of the Statute of Frauds. Without so deciding I shall assume that that defence was sufficiently pleaded to meet the requirements of Quebec procedure, although in Ontario, it would be clearly otherwise, and, since counsel for the plaintiff did not object, I shall also assume that it is open to the appellants to invoke this defence in this court notwithstanding the apparent failure to do so at the trial.

Upon the evidence before it, the Superior Court, being bound to treat the construction and effect of s 17 of the Statute of Frauds as a matter of fact to be established by evidence, could not have done otherwise than hold that its requirements had been satisfied. Mr. Hamilton Cassels so deposed and his testimony remained uncontradicted. The same is true of the Court of Review. See cases collected in Beauchamp, Rep. de Jur. Can., vol. 2, col. 2067, Nos. 326-7. Although we are required to render the judgment which the court appealed from should have rendered (Supreme Court Act, s. 51), it is the settled jurisprudence of this court that it

> is bound to follow the rule laid down by the House of Lords in the case of *Cooper* v. *Cooper* 13 App. Cas. 88, in 1888, and to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada, *suo motu*, even in cases where such statutes or laws may not have been proved in evidence in the courts below and although it might happen that the views as to what the law might be as entertained by members of the court might be in absolute contradiction of any evidence upon those points adduced in the courts below.

Logan v. *Lee* (1907), 39 Can. S.C.R. 311, 313. This view was tacitly acted upon in *Garland* v. *O'Reilly* (1911), 44 Can. S.C.R. 197, 21 O.L.R. 201. This conception of the functions of this court as "an appellate tribunal for the whole Dominion" is in harmony with the Imperial Act of 1859, 22 & 23 Vict. ch. 63, noted by Mr. Lafleur at p. 34 of his work. See too *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306, 14 E.R. 508.

It was, in my opinion, open to the plaintiff to establish by parol evidence, as he did, that the discounts stated in his letters of August 21, (meaningless in themselves) according to the usage of the trade meant and could only mean discounts off the standard drill prices according to the list in common use throughout North America and that both the parties must have so understood. The case seems to me to fall clearly within the principle

of the decision in *Spicer* v. *Cooper* (1841), 1 Q.B. 424, 113 E.R. 1195, where parol evidence was held admissible to shew that a sale of fourteen pockets of Kent Hops at 100s. meant at 100s. per cwt. according to the usage of the hop trade.

In *Newell* v. *Radford*, L.R. 3 C.P. 52, Bovill, C.J., says, at p. 54:—

> It has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum and that for this purpose parol evidence of the surrounding circumstances is admissible.

Byles, J., says at p. 55:—

> Evidence has been held admissible to settle the meaning of the price or of the quantity of goods sold and mentioned in a memorandum.

In *Macdonald* v. *Longbottom* (1859), 1 E. & E. 977, 120 E. R. 1177, parol evidence was admitted to shew that "your" wool meant wool which the plaintiff had purchased as well as wool clipped from his own sheep. In *Hutchison* v. *Bowker* (1839), 5 M. & W. 535, at p. 542, 151 E.R. 227, Parke, B., says:—

> If there are peculiar expressions used in a contract which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was.

Of course the jury must act on evidence. *Alexander* v. *Vanderzee* (1872), L.R. 7 C.P. 530; *Ashforth* v. *Redford* (1873), L.R. 9 C.P. 20. See also cases collected in Benjamin on Sales, 5th ed., p. 236. In Blackburn on Sale, 3rd ed., the rule is thus stated at p. 51:—

> The general rule seems to be, that all the facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.

See too Addison on Contracts (11th ed.), pp. 69 & 70.

I prefer to rest my conclusion that the letter of August 21 sufficiently stated the terms of the contract between the parties in regard to prices on this ground rather than on any other implied reference in it to the standard drill price list, which I consider dubious, to say the least.

Upon the weight of evidence I am convinced that "inch sizes" mentioned in the contract include fractions as well as

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Anglin, J.

multiples of an inch—just as "millimeter sizes" admittedly include fractions of a millimeter.

I have no doubt that the contract in question was within the ostensible, if not within the actual, authority of the defendant's assistant manager, Horton.

The question of damages presents some difficulty owing to the non-specification of definite quantities in the contract. But *id certum est quod certum reddi potest*. The plaintiff has established that, but for the defendant's repudiation he would in due course have specified under his contract with them the drills which he ordered in the American market. The orders in respect of which loss is claimed do not exceed the $35,000 limit placed by the contract upon the defendant's obligation. The evidence disclosed that the plaintiff took reasonable steps to minimize his loss. I find no ground for disturbing the assessment of damages.

The appeal, in my opinion, fails and must be dismissed with costs.

Brodeur J.

BRODEUR, J.:—I had prepared some notes with regard to this case but I find, after having read the opinion of my brother Anglin, that our views coincide. I would be then of opinion that the appeal should be dismissed for the reasons given by my brother Anglin.

Mignault, J.

MIGNAULT, J.:—I have read the opinon of my brother Anglin and I concur in his reasons for the dismissal of the appeal.

The parties undoubtedly looked upon the letter of August 21, 1915, written by the respondent and accepted by the appellant, as forming a contract, and, in its letters seeking to be relieved from the obligations it had assumed, the appellant treated it as such. The opinion of the trial judge, not printed in the case, but filed at the hearing before this court, as well as a careful examination of the record, have convinced me that the grounds urged by counsel for appellant in his argument before us were not contended for in the court below. It is true that counsel of the Ontario Bar were called by the appellant at the trial to support its plea that,

> by the law of Ontario, even if the said letter had been accepted by the appellant, the same does not constitute a valid contract enforceable against the defendant

But the learned counsel based their opinion on what they

considered a lack of mutuality, while admitting that if, subsequently to the letter, the respondent had specified certain goods, before there had been any revocation, there would have been a contract "*pro tanto.*" I must, with deference, think that the objection of lack of mutuality was not well taken. Assuming that the respondent had the right, and had not in any manner lost this right, to specify the goods which the appellant had agreed to supply on specification, I fail to see how the latter could escape from its obligation to supply the goods by repudiating the whole contract before any specification had been made.

I also do not think that the letter of August 21 can be regarded as imposing no obligation on the respondent to take any goods. Properly construed, it obliged him to purchase at least $25,000 worth of cast steel twist drills, with the right to take more up to $35,000. This, if accepted by the seller, would be a valid contract. The question whether any property passed is immaterial, for the contract would be valid even if the goods did not exist but had to be manufactured at a future date.

The objections of appellant's counsel were very ably urged, but they appeared to me somewhat technical. Undoubtedly an order could be made subject to a standard price list, and I think that this was done in the present case. Of course, it is essential that a price be sufficiently agreed upon to constitute a valid contract of sale, but if, construing the contract according to the usages of trade, the prices were to be those determined by a standard price list in use in this trade, and were so understood by the parties, and if, moreover as the evidence shews, the list of discounts mentioned in the letter, according to the common understanding of persons dealing in these articles, determined the price to be paid, I cannot believe that the element of price was absent in the agreement made by the parties. The appellant, in its letters to the respondent, never claimed that the contract was not understandable, but merely pleaded its inability to complete deliveries within the time fixed. The contention now made that the contract is meaningless seems in every way an afterthought.

I am clearly of opinion that the appellant cannot challenge

CAN.

S. C.

HANKIN v. JOHN MORROW SCREW AND NUT CO.

Mignault, J.

the authority of Mr. Horton who accepted the letter "for president and manager." The contract was not an unusual one, and this defence of lack of authority merely impresses me as shewing the anxiety of the appellant to escape from a contract which it repented having made.

The effect of art. 1235 of the Quebec Civil Code, on which appellants' counsel relied, is well demonstrated by my brother Anglin. The whole question under this article is one of proof and not of validity of contract. My brother Anglin has also dealt with the effect of the Statute of Frauds under the Ontario law and I feel I can add nothing to his discussion of this question.

Perhaps I might add that, as the question came before the Superior Court, art. 1235 C.C. would have stood clearly in way of the respondent had he not produced a writing sufficient, under the terms of that article, to prove the contract alleged by him. I do not care to lay down any general rule on the question whether the proof of a foreign contract is, as a matter of procedure, governed by the *lex fori*, or by the *lex loci contractus*. But I do think that such a provision as art. 1235 is one which a Quebec Court must follow when it is sought to make evidence of any of the matters mentioned by it, quite irrespective of the locality where the contract, warranty, promise or acknowledgement was made. In this sense, and I do not wish to be understood as otherwise dealing with the subject of conflict of laws, the *lex fori* prevails over the *lex loci contractus*.

Appellant's counsel also relied on the decision of the Judicial Committee of the Privy Council in the case of *R.* v. *Demers* [1900] A.C. 103. In my opinion, this decision is clearly distinguishable from the one appealed from. Demers had undertaken to print certain public documents at certain specified rates. The contract imposed no obligation on the Crown to pay Demers for work not given him for execution, nor was there anything in the contract binding the government to give him all or any of the printing work referred to in the agreement, the government being free to give the whole work, or such part as it might see fit, to any other printer. Their Lordships did not hold the contract invalid, as is contended in the present case; on the contrary, they were of the opinion that for all work given to

Demers on the footing of the contract the government was undoubtedly bound to pay according to the agreed tariff, but they dismissed the claim made by Demers for damages because no printing had been given him after a certain date.

In the present case the agreement of the parties properly construed was for the sale of certain goods to be specified by the respondent, the latter, in my opinion, being bound to take goods up to the amount of at least $25,000 with the right to order an additional amount of $10,000. The contract mentioned that the specifications were to commence about 3 weeks from its date and that shipment of the whole lot was to be made before the end of March, 1906. I cannot agree with the contention that there was not here a valid contract binding on both parties according to its terms.

On the whole, my opinion is that the appeal should be dismissed with costs.

Appeal dismissed.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. November 25, 1918.

NEGLIGENCE (§ I C—50)—RAILWAY AND TRAFFIC BRIDGE—RAILWAY PART NOT FLOORED—TRESPASSER FALLING THROUGH—DEATH—DAMAGES.

The owner of a railway and traffic bridge, one portion of which is used for railway traffic only and is not floored, the other portion being fenced off from the railway portion and used for the passage of persons and vehicles only and for the use of which a small charge is made, is not liable in damages for the death of a person who, in a state of intoxication, and in order to avoid payment of the charge, attempts to cross on the railway portion of the bridge, falls through and is killed. Such person being a trespasser, the doctrine of implied invitation does not apply.

[*Stevens* v. *Jeacocke* (1848), 11 Q.B. 731, 116 E.R. 647; *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125; *Walker* v. *Midland R. Co.* (1886), 2 Times L.R. 450, followed.]

Statement.

APPEAL by defendant from a judgment of Lennox, J. in an action for damages under the Fatal Accidents Act. Reversed.

The judgment appealed from is as follows:—

The action was tried at Fort Frances. Upon questions submitted, the jury found all the issues in favour of the plaintiff, and assessed the damages at $5,000. There was evidence upon which the jury could very reasonably find that the defendant company was guilty of negligence causing

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

the fatality; and that which they have assigned, in my opinion, constituted acts of legal negligence. They viewed the locality and the bridge, with the concurrence of counsel on both sides, and they were fully instructed, both during the taking of evidence and in my charge, that the subsequent filling up of the open spaces by gratings was not evidence that the company was negligent before the happening of the accident, but they might consider it as evidence of the practicability of that method of protection. It was not questioned at the trial that the accident occurred in the way described by Dr. Moore; indeed the matter is not open to doubt. The duty of the defendant company to exercise care is not at all the same as it would be if there were two independent structures, and the railway bridge only owned and controlled by the company. It was one structure, with one approach from the town, common to both—the whole structure owned and operated by the company, and both for profit. The deceased was a patron or customer of the company, and the company was bound to exercise reasonable care for his safety.

I think the jury were right in negativing contributory negligence. The deceased had been drinking, but, in the opinion of the Customs officer, a very careful, respectable man, he was not in a condition to be dangerous to himself or anybody. If his condition changed while up-town, the change would be a change towards sobriety, as he could not, as a stranger, get liquor in the town, and he was not carrying a bottle or flask. In any case drunkenness is not in itself contributory negligence. Counsel for the defence distinctly repudiated any suggestion of suicide, when I was about to point out to the jury that criminality is not to be presumed. The circumstances afforded ample evidence on which the jury could reasonably conclude that the deceased *bonâ fide* believed that he was proceeding properly, until it was too late, and, confused by the lights and shadows, fell when he had discovered his error and while attempting to reach a place of safety. Even aside from the evidence of the footprints, and in the absence of any suggestion of suicide, it is a case of *res ipsa loquitur*. The deceased was lawfully upon that part of the bridge used as a railway bridge, if, as a traveller returning from a journey over property of the defendant company, used for profit, he mistakenly and in good faith took the wrong one of two side-walled passages,

and the only one with an open end, with the intention of completing his journey; and there is an entire absence of any evidence, direct or circumstantial, to the contrary.

There will be judgment for the plaintiff; but, before it is entered up, the plaintiff must file an affidavit setting out the names, dates of birth, sexes, occupations, and extent of the education of the children of the deceased; and I will then apportion the damages and endorse the record.

R. T. Harding and *C. R. Fitch*, for the plaintiff, respondent.

Clute, J.

CLUTE, J.:—The plaintiff is the widow of William Walsh, who came to his death on the 21st March, 1917, by falling through the railway bridge at Fort Frances. She sues on behalf of herself and three infant children.

The bridge, owned and maintained by the defendant company, is a toll bridge for railway passenger traffic and freight between Fort Frances, Ontario, and International Falls, Minnesota.

The Canadian terminal opens upon Church street, the portion used for railway traffic being open and unprotected. The portion reserved for vehicular and foot traffic is enclosed, for vehicles by a gate, and for foot-passengers by a Customs building, through which the latter pass out by a door to the street.

At the time of the accident, the portion of the bridge used for railway purposes was only partly floored; large spaces on each side of the railway track were open and unprotected. The bridge on the Canadian side spans a canal, and at this point is about 60 feet above the level of the canal.

On the night of the 21st March, 1917, the said William Walsh paid his fare and crossed over from the American side, passing through the Customs building on the Canadian side and entering his name. There is no evidence as to what he did or where he went after he passed out from the Customs house. He was found on the ice of the canal, on the Canadian side, under the railway portion of the bridge, immediately below where appeared footprints upon the bridge, about 50 feet from the east end of the bridge.

Dr. Moore, in stating what he saw, said: "There was a mark of some person having gone out on the ties and having looked back and then having gone sideways to the left, that is, coming back

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Clute, J.

towards the Canadian side, and apparently having fallen, making a curved mark to the north 20 or 30 feet—that is, they turned about and came in the reverse direction"—the inference being that he fell through the opening of the bridge.

The plaintiff charges that the bridge was insufficiently lighted; that the defendant company was ordered by the Railway Board of Canada to construct a gate across Church street near the said bridge and to maintain a watchman at that point, but had neglected to comply with that order, and that the defendant was negligent in maintaining the said bridge unfloored and only partly lighted at night, without any means being taken to warn foot-passengers of such danger, and that the proper entrance to the bridge for pedestrians was through a building, the door to which was kept closed with no sign to indicate that it was the entrance for pedestrians to the said bridge; that the defendant well knew the dangerous character of the bridge; and that the manner in which the different entrances were maintained was a standing invitation for those unacquainted with the locality to use that portion of the bridge reserved for railway traffic.

The defendant admits that it owns a railway and traffic bridge, one portion of which is used for railway traffic only, and the other portion is fenced off from the railway portion and is used for the passage of persons and vehicles, for which a toll is charged by the defendant; and it alleges that the bridge is not built on any part of Church street or any other public highway in the town of Fort Frances; that the Government of the Dominion of Canada has established a Customs house and Immigration office at the Fort Frances end of the said bridge, and has erected a gate across the portion of the said bridge used for passenger and vehicular traffic, to prevent persons entering or leaving Canada without examination.

The defendant charges further that, on the night of the 21st March, William Walsh crossed the said bridge from International Falls to Fort Frances, and applied to the Immigration officer for permission to enter Canada for a short time, which was granted, and the said officer informed the said William Walsh that on his return it would be necessary that he should report himself to the Immigration officer then on duty at the said bridge, and that he must enter said bridge through the Customs and Immigration office aforesaid.

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Clute, J.

