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## VOL. 7

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*(Alphabetically arranged.)*

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## NOBLE v. BOOTHBY.

B.C.

S. C. 1912

Oct. 8.

*British Columbia Supreme Court. Trial before Murphy J. October 8, 1912.*

1. EVIDENCE (§ II E 7—198)—BURDEN OF PROOF AS TO FRAUD IN NEGOTIATING PROMISSORY NOTE—VALUE IN GOOD FAITH WITHOUT NOTICE OF FRAUD.

Where, in an action upon a promissory note, it is shewn that a previous negotiation of the note was a fraud upon the defendant, the plaintiff must shew not only that value has been given subsequent to such negotiation by some other holder in due course, but also that it has been given in good faith without notice of the fraud.

[*Tatam* v. *Haslar*, 23 Q.B.D. 345, followed; *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, referred to; see also Byles on Bills of Exchange, 17th ed., footnote, at p. 144.]

Statement

TRIAL of an action upon promissory notes.

The action was dismissed.

*Burns*, for plaintiff.

*C. Wilson*, K.C., for defendant.

Murphy, J.

MURPHY, J.:—I held at the hearing that the negotiation of the notes in question by Thomas was a fraud on defendant. That being so by sub-sec. 2 of sec. 58 of the Bills of Exchange Act the burden of proof is on the plaintiff to shew that value in good faith has been given for the bill by some other holder in due course. According to Maclaren on Bills, 4th ed., p. 194, there is probably no difference in the effect of this clause and of sub-sec. 2 of sec. 30 of the English Bills of Exchange Act. [See Falconbridge on Banking 458.] As no attempt to impeach the correctness of this statement was made in argument and as a comparison of the language of the two sub-sections in my opinion bears it out, I so hold. Under the English Act the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud: *Tatam* v. *Haslar*, 23 Q.B.D. 345, and see *Talbot* v. *Von Boris*, [1911] 1 K.B. 854.

In a footnote at page 144 of the 17th edition of Byles on Bills of Exchange dealing with this sub-section the following appears:—

> The late Lord Esher, M.R., favoured the editors of the 15th edition of this book with the following opinion on this subject: "If the plaintiff (or the party giving the value relied on) can be called, no jury would, I think, be satisfied unless he is called to say that he had no knowledge of the fraud."

If such evidence were given it would be a question of the balance of testimony whether the plaintiff was merely grossly

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negligent or whether he was dishonest in the sense explained by Lord Blackburn in *Jones* v. *Gordon*, 2 A.C. 616, 629; *Oakley* v. *Boulton*, 5 Times L.R. 60.

In this case the plaintiff was called and I have had a transcript made of his evidence and also of Reid's, they being the only two parties called through whose statements such onus could be satisfied. I cannot find a shred of evidence to shew the plaintiff had no knowledge of the fraud. The matter was not touched on in plaintiff's evidence and the only statement in Reid's evidence that could be so construed was that the transaction was a *bonâ fide* one between him and plaintiff. This was objected to and I think rightly objected to. In any event as the context shews Reid was only referring to the question of value being given. From the nature of things he could not prove that plaintiff had no knowledge of the fraud. If the question had been put directly to plaintiff and he had denied such knowledge it might well be that he would have succeeded in this action. It would then become a question of the balance of testimony. But on the record as it stands I hold the plaintiff has not satisfied the onus cast upon him by said sub-section *in limine* once fraud in negotiating the notes was proven. The action is dismissed.

*Action dismissed.*

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QUE.
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Oct. 18.

## BEAULIEU v. PICARD.

*Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. October* 18, 1912.

1. MASTER AND SERVANT (§ II B 6—170)—PAYMENT BY PIECE—WORK ON PREMISES UNDER SUPERVISION.

It is immaterial, under the Quebec Workmen's Compensation Act, that the workman is paid by the piece or by the foot, provided the work is done on the premises, and under the supervision of the employer.

2. MASTER AND SERVANT (§ III B 3—305)—WHO ARE INDEPENDENT CONTRACTORS.

In order to be an independent contractor a workman must be free from control and must not be subject to the orders of any one as to the manner in which the work is to be done.

Statement

APPEAL from the judgment of the Superior Court at Montreal, St. Pierre, J., condemning the defendant to pay the plaintiff the sum of $110.69, and a weekly payment of $6.18 during the duration of plaintiff's incapacity.

The appeal was dismissed.

*R. Roy*, for plaintiff.

*E. Brossard*, for defendant.

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff obtained a judgment against the defendants for $110.69, representing one-half of the

salary of the plaintiff, to count from the 31st of December, 1911, up to the 10th of May, 1912, the date of the judgment; and further to pay to the plaintiff the sum of $6.18 on each weekly pay day so long as the plaintiff is suffering from the incapacity which he now suffers.

In his action the plaintiff alleges that he was employed by the defendants by verbal agreement on or about the 7th of December, 1911, as day labourer, for the excavation of a drain situated on Rosemount Boulevard, in the city of Montreal; that by the terms of his engagement the plaintiff was to drill rock which might be found in the drain and was to receive for the said work 20 cents a foot, and in default of their being rock to drill, he was to work as an ordinary workman with a pick and shovel.

On the 23rd December, while in the employ and doing the work incident to his employment, he met with an accident, by which his right leg was broken; the said accident being caused by the falling of a large piece of stone from the bank of the excavation.

The defendants pleaded to the action, alleging that the plaintiff was not a workman at the date of the said accident, but was in reality a contractor, that under the agreement with the defendant the plaintiff was at liberty to work when and where he liked, and did not receive a salary or wage, but so much per foot for the rock he drilled; that the plaintiff was never engaged by the defendants at a salary or wage; that, moreover, on the night previous to the accident, there had been an excessive fall of rain and the defendants had abandoned and intended to abandon work on the excavation in question, and had notified their men of such intention; that nevertheless, the plaintiff, although he was notified by the defendants' foreman, that the works were suspended, went to the works before 7 o'clock in the morning to continue his work, and finding the place where he wished to stand in a slippery condition, went to get a large piece of sod upon which to stand, when he struck with his shoulder a suspended rock which fell and caused the accident; that the accident was due to the inexcusable fault of the plaintiff himself.

The question to be decided is largely a question of fact.

If the engagement between the plaintiff and defendants created the relationship of employee and employer, as found by the learned trial Judge, then there is no doubt the Act 9 Edw. VII. ch. 66, known as the Workmen's Compensation Act, is applicable, and the plaintiff is entitled to the relief sought.

On the other hand, if the plaintiff was an independent contractor, and was in no way under the control of the defendants, the relationship did not exist, and the Act is not applicable.

The only remaining question is, whether, the Act being ap-

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plicable, the plaintiff was guilty of an inexcusable fault, thereby exposing him to a reduction in compensation.