The defendant further alleges that Walsh was in an intoxicated condition when attempting to return to International Falls, and refused and neglected to obey the said Immigration officer's instructions; and, although the approach to the said bridge was brilliantly lighted, he apparently attempted to cross on the railway track, and fell from the said bridge to the ice below on the canal and was killed, and that his death was due entirely to his negligence, contributory negligence, and want of care; and that the defendant was not guilty of any negligence or breach of duty in connection therewith.

The jury took a view of the *locus*, which, in the opinion of the Judge, "supplemented very effectively the evidence." No objection was taken to the Judge's charge.

The following are the questions submitted, with the answers thereto:—

1. Was the death of the plaintiff's husband occasioned by negligence of the defendant company? A. Yes.

2. If your answer is "Yes," in what did the negligence of the company consist? State fully. A. By not complying to order of Commission in not putting gates across street and watchman to guard them day and night and not putting grates over openings at end of ties.

3. Notwithstanding the negligence of the company, if any, could the deceased William Walsh, by the exercise of reasonable care, have avoided the accident? A. No.

4. If so, in what did his negligence consist? (Not answered.)

5. Damages? A. $5,000 and expenses.

Upon these findings, judgment was entered for the plaintiff for $5,000.

In his reasons for judgment the Judge took the view that there was evidence upon which the jury could very reasonably find that the company was guilty of negligence causing the fatality, and that what the jury have assigned "constituted acts of legal negligence."

The Railway Board, on the application of the defendant, under the Railway Act, made an order, dated the 22nd January, 1912, as follows:—

"It is ordered that the applicant company be and it is hereby granted leave to construct and operate the bridge and railway across Church street in the said town of Fort Frances as shewn

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Clute, J.

on the said plan; the applicant company to file new plans for the approval of the Engineer of the Board shewing road allowance 66 feet wide at the approach to the traffic bridge and carrying out the grade so that it will run from 8% to 12% on the street from Church street north to the dock (*sic*); the crossing to be protected by the gates installed and maintained by the applicant company and operated both day and night."

On the 8th March, 1915, the Board made a further order as follows:—

"Upon reading what is filed on behalf of the International Bridge and Terminal Company, and it appearing that there is to be a re-arrangement of the tracks at the point in question:—

"It is ordered that pending the said re-arrangement the International Bridge and Terminal Company be and it is hereby directed to appoint day and night watchmen to protect said crossing; plans of the proposed re-arrangement of tracks to be submitted for the approval of the Board within 30 days from the date of this order."

It is said by counsel that nothing was done towards re-arrangement of the tracks. It is apparent that the orders made by the Board to maintain gates and watchmen cannot help the plaintiff. It was not by reason of neglect of duty in this regard that the plaintiff's husband met his death; that had nothing to do with it, and this finding of the jury cannot sustain the verdict.

The defendant company was incorporated by a statute of the Dominion of Canada (1905), 4 & 5 Edw. VII. ch. 108, intituled "An Act to incorporate the International Bridge and Terminal Company." Section 16 provides that the Companies Clauses Act shall not apply to the company. Section 17 provides that the following sections of the Railway Act, 1903, namely, 51 to 117, both inclusive, 118 except para. (*b*) thereof, 119 to 195, both inclusive, 206 to 210, both inclusive, 242, 251, 252, 280 to 284, both inclusive, and 303 and 309, shall, so far as applicable and except as they are extended, limited or qualified hereby, apply to the works and undertaking of the company, and wherever in the said sections the word "railway" occurs it shall, for the purposes of the company and unless the context otherwise requires, mean the said bridge.

Having regard to the interpretation clause of the Railway Act, 1903, sec. 2 (*c.*) and (*s.*), and secs. 3, 4, and 5, and the Incorporation

Act of the defendant company, I am of opinion that the defendant is *not* a company within the meaning of the Railway Act, and only those clauses of the Railway Act which are made applicable by sec. 17 of the Incorporation Act are to be considered as a part of that Act. The trespass clause of the Railway Act is not included in sec. 17 of the Incorporation Act, and has no application to the present case.

Section 180 of the Railway Act, 1903, now sec. 231 of R.S.C. 1906, ch. 37, provides that "no company shall run its trains over any canal, or over any navigable water, without having first laid, and without maintaining, such proper flooring under and on both sides of its railway track over such canal or water, as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water."

This is one of those sections of the Railway Act which are made to apply to the defendant's Act of Incorporation, by sec. 17. Is there a duty created by this section towards the deceased, the breach of which would give him or his representatives, under the circumstances of the present case, a right of action? The protection is not limited to anything falling upon boats, vessels, or craft, or persons navigating such canal or water, but refers to anything falling into the canal or water or upon the boats, whether any one is injured or not, that is, the running of trains is prohibited under a penalty until such proper flooring is laid as is deemed by the Board sufficient for the purposes indicated. The deceased was not killed by reason of the defendant running trains while the flooring was unlaid.

The facts in this case do not create a duty towards the deceased. He had no right to go on the railway portion of the bridge. Section 180 was passed "to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water," and not to ensure safety to any one straying by mistake or otherwise on the bridge. The following authorities may be referred to:—

In *Gorris* v. *Scott*, L.R. 9 Ex. 125, it was held that when a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Clute, J.

maintain an action in respect of such loss. The defendant in that case, a ship-owner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, sec. 75; and it was held that, the object of the statute being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the plaintiffs could not recover.

See also *Stevens* v. *Jeacocke* (1848), 11 Q.B. 731; *Blamires* v. *Lancashire and Yorkshire R. Co.* (1873), L.R. 8 Ex. 283; *LeMay* v. *Canadian Pacific R. Co.* (1890), 17 A.R. (Ont.) 293, at p. 300.

In Halsbury's Laws of England, vol. 27, p. 192, para. 379, it is said: "The damages recoverable in respect of a breach of statutory duty may either be imposed by the terms of the statute imposing the duty, or be such as are contemplated by the statute, and flow directly from the breach."

The failure to exercise statutory powers or to perform statutory duties only renders a body having such powers or duties liable to a civil action if the statute intended to give a right of action to a person injured by such failure: *Maguire* v. *Liverpool Corporation*, [1905] 1 K.B. 767 (C.A.)

A public corporation to which an obligation to keep public roads and bridges in repair has been transferred is not liable to an action in respect of mere nonfeasance unless the Legislature has shewn an intention to impose such liability upon it: *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400.

"The harm in respect of which an action is brought for the breach of a statutory duty must be of the kind which the statute was intended to prevent," referring to *Gorris* v. *Scott*, *supra:* Pollock on Torts, 10th ed., pp. 205, 206. And again, p. 206: "In an action not founded on a statutory duty the disregard of such a duty, if likely to cause harm of the kind that has been suffered, may be a material fact," referring to *Blamires* v. *Lancashire and Yorkshire R. Co.*, *supra.*

Gorris v. *Scott* is also referred to in Clerk & Lindsell on Torts, 6th ed., pp. 31 and 32, where it is said: "It is not, however, in every case that a party is entitled to maintain an action by reason

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Clute, J.

of his having suffered some particular damage from which the due fulfilment of some public duty would have saved him. It must further appear that his damage was within the mischief against which the law intended to provide . . . Even, however, where a party has suffered the very damage against which some statutory obligation is provided as a safeguard, he will not necessarily have any right of action. The whole language and scope of the statute must be carefully considered in order to discover whether it was the intention of the Legislature to give by implication such a remedy. (See *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441.) But the general rule would seem to be that where a statute imposes a penalty for the breach of the duty which it creates there is no right of action. The presumption is that the Legislature considered the penalty sufficient protection. (See *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347; and *per* Lord Hobhouse, *Municipality of Pictou* v. *Geldert*, [1893] A.C. 524, at p. 525. In such and cognate cases, the question whether an action will lie for breach of a statutory duty probably depends mainly upon the nature of the injury likely to arise from a breach, and the amount and allocation of the penalty imposed. 'If it be found that the remedy provided by statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration.' But, 'although it may be a cogent and weighty consideration, other matters have also to be considered:' *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q.B. 402, Vaughan Williams, L.J., at p. 416."

See also Pollock on Torts, pp. 27 and 28; and see *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, at p. 23.

The appeal should be allowed and the action dismissed. It is not a case for costs.

MULOCK, C.J. Ex., agreed with CLUTE, J.

Mulock, C.J.Ex.

RIDDELL, J.:—The deceased lived in Minnesota as a hotel and boarding-house keeper; he came to International Falls, Minnesota, intending to go into business there; when there he came across the river by the defendant's bridge to Fort Frances, Ontario, and returning fell through the bridge and was killed. An action being brought under our statute, judgment was given for his widow, the plaintiff, for $5,000. The defendant company now appeals.

Riddell, J.

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Riddell, J.

The defendant company was incorporated by Dominion legislation (1905), 4 & 5 Edw. VII. ch. 108; in this Act, by sec. 17, certain of the sections of the Railway Act of 1903, 3 Edw. VII. ch. 58, are incorporated.

Under its statutory powers the company built a bridge across the river from International Falls; this was in three parts, the viaduct for the railway tracks being to the east, then a floored carriageway, and then a little higher a floored footway. No foot-passenger on the footway could without great difficulty get upon the railway viaduct, which was not floored. The railway part has its girders on either side, while the traffic parts for carriages and foot-passengers is a kind of extension or annex.

For one crossing to Canada by the footpath it is necessary for him to pass through the Canadian Customs office. The deceased crossing on the footpath passed through the Customs office. The Customs officer describes him as then under the influence of liquor, apparently drunk—"he staggered when he came in the door, and his breath smelt pretty strong of liquor."

The officer questioned his right to enter Canada, and "told him he was pretty drunk to see Fort Frances," but the deceased "told me . . . that I need not be afraid of him or I need not think he was a German spy, that he was prepared to lick all the Germans in the United States," and that "helped to get him by." He wrote his name on the register, and the officer told him he would have to come back to report out. This was about 9.30 p.m. of the 21st March, and after that time he was not seen alive by any witness called, nor have we any indication of where he went or what he did until shortly before his death. In the morning his body was found under the railway part of the bridge, "almost underneath the railway track" on the right hand side, i.e., the west side. From his marks in the snow, it was evident that the deceased, instead of going through the Customs office, as he should have done, had turned in on the viaduct, gone some 60 feet on it, and then turning back had gone a short distance "sideways to the left" and fallen on the ice below between the ends of the ties and the side of the railway viaduct. His watch stopped at 10.35, indicating that the unfortunate man had not remained in Canada quite an hour.

At the trial it was proved that an order had been made by the Railway Board as follows:—

"Upon the hearing of the application, in the presence of counsel for the applicant company, and the reports of the Chief Operating Officer and the Chief Engineer of the Board:—

"It is ordered that the applicant company be and it is hereby granted leave to construct and operate its bridge and railway across Church street in the said town of Fort Frances as shewn on the said plan; the applicant company to file new plans for the approval of an Engineer of the Board shewing road allowance 66 feet wide at the approach to the traffic bridge, and carrying out the grade so that it will run from 8% to 12% on the street from Church street, north to the dock; the crossing to be protected by gates installed and maintained by the applicant company, and operated both day and night."

Church street is a highway crossing the railway tracks a short distance north of the bridge and (substantially) at right angles to the tracks.

There was a later order:—

"Upon reading what is filed on behalf of the International Bridge and Terminal Company, and it appearing that there is to be a re-arrangement of the tracks at the point in question:—

"It is ordered that pending the said re-arrangement the International Bridge Company be and it is hereby directed to appoint day and night watchmen to protect the said crossing; plans of the proposed re-arrangement of tracks to be submitted for the approval of the Board within 30 days from the date of this order."

But the re-arrangement scheme was never proceeded with, and it does not seem necessary to consider the order. In any case, it does not alter or modify my view.

[The learned Judge then set out the findings of the jury, which were as stated by Clute, J., *supra*, with the exception of the answer to question 2, which at first read: "By not putting gates across *tracks* and watchman to guard them" etc.]

It is apparent that the jury thought that the Board had ordered gates across the mouth of the bridge, across the railway tracks; and his Lordship drew their attention to the error, whereupon the jury changed the answer to Q. 2 and made it read thus:—

"A. By not complying to order of Commission in not putting gates across street and watchman to guard them day and night and not putting grates over openings at end of ties."

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Riddell, J.

Upon the hearing before us, Mr. Harding, in his very exhaustive argument, contended for a breach by the defendant of both statutory and common law duty, and it will be convenient to consider the argument in that order.

The incorporating Act, by sec. 7, enables the defendant to "construct, maintain and operate a bridge, with the necessary or proper approaches . . . from a point in or near the town of Fort Frances . . . and lay tracks on the bridge . . . " and sec. 118 (*f.*) of the Railway Act, 1903, made part of this Act by sec. 17, enables them "to make, complete, operate, alter and maintain the bridge" (see last three lines of sec. 17) "with one or more sets of rails or tracks." Consequently, the approach to the bridge over Church street is fairly part of the authorised undertaking—the same conclusion must be reached from a consideration of sec. 175 of the Railway Act, 1903. Accordingly secs. 184 to 186 of the Railway Act apply; and, indeed, the defendant recognised this by applying to the Board and obtaining the order already spoken of—it is bound by that order although it has wilfully disobeyed it.

It was the duty of the defendant to protect the crossing on Church street "by gates installed and maintained by the company and operated both day and night." This does not mean that the gates are to be continuously raised and lowered day and night. The company would have no right to such a course of conduct, and could be indicted for a nuisance if they attempted anything so absurd. The position of a company such as this in respect of a highway is quite different from the position as regards other lands belonging to individuals over which it passes. In the latter case the land may be expropriated and is expropriated, thereby becoming the absolute property of the company; but, as regards a highway, the fee is not required and is not acquired by the company, nor does the company ask or expect to acquire any exclusive right to use any part of it—the track may be "carried upon, along or across an existing highway," but "it is the right of all His Majesty's subjects to go upon any part of the highway, so long as it is not occupied by other passengers or occupants. While, of course, no person has the right to be along the line of the railway during the time the train of the railway company is passing, every person has a right upon such place at any other time, and every person has

a right upon other parts of the highway at all times, except so much as is actually occupied by the passing train:" *Grand Trunk R. Co.* v. *McKay* (1903), 34 Can. S.C.R. 81, at p. 88. The sole power given the company by an order under sec. 186 is to provide by gates and watchmen for the "protection, safety and convenience of the public" at the crossing; and the company could not, on a pretence of protecting the public, debar any one from the crossing except when a train was actually passing or about to pass. Accordingly the only duty cast upon the defendant is to have there a gate or a watchman when trains are passing or about to pass.

Here there is no pretence that any train passed or was expected to pass at any time during the visit of the deceased to Canada—there was therefore no statutory obligation in his favour.

Moreover, it is plain that the whole object of the legislation is the protection of those upon the crossing. Where a duty is created, as this was, by statute, for the purpose of preventing a mischief of a particular kind, a person who by neglect of this duty suffers a loss of a different kind is not entitled to maintain an action for damages in respect of such loss: *Stevens* v. *Jeacocke*, 11 Q. B. 731, 116 E.R. 647; *Gorris* v. *Scott*, L.R. 9 Ex. 125. "Admit there has been a breach of duty; admit there has been a consequent injury; still the Legislature was not legislating to protect against such an injury, but for an altogether different purpose:" *ib.*, p. 130; "The Act of Parliament was passed *alio intuitu:*" p. 131; see *LeMay* v. *Canadian Pacific R. Co.*, 17 A.R. (Ont.) 293, 300.

Then as to the want of flooring—the argument of the plaintiff is based upon sec. 180 of the Railway Act of 1903.

The answers to the contention are several—the prohibition is against running trains without having first laid and without maintaining proper flooring—there would be no violation of the law in the defendant maintaining its bridge for a century without a flooring—the obligation is on the company which runs the trains. The duty of this company is performed when it has complied with secs. 179, 181, 182, 183.

Moreover, the flooring is to be under and on both sides of the track, sufficient to prevent anything falling from the railway into the water or upon the boats or persons navigating it—plainly for the protection of those below, not for the protection of the "thing" (anything) which might fall. The cases just cited, therefore, apply.

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Riddell, J.

These are the acts of negligence found by the jury—much argument, however, was addressed to us upon the alleged neglect of the defendant to fence its track on the side between Church street and the bridge. As to that it is sufficient to say that there is no duty at the common law to fence; and the section of the Railway Act of 1903, imposing that duty upon railway companies, sec. 199 of the Act of 1903, is not incorporated in the company's Act of Incorporation—see sec. 17.