At the argument it was suggested, that in any event, the accident did not happen during the course of his employment, but happened before the hour when the men were accustomed to start.

Upon questions of fact, as above stated, the learned trial Judge found against the defendants. He found, that the proof established that the plaintiff was engaged by the defendants to drill rock, and that when there was no drilling to be done, he worked as an ordinary workman in the employ of the defendants. He found, in like manner, that after seven o'clock, while the plaintiff was at the bottom of the trench or excavation, a stone was detached from the side or bank of the excavation and the falling of it broke his leg. He found that the work that the plaintiff was doing was under the control of the defendants, and that he had remedy under 9 Edw. VII. (Que.) ch. 66, even if he was not engaged at the same time as a day workman.

The learned Judge found, further, that no notice was at any time given to the plaintiff not to work.

There is no doubt that the business carried on by the defendants was one of the industries covered by the Workmen's Compensation Act. No contention to the contrary was made.

In my opinion, there is no doubt that the proof clearly establishes that the relationship of employer and employee existed between the plaintiff and the defendants at the time the accident happened.

The proof establishes that the plaintiff was recommended to the defendants as a competent workman, and was told by the defendants, or one of them, to go to work at drilling holes for the purpose of rock blasting, and was also told that he would be paid at the rate of twenty cents per foot.

The defendants pretend that the plaintiff thereby became a contractor.

It must be observed at once, that the plaintiff did not contract for any specific quantity of drilling; did not contract to do the drilling in any particular place, but was at all times under the immediate control, direction and governance of the defendants; he was doing work for the defendants at a place where they were carrying on a work covered by the Workmen's Compensation Act, and was subject to the orders of the defendants. If there was no drilling to be done, he was told so, and on one occasion, at least, was put by the defendants to an ordinary labourer's work with a pick and shovel, and was paid at the rate of so much per hour.

I take it as a fair statement of our law and jurisprudence, that it is immaterial whether the workman is paid by the piece

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or by the foot, as in this case, provided the work was done on the premises and under the supervision of the defendants.

In order to be an independent contractor, as pretended by the defendants, a workman must be free from orders, and must not be subject to the orders of any one as to the manner in which the work is to be done.

That the accident happened during the course of the plaintiff's employment, I have no doubt. The plaintiff had been working for some time previous to the accident. On the morning of the accident he returned to his work in the usual manner, and with others of his companions, resumed work at a place where he had been directed to work by his employers the previous day, and it was while engaged in this work that he met with the accident.

In my opinion, the proof does not disclose any fault whatever on the part of the plaintiff, much less an inexcusable fault; nor does the proof establish that he was forbidden to work; if he was forbidden to work, it would clearly destroy the other pretension of the defendants, that the plaintiff was working independently entirely of them, and was not under their control.

Upon the whole I find no error in the judgment of the learned trial Judge, and I am to confirm the judgment.

*Appeal dismissed.*

**Annotation—Master and servant (§ II—35)—Workmen's compensation law in Quebec.**

**Annotation**

Workmen's Compensation Law (Que.).

The following is a summary of the principal provisions of the Quebec Workmen's Compensation Law, 9 Edw. VII. ch. 66, and R.S.Q. 1909, secs. 7321-7347.

*Date of enactment.*—May 29, 1909, in effect January 1, 1910.

*Injuries compensated.*—All injuries happening to workmen by reason of or in the course of their work causing death or disability lasting over seven days. Injuries intentionally caused by the person injured are not compensated.

*Industries covered.*—Building, manufacturing, transportation, engineering and construction work, mining, quarrying stone; wood and coal yards; any industrial enterprise using machinery operated by power. Agriculture and sailing vessels are excluded.

*Persons compensated.*—Workmen, apprentices, and employees earning not more than $1,000 per annum. Foreign workmen or their representatives are compensated only if and so long as they reside in Canada.

*Government employees.*—Government employees are not mentioned in the Act.

*Burden of payment.*—The entire expense rests upon the employer.

*Compensation for death.*

(*a*) Medical and funeral expenses not in excess of $25, unless same are provided by an association of which the deceased was a member.

(*b*) Four times average yearly wages, but not less than $1,000 nor

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Annotation

Workmen's Compensation Law (Que.).

Annotation (*continued*)—Master and servant (§ II—35)—Workmen's compensation law in Quebec.

more than $2,000, payable to surviving consort, to children under 16 years of age, and dependent ascendants; shares to be agreed upon or determined by Court.

All amounts may be decreased or increased by Court on account of inexcusable fault of employee or employer.

Payments made for disability before death are deducted.

*Compensation for disability.*

(*a*) For permanent total disability, a pension equal to 50 per cent. of the yearly wages (including the maximum and minimum amounts).

(*b*) For permanent partial incapacity, a pension equal to 50 per cent. of the amount by which the wages have been reduced because of the injury.

(*c*) For temporary incapacity lasting over seven days, compensation equal to one-half the daily earnings received at the time of the accident, beginning with the eighth day.

(*d*) In computing pensions only one-fourth the excess of the annual earnings between $600 and $1,000 is considered. The capital of any pension shall not exceed $2,000, unless higher, because of accidents due to inexcusable fault of the employer.

*Revision of compensation.*—Demands for change of amount of compensation may be made within four years.

*Insurance.*—No reference concerning the insurance of risks under the law is contained in the Act, except as to the payment of pensions due, which may be transferred to insurance companies. No release from liability is obtained by the employer by such transfer.

*Guarantee of payment.*—Claims for compensation or pensions form a lien on the real and personal property of the employer so long as they remain unpaid.

*Settlement of disputes.*—Superior and Circuit Courts have jurisdiction over all disputes arising under this Act. All proceedings are summary, no trial by jury being allowed.

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QUE.

K. B. 1912

Oct. 31.

## MONTREAL STREET RAILWAY v. FEIGLEMAN.

*Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.*

1. PUBLIC POLICY (§ I—5)—PRIVILEGE EXTENDING TO COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT.

The privilege attached to communications between solicitor and client is given in favour of the client and not of the solicitor, and is a matter of public order both under French law and English law.

2. DISCOVERY AND INSPECTION (§ I—2)—STATEMENT FURNISHED BY EMPLOYEE AS TO ACCIDENT—USE OF SOLICITOR—NO LITIGATION CONTEMPLATED—PRIVILEGE.

A document or statement of facts prepared by the employees of a company (*e.g.*, conductors and motormen) at the request of the company and ostensibly for the use of the solicitors of the company in case of litigation is a privileged communication of which the adverse party cannot compel the production at an examination on discovery,

notwithstanding that such report was made at a time when no litigation was contemplated and that it was only communicated to the solicitors of the company ten months after the accident.

[*Feigleman* v. *Montreal Street R. Co.*, 3 D.L.R. 125, reversed.]

3. DISCOVERY AND INSPECTION (§ I—2)—REPORT OF ACCIDENT—PRIVILEGE —INTENTION OF PARTY PREPARING SAME.

A statement of facts prepared by the employees of a company at the request of the company is privileged although it were only a subterfuge on the part of the company to avoid disclosure of the facts of the action when it appears that the persons making the report prepared it under the impression that it was to be treated as confidential.

[*Southwark and Vauxhall Water Co.* v. *Quick*, L.R. 3 Q.B.D. 315; *Anderson* v. *Bank of British Columbia*, L.R. 2 Ch.D. 644; *Bondy* v. *Valois*, 15 Rev. Leg. 63; *Hunter* v. *G.T.R.*, 16 Ont. P.R. 385, referred to; *Collins* v. *London General Omnibus Co.*, 68 L.T. 831, followed; see also *Swaisland* v. *G.T.R.*, 5 D.L.R. 750.]



Statement

AN appeal from the interlocutory judgment of Charbonneau, J., in *Feigleman* v. *Montreal Street R. Co.*, 3 D.L.R. 125, ordering the defendant, appellant, to produce on discovery the report of a street car accident prepared by employees of the company, appellant.

The appeal was allowed.

Argument

*R. Taschereau*, K.C., for the appellant:—The report in question was handed to the appellant's attorneys that they might prepare their defence thereon. To compel the appellant to produce this report is to compel it to give away its defence and thereby to be seriously prejudiced. The Judges of the Superior Court seem to be hesitant as regards these reports and their decisions are somewhat conflicting: *Stocker* v. *C.P.R. Co.*, Trenholme, J., 5 Que. P.R. 117; *Zaste et al.* v. *G.T.R. Co.*, Fortin, J., 10 Que. P.R. 270; *Emerson* v. *M.S.R. Co.*, Demers, J., 13 Que. P.R. 13; *Glickman* v. *M.S.R. Co.*, Laurendeau, J., 13 Que. P.R. 143. Mr. Justice Charbonneau himself a few weeks ago was of the opinion that such a report could not be produced: *Beardsell* v. *M.S.R. Co.*, 13 Que. P.R. 152. English authorities, however, consider such report as privileged: *Anderson* v. *Bank of British Columbia*, L.R. 2 Ch. D. 644, 35 L.T. 76, 45 L.J. Ch. 449; *Hunter* v. *G.T.R. Co.*, 16 Ont. P.R. 385; Holmested & Langton, Ontario Judicature Act, 3rd ed., p. 585; Nellis on Street Railways, 2nd ed., vol. 2.

*A. Rives Hall*, K.C., for the respondent:—The application is justified under 289 C.[illegible] rule 507 of the Ontario Judicature Act and English Rule No. 356. English and Ontario authorities therefore apply. Two questions suggest themselves: (1) Is the report a document? Yes, for "document" means any substance having any matter expressed or described upon it by marks capable of being read: *Anderson* v. *Bank of British Columbia*, L.R. 2 Ch. D. 644, 35 L.T. 76, 45 L.J. Ch. 449; *Cook* v. *Metropolitan Tram Co.*, 6 Times L.R. 22; *Jones* v. *Great Central R. Co.*, 100 L.T. 710; *Fox et al.* v. *Sleeman et al.*, 17 Ont. P.R. 492;

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*Cameron* v. *Cameron*, 10 Ont. P.R. 522. (2) The report being a statement of the circumstances of the accident, prepared by a servant of the company and delivered by him to the company itself, is not entitled to any privilege: Phipson on Evidence, p. 181; Odgers, Law of Evidence, Canadian ed., pp. 231, 636; *Westinghouse* v. *Midland Ry.*, 48 L.T. 462; *Woolley* v. *North London Ry.*, L.R. 4 C.P. 602; *Chadwick* v. *Bowman*, 16 Q.B.D. 561; *Bustros* v. *White*, 1 Q.B.D. 423; *Martin* v. *Butchard*, 36 L.T. 732. The report was made by the employee in the ordinary course of his duty, it was not prepared at the instance of the solicitor who only learned thereof ten months after the accident. The endorsement that the report is made at the request of the solicitors is a mere subterfuge. The principle is laid down in the ruling and most recent case of *Jones* v. *Great Central R. Co.*, 100 L.T. 710.

*Taschereau*, in reply.

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated):—This is an appeal from an interlocutory judgment which ordered the company-appellant to produce a report which it had received from the conductor and the motorman of the street car, concerning an accident in which the plaintiff is alleged to have received serious injury, for which he sues the company in damages.

This report is written on printed forms, on which are the following words:—

> Ce rapport est fait pour l'usage exclusif des procureurs de la compagnie, et pour leur permettre de conduire la défense de la compagnie au cas où elle serait poursuivie.

The company gives to each one of its conductors a document on which this endorsement appears, requesting him to make a report each time an accident happens which causes damages, corporal injuries or loss of life. The question at issue is as to whether this report is privileged or not.

Article 332 of the Code of Civil Procedure states that a witness cannot be compelled to declare what has been revealed to him confidentially in his legal capacity as a religious or legal adviser. This is what is known as professional secrecy. The law protects, by declaring them secret, all communications which may take place between solicitor and client. This provision of the law is absolute and one of public order. It has existed at all times and under every legislation. It has been introduced in order to establish absolute confidence in the exercise of the advocate's profession.

> Tout se que le client dépose dans le sein de ses avocat est confidentiel et doit rester couvert du secret le plus impénétrable.

These words are of a distinguished magistrate, Mr. Mollot, who was able to explain, as he knew how to practise them, the duties of the Bar. Mollot continues:—

C'était pour l'avocat un point de religion, avant que la loi pénale lui en eût fait un devoir d'état.

La confiance nécessaire qui leur est témoignée dans un grand nombre de circonstances, says Ph. Dupin, "fait un devoir aux membres du barreau de la discrétion la plus absolue; leur cabinet, comme le confessionnal du prêtre, ne doit jamais rendre à personne les paroles mystérieuses qui s'y prononcent."

Chauveau and Hélie express the same doctrine:—

Comme le prêtre, l'avocat reçoit dans l'exercice de ses fonctions les aveux et la confession des parties; il doit considérer ces révélations comme un dépôt inviolable. La confiance que sa profession attire serait un détestable piége s'il pouvait en abuser au préjudice de ses clients. Le secret est donc la première loi de ses fonctions; s'il l'enfreint, il prévarique. (vol. 5, No. 1868).

Merlin, on the other hand, says that:—

La discrétion est une qualité essentielle à l'avocat. Dépositaire de la confiance de ses clients et de leurs secrets souvent les plus importants, il trahirait indignement son ministère s'il abusait de cette confiance.