Moreover, the jury have not found that omission negligent—and in any case this duty is imposed only for the benefit of adjoining owners whose cattle or other animals may get on the line from omission to fence: sec. 199 (2); *Conway* v. *Canadian Pacific R. Co.* (1886), 12 A.R. (Ont.) 708, and many other cases in our Courts; *Buxton* v. *North Eastern R. Co.* (1868), L.R. 3 Q.B. 549; *Harrold* v. *Great Western R. Co.* (1866), 14 L.T.N.S. 440; *Dawson* v. *Midland R. Co.* (1872), L.R. 8 Ex. 8; *Matson* v. *Baird & Co.* (1877), 5 Rettie (Sess. Cas., 4th ser.) 87, at p. 93; *Ricketts* v. *E. and W. India Docks etc. R. Co.* (1852), 12 C.B. 160, 138 E.R. 863; *Midland R. Co.* v. *Daykin* (1855), 17 C.B. 126, 139 E.R. 1016; *Manchester Sheffield and Lincolnshire R. Co.* v. *Wallace* (1854), 23 L.J.C.P. 85, at p. 87; Thornton on Railroad Fences and Private Crossings (1892), sec. 79, and cases cited from several of the United States.

It is, I think, clear that no action will lie based upon breach of any statutory duty.

We must now look at the common law—for, of course, in the absence of restriction, express or by necessary limitation, a statute does not affect common law rights: *Powell* v. *Fall* (1880), 5 Q.B.D. 597; *Hilliard* v. *Thurston* (1884), 9 A.R. (Ont.) 514, at p. 526.

That there is no common law duty to fence appears by the cases already cited; that there is none to floor a railway bridge will probably be admitted by all. The plaintiff's case must rest on the proposition that the deceased was an invitee. If he was a mere trespasser, the action must fail: *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731, 141 E.R. 1003; *Hardcastle* v. *S. Yorkshire R. Co.* (1859), 4 H. & N. 67, 74, 157 E.R. 761; *Binks* v. *South Yorkshire R. Co.* (1862), 3 B. & S. 244, 122 E.R. 92. If a bare licensee, he had to take the place as he found it; the only obligation on the defendant was that there should be no trap set for him: *Corby* v. *Hill* (1858), 4 C.B.N.S. 556, 140 E.R. 1209; *Gautret* v. *Egerton* (1867),

L.R. 2 C.P. 371; *Bolch* v. *Smith* (1862), 7 H. & N. 736, 158 E.R. 666. "If the hole has always been uncovered, and the man walks into it, he has no cause of action:" Addison on Torts, 8th ed., p. 723; "otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license:" *per* Willes, J., L.R. 2 C.P. at p. 375.

Was the deceased an invitee? Express invitation he certainly had not, and I think an implied invitation cannot be found in the circumstances of this case. Assuming that sec. 291 of the Railway Act of 1903 does not apply, as it is not incorporated in this company's Act by sec. 17, how can a company which is operating a railway track be considered to have impliedly invited any one to use it, to do what, but for the reason that it is a bridge company and not a railway company, would be a crime? The company knew that, for a foot-passenger to cross, it had provided a perfectly safe way, reached by passing through a building, the Customs office; there was an abundance of light, and no chance of any one who used the slightest care making any mistake; how can it be said that there was any implied invitation? Of course the doctrine of *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311, is appealed to, but there the plaintiff was engaged in work for the defendant; the defendant had contracted for the work, and knew that the plaintiff or some other workman would come on the premises; I can find nothing in the facts of this case which would indicate that the defendant knew or ought to have known that any one would be so foolish as to go on the railway viaduct—even such knowledge and implied permission would not be sufficient to fix it with damages: *Caledonian R. Co.* v. *Mulholland*, [1898] A.C. 216, 225; much less to indicate that it impliedly invited the deceased.

It is said that the deceased came upon the property of the company on business in which they were both interested. I do not think so—the company was interested in his using the footpath a distance away from the viaduct—it invited him and expected him to use the footpath, not the viaduct—and to get to the footpath he had no need and could not be expected to go upon the viaduct. It is, of course, not the case that one invited upon a certain part of another's property has a right to go to another part.

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Riddell, J.

"A person who strays from the ordinary approaches to a house, and trespasses upon the adjoining land, where there is no path, has no remedy for any injury he may sustain from falling into unguarded wells or pits" there: Addison on Torts, 8th ed., pp. 711, 712. Suppose a man had three shops, one a grocery, next it another, and then a third (say) a blacksmith's shop—could one who wanted groceries claim that he was also invited to go into the third, and complain that he there received an injury?

Walker v. *Midland R. Co.*, 2 Times L.R. 450, shews how careful the Courts have been in applying the doctrine of implied invitation. There the deceased was a guest at the defendants' hotel with his wife; shortly after midnight he left his room, intending to go to the water-closet; there were no candles, and the gas was turned down low so that it was hard to see one's way. He mistook the door of a service-room for that of the water-closet, walked some feet into the room, and fell down the unguarded well of a luggage lift. The jury found for the plaintiff, but this was reversed by the Queen's Bench Division, and the reversal sustained by the Court of Appeal and the House of Lords. The House of Lords held that, while the deceased was rightfully on the defendants' property, the duty of taking care of him was "limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so:" 2 Times L.R. at p. 451.

Applying this test, how could the unfortunate Walsh possibly have a belief reasonably entertained that he was entitled or invited to go on the viaduct?

In *Wilkinson* v. *Fairrie*, (1862), 1 H. & C. 633, 158 E.R. 1038, the plaintiff, being lawfully on the premises, chose to go wandering around in the dark, and it was held that he ceased to be an invitee—see as to this *Paddock* v. *North Eastern R. Co.* (1868), 18 L.T.R. 60 (Cam. Scacc.)

In *Lewis* v. *Ronald* (1909), 26 Times L.R. 30, a tradesman delivering goods went to a part of the staircase (which he was rightfully using) which part was not lighted, and he was injured: held that he could not recover.

See, as to such cases, *Driscoll* v. *Partick Burgh Commissioners* (1900), 37 Sc. L.R. 274.

In *Schofield* v. *Bolton Corporation* (1910), 26 Times L.R. 230

(C.A.), a child was allowed by the defendants to play in their field—the child strayed through an open gate upon a railway line and was injured; the defendants were held not liable. See *Jenkins* v. *Great Western R. Co.*, [1912] 1 K.B. 525 (C.A.); *Cairns* v. *Boyd* (1879), 6 Rettie (Sess. Cas., 4th ser.) 1004: *Fleming* v. *Eadie* (1898), 35 Sc. L.R. 422. The liability of the occupier is only commensurate with the extent of the invitation: *Mackie* v. *MacMillan* (1898), 36 Sc. L.R. 137; *O'Sullivan* v. *O'Connor* (1888), 22 L.R. Ir. 467, 476.

Remembering the fact that the toll-keeper for foot-passengers on the American side was separated from the viaduct by a fence, and remembering the condition of Walsh less than an hour before, it seems to me fairly certain either (1) that he was trying to deprive the company of the trifling toll, (2) that he negligently, in his state of intoxication or semi-intoxication, took the railway track deliberately, or (3) that from the same cause he negligently mistook his way. In none of these cases can the company be liable.

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

SUTHERLAND, J., agreed in the result.

Sutherland, J.

KELLY, J.:—This appeal is by the defendant company against the judgment of Lennox, J., awarding the plaintiff $5,000 damages, on the findings of the jury in their answers to the questions submitted to them.

Kelly, J.

Briefly the facts before the jury were that the plaintiff's husband, William Walsh, a resident of the United States, on the evening of the 21st March, 1917, crossed over from International Falls, in the State of Minnesota, to Fort Frances, in the Province of Ontario, by means of a bridge between these two points, erected and maintained by the defendant over Rainy River at the Falls.

The bridge is in two parts—the easterly or up-stream part being for the passage of railway trains and cars, and the westerly or down-stream part, which, to outward appearances at least, is joined to the other part, being for the accommodation of vehicular traffic such as carriages, waggons, motor-cars, etc., and along the westerly railing of which, and raised slightly above the floor of the carriageway, is a narrow way for foot-passengers. The bridge is a toll bridge, the collection of the toll for foot-passengers

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Kelly, J.

and vehicles being made at the Minnesota end. The footway at its Canadian end leads into a building used as the Canadian Immigration office, and foot-passengers coming in, after having passed the inspection required by the Immigration officers, pass through the building and, by means of a door at the north-east corner thereof, on to Church street in Fort Frances.

Church street is one of the main streets of the town and leads westerly from the business portion thereof in the direction of the Immigration office, before reaching which it crosses, approximately at right angles, the railway tracks which lead to and cross the railway portion of the bridge. Carriage traffic and foot-passengers from the Canadian to the Minnesota side pass westerly along Church street, crossing the railway tracks and then turning to the left on the portion of the bridge reserved for that class of traffic. At the Canadian end of that part of the bridge, there is a gate across the driveway, which is usually kept closed, except when required to be opened for the passage of vehicles. Persons approaching the Immigration office by way of Church street are thus required to cross the railway tracks, and then into and through the Immigration office on to the footway of the bridge.

Walsh, so far as it appears, had not, previous to the night of the 21st March, 1917, crossed into Canada by means of this bridge, and it is in evidence that the Immigration officers told him, when he was passing through the office into Fort Frances, that on his return he must again pass through the office in order to reach the footway on the bridge. There is no gate or other barrier across the railway tracks at or to the south of the line of Church street, or at the entrance to the railway portion of the bridge.

On the morning of the 22nd March, 1917, Walsh's dead body was found on the ice in the canal beneath the railway bridge, at a point about 40 or 50 feet from its Canadian end, which according to one witness is about 60 feet from Church street. From the time he passed out of the Immigration office on his way into Fort Frances, it is not in evidence that any person saw him; there was nothing to suggest how he came to be on the ice or by what means he reached that place, except footprints upon the snow on the ties or flooring of the bridge, traceable from the northerly (or Canadian) end of the bridge along the bridge for some distance, then turning to the left and somewhat to the north as if about

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Kelly, J.

to retrace his course, when they disappeared just over the place where his body was found on the ice.

At the sides of the railway tracks upon the bridge near the end of the ties there were openings sufficiently large to permit of a body passing through.

On that general statement of facts, the case went to the jury.

The defendant company was incorporated by statute (Dominion) 4 & 5 Edw. VII. ch. 108, with power to construct, maintain, and operate a bridge with the necessary or proper approaches and terminal facilities over the Rainy River from a point in or near the town of Fort Frances, in the Province of Ontario, to a point in or near the town of International Falls, in the State of Minnesota, and to construct and arrange the bridge for the passage of pedestrians, cars and vehicles, and for general traffic purposes, and to lay tracks on the bridge and on its terminal property in or near the said towns for the passage of railway and other cars, and to charge tolls for the passage of cars, vehicles, pedestrians, and general traffic over the bridge, approaches, and terminal property, or for the use thereof.

By sec. 16 of the Act, it was declared that the companies Clauses Act shall not apply to the company; and, by sec. 17, certain sections of the Railway Act of 1903 there specified were made to apply to the works and undertaking of the company, so far as applicable and except as they were extended, limited, or qualified by the Act of Incorporation, it being also declared that wherever in the sections so made applicable the word "railway" occurs, it shall, for the purposes of the Act and unless the context otherwise requires, mean the said bridge.

At the trial, the jury in answer to questions found that Walsh's death was caused by negligence of the defendant "by not complying to order of Commission in not putting gates across tracks and watchman to guard them day and night and not putting grates over openings at end of ties;" they also found that Walsh was not guilty of contributory negligence.

From the language used by the jury, the order of the Commission mentioned in these answers of theirs evidently had reference to an order of the Dominion Railway Board of the 12th January, 1912, by which leave was granted to the company to construct and operate its bridge and railway across Church

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Kelly, J.

street; the company to file new plans for the approval of an engineer of the Board shewing road allowances 66 feet wide at the approach of the traffic bridge . . . the crossing to be protected by gates installed and maintained by the company and operated both day and night; and to another order of the Board of the 8th March, 1915, by which, after reciting that it appears that there is to be a re-arrangement of the tracks at the point in question, it was ordered that pending the re-arrangement the International Bridge Company be and it was thereby directed to appoint day and night watchmen to protect the said crossing; plans of the proposed re-arrangement of tracks to be submitted for the approval of the Board within 30 days from the date of the order.

It was stated by counsel, in the course of the trial, that the arrangement never was carried out. The crossing which, by the order of the 12th January, 1912, was ordered to be protected by gates, was the crossing of Church street by the railway tracks, so that persons travelling on that street and desiring to cross over the railway tracks intersecting Church street would be protected against danger from passing trains or cars. The learned trial Judge, appreciating this, in his charge adopted as true the statement that had been made that, if there were gates there, they would not be across the railway track, and he stated that such gates were not intended to wall off the end of the bridge. On the jury returning their answers, as above, to the questions, the learned Judge pointed out to them that it was not clear to him what they meant by "putting gates across the tracks," and he added: "By 'across the tracks' I would mean putting a gate across the railway. As I understand it, the Commission ordered them to be put along the side of the railway . . . I am not saying that that is not the way you ought to answer—that may be perfectly correct—but take it to your room and consider it." The jury did further consider and then stated that the defendant's negligence was in "not complying to order of Commission in not putting gates across street and watchman to guard them day and night and not putting grates over openings at end of ties."

On the findings in this amended form, judgment was given in the plaintiff's favour for $5,000 assessed by the jury.

The defendant's negligence as so found was thus confined to two separate and distinct acts of omission: (1) not complying with

the order of the Board to put gates across the street, and watchmen to guard them day and night; and (2) not putting grates over openings at the end of ties; by which was manifestly meant the openings at the ends of the ties upon the railway bridge. There is no question of negligence arising from failure to place and maintain a gate or other barrier across the tracks themselves, if indeed such failure could be taken under the circumstances to constitute negligence; there is no finding against the defendant in that regard. What the jury evidently had in mind was that, having been ordered by the Railway Board to erect and maintain gates across the street, for the purpose, no doubt, of preventing persons proceeding along the street from continuing their course across the tracks when trains or cars were running upon or approaching the part of the tracks upon the street, and having failed to do so, and consequently there being no watchmen to guard them, the defendant was, under such circumstances, properly chargeable with negligence towards a person who made his way along the railway tracks outside of and beyond the street, and was there injured. When one considers the purpose of the order, it would not be reasonable to expect that the gates would be lowered, except when trains were passing over or approaching the street.

There is no evidence that, on the night Walsh met with his death, any train or cars crossed Church street, or that, even if gates had been installed, there was on that night any occasion for their being lowered or closed. It has been suggested, however, that, had there been a watchman, he might have prevented the deceased from turning off the street on to the railway tracks, and that this affords justification for the finding against the defendant.

Assuming that a watchman had been stationed at the crossing in compliance with the order of the Railway Board, his duty would have been confined to carrying out the purposes of that order by protecting persons travelling on Church street against danger from trains running upon the street; there would have been no duty upon him to do something not contemplated by the order. How then can it be reasonably urged that the defendant was guilty of a breach of duty based on non-compliance with the order, for an occurrence resulting from something against which the order was not intended to protect?

Where a duty is created by a statute for the purpose of prevent-

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Kelly, J.

ing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss: Underhill on Torts, 7th Eng. (1st Canadian) ed., pp. 47 and 48, citing *Gorris* v. *Scott*, L.R. 9 Ex. 125.

In the *Gorris* case the defendant, a ship-owner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, made under the authority of the Contagious Diseases (Animals) Act, 1869, sec. 75, and the Court held that the object of the statute and the order being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the plaintiffs could not recover. In his reasons for judgment, Kelly, C.B., at p. 128, says:—

"If, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but . . . when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect." And he gives the illustration of the principle in the case of a breach of a duty imposed upon a railway company to erect a gate on a level crossing and to keep it closed except when the crossing is being actually and properly used, the object of the precaution being to prevent injury to animals or vehicles upon the line at unseasonable times, and where by reason of such breach of duty an injury ensues to a passenger, an action will lie against the railway company, because the intention of the Legislature was that, by the erection of the gates and by their being kept closed, individuals should be protected against accidents of that description.

And at pp. 129 and 130:—

"Looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view" (that is, not with the view to protecting property from being washed overboard or loss by perils at sea); "there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being

exposed to disease on their way to this country . . . The damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable."