He quotes a judgment of February 12th, 1672, and the qualification applied by Robert to the lawyer witnessing against his client:—

Rem facit perfidam, nefariam et sceleratam.

In France, where a lawyer violates the secret confided to him by a client, in the interest of his consultation or of his defence, this constitutes an offence falling under and punished by the penal code.

From the foregoing it will be clearly seen that professional secrecy exists in favour of the client and not in favour of the advocate. The same doctrine obtains in England.

Starkie, Law of Evidence, vol. 2, p. 229 (20th ed.), speaks as follows on the subject:—

The rule that counsel, solicitor, or attorney, shall not be permitted to divulge any matter which has been communicated to him in professional confidence, has already been adverted to as one that is founded on the most obvious principles of convenience. This is the privilege of the client, and is founded on the policy of the law which will not permit a person to betray a secret which the law has intrusted to him. To allow such an examination would be a manifest hindrance to all society, commerce, and conversation.

In a case to which I shall refer at greater length in a moment: *The Southwark and Vauxhall Water Co.* v. *Quick*, L.R. 3 Q.B.D. 315, Cotton, J., says as follows:—

Laymen (by which I mean persons not learned in the law) cannot be expected to conduct their defence or litigation without the assistance of professional advisers; and, for the purpose of having the litigation conducted properly, the law has said that communications between the client and the solicitor shall be privileged. . . . There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule.

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In another case of *Anderson* v. *The Bank of British Columbia*, L.R. 2 Ch.D. 644, the Master of the Rolls lays down the same doctrine:—

> As, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications so made to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

As will be seen the same idea prevails on the subject both in France and in England, and this idea must necessarily obtain under every legislation where professional secrecy is recognized. The privilege is absolute and of public order, and exists in favour of the client.

The English expression translates this idea, it seems to me, far better than the French expression.

We are dealing here rather with a privileged communication than with a "*secret professionnel.*"

In our own local jurisprudence I find the case of *Bondy* v. *Valois*, 15 Revue Légale 63, where the reporter speaks as follows in a footnote:—

> Quant à ce qui concerne les communications professionnelles, la règle est maintenant bien établie que, lorsqu'un avocat est employé par un client en sa capacité professionnelle, toutes communications qui interviennent entre eux, au cours et pour les fins de cet emploi, sont privilégiées, au point qu'on ne peut permettre à l'aviseur légal, lorsqu'il est appelé comme témoin de les divulgeur, soit qu'elles soient sous forme de titres, testaments, documents ou autres papiers requis, ou déclarations à lui faites, ou de lettres, mémoires ou déclarations écrites ou faites dans cette capacité.

The reporter then cites a large number of judgments and authorities on the question. This footnote is in answer to those who would contend that professional secrecy no longer exists when an advocate is examined as a witness in open Court. Besides, if I have been so insistent on this subject, it is not because the respondent contests the principles I have just enunciated. On the contrary he admits them implicitly. He recognizes that if the report in question had been prepared at the request of the company's solicitor, and during the course of a suit, or in view of a probable suit, then that this report would constitute a privileged document.

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But the respondent contends that the report is not privileged for three reasons:—

(1) Because it was not prepared at the request of the company's solicitors, who only received communication thereof ten months after it had been made.

(2) Because, when the report was made there was no existing litigation nor any litigation contemplated.

(3) Because the report was made by the company's employees in the ordinary course of their duties.

The foregoing enunciation of the legal principles governing this subject will help us to solve these objections. As already said, the report in question was made by two employees of the company on a blank form handed to them by the company, with an endorsement thereon to the effect that said report was to be made for the exclusive use of the company's solicitors and in order to allow them to conduct the defence of the company, in case it should be sued.

Do we not find here all the elements required to make of this report a privileged communication? Those who made the report were notified that it was to be for the exclusive use of the company's solicitors in case of litigation. Were they not given reason to believe that their declarations were confidential and would be held secret as privileged communications? Should not the company itself be protected? Surely it must have the right of refusing to communicate to the adverse party a document which it has obtained for the use of its solicitors in order to obtain their advice in case claim is made, as a result of the accident on which the report is based.

The fact that the report was not made at the demand of the company's solicitors cannot affect the question. For as the privilege exists in favour of the client it matters little whether the documents have been prepared or not at the attorney's request; it suffices that it had been prepared in order to be communicated to the attorney in case of litigation, in order to allow him to prepare and conduct the defence.

This question is not new. It has arisen several times in England and in the Province of Ontario, and the rule recognized and laid down by the jurisprudence is clearly expressed by Bray, Law of Discovery, at page 415.

In a case of *Hunter* v. *The Grand Trunk R. Co.*, 16 (Ont.) P.R. 385, Ferguson, J., cited the following quotation of Bray, who, after having referred to the judgments on this question, continued:—

> The true principle is that, if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and his

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solicitor, and it makes no difference whether in fact it has or has not been laid before the solicitor so long as it was *bonâ fide* prepared with that object, and is so stated in the affidavit.

I find the same rule laid down in Halsbury's Laws of England, vol. II., p. 76:—

> Communications between a party and a non-professional agent or third party are only privileged if they are made both—1o—in answer to inquiries made by the party as the agent for or at the request or suggestion of his solicitor, or without any such request, but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice, or of enabling him to prosecute or defend an action, or prepare a brief; and; 2o—for the purpose of litigation existing or contemplated at the time. Both these conditions must be fulfilled in order that the privilege may exist.

The rule thus laid down has been consecrated as it were by jurisprudence. A great number of precedents exist on the subject. I shall be content with citing those which appear to me to have most analogy with the present case.

The first case is that of *Anderson* v. *The Bank of British Columbia*, decided in 1875, and reported, L.R. 2 Ch.D. 644. This was an action instituted against the bank to compel it to reimburse a sum of money which it was alleged had been improperly transferred from one account to another, to one of its branch offices in Oregon. Before the institution of the action, but at a time when litigation was most probable, the London manager of the bank telegraphed to the manager of the Oregon branch to send him details of the transaction. Whilst the suit was pending plaintiff demanded that the letter sent by the Oregon manager, in answer to this telegram, be produced. The Master of the Rolls decided that the letter in question was not a privileged document, and ordered the production thereof. His judgment was confirmed in appeal. The reason as given in justification of this holding that the document was not privileged, was that there was nothing of record to shew that the answer of the Oregon manager was to be considered as confidential, because it was to be submitted to the bank's attorney for his opinion. I cite this case because the principles on the points at issue are explained by the Master of the Rolls.