And Baron Pollock (at p. 131) says:—

"Suppose, then, that the precautions directed are useful and advantageous for preventing animals from being washed overboard, yet they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action."

All this has application as well to the effect of the finding against the defendant of negligence "in not putting gratings over openings at the end of ties," in so far as that finding is based on any statutory duty imposed upon the company.

By sec. 180 of the Railway Act of 1903 (3 Edw. VII. ch. 58):—

"No company shall run its trains over any canal, or over any navigable water, without having first laid, and without maintaining, such proper flooring under and on both sides of its railway track over such canal or water, as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water."

By the defendant's Act of Incorporation, this section is made to apply to it. The prohibition is against running trains over any canal or other navigable water without providing the protection there required "to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water."

Manifestly the object of the section was the protection of persons or property beneath the railway tracks from danger of anything falling from the tracks, and not the protection of anybody who might happen to be upon the tracks. Particularly is this so in the case of tracks upon a bridge which was not intended for use by foot-passengers—where this use was confined altogether to the passage of trains, and where foot-passengers to whom there was no invitation either express or implied had no right to be. The purpose of this legislation was not the protection of persons situate as Walsh was and in the circumstances under which he met his death; no statutory right was imposed upon the defendants to protect him (*Gorris* v. *Scott*, *supra*).

ONT.

S. C.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.

Kelly, J.

Nor am I aware of any rule of law, outside of statutory obligation, by which the defendant can be held liable under the circumstances of this case. If, as it has been assumed, the deceased was on his way to recross from Fort Frances to the Minnesota side, his way—the usual way of foot-passengers—was along Church street to the Immigration office, by passing through which he would reach the footway on the bridge.

Earlier in the evening it was drawn to his attention that this was the proper way to return. If there was any invitation from the defendant, either expressed or implied (there is no evidence of express invitation unless the direction given him by those in the Immigration office amounted to it), it was to enter upon their property in the usual way from Church street through the Immigration office.

There is no finding that there was want of proper lighting or that it was an unsafe or an unsuitable way for him to travel. There is the evidence of Dr. Moore, called by the plaintiff, "that the place is very well lighted towards the Customs house" (by which I take him to mean the building referred to elsewhere as the Immigration office) "and that it is lighted from every way, the windows, the bridge and the streets."

The defendant having provided a safe and suitable way for foot-passengers to pass from the public street to the traffic portion of the bridge, I am at a loss to understand how an invitation can be implied to one desiring to cross by means of the foot-bridge, to go upon any other part of the defendant's property clearly not intended or suitable for that class of traffic. For all that appears, the deceased had no good reason for departing from the recognised way provided for foot-passengers, and his presence on the railway portion of the bridge was an act of trespass.

The circumstances in *Walker* v. *Midland R. Co.*, 2 Times L.R. 450—cited on the argument—were much more favourable to the plaintiff's case in that action than are the present circumstances to the present plaintiff; and the judgment there was in favour of the defendants.

In any view of the matter, I am of opinion that the findings of the jury do not support the verdict in the plaintiff's favour.

The appeal should be allowed and the action dismissed—both without costs.

Appeal allowed.

REX v. CHURTON.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. February 11, 1919.

JURY (§ II A—52)—CRIMINAL TRIAL—PEREMPTORY CHALLENGE BY CROWN OF JURORS WHO HAD BEEN STOOD ASIDE WHEN PANEL FIRST CALLED—SEC. 928 CRIMINAL CODE—ACCUSED DEPRIVED OF RIGHT GIVEN BY LAW—NEW TRIAL.

The peremptory challenging by the Crown of jurors who had been stood aside when the panel was first called, upon their being called a second time, instead of shewing cause why they should not be sworn, as provided by s. 928 of the Criminal Code, deprives the accused of a right given by law, and entitles him to a new trial, notwithstanding s. 1019.

Statement.

APPEAL by way of stated case and appeal from the refusal of Macdonald, J., to state a further case of January 14th, 1919. New trial ordered.

Lowe, for appellant, prisoner; *Brandon*, for Crown, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—On the hearing of this appeal we dismissed the motion made on behalf of the prisoner to direct that other questions not stated by the judge should be submitted for the opinion of the court. The only question, therefore, now before us is the one stated, which is founded on the following facts: The list of jurors was first called and gone through, and in the process several jurymen were at the instance of the Crown directed to stand aside. A complete jury not being obtained, the list was gone through a second time, when the Crown, not having exhausted its right of peremptory challenge, so challenged a number of jurymen, but not in excess of the number of peremptory challenges allowed by statute. There were not a sufficient number of jurymen left to complete the panel and tales were summoned pursuant to s. 939 of the Criminal Code. No objection was taken by prisoner's counsel to the said challenges until after trial and conviction of the prisoner.

The first question is very inaptly stated, but the point involved and argued is this: Was it open to the Crown in the circumstances detailed above to challenge peremptorily on the second perusal of the panel?

We were referred among other cases to *Morin* v. *The Queen* (1890), 18 Can. S.C.R. 407; and *Reg.* v. *Boyd* (1896), 4 Can. Cr. Cas. 219. Neither of them is quite in point and *Morin* v. *The Queen* is earlier than s. 928 of the Code, but the question involved in this appeal is touched on *obiter*.

Ritchie, C.J., at p. 421, said:—

B. C.

C. A.

REX v. CHURTON.

Macdonald, C.J.A.

Having been gone through, and a jury not secured, the clerk proceeds to go over the panel a second time when the right of the Crown to require jurors to stand aside ceased, and the Crown was bound if its officers sought to perfect its challenge to do so by shewing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted.

Strong, J., at p. 429, said:—

I am of opinion that this ruling (namely, to stand jurors aside a second time) having regard to s. 164 of the Criminal Procedure Act, which limits the right of the Crown to order jurors to stand aside only until the panel has been once gone through, was substantially an allowance of eleven peremptory challenges (eleven being the number stood aside the second time) and therefore the Crown not having the right to challenge peremptorily that number of jurors, the objections to more than four of those jurors were unwarranted by law and consequently the court erred in allowing them.

And Patterson, J., at p. 460, said:—

But when the panel has been gone through and the power to cause a juror to stand aside in place of shewing cause for challenging him is asserted a second time, what is done is not easily distinguishable in its effect from a peremptory challenge, and is not warranted by the authority of any English decision or (beyond the number of four) by s. 164. The first four of the eleven might perhaps be held in this view to have been properly excluded from the jury as being peremptorily challenged, but the other seven should not have been set aside except for cause.

Gwynne, J., thought that even on the facts of that case what was done was only an irregularity and was, in the absence of prejudice to the prisoner, though objected to, not ground for interference. The proposition of law submitted to us by counsel for the prisoner, and the only one which he put forward, amounts to this, that if the Crown officer neglects to use his right of peremptory challenge while the jury list is being perused the first time he loses it, and when the jurors are called a second time the Crown's only right is to challenge for cause.

The prisoner's counsel relies upon s. 928 of the Criminal Code. In England, the Crown had long been deprived of the right of peremptory challenge and the practice grew up of ordering, at the instance of the Crown, jurors to stand by until it could be seen whether a jury could be got without calling upon the Crown to shew cause of challenge.

When an attempt was made to go further than to order jurors to stand by the first time and stand them by a second time, the right was denied and the law so settled was, I think, that intended to be expressed by s. 928 which is a codification of the then existing practice in England and, so far as challenges for cause were concerned, in Canada as well.

The right to challenge four jurors peremptorily is expressly given to the Crown in Canada and, according to the well-settled practice, a challenge could always be made at any time before the juror came to the book. Is s. 928 to be read as, by implication, taking away this right or modifying this practice? I think not.

Macdonald, C.J.A.

But if what is complained of was not according to law, then I am of opinion that no substantial wrong or miscarriage was thereby occasioned and hence applying s. 1019 of the Code, a new trial should not be ordered.

It will be noted that the proviso in this section is indicative of its applicability to the facts of this case. It shews that parliament had challenges in mind when the section was enacted and made particular exception, from the application of the section, of any challenge for the defence improperly disallowed. It is, therefore, I think evident that the section may be invoked as I have invoked it, where challenges other than of the description mentioned in the proviso are complained of.

That no substantial wrong was done to the prisoner here is perhaps best evidenced by the fact that her counsel made no objection at the time to what he now complains of. While failure to object is not necessarily a ground for refusal to consider the merits of the question raised in the appeal, yet it is a mistake to suppose that the court will, as a matter of course, sustain objections made for the first time in the appeal, or where there has been failure to make the objection at the proper time when the fault could have been remedied. The prisoner took her chance of conviction as well as acquittal with the jury as sworn, and ought not, on the facts of this case, now to be heard to complain.

The first question should be answered in the negative, which means that the Crown prosecutor was not, on the facts stated, bound to shew cause for his challenges; that they were rightly treated as good peremptory challenges.

The second question should be answered in the affirmative.

Galliher, J.A.

GALLIHER, J.A.:—Mr. Lowe asks that the trial judge be directed to state a case on 6 different grounds, all of which were considered and disposed of against his contention.

The case as stated by the trial judge was then proceeded with. The points reserved were:—

1. Should the Crown prosecutor, after the panel had been exhausted by

B. C.

C. A.

REX v. CHURTON.

Galliher, J.A.

challenges and directions to stand by then have challenged each of the said jurymen who had been directed to stand by (with the exception of the one of said jurymen challenged by counsel for the prisoner) as each of said jurymen were then called to be sworn and shewn cause why they should not be sworn?

2. Was the jury properly constituted?

The second ground depends, of course, upon the answer to No. 1.

When the entire jury panel was called by reason of challenges and standing aside by the Crown sufficient jurymen were not sworn to form a jury.

On those who had been stood aside being called a second time, one was challenged by counsel for the prisoner, and the other four were challenged peremptorily by the Crown.

It is admitted that the Crown had its four peremptory challenges left, but it is contended that once having been stood aside they were not the subject of peremptory challenge, and could only be challenged for cause.

In the case of *The Queen* v. *Morin*, 18 Can. S.C.R. 407, where this question was discussed by the judges, we find Ritchie, C.J., at p. 421, using these words:—

If we look at the practice in England, as to the effect of desiring jurors to stand aside, or that in the provinces previous to the passing of this statute, so far as my experience extends and as I can discover, the practice has been entirely consistent, namely, that the panel shall be gone through, or perused as it is termed, once on which calling or perusal it was the privilege of the Crown to require jurors to stand aside until the list shall be gone through. Having been gone through and a jury not secured, the clerk proceeds to go over the panel a second time when the right of the Crown to require jurors to stand aside ceased, and the Crown was bound, if its officers sought to perfect its challenge, to do so by shewing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted.

And Strong, J., at 428:—

It remains to be considered whether the decision of the learned judge at the trial in sustaining the objection of the counsel for the Crown to eleven of the jurors who had on the first calling over of the panel been ordered by the Crown to stand aside was erroneous in law. I am of opinion that this ruling, having regard to s. 164 of the Criminal Procedure Act, which limits the right of the Crown to order jurors to stand aside only until the panel has been once gone through, was substantially an allowance of eleven peremptory challenges, and therefore the Crown not having the right to challenge peremptorily that number of jurors, *the objections to more than four of those jurors were unwarranted by law* and consequently the court erred in allowing them.

And Patterson, J., at 460:—

But when the panel has been gone through and the power to cause a juror to stand aside in place of shewing cause for challenging him is asserted

a second time, what is done is not easily distinguishable in its effect from a peremptory challenge, and is not warranted by the authority of any English decision or (beyond the number of four) by s. 164. The first four of the eleven might, perhaps, be held in this view to have been properly excluded from the jury as being peremptorily challenged, but the other seven should not have been set aside except for cause.

And in England we find the rights of the accused summed up in these words in Blackstone's Commentaries, vol. 4, star p. 353, dealing with the rights of the prisoner as to challenge:—

> Upon challenge for cause shewn, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

The statute of 33 Edw. I. s. 4, denied the right of peremptory challenge to the King, but under our own Criminal Procedure Act, which was in force when *The Queen* v. *Morin* was decided, the Crown had the right to challenge four peremptorily.

I think then in view of what I have above set out I am justified in concluding that, at all events prior to the passing of our Criminal Code in 1892, what was done in the case before us would be in accordance with law.

There was, however, introduced into our Judicature Act, s. 928 which is as follows:—

> If, by challenges and directions to stand by, the panel is exhausted without leaving a sufficient number to form a jury, those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shews cause why they should not be sworn: Provided that if before any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called. 55-56 Vict., c. 29, s. 667.

The particular words are "Those who have been directed to stand by shall be again called in the order in which they were drawn and *shall be sworn* unless challenged by the accused or unless the prosecutor challenges them *and shews cause why they should not be sworn.*"

Is the effect of this section to prevent the Crown challenging peremptorily any juror whom they have asked to stand aside. In effect that section seems to me to mean that when such juror is called a second time he shall be sworn—unless one of two things

B. C.
C. A.
REX
v.
CHURTON.
Galliher, J.A.

happens—*i.e.*, 1, he is challenged by the accused, and 2nd, unless the prosecutor challenges him *and shews cause* why he should not be sworn.

But the Crown prosecutor submits that, assuming this to be so, s. 1019 of the Code and sub-s. 3 of s. 929 meet the objections raised.

S. 1019 as affecting this case is:—

> No conviction shall be set aside nor any new trial directed although it appears . . . that something not according to law was done at the trial . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

Now what was done not according to law here was the peremptory challenging of jurors who had been stood aside by the Crown when the panel was first called upon their being called a second time instead of shewing cause why they should not be sworn.

It might be that the Crown had they proceeded to shew cause in the case of the 4 peremptorily challenged would have failed, and that these jurymen would then have to be sworn.

At all events, the accused was deprived of a right which the law gave her to have the competence of these jurors tried in a certain way by the Crown.

Of course, had the Crown challenged these jurors peremptorily when first called the result as it turns out would have been the same, viz., that the prisoner would have been tried by the same jury which actually did try him. This, however, is not a sufficient answer.

The deprivation to the accused under the explicit words of the statute seem to me to go to the root of the matter, to the very constitution of the jury, and if the jury is not properly constituted, I think we cannot say a substantial wrong has not been occasioned to the accused on the trial.

As to s. 929 (3) that can only be applicable in so far as the sections are directory, and if I am right in the view just expressed would be no answer to the objection taken here.

I would answer the first question in the affirmative, and the second question in the negative.

There should be a new trial.

McPhillips, J.A.

McPHILLIPS, J.A.:—This reserved case stated by Macdonald, J., for the consideration of the Court of Appeal raises a very

important point which is fundamental in its nature. The question in effect is—whether the court which tried the prisoners was the constitutional tribunal called for under the Criminal Code, or whether the court, as constituted, can be said to have been without jurisdiction, *i.e.*, *coram non judice*?

It would appear that the entire jury panel was for a first time called over and the Crown stood by five of the number called when by reason of challenges and directions to stand by the panel was exhausted, without leaving a sufficient number to form a jury. Then those of the panel who had been stood by were again called and from out of the five four challenges were exercised by the Crown, without shewing cause why they should not be sworn. In my opinion, error in law took place in this procedure. It is only necessary to read s. 928 of the Criminal Code to see that this course was a course in plain contravention of the enactment. S. 928 reads as follows:—(See judgment of Galliher, J.A.)

It was held in *The King* v. *Barsalou* (1901), 4 Can. Cr. Cas. 343 (see head-note) that:—

> A direction to a juror to "stand by" at the instance of the Crown is in substance a deferred challenge for cause and cannot be made after the juror has, by direction of the Clerk of Assize, taken the book to be sworn.

At p. 345, Wiirtele, J., said:—

> The direction to stand by is practically a challenge for cause, and such being the case, the order to stand by must be given at a time when a challenge could be made.

Now it is true the Crown has the right to four peremptory challenges, but this right does not extend to challenging peremptorily those already stood by. As to those, the Crown is under the statutory obligation to shew cause. The words of the section are:—

> Those who have been directed to stand by shall be again called in the order in which they were drawn and shall be sworn *unless challenged by the accused or unless the prosecutor challenges them and shews cause why they should not be sworn.*

If what was done was not the selection of a jury in accordance with the law, from and out of the panel, a right the accused person had, save where necessity required the ordering of a tales, the error in law is fundamental (see Duff, J., in *Anderson* v. *S. Vancouver* (1911), 45 Can. S.C.R. 425, at 446), and it cannot be said that by reason of s. 929 (3) of the Criminal Code the validity of the trial remains unaffected, the error is not merely one of failure

B. C.
C. A.
REX
v.
CHURTON.
McPhillips, J.A.

to comply with directory provisions. In the present case, a tales was ordered and the accused was tried by a jury not from and out of the panel, but with the intervention of unqualified jurors, because of the action of the Crown in challenging peremptorily men from the panel who had already been stood by, not challenging them and shewing cause as required by the plain terms of s. 928 of the Criminal Code.

The peremptory challenges admitted in the present case, taking place when the jurors were called a second time and after the panel had been exhausted, in effect, was the standing by of the same jurors a second time as the four peremptory challenges were exercised by the Crown against four of the men who had previously been stood by. I interpret the judgment of Ritchie, C.J., of Canada, in *Morin* v. *The Queen*, 18 Can. S.C.R. 407, at 421, as deciding upon the law as it then stood (s. 164, c. 174 R.S.C. 1886), that when the *entire panel* was gone through a second time, there might be peremptory challenges by the Crown where the challenges had not been exhausted upon the first calling over of the panel, but not to support that which was done in the present case, where, in pursuance of s. 928 of the Criminal Code, those who had been directed to stand by only were again called. As the law now stands these men *shall be sworn* (note the express words) "*unless challenged by the accused or unless the prosecutor challenges them and shews cause why they should not be sworn.*" The *ratio decidendi* of the judgments of Ritchie, C.J., and Strong, Fournier and Patterson, JJ., is unmistakably, and as applied to the present Criminal Code is incontrovertibly to the effect that what was done in the present case was error in law.

The accused had the inalienable right to have, as the jury to try the issues, those men whose names stood upon the panel (s. 929 of the Criminal Code) save where, as of necessity, a tales must be ordered (s. 939 of the Criminal Code) in the present case a tales was ordered but, in my opinion, it was not a proper case to so order. I would refer to the concluding portion of the judgment of Ritchie, C.J., in the *Morin* case at pp. 425, 426, where he said:—

> Willes, J., in Exchequer Court, 8 E. & B., p. 108, citing 4 Blackstone Com. 353: "The King need not assign his cause of challenge until all the panel is gone through, and unless there cannot be a full jury without the person so challenged, and then, and not sooner, the King's counsel must shew

the cause or otherwise the juror shall be sworn." I think, therefore, in this case there was an assumption on the part of the officer of an unlimited right of challenging jurors without assigning cause. The object of the law certainly is to secure the prisoners a fair trial. How can this be accomplished if he is deprived of the privilege the law gives him in the selection of the jury by whom he is to be tried?

I take the liberty to adopt the language of Lord Campbell, C.J., in *Reg.* v. *Bird* (1851), 2 Den. C.C. 94 at 216, where he says: "I should feel deep regret if a great offender were to escape punishment, but the due administration of criminal justice requires that the forms of judicial procedure should be observed, these forms are devised for the detection of the guilty and for the protection of the innocent."

In the present instance the objection taken is not raised on a mere technicality, but is that the jury to whom the prisoner shall be given in charge shall be legally selected, chosen and sworn, and that neither the Crown nor the prisoner shall have any advantage or privilege other than those conferred by law; but when privileges are conferred by law they shall be rigidly respected.

Believing then as I do, that the prisoner has not had a legal trial I cannot by my voice send him to the gallows. Had I any doubt in the case, I should *in favorem vitæ* give the prisoner the benefit of such a doubt.

In considering the Criminal Code of Canada, it is instructive to note what Mr. Crankshaw, K.C., in his admirable work on the Criminal Code of Canada said in the 1st page of the introduction of the 4th edition (1915) as indicating the intention of parliament:—

It codified both the common and the statutory law relating to criminal matters and criminal procedure; but, while it aimed at superseding the statutory law, it did not abrogate the rules of the common law, these being retained, and left available, whenever necessary, to aid and explain the express provisions of the Code and of statutes remaining unrepealed, or to supply any possible omissions or to meet any new combination of circumstances that may arise; so that, in this respect, all that elasticity which is claimed for the common law rules and principles of the old system is preserved for the system established by the Code.

It is right and proper and in accordance with natural justice that the prisoner should be given every protection, and that there should be, at all times, accorded to the prisoner a fair trial, and to effectuate this the statutory requirements must be complied with and strictly followed, otherwise there cannot be "due administration of criminal justice." (Lord Campbell, C.J., in *Reg v. Bird, supra.*)

It is to be noted that in England the Crown has no peremptory challenge, whilst under the Canadian Criminal Code the Crown has four peremptory challenges (s. 933, Canadian Criminal Code). In vol. 9 of Hals. we find this stated, at p. 361:—

The Crown has no peremptory challenge in any case, but may challenge as the names are called over, and is not bound to shew cause of challenge

B. C.
C. A.
REX
v.
CHURTON.
McPhillips, J.A.

until the panel is gone through; a defendant on a charge of misdemeanour or a defendant on a charge of felony whose peremptory challenges have been exhausted may follow the same course. *R.* v. *Horne Tooke* (1794), 25 State Tr. 1 at 25; *per* Eyre, C.B.; *R.* v. *Frost* (1839), 4 State Tr. (N.S.) 86, at 123; *Mansell* v. *R.* (1857), Dears. & B. 375; *R.* v. *Blakeman* (1850), 3 Car. & Kir. 97; *R.* v. *McGowan* (1858) (not reported), cited in *R.* v. *McCartie* (1859), 11 I. C.L.R., 188, at 206.

I would answer the first question in the affirmative and the second question in the negative, and would consider the case one in which a new trial should be directed.

Eberts, J.A.

EBERTS, J.A., ordered a new trial. *New trial ordered.*

SASK.
C. A.

MASSEY-HARRIS Co. Ltd. AND GRAY-CAMPBELL Co. v. DELL.

Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A., and Macdonald, J. ad hoc. March 20, 1919.

INTERPLEADER (§ II—20)—EXAMINATION FOR DISCOVERY—QUESTIONS AND ANSWERS OFFERED IN EVIDENCE—RULE 303 SASK.—GOODS SEIZED—APPARENT POSSESSION—ONUS OF PROOF.

In an interpleader action after certain evidence had been given, counsel for the claimant offered in evidence questions and answers from his own clients' examination for discovery; these were objected to but were received. The court held that under rule 303 (Sask.), counsel for the claimant had no right to put in this evidence.

Where goods seized are at the time of the seizure in the actual or apparent possession of the judgment debtor, the presumption is that the goods are his and the onus is upon the claimant to establish title thereto; where, however, the goods at the time of seizure are not in the actual or apparent possession of the execution debtor, the onus is upon the execution creditor to establish his right to seize them. The party upon whom the substantial onus of proof rests should be made plaintiff in the issue.

Statement.

INTERPLEADER issue directed to try the question "whether at the time of the seizure by the sheriff the goods seized were the property of the execution creditors as against the claimant?" The execution creditors were made plaintiffs in the issue. The claimant is the wife of the execution debtor.

H. E. Grosch, for plaintiffs, appellants.

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

The judgment of the court was delivered by

Lamont, J.A.

LAMONT, J.A.:—The procedure adopted on the trial of the issue was somewhat out of the ordinary. The only witness called on behalf of the plaintiffs was the sheriff, who established, as the trial judge found, that he had made a seizure of certain grain on the south-east quarter—2-30-32-west 1st, under executions against the claimant's husband by the plaintiffs. The sheriff

also stated that he had received from the claimant's solicitor the following notice:—

I beg to advise you that Edith Florence Dell has instructed me to write you regarding the seizure made by your officer of 50 acres of wheat and oats seized on the S.E. ¼ 2-30-32-w.1. The property in question is owned by James Brown of Portage la Prairie. Mrs. Dell has a lease from Mr. Brown for five years commencing from the 14th of October, 1916. She has broken up the land and has financed the seeding of it and done or paid for all the work which has been required for harvesting the said crop. Will you kindly notify the solicitors for the execution creditors Gray-Campbell Co. Limited, and advise them of this claim?

J. G. BANKS.

At the close of the sheriff's evidence, counsel for the plaintiffs put in certain questions and answers from the claimant's examination for discovery, and he also put in certain questions and answers from an examination of the execution debtor which had been taken in aid of execution in the action between the plaintiff the Massey-Harris Co. and himself. The plaintiffs then rested their case.

Counsel for the claimant then offered in evidence questions and answers from his own client's examination for discovery. These were objected to, but were received. He also put in certain questions and answers from the examination of the judgment debtor in aid of execution. No other evidence was given at the trial.

The district court judge in his judgment says, that he read all of both examinations above referred to, and he gave judgment in favour of the claimant. The plaintiffs appeal on the ground that counsel for the claimant was not entitled to put in or have received in evidence any part of his client's examination for discovery unless the same was explanatory of some portion put in by the plaintiffs, and then only when the same was directed by the trial judge to form part of the evidence. They also contended that no portion of the examination of the judgment debtor in aid of execution should have been received on behalf of the claimant.

I agree with counsel for plaintiffs that counsel for the claimant had no right to put in evidence on behalf of his client questions and answers from her examination for discovery.

Rule of Court 303 provides that one party may use in evidence any part of the examination of the *opposite* party. No part of such evidence can be used on behalf of the party examined unless the judge on looking at the whole examination is satisfied that

SASK.

C. A.

MASSEY-HARRIS CO. LTD. AND GRAY-CAMPBELL CO. v. DELL.

Lamont, J.A.

the part put in should not be used without certain other parts being read along with it and directs that such other parts shall be put in.

Whether either party to these proceedings was entitled to read in evidence any part of the examination of the judgment debtor taken in aid of execution is a question which it is not necessary, in my opinion, to determine, because, if we assume the plaintiffs to be entitled to put in evidence the portions which were in fact put in on their behalf, these portions, together with their other evidence, fall far short of establishing that they were entitled to seize the grain. Their evidence does establish that the executor debtor worked 24 days at the seeding of the crop on the said quarter section, and 9 days during harvest and 4 days during threshing; but it does not shew who was the owner of the land or in occupation thereof, nor does it shew the capacity in which the execution debtor did the work above mentioned, whether as agent or servant of the owner or occupant or on his own behalf. Neither does it shew that the grain seized was, at the time of the seizure, in his apparent possession. Counsel for the plaintiffs realizing this difficulty argued that, no matter what the form of the issue might be, the onus was on the claimant to establish her right to the grain.

I do not agree. I have always understood the rule to be that the party upon whom the substantial onus of proof rests should be made plaintiff in the issue; that, where the goods seized are, at the time of the seizure, in the actual or apparent possession of the judgment debtor, the presumption is that the goods are his, and the onus is upon the claimant to establish title thereto. Where, however, the goods at the time of the seizure are not in the actual or apparent possession of the execution debtor, the onus is upon the execution creditor to establish his right to seize them. This onus he can discharge by showing (1) that the goods seized belong to the execution debtor, or (2) that they were before seizure the property of the execution debtor and that he conveyed them to a near relative under suspicious circumstances, in which case the courts agree in placing the onus on the claimant.

The following authorities are instructive:—*Doran* v. *Toronto Suspender Co.* (1890), 14 P.R. (Ont.) 103; *Hogaboom* v. *Grundy*

(1893), 16 P.R. (Ont.) 47; *Farley* v. *Pedlar* (1901), 1 O.L.R. 570; *Young* v. *Spofford* (1916), 32 D.L.R. 262, 37 O.L.R. 663; *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554; *Dickson* v. *Podersky* (1918), 39 D.L.R. 584, 13 A.L.R. 110.

In this latter case, the Appellate Court of Alberta advocate the adoption of a general practice by which the execution creditor will be the plaintiff in the issue in every case, regardless of whose possession the goods are in at the time of the seizure.

The evidence put in on behalf of the plaintiffs does not show that the goods when seized were in the actual or apparent possession of the judgment debtor or that they ever belonged to him. The onus was, therefore, on the plaintiffs to establish their right to seize the goods. This onus they failed to discharge, and for that reason they cannot succeed.

If we look at all the evidence admitted by the trial judge, it establishes that the claimant had a lease of the land on which the grain was grown; that no one lived on the land; that the judgment debtor was a drayman, carrying on business in town, and was hired by his wife to work the 37 days which he did work upon the land, and that she paid him therefor. Had these facts been established by proper evidence, the conclusion reached by the trial judge could not be successfully contested. As it is, the claimant succeeds because the plaintiffs have not shewn that they were entitled to seize the grain.

The appeal should be dismissed with costs.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

ALTA.

S. C.

Re ESTATE of McBRATNEY.

Alberta Supreme Court, Stuart, J. March 21, 1919.

WILLS (§ I—36)—*Widows Relief Act (Alta.)—Widow not receiving as much as under intestacy.*]—Application by the widow for relief against the provisions of the testator's will under the Married Woman's Relief Act (Alta. 1910, 2nd sess., c. 18).

M. B. Peacock, for applicant; *C. T. Jones*, K.C., for executrices.

STUART, J.:—There is no doubt that the condition precedent, necessary to establish jurisdiction, was shewn to exist, viz: that the widow had not received by the will as large a part of the estate as she would have received if he had died intestate. In fact, nothing at all was given by the will to the widow. But even treating what property she, at the time of his death, possessed in her own name as part of the estate and as having been given by the will, it is still not as much as she would have received by an intestacy. The will referred to the receipt of this property by the wife from the testator as being the reason why no other provision was made for her. The widow in her evidence endeavoured to prove that this property had been acquired by the investment of her own money acquired from certain legacies and by her own earnings in keeping boarders. The husband, of course, was not available to tell his side of this matter.

The cross-examination of the widow tended, in my opinion, to cast considerable doubt upon the absolute correctness of her claim in its entirety, but, nevertheless, I see no reason to doubt that it was to some extent, and indeed to a large extent, through some little money she had, and through her efforts in working and saving that the property in question was acquired. I am inclined to think that the husband would, if the full facts were known, be found to have contributed to some very considerable extent as well. Naturally, they would work together in such a matter, and

ALTA.
S. C.

no very strict record would be kept of the exact source of the various payments even if the parties themselves could, even at the time, have told or decided with any approach to accuracy as to the real source thereof. This property consisted of six twenty-five foot lots on Second Avenue East in Calgary, and is in close proximity to the Chinese quarter. There are three frame houses, two of which are in fact occupied by Chinamen. The centre house is rented to the widow's married daughter. The furniture in this also belongs to the widow. As thus furnished it rents for $25 a month. The other two houses rent for $20 a month each to the Chinamen. This is a total rental of $780 a year. The yearly taxes were said to be over $400. Insurance would also further reduce the net revenue. Two reliable valuators were called, one of whom valued this real estate at $6,800, of which $3,600 was for the land, but he stated that the property if put up for sale could not now be sold, and that he would not recommend a loan on the property at all. The other valued the land at $4,500 and did not mention a value for the buildings, as he had not gone inside. He said the property was desirable. In 1918, the land was assessed for $7,500 and the buildings for $1,525 as one-quarter of their value. The assessed value would, therefore, be $13,600, but in these days this is a very poor, indeed practically a useless guide, and strictly of course it is perhaps not evidence at all.

The widow received $930 as life insurance money and some expenses had to be paid out of this.

The general principle which I have always felt disposed to adopt in exercising the important power and undertaking the grave responsibility given and cast upon the court by the Act under which this application is made is so to decide the matter as to leave the widow in at least as good a position as she was with respect to her maintenance and comfort when her husband was alive, so far as this can be done without unduly interfering with the rights given by the will to other persons who may have had also strong moral or legal claims upon the testator with respect to maintenance.

In the present case, the testator left the whole of his property to his sister Janet McGregor McBratney for her own use and benefit, adding the words "I have made ample provision for my

ALTA.
S. C.

wife by transferring to her certain real properties in the City of Calgary." He appointed the said sister Janet McGregor McBratney and another sister, Mary McBratney, as executrices of his will.