After having declared that the document was not privileged, for the reason that it was not destined to be communicated to the bank's attorney for his opinion, he went on to say:—

> If it had been so, I apprehend that it would have been protected upon principles well understood. If you ask your agent to draw out a case for the opinion of your solicitor, or for the opinion of your counsel, that is a confidential communication made for that purpose. Here there is nothing of the sort. . . . This communication then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser nor was there any intimation of such purpose sent by the person who required the communication.

In another case, decided in 1878, *The Southwark and Vauxhall Water Co.* v. *Quick*, 3 Q.B.D. 315, three documents were in issue. The first was a transcription of stenographic notes of a conversation which took place between a chimney-sweep in the employ of the company and the company's engineer, the object of which was to give to the latter information which he should transmit to the directors. The second document was also a transcription of stenographic notes of interviews which took place between the president and the engineer of the company and certain of the company's inspectors. The third document was a statement of facts prepared by the president of the company. The three documents had been prepared for the purpose of submission to the company's solicitor, in order to have his opinion on the action to be brought. Two of the documents were, as a matter of fact, submitted to the company's solicitor, but there was no evidence whether the first document had really been submitted to him.

All three documents were held to be privileged. And it was held:—

> Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bonâ fide* intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced.

Several Judges expressed their opinion. Cockburn, J., said:—

> The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk. The question here is whether the documents of which inspection is sought are within the privilege. I think they are. It is clear that they were documents containing information which had been obtained by the plaintiff with a view to consulting their professional adviser. Two out of the three sorts of documents were actually submitted to him; as to the other it is not clear whether it was actually submitted to him or not. It is admitted upon the decisions that where information has been obtained on the advice of the party's solicitor it is privileged. I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. If the Court is satisfied that it was *bonâ fide* procured for the purpose, it appears to me that it ought to be privileged.

Mellor, J., on the other hand, said:—

> It is conceded that information procured by the advice of a solicitor

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to be submitted to him is privileged. If so, I cannot understand the distinction between such information and that spontaneously procured for the same purpose. . . . I do not see any sound distinction between the document that was not actually submitted to the solicitor and those that were, provided the former was really intended to be submitted to him.

Manisty, J., added:—

As to the documents that were actually submitted to the solicitor I entirely agree. As to the other document I have some doubt; but the distinction is perhaps rather subtle, and I am not prepared to differ from my Lord and Brother Mellor. With regard to the statement of facts by the chairman, it would be monstrous that such a statement, made for the purpose of being laid before the company's solicitor, and actually laid before him, should not be privileged. What can be the difference between asking to see such a statement and asking what oral instructions were given to a solicitor? The same principle also applies, I think, to the other set of documents that were submitted to the plaintiff's solicitor.

The case was carried to appeal, and their Lordships in appeal expressed themselves as follows:—

Brett, J.:—

The question depends upon what is the principle to be extracted from *Anderson* v. *Bank of British Columbia*, L.R. 2 Ch.D. 644. The facts of that case do not apply to the present, but the judgment lays down the rule upon which we ought to act. James, L.J., lays down a rule; he says: "Looking at the dicta, and the judgments cited, they might require to be fully considered; but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." Now, reading that passage, it is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged. It has been urged that the materials, or the information obtained for the brief, should have been obtained at the instance or at the request of the solicitor; but I think it is enough if they come into existence merely as the materials for the brief, and I think that phrase may be enlarged into "merely for the purpose of being laid before the solicitor for his advice or for his consideration."

Cotton, L.J.:—

Privilege only extends to communications with legal advisers, or in some way connected with legal advisers; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor.

After giving the reasons wherefore communications between an advocate and his client should be considered secret, Cotton, L.J., continued:—

It was conceded on behalf of the defendant, that if the documents had been obtained or prepared at the instance and by the instruction

of the solicitor, they would be privileged, though not prepared by the solicitor himself, and the contention is, in fact, that there was no request beforehand by the solicitor that this information should be obtained. . . . That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor. . . The fact that one of the documents was not actually laid before the solicitor, can, in my opinion, make no difference; the object of the rule and the principle of the rule is that a person should not be in any way fettered in communicating with his solicitor, and that must necessarily involve that he is not to be fettered in preparing documents to be communicated to his solicitor. If such a distinction prevails, what is to be the rule where the application is made before a document is laid before a solicitor, but which it is intended should be laid before him? Is it then to be produced? If so, is it to be saved from production, because after the original application, but before the appeal is heard, the party has in fact laid the document before his solicitor? The distinction, in my opinion, is not one which can be supported."

I shall cite another case, *The "Theodor Komer,"* 3 P.D. 162. This was an action for damages caused to a cargo. The owners of the ship had requested one of their employees to make an investigation as to the causes of the accident by questioning passengers, the members of the crew, and by any other method.

The report made in compliance with these instructions was declared to be a privileged document, and Sir Robert Phillimore thus expressed himself:—

I do not see how, having regard to the language of the plaintiff's affidavit, I can grant the motion. The affidavit states in effect, that the plaintiffs have in their possession these two reports of survey, but that they object to produce them, on the ground that the documents in question were written and prepared solely for the purpose of proceeding in this action. This being so, I am of opinion if I did grant the motion I should be disregarding the principle, in accordance with which the Court of Appeal decided the case of the *Southwark Waterworks Co.* v. *Quick*, 3 Q.B.D. 315. This I cannot do.

In another case of *Collins* v. *London General Omnibus Company*, decided in 1893, 68 L.T., p. 631, an action in damages resulting from an accident, a vicious horse had caused the accident, and a passenger who was riding in the omnibus, and who had been injured in the accident, sued the company in damages, alleging negligence on the part of the omnibus conductor. The latter, on the morrow of the accident, had made a detailed report to the company. When the company was called upon to produce and file this report it contended that it was a privileged document, alleging:—

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that it had been made or had come into existence for the use of the company's solicitor in this action, and as evidence and information as to how evidence could be obtained, and otherwise for the use of the said solicitor to enable him to conduct the defence in this action, and to advise the defendant company in reference thereto, and that it had been made under the actual direction of the defendant's solicitor, and for no purpose other than for his use in anticipation of litigation, and in the conduct of this action.

Held, that, though there was at the time of the making of the report no action begun or even threatened, the circumstances of the case were such as to raise a high probability, amounting almost to a certainty, that litigation would ensue, and that the report having come into existence in view of litigation reasonably apprehended, for the purpose of being laid before the defendant's professional adviser, was privileged from inspection by the other side.

This judgment, as will be seen, is based on that of the *Southwark and Vauxhall Water Company* v. *Quick*, 3 Q.B.D. 315.

I shall cite finally the Ontario case where I find the quotation from Bray, On Discovery, already referred to; the case of *Hunter* v. *Grand Trunk R. Co.*, 16 Ont. P.R. 385. This case involved a report of a nature similar to the one in controversy in the present case. It was headed: "Personal Casualty Report for the information of the company's solicitor and his advice thereon."