Although Janet McGregor McBratney was the sole beneficiary under the will she did not, in that capacity, oppose the present application. Mr. Jones stated that he was appearing for the executrices only in their capacity as such. The beneficiary, when giving her evidence, testified that she was opposing the application purely in her character as executrix and, as I understood her, simply because she, as such executrix, thought it her duty to prevent, if possible, the declared last will of the deceased from being interfered with. It would, of course, only be an extremely cynical man of the world who would venture to suspect that any personal interest actuated the beneficiary in her opposition. The problem presented to me would, in reality, be much simplified by accepting unreservedly her statement that she is, so far as personal financial interest goes, quite unconcerned as to the result of this application. I think, indeed, that the statement was at the time quite honestly made, but am also inclined to think that it was due to a certain exaltation of moral feeling which is known to be exhibited at times by persons of her, and her sister's, evidently stern rectitude of character. I shall take the liberty, therefore, without cynical disbelief, of considering Miss McGregor as personally interested, to some extent at least, in the final destination of the deceased's property, and of attributing her opposition to the application to what was perhaps really only a sub-conscious desire to protect that interest. But I may perhaps venture to observe that, although the legislature, possibly with some arrogance, may have dared to endow a supreme court judge with a limited power to interfere with the right of a living but mortal man to project his will into that part of the future which succeeds his death, and, while necessarily withdrawing physically from this earthly scene, to leave that will still active and operating upon his property; nevertheless no one, even of those who criticize such interference by the legislature, has ever suggested that a testator, in making his will and giving his property to a named person simply without more, ever really intends to restrict the liberty of action of that person with regard to the

property, or, unless he says so specifically, to prevent that person from doing whatever she or he pleases with the property, when she or he gets it. So that it is not the sacred will of the testator that really prevents the present beneficiary from doing what she pleases with the property and, if she really does not want it at all, from letting the widow of the deceased have it, or a large portion of it, when she seems, quite in contrast with the beneficiary, to be eager to secure it. There is probably no doubt that the opposition of the executrices is largely due to the fact that the present applicant brought an action to declare the will null and void as having been made under their undue influence. I can easily understand how persons of the high character and of the keen sense of honour possessed by the executrices would deeply resent such an imputation and would be tempted to strike back at whatever spot in the opponent's armour might appear weak or exposed. The trial of that action seems to have amounted to a bitter conflict between the parties, in which the relations existing between the wife and her husband were probed to the uttermost, and in which mutual recriminations were freely indulged in between the sisters and the widow. Upon the present application, these recriminations were renewed, though perhaps not pursued so far as before.

I do not know how the parties expected me to decide upon the real truth of these matters or upon what ground it was thought that they could possibly be relevant. The mere fact that some lack of matrimonial harmony did exist is perhaps a matter that a judge acting under the Act should be informed of so that he may have at least an inkling as to the motives of the testator in making his will in such a way as to give the court under the Act jurisdiction to disturb it. But an attempt to make a decision as to where the blame rests for such a state of affairs is, in my opinion, both futile and irrelevant. Indeed, I doubt if under this Act there is any necessity for leading evidence to suggest matrimonial discord. As a general rule, whenever a testator makes a will in such terms as to give jurisdiction, and to force his widow to pray for relief, we may take it for granted, I think, that there was either open disagreement or secret dissatisfaction, whether justified or not, with the wife's conduct on the part of the testator. And, as a rule, no amount of attempted *post mortem* scrutiny will ever reveal the truth. So that I would venture to deprecate in the most emphatic

ALTA.
S. C.

way the introduction of evidence of the character of much of that which was advanced in this case. As long as the widow is not excluded by the terms of the Act from making the application, I think the court should act on the assumption that the marriage relationships had shewn merely the average harmony and the average discord.

The estate of the deceased was valued in the probate papers at $25,740, but in this was included a number of horses valued at $7,000, which are claimed by the daughter under a bill of sale and this dispute is, I understand, still undecided. The land of a ranch 20 miles northwest of Calgary was valued at $14,400. There are some vacant lots in Calgary and other smaller items of property. Probably, the value of the undisputed estate is as much as $18,000. Probably it is less than that. There are no encumbrances.

When he died the testator was earning $65 a month as an accountant, although in previous years he had, at times, received $80, and for a short time, I think, something over $100. The ranch had been rented, so the applicant thought, at $40 or $50 a year. No definite evidence was given as to this, but I am convinced that this property must have been able to yield the deceased a greater revenue than $4 or $5 a month, even if rented only for pasture land. In her affidavit opposing the present application, the beneficiary states that the deceased "made considerable moneys from various outside investments and speculations."

On the whole, I think it is not an exaggeration of the testator's position to suggest that, prior to the illness that led immediately to his death, he was, quite aside from the property in his wife's name, able to secure an income of $100 a month. No doubt, out of this, he had taxes to pay in order to hold his property, but he was holding it, as all do, with the hope of ultimately getting a good price for it, and no doubt his wife was entitled to expect an increase of comfort when this was realized. What the wife had as her own, she still has as her own. But she has lost the additional means of support which the revenues earned or received by the husband afforded her. He, of course, himself shared in these, so that it would be placing her in a much better position as to sustenance and comfort than she was before the death, if I were to give her anything that would yield her $100 a month, and that clear of all trouble or obligation. She is 51 years of age, and

ALTA.

S. C.

has no one but herself to support. The beneficiary is a lady of much education and ability and is able to command a good salary in the Provincial University. Aside from her own avowal of unconcern, to which I have referred, it does not seem that she is in grave need of any assistance from the deceased. She has also other property of her own.

In those circumstances, I do not think I am being too generous to the widow if I decide that the sum of $60 a month ought to be secured to her in addition to what she can receive from her own property, which I gather is not more than $25 a month net, if it amounts to that. I do not think $85 a month is any too much for a woman to receive in these days for her sustenance and support. It may make her somewhat better off than she was with her husband alive, but in the absence of any infringement upon anything given to others gravely needing assistance, and having very much more moral claim thereto, I think the relief to be extended to the widow, in this case, should go as far as I have indicated. Looking at the annuity tables, I find that it would cost $10,198 to purchase an annuity of $60 a month for the widow.

My judgment, therefore, is that next after debts and incumbrances, and after the costs of the unfortunate litigation in the district court over the will, which I understand is quite large, the estate be charged with the sum of $10,198, or in case there may be an error, with such sum as will purchase the applicant an annuity of $720 a year, payable half-yearly. The applicant may take this sum and buy the annuity or not as it seems best to her. The applicant's costs of this application will also be a charge on the estate prior to the charge for the sum I mention. The executrices, I think, should bear their own costs and not charge them upon the estate, except to the extent of what those would have been if an independent beneficiary had opposed the application, and the executrices had simply submitted to the judgment of the court. I think that is all the interest they had in the matter, *quâ* executrices.

Judgment accordingly.

ALTA.

S. C.

FABRIE v. HEWELMAN.

Alberta Supreme Court, Walsh, J. April 15, 1919.

LANDLORD AND TENANT (§ I—1)—*Verbal lease—Creation—Possession by tenant—Termination.*]—Application on originating notice for an order for the possession of certain lands owned by applicant.

F. C. Moyer, for plaintiff; *F. E. Eaton*, K.C., and *T. H. Wells*, for defendant.

WALSH, J.:—The plaintiff applies on originating notice for an order for the possession of certain lands owned by him. The admitted fact is that the defendant occupies the same under a verbal lease thereof for 3 years entered into between him and the plaintiff upon certain conditions, one of which was that the plaintiff was to have the use of one room in the house for the full term of the lease and stable room and pasture land for 8 horses. This arrangement was made in April, 1918, and was to have been reduced to writing, but it never has been.

The plaintiff advances two reasons why he should now be able to dispossess the defendant in the face of this arrangement. He says in the first place that as the defendant is not entitled to the exclusive possession of this land because of his (the plaintiff's) right to the use of the room in the house and the stable room and pasture, what took place between them does not amount to a lease, but is simply a license which has been terminated by his notice to quit. I think that the substance of the transaction should be looked at for the determination of the question of lease or license, and in substance this is a lease of the land with a reservation to the plaintiff of the room in the house and the stable room and pasturage, the effect of which is to give the defendant the exclusive right of occupation of the lands subject to these reservations. This objection therefore fails.

Then it is said that this is but a lease at will because it is not in writing. It is difficult to say from the material whether or not this is a lease which under the Statute of Lands must be in writing. My impression is that it is not, but even if it is, I think that as the defendant took and still holds possession under it a perfectly good agreement for a lease has thereby been created, of which the defendant could compel specific performance, and, therefore, that he cannot be dispossessed upon this ground.

The motion is dismissed with costs.

WHITAKER v. RUMBLE. ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Simmons, JJ. March 29, 1919.

SALE (§ III—45)—*Sale of business—Stock-in-trade—Mutual mistake in computing amounts—Rights and remedies of parties.*]—Action to recover a certain sum included twice in statement of liabilities.

Frank Ford, K.C., for appellant; *J. C. McDonald*, for respondent.

The judgment of the court was delivered by

SIMMONS, J.:—Plaintiff's action was to recover the sum of $322.22, on the ground that in the statement of liabilities assumed by the defendant under an agreement for purchase of plaintiff's store business including stock-in-trade and fixtures that by mistake this item had appeared twice, so that in the result the defendant actually assumed $322.22 less in liabilities than was intended under the agreement.

The trial judge found that there was a mistake in the computation of the liabilities assumed by the defendant as purchaser. He refused to grant relief by way of rectification on the ground that the purchase was for a lump sum. He also held that although the plaintiff and one Kidney, who took part in the negotiations, had agreed that the formal agreement should be subject to rectification as to this amount if a mistake was substantiated, yet that the defendant had no knowledge of this reservation and that Kidney had no authority to make such a reservation on behalf of the defendant and therefore the defendant was in no way bound by it.

Counsel at the argument asserted that the findings of the trial judge on the ground of agency were incorrect and should be reversed. It was suggested by the court during argument that even accepting the findings of the trial judge, the plaintiff might be entitled to succeed if the amount of the liabilities which the purchaser assumed was a definite sum, and that if in this amount a sum had been added inadvertently which was not a liability, the defendant should not have the benefit of it.

It is not necessary in this view of the case to deal with the findings of fact of the trial judge upon the question of agency.

The point raised at the argument before us was not suggested to him.

ALTA.

S. C.

I am of the opinion, however, that the plaintiff should succeed on the ground of mutual mistake.

It is true the mistake must be mutual. Kerr on Fraud and Mistake, 4th ed., pp. 498-499, and it is suggested that as the defendant knew nothing about the reservation that there was no mistake on his part.

It is quite clear, however, that there was a considerable amount of negotiation, and that the material questions were the amount of stock on hand, the amount of the liabilities and the amount and value of the book debts.

Both parties had in their mind an ascertained amount of the liabilities and negotiated on this basis. Towards the close of the negotiations the plaintiff discovered what he thought was a discrepancy as to this amount of $322.22 and discussed it with Kidney.

The defendant was not a party to and had no knowledge of this discussion. The plaintiff then has in fact become a party to an agreement which is not affected in any way by the fact of the discussion between him and Kidney as to this discrepancy.

It turns out that there was an actual mistake in the computations as a result of which the defendant assumes $322.22 less in liabilities than was intended by the parties to the contract. This in my view brings it quite within the purview of mutual mistake and the court may grant equitable relief and in this case should do so.

The defendant, however, cross-appeals as to three items in his counterclaim which were disallowed at trial, and which amounted to $82.71.

It is pretty well established that these items are in the same class as the sum claimed in the statement of claim. The items do not appear in the schedule which is a part of the agreement in writing, but represented liabilities of the plaintiff which the defendant has paid.

I would, therefore, allow the appeal and cross-appeal.

In the result there will be judgment for the plaintiff for his claim and costs and judgment for the defendant for his counterclaim and costs.

The plaintiff has succeeded on his appeal and the defendant has succeeded in his cross-appeal, but the major amount has been recovered by the plaintiff.

The plaintiff appellant should be allowed to tax all proper disbursements incurred in the appeal and two-thirds of the remaining taxable costs. *Appeal and cross-appeal allowed.*

HALLMAN v. FOUNDRY PRODUCTS Ltd.

Alberta Supreme Court, Stuart, J. April 1, 1919.

PLEADING (§ I I—65)—*Demand for further particulars—Order by master—Refusal to set case down for trial.*]—Appeal from order of the master ordering plaintiff to give further particulars and refusing to set case down for trial at next jury sittings in Calgary.

STUART, J.:—The action is by the purchaser of a tractor against the vendor for a rescission or termination of the purchase-agreement and repayment of the money paid on the purchase-price and in the alternative damages. The plaintiff alleged certain conditions and warranties and that these were broken. They are that the tractor was (a) to be of good material; (b) to be properly constructed both as to design and workmanship; (c) to satisfactorily perform the work for which it was intended; (d) to be free from latent and other defects; (e) to be in every way so constructed as with proper care and use to ensure a reasonable durability; and (f) to pull two drills with twenty discs in each or of a total width of twenty feet.

The action was begun on January 27, 1919. On January 31, the defendant demanded particulars of the breaches of the first five warranties or conditions. On February 25, plaintiff in answer to this demand gave particulars respecting warranty (c) above set forth. In an order for directions made on March 26, the master ordered particulars as to warranties or conditions (a), (b), (d) and (e), and also particulars as to whether the alleged guarantees or warranties were given in writing or verbally in whole or in part. He also refused an application that the action be set down for trial for April 20, reserving leave however to plaintiff to apply after discovery to set the action down for that date.

Upon the appeal, which is not however against the order for the particulars last above mentioned, the plaintiff's solicitor read an affidavit of his own in which he asserts that the plaintiff is unable to give the other particulars ordered to be given.

I think this affidavit is conclusive in one respect. The plaintiff

ALTA.
S. C.

cannot be ordered to give particulars which he asserts upon affidavit he is unable to give. This affidavit was not before the master, as I understand the matter.

But what is the consequence? I think the consequence is that the plaintiff cannot at the trial be allowed to lead evidence in chief giving particulars of the breaches complained of. If the plaintiff knows of specific defects in the material used in the construction of the tractor he should state now what those defects are. This is quite obviously not pleading evidence at all. The same may also correctly be said, in my opinion, in regard to the matter of latent or other defects, the matters of improper design, workmanship, construction and durability. It does not follow that the jury may not infer generally from the facts that the tractor would not satisfactorily perform the work for which it was intended or would not pull two drills with twenty discs in each, if they so find, that these must have been due to some of the defects generally alleged. But that is a different question.

If the plaintiff should with the pleadings as they now stand proceed in his evidence in chief to shew by witnesses that there existed specific defects in material, workmanship or design, as alleged, those would be matters as to which the defendant might be taken by surprise. I think it is now entitled to be told what these specific defects are if it is proposed that the way should be kept open for the plaintiff to lead such evidence in chief. It may be, however, that the plaintiff hopes by the time the trial comes on to secure specific information and evidence of this kind. If he hopes to be able to do so he ought to give the defendant reasonable notice of his intention to do so, so that the defendant may have time to prepare to meet it. There are 2 weeks allowed for the next jury Sittings, and if the case is not then tried it will have to go over till the autumn Sittings. I think it is desirable that the case should be tried this spring, and I see no real reason whatever at present why this can not be done. There is still ample time for preparation for trial if the parties are no longer dilatory. The plaintiff was no doubt rather dilatory in answering the demand for particulars, but still I think in the interests of the parties an effort should be made to have the case ready for the second week of the jury Sittings. Assuming that both parties are anxious to have the case tried as soon as possible, I think they can both be ready in ample time.

ALTA.

S. C.

I will, therefore, allow the appeal and make an order that the case be set down for trial for a day in the latter part of the second week of the jury Sittings, that the plaintiff be given until the 15th of this month to give the further particulars ordered by the master, if he so desires, but that if they are not given by that time the plaintiff must go to trial without them and without being able to lead evidence in chief supporting the claims made in regard to breaches of warranties with respect to which he has not given particulars or in other words those portions of his claim are to be struck out. If the plaintiff desires further time in regard to giving such particulars, then he must submit to an adjournment till next fall. The plaintiff may of course in order to remove any argument for delay give notice at once that he does not intend to give more particulars.

I do not attach much importance to the question of pleading. In answer to such particulars a general denial is obviously all that the defendant would need to plead, or if there is some special plea intended to be made, it will not, I feel sure, be such as to involve any real necessity for delay. In any case, with a full month to go upon I am unable to see how any difficulty can possibly exist in getting ready for trial, say, on Thursday, May 1. Two full weeks, if the plaintiff does give particulars, should be ample time to get ready to meet them. With only this one jury Sitting between now and next fall this matter of delay in setting down until discovery is had should be treated differently in a jury case than in a non-jury case. The plaintiff must be ready to attend for examination promptly. There will always be a right for either party to apply to postpone the trial without my reserving. The costs will be costs in the cause.

Judgment accordingly.

PORTER v. GRAND TRUNK PACIFIC R. Co.