As in the present case this declaration was printed on a blank form given by the company to its employees. Ferguson, J., confirming the judgment of the Judge in Chambers, held the report to be privileged. And speaking of the printed headline on this report stated:—

> This would, of course, intimate to and inform the officer, agent, or employee of the defendants, that he was making a report for this purpose, and even if it should be assumed that the report answered another purpose, that is, to give information to other people as well, I do not see that this would make any difference, so long as it was in good faith prepared for the purpose of being communicated to the solicitor as above.

This remark of Mr. Justice Ferguson is in answer to the respondent's objection that the endorsement of this printed declaration which appears on the back of the report is a subterfuge on the part of the company in order to pass off as privileged a document which is not so in reality.

Whatever be the object of the company it remains none the less true that the report was made in good faith by employees who were led to believe that the report was intended for the company's solicitors in order to allow them to advise the company and to conduct the defence in case of litigation. Nor is it possible to follow respondent when he says that the report in question was prepared by the company's employees in the ordinary course of their duties. I again repeat that the employees

were notified that this report was intended exclusively for the company's solicitors. As a result they were to consider this report as confidential. Therefore, in preparing and transmitting this report to the company they were no longer discharging their ordinary duties.

The respondent's demand is based on C.P. 289, which states that the Judge may, at any time after defence filed and before trial, order the opposite party to give communication or furnish a copy or allow a copy to be made of any document under his control relating to the action or the defence. This disposition of article 289 is a reproduction of a similar disposition of the Ontario Judicature Act (rule 507), and is derived from English law. Hence English and Ontario authorities apply, and, as we have seen, under these the present report is confidential and privileged.

It might be that the communication of this document would tend to throw more light on the case and would enable the Court to render better justice, but the maintenance of the privilege is of such importance that it must override the benefit which might accidentally result from the production of the document.

This is the opinion expressed, as we have seen, by Cockburn, J., in *Southwark Water Company* v. *Quick*, 3 Q.B.D. 315.

> Though it might occasionally happen, that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk.

In another case of *Reece* v. *Trye*, decided in 1846, 9 Beav. 316, the Master of the Rolls expressed himself in the same manner. He said:—

> The unrestricted communication between parties and their professional advisers has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained.

For these divers reasons I am of opinion that the judgment of the Court below should be set aside.

*Appeal allowed.*

N.B.—A similar judgment was handed down in the case of the *Montreal Street Railway Co.* v. *Findlay and Howard.*

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## Re CAMPSALL and ALLEN.

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. October 19, 1912.*

1. MINES AND MINERALS (§ I A—7*a*)—MINING ACT OF ONTARIO—RECORDING MINING CLAIMS—WHEN APPLICATION DEEMED TO BE RECORDED.

An application under the Mining Act, 8 Edw. VII. (Ont.) ch. 21, sec. 62, for a mining claim is deemed to be recorded in the mining recorder's office as soon as the application is received in the recorder's office after all requirements for recording have been complied with by the applicant.

2. MINES AND MINERALS (§ I C—21)—APPLICATION FOR MINING CLAIM—DISPUTANT—PROCEDURE.

Under the Mining Act, 8 Edw. VII. (Ont.) ch. 21, sec. 62, where an application for a mining claim is refused by the mining recorder, and the refusal is contested, the applicant's proper and competent procedure for a hearing is that provided under sections 63, 65, 66, 130 (2), where the recorder's formal decision is to be obtained in the first instance before the right to appeal to the mining commissioner arises.

3. MINES AND MINERALS (§ I C—21)—DENIAL OF APPLICATION FOR RECORD—DISPUTANT—APPLICATION TO MINING COMMISSIONER.

Under the Mining Act of Ontario, 8 Edw. VII. ch. 21, where a disputant, ignoring sections 63, 65, 66 and 130 (2), fails to submit the dispute in the first instance to the recorder and instead initiates his proceeding before the mining commissioner, the commissioner will rightly refuse to go into the merits because the dispute is not properly before him under sec. 130 (2).

Statement

APPEAL by W. Campsall and others from a decision of the Mining Commissioner of the 4th March, 1912.

*J. J. Gray*, for the appellants.
*H. E. Rose*, K.C., for the respondents.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—On the 3rd July, 1911, the Mining Commissioner decided adversely to certain claims which are referred to in *Re Burns and Hall* (1911), 25 O.L.R. 168. The judgment is said to have been received at the Mining Recorder's office on the 5th July. On the 6th July, the respondents appeared at the Recorder's office with five claims based upon discoveries purporting to have been made that morning. The applications were regular in all respects in point of form; but the Recorder thought they should not be recorded, because the time for appealing to a Divisional Court from the decision of the Mining Commissioner had not run. The claims were accordingly filed under the provisions of sec. 62 (2) of the Mining Act of Ontario, 8 Edw. VII. ch. 21.

It is asserted by the appellants that certain discoveries were made for them on the 1st, 2nd, and 3rd January, 1912; they appeared at the Recorder's office on the 5th January, but were refused record, as they had not their licenses: sec. 60.

The judgment of the Divisional Court in Re Burns and Hall, 25 O.L.R. 168, having been reported to the Recorder, he, on the 6th January, without further application by the respondents, recorded their claims.

On the 16th January, the appellants, having obtained duplicate mining licenses, again tendered their claims, but the Recorder refused.

On the 20th January, an appeal was taken from this refusal, and also from the recording on the 6th January of the respondents' claims.

On the 23rd January, the Recorder granted the respondents an extension of time for the work: sec. 80.

Leave was obtained to appeal also from this extension.

On the 4th March, all three appeals came on before the Mining Commissioner; and he refused to go into the merits of the staking, etc., and dismissed the appeals

This is an appeal from that decision.

I think the appeal must fail. Section 140 provides that "the Commissioner shall give his decision upon the real merits and substantial justice of the case"—but that means "the case which is properly before him." It does not mean that any claimant may raise an issue before him at any time, without regard to the provisions of the Act—and have the merits of that issue decided.

Section 62 (1) provides that when a mining claim is deemed by the Recorder to be in accordance with the Act, unless a prior application is already recorded, the Recorder must file it with his records; "and every application proper to be recorded shall be deemed to be recorded when it is received in the Recorder's office, if all requirements for recording have been complied with, notwithstanding that the application may not have been immediately entered in the record book." When the respondents presented their claims on the 6th July, they should have been recorded; and must be deemed to have been recorded as of that day.

In any case, they were properly recorded on the 6th January, before the appellants had any right to have theirs recorded.

They should then have proceeded the "dispute" under sec. 63—see secs. 65, 66—and had their dispute passed on by the Recorder under sec. 130 (2).

The Mining Commissioner rightly refused to go into the merits. Nor can we say that the Recorder was wrong in extending the time for doing the work. And it is plain that, the claims of the respondents being recorded, the Recorder was right in refusing to record those of the appellants.

All the appeals should be dismissed with costs.

We do not interfere with the proceedings said to have been taken under sec. 66 of the Act.

*Appeal dismissed.*

ONT.

D. C.
1912

Oct. 18.

## HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. October* 18, 1912.

1. APPEAL (§ VII L 4—510)—REVIEW OF MASTER'S REPORT—RE-OPENING—SOLICITOR'S NEGLECT—SUBSTANTIAL GRIEVANCE.

A motion by the defendants entitled to the equity of redemption to re-open a Master's report in a mortgage action upon the ground of mistake will not be refused where a substantial grievance to the defendants is suggested by the material produced and the mortgagee's security is ample, although the omission to bring all the facts before the Master may have been due to the default of the defendants' solicitor.

[*Home Building and Savings Assocn.* v. *Pringle*, 3 D.L.R. 896, 3 O.W.N. 1595, reversed on appeal.]

2. MORTGAGE (§ III—48)—SALE OF PART OF MORTGAGED LANDS—COVENANTS AGAINST INCUMBRANCE—EQUITIES.

Where a person purchases part only of the lands comprised in a mortgage made by his vendor and takes a covenant against incumbrances, for further assurance and for quiet possession, he is entitled as against the mortgagor and as against a subsequent purchaser of the remainder of the mortgaged lands with notice of rights, to be indemnified against the amount due on the mortgage.

[Fisher on Mortgages, 6th ed., sec. 1350; *In re Jones*, [1893] 2 Ch. 461; *In re Darby's Estate*, [1907] 2 Ch. 465, 470; *Maitland* v. *McLarty* (1850), 1 Gr. 576; *Tully* v. *Bradbury* (1861), 8 Gr. 561; *Heap* v. *Crawford* (1864), 10 Gr. 442; *Henderson* v. *Brown* (1871), 18 Gr. 79; *Egleson* v. *Howe* (1879), 3 A.R. 566; and *Ker* v. *Ker* (1869), 4 Ir. Eq. 15 at 28, referred to. See also Bell and Dunn on Mortgages 424, and 27 Cyc. 1367.]

3. REFERENCE (§ I—4*a*)—REPORT AND FINDINGS—MORTGAGE ACCOUNTS—SENIOR AND JUNIOR MORTGAGES.

Where mortgage accounts are the basis of a Master's report, involving the marshalling of assets as between senior and junior mortgages, and the sale of part of an incumbered estate with various equities set up by defendant purchasers, the facts upon which the Master proceeds should be set out in his report so that in case of appeal all necessary material may be before the court.

Statement

APPEAL by the defendants Victoria McKillican and David A. Smith from the order of Sutherland, J., 3 O.W.N. 1595.

The appeal was allowed.

*C. H. Cline*, for the appellants.

*F. A. Magee*, for the plaintiffs.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—The facts are not fully disclosed, but, so far as they appear and are material, they are as follows.

One Peter Valley, on and prior to the 1st March, 1885, owned a considerable portion of land in the county of Stormont, and he upon that day mortgaged it to the Hamilton Provident and Loan Society for $1,900 and interest. He also on the 1st Febru-

ary, 1886, mortgaged the land to the same company for $150 and interest. Making certain payments, certain portions of the land were released from the mortgage at his request.

On the 26th March, 1887, he made conveyance of a certain lot, part of the said land, to one J.T., by a deed which contained covenants for quiet possession, further assurance, and "that he has done no act to incumber the said lands." The defendant McKillican claims under J.T. On the 24th May, 1887, Valley sold another lot to M.M., giving a similar deed. The defendant Smith claims under M.M.

On the 16th December, 1887, the defendant Pringle bought the equity of redemption under Sheriff's sale, and took a quit claim deed from Valley.

Thereafter, Pringle made deeds in like form of certain lots to individual purchasers. Some of these mortgaged to the plaintiffs, who acquired the position of the Hamilton Provident and Loan Society, the original mortgagees. The plaintiffs sold some of these lots so mortgaged to them, purporting to act under the power of sale in the mortgages made to them by the several owners—but made a conveyance of the fee to the purchasers and discharged their first mortgage as against these lots. They applied all the proceeds of the sale upon the second mortgages without reference to the first mortgage.

In March, 1908, the plaintiffs brought an action against Pringle and other defendants (including McKillican and Smith) for $631 interest and costs, and, in default of payment, sale, possession, etc. Smith and McKillican defended on the Statute of Limitations, and said further that the plaintiffs had received sufficient to pay their mortgage off, principal and interest.

Judgment was given on the 25th February, 1911, under which a reference went to the Master at Ottawa: and he, on the 6th November, 1911, reported a balance of $819.80 due, including costs, etc.—$460 being the amount found due as principal on the two mortgages.

A motion was made by McKillican and Smith on the 8th June, 1912, to reopen the report, on the ground of mistake, etc. Mr. Justice Sutherland refused, and this is an appeal from such refusal.

The land being admittedly ample security for any amount which may be found due on the mortgages—and no great inconvenience being suggested against such a course—I think, if the appellants have any substantial grievance, they should be allowed an opportunity fully to explain and develope their case, and have such relief as the facts entitle them to—even if the omission to bring all the facts before the Master were due to the default of their own solicitor.

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HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

Riddell, J.

As the facts are not fully disclosed either on the material before us on the argument or on the further material furnished us, I do not think we should determine the rights of the appealing defendants at the present time. We should do no more than call the attention of the learned Master to the rule laid down in Fisher on Mortgages, 6th ed., sec. 1350, fully supported as it is in *In re Jones*, [1893] 2 Ch. 461; *In re Darby's Estate*, [1907] 2 Ch. 465: "By the sale of part of an incumbered estate the burden is thrown upon the residue in favour of the purchaser." See also our own cases: *Maitland* v. *McLarty* (1850), 1 Gr. 576; *Tully* v. *Bradbury* (1861), 8 Gr. 561; *Heap* v. *Crawford* (1864), 10 Gr. 442; *Henderson* v. *Brown* (1871), 18 Gr. 79; *Egleson* v. *Howe* (1879), 3 A.R. 566.

The modification of this doctrine in case of several purchases, spoken of by Christian, L.J., in *Ker* v. *Ker* (1869), 4 Ir. Eq. 15, at p. 28, and by Warrington, J., in *In re Darby's Estate*, [1907] 2 Ch. 465, 470, may also be of importance.