Alberta Supreme Court, Appellate Division, Beck and Simmons, JJ. March 29, 1919.

CONTRACTS (§ II D—185)—*Medical and hospital expenses—Workmen paying monthly for support of hospital and physician's salary.*]—Action by medical practitioner for medical and hospital expenses to four labourers injured by train crew.

ALTA.

S. C.

N. D. Maclean, for appellant.

G. C. Valens, for respondent.

SIMMONS, J.:—The plaintiff is a medical practitioner who claims against the defendant for medical and hospital services to four labourers who were injured by the defendant's train crew at Lovett, Alberta.

These workmen were employed by the Pacific Pass Coal Co., and this company had provided a hospital at Lovett which was under the control and direction of the plaintiff. This company deducted money from the wages of the men for the support of the hospital and for the plaintiff's salary.

The contract or arrangement between this company and its employees in this regard is not in evidence. The plaintiff had a contract in writing with this company which he did not produce at the trial. He said "they (the Pacific Pass Coal Co.) collected fees from the men and paid me."

These injured workmen sued the defendant for damages on account of injuries to them caused by the negligence of the defendant's workmen. Among other things, they claimed that they had incurred expense for medical services rendered to them by the plaintiff (Dr. Porter) and the doctor's bills for services rendered to them were put in evidence. I tried this action and gave judgment for the plaintiffs for damages. I refused to include the claim for medical fees on the ground that there was a company doctor, and a fee was collected monthly from these men.

The plaintiff in this action admits that the men were entitled to treatment in the hospital and that moneys were deducted from their wages for this treatment, and that this was in accordance with his agreement with the Pacific Pass Coal Co. He says, however, that this company refused to pay him for his services rendered to these workmen.

The plaintiff bases his claim upon a telegram sent by him to H. McCall, superintendent of the defendant at Edson, which is as follows:—

> Four men badly injured here, August 11, by runaway G.T.P. train. In hospital here at your expense for medical and surgical treatment, food and nursing.
>
> (Sgd.) Dr. A. E. PORTER, Lovett, Alta.

Coupled with the fact that the company's superintendent at Edson asked for reports on the condition of the men in the hospital which reports he furnished to them.

ALTA.
S. C.

The Grand Trunk Pacific R. Co. was as a matter of fact made the defendant in an action for damages arising out of the injuries to these men caused by a runaway train operated by the company.

It is not unreasonable to expect that the nature and extent of the injuries should be a subject of inquiry as it would be a material part of a probable claim made against them.

The superintendent did not answer the telegram of the plaintiff, and since a reasonable explanation arises out of the circumstances for the subsequent inquiries, I am of the opinion that the plaintiff has failed to establish an implied contract by conduct to assume any liability.

The case is somewhat analogous in its material aspect to *Larose* v. *Webster* (1913), 11 D.L.R. 319, 14 D.L.R. 79, 7 A.L.R. 6, affirmed in the Supreme Court of Canada.

The trial judge did not have before him the facts I have adverted to in regard to the action of these workmen against the same defendant, but they were within the knowledge of this court and were referred to by the court at the argument without objection by counsel.

I would, therefore, allow the appeal, with costs, and dismiss the plaintiff's action with costs.

BECK, J.:—I concur.

MCCARTHY, J., being absent, took no part.

Appeal allowed.

GREAT WEST PERMANENT LOAN Co. v. NATIONAL MORTGAGE Co.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. February 11, 1919.

MORTGAGE (§ II—30)—*Assignee of first mortgage—Mechanics' liens against property—Second mortgage—Assignee paying off liens—Rights and liabilities of parties.*]—Appeal by defendant from the judgment of Morrison, J. Reversed.

Horace W. Bucke, for appellant.

J. A. MacInnes, for respondent.

MACDONALD, C. J. A.:—The plaintiffs are assignees of a first mortgage given by one Murray to Day & Heisterman on July 26, 1912, and registered on March 13, 1913. The mortgage moneys were not advanced until March 26, 1913, but this circumstance

B. C.
C. A.

is only of importance in its relation to the mechanics' lien of the Harrell Lumber Co., hereafter more particularly referred to.

In August, 1912, Murray gave a second mortgage to the defendants, which was not registered, but on March 1, 1913, he gave a new mortgage to the defendants in substitution therefor to secure $11,000, being the balance remaining due on the unregistered mortgage, and a sum representing the amount due to Murray's vendors for unpaid purchase money. This mortgage was duly registered.

The following mechanics' liens were registered against the mortgaged property: Harrell Lumber Co., filed December 26, 1912, for $859.85; three others for considerable sums, and filed subsequent to the registration of the second mortgage and to the payment of the mortgage money secured by the first mortgage. It was admitted at the Bar that these several lien-holders proceeded in the county court and obtained judgments establishing their liens. It appears that an issue was directed in the said county court in which the plaintiffs and defendants herein were plaintiffs, and the said lien-holders defendants, to determine their respective priorities, but that issue was dismissed on technical grounds, and nothing further was done in the matter.

The plaintiffs brought this action for foreclosure, and it was referred to the registrar to take the accounts and fix the dates for redemption. The only parties who appeared before him were the plaintiffs and defendants in this action respectively. The registrar included in the sum found due under the mortgage the amounts claimed by the several lien-holders, with interest, which it is alleged the plaintiffs paid to the lien-holders, but there is no proof of that in the case, and while a statement was made by counsel for the plaintiffs in argument, it goes no further than this, that the plaintiffs purchased the rights of the said lien-holders.

Defendants moved to vary said report by striking out the said several mechanics' lien items, but the motion was refused and hence the appeal to this court.

It may be useful here to consider what were the rights and remedies of the lien-holders in relation to the mortgaged property and to plaintiffs and defendants, the mortgagees. They were

B. C.
C. A.

such only as were given by the Mechanics Lien Act. That Act provides that there may be a sale of the property at the discretion of the county court judge to ascertain the sum by which the value of the property was increased by the work done or material furnished by the lien-holders. It is to such sum only the liens subsequent to a mortgage attach in priority to the mortgage.

Foreclosure under liens is not one of the remedies provided by the Act. While a lien may be a charge in priority to a mortgage, the person entitled to it can only realize upon it in the manner authorized by the statute. Therefore, when the plaintiffs paid off, if they did pay off the lien-holders, they did so before it was ascertained whether the lien other than that of the Harrell Lumber Co. had any priority over the mortgages or not.

There is a covenant in the plaintiffs' mortgage under which they are entitled to pay "liens, taxes, rates, charges or encumbrances" affecting the mortgaged lands and add them to the mortgage debt. It is apparently under this covenant that the items objected to as aforesaid were allowed.

Now it is not known even to-day whether these liens other than the one above mentioned, were entitled to priority over the mortgage or not. It is not known whether the county court judge would have ordered a sale. It appears that the building was never completed, and it may well be that the county court judge might decide not to order a sale. In these circumstances, were the plaintiffs within their covenant when they paid off these liens and seek to charge them in their mortgage account to the prejudice of subsequent encumbrancers?

As I have already said, it may be that these are liens only upon the equity of redemption; unless the holders of them gained a footing by shewing that the property had been increased in value by their services or material they clearly are such, with the exception of the Harrell Lumber Co., they are of later date than either the plaintiffs or defendants' mortgages.

Now, upon a fair interpretation of the said covenant, can it be said that the plaintiffs are entitled to pay off liens not only

B. C.
C. A.

subsequent in right to the plaintiffs themselves, but to the defendants, and thus give the lien-holders priority over the defendants? That is what is contended for in this appeal. That is the construction we are asked to put upon the covenant. Now, while the language of the covenant is general, I think it must be confined in its interpretation within reasonable limits, and within the apparent object to be attained These payments must be in the nature of "just allowances." No doubt the covenant may include items which would not, apart from it be included in that term, but I think its meaning must be confined to the payment of liens which affect the plaintiffs' interest in the property. By the covenant liens are in the same category with "charge" and "encumbrance."

If the plaintiffs may pay off charges and encumbrances over which the defendants have priority, then perhaps a similar meaning can be given to the language in respect of liens. If that is the true interpretation of the covenant, then the plaintiffs may pay off every mortgage, judgment, debt, and lien subsequent in point of time to the defendants' mortgage, and thus give them priority over the defendants' mortgage.

I think this proposition need only be stated to shew that that construction cannot in reason be given to the covenant, and that therefore when the plaintiffs paid these liens before their status was ascertained, they did so at their own risk, and cannot, on the evidence in this case, claim to bring the sums so paid into the mortgage account. The lien of the Harrell Lumber Co. was in a position different to that of the others. It existed before the money secured by the plaintiffs' mortgage was paid to the mortgagor, and it therefore takes priority by virtue of s. 9 (*a*) of the Mechanics Lien Act.

With regard to the Harrell Lumber Co.'s lien it was contended that the unregistered mortgage already mentioned being prior in date, though not in registration, was prior in interest, but it is only necessary to point out that that mortgage was discharged and displaced by the subsequent mortgage, also already mentioned, and does not come in question here at all.

The evidence in the case is very meagre indeed, and I am able to deal only with the matter in its broad aspect, and on the

footing that the plaintiffs have failed to make out a case for the allowance of the amounts paid in respect of the liens other than that of the Harrell Lumber Co. B. C. C. A.

The appeal should be allowed, and the case referred back to the registrar to take the accounts on the basis above outlined, and to fix a new date, or new dates, for redemption.

MARTIN, J. A., allowed the appeal.

MCPHILLIPS, J. A.:—I concur in the judgment of the Chief Justice.

EBERTS, J. A. allowed the appeal.

Appeal allowed.

JUDGE v. TOWN OF LIVERPOOL. CAN.

Supreme Court of Canada, November 18, 1918. S. C.

MUNICIPAL CORPORATIONS—(§ II C 3—236)—*Negligence—Drainage—Damage to property—Extraordinary rainfall.*]—Appeal from a decision of the Supreme Court of Nova Scotia (1916), 28 D.L.R. 617; 49 N.S.R. 513; maintaining the verdict for the defendant (respondent) at the trial.

The appellant claimed damages by reason of water entering his cellar when the drain overflowed during a heavy rain. He contended that a stand-pipe placed in the drain was the cause of the overflow.

The trial judge gave judgment for the defendant, holding that the damage suffered was entirely due to the extraordinary fall of rain and that the stand-pipe was not a contributing cause. The full court affirmed this judgment.

The court, after hearing counsel and reserving judgment, dismissed the appeal, Idington, J., dissenting.

Appeal dismissed.

Burchell, K.C., for appellant.

Hall, K.C., for respondent.

GILBERT BROS. ENGINEERING CO. v. THE KING.

Supreme Court of Canada, February 4, 1919.

BUILDING CONTRACTS (§ I—10)—*Public work—Progress estimates—Payment to contractor—Certificate of engineer—Failure*

CAN. S. C.

to file claims.]—Appeal from the judgment of the Exchequer Court of Canada (1917), 40 D.L.R. 723, 17 Can. Ex. 141, in favor of the Crown.

In 1897 the appellants obtained the contract for clearing out the channel through the Gallows Rapids in the St. Lawrence and later, under the same contract, of deepening and widening the channel. Payments were to be made only on the certificate of the engineer, the contractors, if not satisfied with any such certificate, being obliged to file their claims within thirty days from its receipt.

The work was completed, the securities released, and the plant handed over to the contractors, after which they filed a claim for about $130,000 which two engineers had certified they were entitled to. The Exchequer Court Judge dismissed an action to recover this amount on the ground that no claim for any part of the amount was filed as the contract required and the final certificate had been issued.

The court affirmed this judgment after hearing and consideration.

Appeal dismissed.

Pringle, K.C., for appellants.

Howard, K.C., and *Tyndale*, K.C., for respondent.

FRIESEN & SON v. ALSOP PROCESS CO.

Supreme Court of Canada, November 18, 1918.

PATENTS (§ II C—20)—*Process patent—Importation—Anticipation.*]—Appeal from the judgment of the Exchequer Court of Canada (1917), 35 D.L.R. 353, 16 Can. Ex. 507, in favor of the plaintiffs (respondents).

The respondents by their action claimed damages for infringement of their patent for the process of bleaching flour and an injunction. The defendants alleged that the patent was void for importation of the invention.

The invention was for bleaching flour by subjecting it to a specified oxidising agent and what was imported was a machine for making this agent. The Exchequer Court held that this was not importation of the invention.

The court after argument reserved judgment and eventually affirmed the judgment of the Exchequer Court.

Appeal dismissed.

Fetherstonaugh, K.C., and *Russell Smart*, for appellants.

McKay, K.C., for respondents.

CLARK v. NORTHERN SHIRT CO.

Supreme Court of Canada, November 18, 1918.

PATENTS (§ II B—15)—*New invention—Adaptation of old device—Seam in overalls.*]—Appeal from the judgment of the Exchequer Court of Canada (1917), 38 D.L.R. 1, 17 Can. Ex. 273, in favor of the plaintiff (respondent).

The action was brought by respondent to set aside a patent for "an alleged new and useful improvement in methods of producing overalls." The claims presented for the invention are set out in the report of the decision of the Exchequer Court and are, shortly, for constructing the side openings in overalls between the front and back legs by slitting the front leg in advance of the seam and applying a band to the edges of the slit. The object was to overcome the difficulty of sewing over the thickness of the seam.

The Exchequer Court and the Supreme Court of Canada held that a similar device had existed in reference to shirt sleeves and that the alleged invention was merely the application of this old device to overalls and was not patentable.

Appeal dismissed.

Lafleur, K.C., and *Russell Smart*, for appellant.

E. K. Williams, for respondent.

BURKETT v. OTT.

Supreme Court of Canada, December 23, 1918.

CONTRACTS (§ I C—26)—*Money in bank—Instructions to banker—Undue influence—Maintenance of aged couple.*]—Appeal from a decision of the Appellate Division of the Supreme Court of Ontario (1918), 41 D.L.R. 676, 41 O.L.R. 578, affirming, by an equal division of opinion, the judgment for the defendants (respondents) at the trial.

CAN.
S. C.

The plaintiff, Emma Burkett, brought action to have it declared that money in a bank, formerly belonging to her deceased father, was the property of his personal representatives. The defendants, plaintiff's mother and sister, claimed the money as their own.

The father, not long before his death, executed a document addressed to the bank in which he had on deposit some $3,000 and directing an account to be opened in the name of himself, his wife Catherine Ott, and his married daughter, Minerva Barrick (the two latter being defendants in this action), the money to be drawn out on the cheque of any one of the three. The defendants alleged an agreement to maintain the father and mother while they lived as consideration for this agreement. The trial judge held that the money belonged to the defendants, there being good consideration and no fraud nor undue influence proved. On appeal, that judgment stood affirmed by equal division in the Appellate Division.

The court reversed this judgment holding that it was an improvident arrangement which should not be allowed to stand.

Appeal allowed.

Colter, for appellant.

Morwood, for the respondents Ott and Barrick.

Bradford, for the respondent Bank of Hamilton.

SASK.
C. A.

KRIENKE v. SCHAFTER et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A March 20, 1919.

SALE (§ III A—51)—*To members of a club—Assignment of vendor for benefit of creditors—Notes of trial unsatisfactory—Evidence.*]—Appeal from the trial judgment in an action for goods sold and delivered. New trial ordered.

D. Buckles, for appellant.

J. A. Allan, K.C. for respondents.

The judgment of the court was delivered by

ELWOOD, J. A.:—This is an action for goods alleged to have been sold and delivered by the plaintiff to the defendants, who are alleged to have been members of a club known as "The Stag Club." The district court judge before whom the action was

SASK.

C. A.

tried, at the conclusion of the plaintiff's case, dismissed it on the ground that the evidence showed that the plaintiff had made an assignment to the Canadian Credit Men's Association for the general benefit of his creditors, and from that judgment this appeal has been taken.

The appeal came on for hearing before us on December 3, last, and on December 21, last, the judgment of the court was given as follows:—

The judge's notes of the evidence at the trial are so unsatisfactory that, in my opinion, the appeal book should be sent back to him for additional notes of evidence, or, at any rate, further information on the evidence given by the plaintiff.

Mr. Buckles, on the argument before us, stated that at the trial the plaintiff had sworn that the defendants mentioned in the style of cause were all present when the contract for the goods the subject matter of the action was made, and were the parties with whom the plaintiff contracted for the sale of these goods. The judge has no note on this point, and his notes are so meagre that it is inconceivable that they contain all of the evidence of the plaintiff, and, as I have stated above, I am of opinion that the appeal book should be sent back to him for information as to what—if any—evidence was given as to the names of the persons who were present when the contract for the goods the subject matter of the action was made, and whether or not these persons were parties to the contract.

The matter came on for hearing before us again on March 3, instant, when Mr Buckles read an affidavit stating that he had requested the district court judge to comply with the above judgment, but the district court judge said that he had no notes of evidence other than those contained in the appeal book, and that he had no recollection of the facts.

So far as the ground upon which the learned district court judge dismissed the plaintiff's claim is concerned, the case of *Covert* v. *Janzen*, (No. 2) (1908), 1 S.L.R. 429 at p. 435 seems to me to decide that the action may be brought in the name of the original creditor, and, that being so, the ground upon which the district court judge dismissed the action fails.

It was, however, contended before us that there was no evidence in the notes of evidence to show that the defendants had ordered or agreed to pay for the goods the subject-matter of the action, or that they were members of the "Stag Club."

So far as the defendant Schafter is concerned, his examination for discovery shows that he was a member of the club and that he, at any rate, was a party to the purchasing of the goods

SASK.
C. A.

sued for. Therefore, so far as he is concerned, there should be judgment against him. So far as the other defendants are concerned there is not, however, in my opinion, evidence contained in the notes of the district court judge that they were present when the contract was made or were parties to the contract.

In view of the affidavit of Mr. Buckles, and of his statement referred to in the judgment of this court of December 21, last, it would appear that evidence had been given before the district court judge establishing the liability of these defendants. I am, therefore, of opinion that as to the defendants except the defendant Schafter there should be a new trial.

This is not the first occasion upon which the notes of evidence of a district court judge presented to us on appeal have, in the opinion of the court, failed to state all the evidence given before such judge on the trial. In the present instance, the parties are put to additional and quite unnecessary expense in consequence of the judge not taking sufficient notes of evidence, and it does seem to me that the district court judges should, on all occasions, take such notes as will convey to the Court of Appeal, in case of appeal, exact information as to what evidence was given before them. My attention has not been directed to whether or not they are required to make a record of the evidence, but they should make such a record, and, in my opinion, some provision should be made whereby the Court of Appeal is furnished with fuller notes than we have in this instance.

In *Last West Lumber Co.* v. *Haddad* (1915), 25 D.L.R. 529, 8 S.L.R. 407, it was held that, in all cases where in the opinion of the court the payment of a just debt has been improperly withheld and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the court may think right. Apparently, in that case, interest was allowed because the plaintiffs had demanded payment of the account. In the case at bar, there is no evidence that any demand had ever been made for payment of the account, and from the manner in which the pleadings are framed I do not think it can be successfully urged that a demand is admitted. I would, therefore, only allow to the plaintiff, interest at 5% from the date of the issue of the writ.

SASK.

C. A.

In the result, the plaintiff should have judgment against the defendant Schafter for $140.20 and interest thereon at 5% from the date of issue of the writ until judgment and his costs of the action of this appeal. As to the other defendants, there should be a new trial. The costs of the former trial and of this appeal to abide the event of such new trial.

FEAR v. HILTZ.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. March 20, 1919.

BILLS AND NOTES (§ V A—105)—*Settlement of business transaction—Notes of third parties given in settlement—Personal note given as security—Action on personal note before exhausting means of collecting on others.*]—Appeal from the trial judgment in an action on a promissory note. Reversed.

G. H. Yule, for appellant.

T. D. Brown, K.C., for respondent.

ELWOOD, J. A.:—The plaintiff and defendant had been engaged in the business of selling horses, which business was concluded between them in January, 1917, when a settlement was made. As part of this settlement, the plaintiff received three notes: namely (1) Alexander Hamilton $148, past due; (2) G. Froland $350, due November 1, 1917; (3) Hyland $160, past due.

Some question having arisen as to whether the makers of these three notes were financially good, it was arranged between the plaintiff and defendant that, in case there were any loss on the collection of these notes, the plaintiff and defendant would each bear half of such loss, and in order to settle the matter the defendant gave to the plaintiff his promissory note for $329, representing the total of such loss payable by the defendant in case the plaintiff was unable to collect any of the above three notes, which, it will be noticed, total $658. This action was brought upon the above note given by the defendant to the plaintiff, and judgment was given for the plaintiff. From this judgment, the defendant has appealed.

At the time the action was brought, credits were given on the notes sued on, totalling $79.60, for various amounts received by or on behalf of the plaintiff on the three notes transferred to

SASK.
C. A.

him, and for $107.54 costs owing by the plaintiff to the defendant in an action which had been brought by the defendant against the plaintiff.

The evidence shews that at the time of the trial the Hyland note was paid in full, and only $12 was owing upon the Hamilton note. The contention on behalf of the plaintiff is, that the defendant became liable on his note practically as soon as the makers of the three notes transferred to plaintiff failed to pay, or, at any rate, upon the date that the note sued on became due.

The note sued on apparently became due on October 23, 1917. It will be observed that this was before the note made by Froland came due. Neither party could explain at the trial, how it was that the note sued on came due on October 23.

I am of the opinion that, in order to entitle the plaintiff to succeed, he must shew that at least every reasonable effort was made to collect the notes transferred to him and that, in spite of such reasonable efforts, he had been unable to collect them or part of them. One at least of these notes was apparently a lien note. No effort was made to realize on the lien, and the efforts to collect from Froland were, in my opinion, at least not as vigorous as might be. At least $140 was received from Hamilton after action was commenced, and some considerable sum from Hyland. In order to entitle the plaintiff to succeed, he should have shewn either that he had sued the parties and was unable to collect, or that it would have been futile to have sued them.

I am, therefore, of the opinion that the plaintiff failed to produce before the district court judge any evidence to shew that there had been any loss upon the notes as contemplated by the parties. In my opinion, the appeal should be allowed with costs and the plaintiff's action dismissed with costs.

HAULTAIN, C. J. S., concurred with Elwood, J. A.

LAMONT, J. A.:—I concur in the conclusion reached by my brother Elwood that the plaintiff is not entitled to recover. The evidence both of the plaintiff and the defendant makes it quite clear that the defendant gave the note in question as an acknowledgment that he would pay one-half of any loss suffered by the plaintiff in case he was unable to obtain payment from the makers of the three notes in respect of which the defendant's note was given.

SASK.

C. A.

At the date of the trial, one of these notes had been paid in full, and the second had been paid with the exception of $12, and this $12 the plaintiff admitted he did not consider a loss. The third note was a lien note not a month past due. No attempt had been made by the plaintiff to collect the note from the maker thereof, or to realize upon the lien which he had on the horses mentioned in said note. Having the security in his hands, I do not see how he can say that he suffered a loss at the time he brought this action. I am satisfied it was never the intention of the parties that the defendant should be compelled to pay before the plaintiff—to say the very least—had realized upon his securities. *Appeal allowed.*

STEVENS v. SASKATOON TAXICAB Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. March 20, 1919.

HIGHWAYS (§ II B—35)—*Driver of automobile—Colt running with mother on hay wagon—Collision—Death of colt—Negligence—Damages.*]—Appeal by defendant from the trial judgment in an action for damages for death of a colt injured on highway. Reversed.

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

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

The judgment of the court was delivered by

ELWOOD, J. A.:—On the occasion of the accident which gave rise to the cause of action herein the plaintiff and his brother were driving two loads of hay to town on a level, graded road in daylight. The plaintiff was driving the second load, drawn by a team of which one was a mare, which had her colt—about two months old—running beside her. The defendant was driving a motor car in the opposite direction, and, according to the evidence of the plaintiff, when the car was directly opposite to his team the colt turned to the left and the car struck it, knocked it down, broke its leg, and, subsequently, the colt had to be killed. The plaintiff and his brother swear that the defendant was travelling at a speed of from 25 to 30 miles an hour, and that he did not slacken up at all when he passed them. The defendant says that he passed them at the rate of not more than 15 miles

SASK.
C. A.

an hour. The trial judge while making no actual finding as to the rate of speed states that, if it were necessary that he should make a finding, he would find in favor of the version of the plaintiff and his brother. The trial judge expresses the opinion that, if the speed had been slackened up to say, 7 or 8 miles an hour, the accident would not have occurred. The trial judge found for the plaintiff, and from that judgment this appeal is taken.

According to the plaintiff's evidence, the distance between the two loads was between one and two rods. The defendant says between 50 and 75 feet. The defendant says that until he had practically passed the first load he was not aware that there was any second load, and that he did not see the colt until he was about 3 feet from it. It was suggested by counsel for the plaintiff that, if the defendant had been going at a slower rate of speed, he would have noticed the colt before he had gotten so close to it, and should then have anticipated that the colt might jump in front of his car, and that he might have taken means to avoid the accident.

To my mind, it is pure conjecture to speculate upon whether if the defendant had been going at a slower rate of speed he would have seen the colt earlier, or whether, if he had been going slower, the colt would have gotten in front of his car, or what steps he might have taken in such event to get out of the way of the colt.

If the defendant should have known that the colt was likely to jump in front of his car, then the plaintiff should also have known that, and it seems to me that there would be some duty cast upon the plaintiff to warn an approaching car to stop, or that the colt was there, so that, if necessary, some extra precaution might have been taken by the defendant. The plaintiff for several hundred yards perceived the approach of the defendant, must have been aware to some extent of the rate of speed at which he was approaching, and gave no warning whatever.

It was suggested by the district court judge that the defendant should have anticipated that there might be a colt with one of these loads. I must confess that this suggestion does not appeal to me.

SASK.

C. A.

When the colt jumped in front of the car it was immaterial at what rate of speed it was travelling, because from the evidence it appears that it jumped in front of the car just as the car came opposite to it, and the moment that it jumped in front of the car it was struck. So that even if the car had been travelling at the rate of speed that the district court judge thought was a proper speed the colt would have been struck.

I am, therefore, of the opinion that the appeal should be allowed with costs, and the plaintiff's action dismissed with costs.

Appeal allowed.

ONT.

S. C.

ROTH v. SOUTH EASTHOPE FARMERS MUTUAL FIRE INS. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 6, 1918.

INSURANCE (§ VI B—257a)—*Fire and lightning—Barn struck by lightning—Further injury by wind—Damage to contents—Negligence—Recovery under policy.*]—Appeal by the defendant company from the judgment of Middleton, J., 41 O.L.R. 52, in an action under a fire and lightning insurance policy Varied.

I. F. Hellmuth, K.C., and *W. T. McMullen*, for appellant company.

Glyn Osler, for respondent, the plaintiff.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Middleton, J., dated the 22nd November, 1917, which he directed to be entered after the trial before him sitting without a jury at Stratford on the 13th day of that month.

The action is brought on a policy of insurance issued by the appellant on the 10th February, 1913, by which the appellant insured the respondent against loss or damage by fire or lightning to the amount of $4,000 as follows: $1,200 on his brick dwelling, $300 on its ordinary contents, $1,600 on his bank-barn, and $900 on his farm-stock, produce, and farm-implements, and the appellant agreed to make good to the respondent all such immediate loss or damage, not exceeding those amounts, as should happen by fire or lightning during the term of the policy.

The respondent's case is that the barn was struck by lightning, "by reason and in consequence of which" it was "destroyed and

ONT.
S. C.

damaged" to the extent of $1,689, and the produce in it was "destroyed and damaged" to the extent of $230.

The appellant's contention is that the barn was not struck by lightning, but that it was damaged by a violent windstorm, and as to the claim for damage to the produce that, even if the injury to the barn was caused by lightning, the damage was not the result of it, but was occasioned by the fault of the respondent and his failure "to use all ordinary means and precautions to save and preserve the property . . . insured at and after the fire." which by the policy it was made a condition that he should do.

The evidence established to the satisfaction of the trial Judge that the barn was struck by lightning and was thereby damaged. He accepted the testimony of the respondent's wife, who was an eye-witness to what happened and told what she saw. According to her account the lightning struck the barn, tore out the north gable and upwards of 20 feet of the roof, and a violent wind followed in 5 or 10 minutes, which tore off the remainder of the roof and took out the sides of the building, leaving the south gable standing.

The finding of the trial Judge was "that the injury caused by the lightning was . . . throughout, an operating and continuing cause, and a proximate cause within the meaning of the rule," that is, the rule which he deduced from the cases to which he refers.

In an earlier part of his reasons for judgment, the learned trial Judge said: "Whether the wind would have damaged the barn if it had not previously been opened by the lightning, no one can say." This, it is contended, is inconsistent with his finding to which I have referred, and is, if a correct conclusion, fatal to the claim of the respondent for the damage which was caused by the wind.

I do not see the suggested inconsistency. It may well be that it is impossible to say whether, if the barn had been uninjured, it would have been blown down by the wind, and at the same time it may be a reasonable inference from the facts proved that the lightning was the proximate cause of the damage which was done by the wind.

The north gable had been torn out and part of the roof carried away, and the building had been thereby weakened. If the wind came from a westerly direction, as it doubtless did, the sides

ONT.

S. C.

of the building which were blown down were more susceptible to its action owing to the weakening of the structure by the damage that it had received, and the finding of the learned trial Judge that lightning was the proximate cause of the injury which the wind did is, in my opinion, a reasonable inference from the facts proved.

I would affirm the judgment as to the damages for the injury to the barn.

The learned Judge does not deal with the argument as to the claim for the damage done to the grain and hay, the injury to which was caused by rain which followed the injury to the barn. The grain, which consisted of wheat, barley, and oats, was threshed about a week after, and the threshed grain was put in the granary, and, as I understand the evidence, was while there injured by the rain. It cannot, I think, be said that the lightning was the proximate cause of this loss. The grain might and should have been put in a place of safety. The quantity of it was comparatively small, 75 bushels of wheat, 80 bushels of barley, and 150 bushels of oats; and, as the respondent chose to put it where it was exposed to the rain, he must bear the loss. The amount allowed on this head of the respondent's claim was $100, and I would vary the judgment by reducing the damages awarded by that sum.

There should be no costs of the appeal to either party.

Judgment below varied.

Re GLASS v. GLASS.

Ontario Supreme Court, Appellate Division, Riddell and Latchford, JJ., Ferguson, J.A., and Rose, J. January 15, 1919.

COURTS (§ II A—151)—*Division Courts—Jurisdiction—Claim for conversion of goods—Division Courts Act, R.S.O. 1914 c. 63, sec. 62.*]—Appeal from a judgment of Middleton, J., granting a prohibition to a Division Court. Affirmed. The sole question is whether this action is founded on contract or on tort.* Other grounds were taken in the material and were abandoned.

The claim is "for the sum of $96, being the price for 8 tons of hay, at $12.00 per ton, taken by the defendant."

*By sec. 62 (1) of the Division Courts Act, R.S.O. 1914, ch. 63, a Division Court has jurisdiction in an action founded on tort only up to $60.

ONT.
S. C.

The plaintiff and defendant are brothers, and along with others were tenants in common of a farm. There was a partition and an adjustment of claims. Some hay upon the farm, it is said, was allotted to the plaintiff, but the defendant, it is said, took it and converted it to his own use.

The action was tried by a jury, and the jury has found for the plaintiff. The facts and merits of the dispute are to some extent dealt with in the affidavits, but from them it is impossible to form any opinion as to the real situation.

The defendant's main contention seems to have been that the question as to this hay was covered by the disputes included in the adjustment of accounts in the partition proceedings. The plaintiff contended that the present dispute arose out of a subsequent transaction by which it was agreed that the hay in question should be his, but the defendant in violation of this agreement took it.

The plaintiff's title rested on agreement and contract, but his complaint here is for conversion, and so the action is founded on tort.

Sachs v. *Henderson*, [1902] 1 K.B. 612, is the leading case. *Edwards* v. *Mallan*, [1908] 1 K.B. 1002, is the latest.

In *Bryant* v. *Herbert* (1878), 3 C.P.D. 389, an action of detinue is said to be founded on tort, the wrongful detention being the foundation of the action, and not the contract under which the plaintiff acquired his title.

The prohibition must be granted with costs, which I fix at $20.

I venture to suggest that these parties have had enough law and would be wise to drop all contention without costs, remembering what was said long ago: "He who loves law dies either mad or poor."

J. H. Naughton, for the appellant.

J. Gilchrist, for the defendant, respondent, was not called upon.

THE COURT, at the conclusion of the argument for the appellant, dismissed the appeal with costs, being of opinion that the action was clearly in tort.

Appeal dismissed.

INDEX.

CASES—