Upon all the facts being brought out, the Master will be in a position to apply the law. In his report he should set out the facts upon which he proceeds, that in case of an appeal the Court may have all necessary material.

As it may turn out that the new facts are wholly immaterial or should have been brought out by the appellants, I think we should leave the costs of this appeal and of the motion before Mr. Justice Sutherland in the discretion of the Master.

*Appeal allowed.*

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CAN.

S. C. 1912

## LA COMPAGNIE PONTBRIAND v. LA COMPAGNIE DE NAVIGATION CHATEAUGUAY ET BEAUHARNOIS.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 7, 1912.*

1. EVIDENCE (§ XII—921)—EXPERT EVIDENCE—CODE CIVIL PROCEDURE (QUE.)—VIEWERS AND EXPERTS—APPOINTMENT BY TRIAL JUDGE SUA SPONTE.

Where, at the close of the evidence in the trial of a breach of contract case, upon the motion of the plaintiff under secs. 392 *et seq.* of the Code of Civil Procedure (Que.), for the appointment of viewers and experts, the trial judge, *sua sponte* and over the defendant's objection, appoints a single viewer and expert, such appointment will on appeal be set aside as irregular where the directory provisions of the Code have not been strictly followed.

2. APPEAL (§ VIII C—675)—EXPERT EVIDENCE—CODE CIVIL PROCEDURE (QUE.)—VIEWERS AND EXPERTS—APPOINTMENT IRREGULAR, CASE REMITTED FOR REHEARING IN PART.

Where, at the close of the evidence in the trial of a breach of contract case, upon the motion of plaintiff for the appointment of viewers and experts, the trial judge irregularly appoints a single expert under secs. 392 *et seq.* of the Code of Civil Procedure (Que.), and such appointment is on appeal declared irregular, the cause will be remitted to the trial court to be reinscribed for hearing on the roll at the stage it had reached when the motion for *expertise* was made.

3. APPEAL (§ VIII C—675)—REMITTING—CODE OF CIVIL PROCEDURE (QUE.)—VIEWERS AND EXPERTS—IRRELEVANT QUESTIONS BY TRIAL JUDGE.

Where the trial judge submits to a single expert, appointed by the judge *sua sponte* at the trial, questions not relevant under the pleadings, the cause will be remitted for rehearing from the point reached in the trial when the motion for the appointment of the expert was entered.

APPEAL from the judgment of the Superior Court, sitting in review, at the city of Montreal, affirming in part the judgment of Mr. Justice Bruneau in the Superior Court for the district of Richelieu.

The action was for breach of a contract for alterations and repairs to a ship, and the pleadings involved a counterclaim and an incidental demand. At the close of the evidence the respondents (plaintiffs) made a motion for the appointment of experts to examine the ship in order to ascertain what works were necessary to put it in condition for navigation, and the cost of such works. The motion for the proposed *expertise* was granted forthwith, notwithstanding objections raised on behalf of the appellants, and, without the consent of the parties as to the appointment and choice of an expert or experts, nor allowing an opportunity for recusation, the trial Judge *sua sponte*, named one expert for the purpose of ascertaining the matters mentioned. The appellants took exception to the Judge's order. The single expert, named, made some investigations, but did not hear evidence of witnesses, and made a report recommending that certain alterations should be made to the ship at a cost of about $5,800. The trial Judge received this report, and, without any further proceedings, maintained the respondents' action in respect of several items of damages claimed by the principal demand and, in addition, for the sum of $5,800 mentioned in the report of the expert. From the total amount, so found, the trial Judge deducted the amount claimed by the appellants' cross-demand, and condemned them to pay the remainder to the respondents. On an appeal to the Court of Review, this judgment was affirmed as to the principal demand and the cross-demand, and, as to the incidental demand the Superior Court judgment was reversed and the said demand was dismissed.

The appellants, on their appeal to the Supreme Court of Canada, contended that, on the evidence, the principal demand should have been dismissed and the cross-demand maintained, and complained that the appointment of the expert had been irregularly made, without compliance with the requirements of articles 392 *et seq.* of the Code of Civil Procedure and, further, that the trial Judge had no authority, on the pleadings, to submit the questions referred to a single expert and that the report should have been disregarded as the expert had not based it upon evidence regularly adduced before him.

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LA COMPAGNIE PONTBRIAND v. LA COMPAGNIE DE NAVIGATION CHATEAUGUAY ET BEAUHARNOIS.

*T. Chase Casgrain*, K.C., and *George E. Mathieu*, for the appellants.

*Aimé Geoffrion*, K.C., for the respondents.

THE COURT allowed the appeal with costs in the Supreme Court of Canada and in the Court of Review, costs in the Superior Court to abide the issue of a partial new trial; it was ordered that the cause should be remitted to the Superior Court to be re-inscribed for hearing on the roll at the stage it had reached when the motion for *expertise* was made; and it was declared that the appointment of the expert was irregularly made and the questions submitted to him by the trial Judge were not relevant in the existing state of the pleadings.

*Appeal allowed with costs.*

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ALTA.

S. C.
1912

Sept. 13.

## Re BAPTISTE PAUL.

**(Decision No. 1.)**

*Alberta Supreme Court, Simmons, J., in Chambers. September* 13, 1912.

1. SUMMARY CONVICTION (§ III—30)—ILLEGAL METHOD OF COMPELLING ATTENDANCE TO ANSWER CHARGE.

Whether the defendant was illegally arrested or not is not material to the jurisdiction of a magistrate under the summary convictions clauses of the Criminal Code when the accused is brought before him to answer a charge as to which an information had been properly laid before such magistrate.

[*Reg.* v. *Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied; *McGuiness* v. *Dafoe*, 3 Can. Cr. Cas. 139, 23 A.R. (Ont.) 704, referred to; but see *contra*, *Re Paul* (No. 2), 7 D.L.R. 25.]

2 HABEAS CORPUS (§ I C—12*a*)—ILLEGAL PROCEEDINGS—ARREST WITHOUT WARRANT.

The fact that a person charged before a magistrate with an offence punishable on summary conviction had been brought before the magistrate under arrest without warrant, although a warrant was required by law, does not go to the jurisdiction of the magistrate, nor affect the validity of a conviction and commitment made at the hearing.

[*Reg.* v. *Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied; *McGuiness* v. *Dafoe*, 3 Can. Cr. Cas. 139, 23 A.R. (Ont.) 704, referred to; but see *contra*, *Re Paul* (No. 2), 7 D.L.R. 25.]

Statement

AN application by way of *habeas corpus* on behalf of one Baptiste Paul, who was tried and convicted under the Indian Act before two justices of the peace for supplying liquor to an Indian.

The application was refused.

*J. MacKinley Cameron*, for appellant.

*Stanley L. Jones*, for respondent.

Simmons, J.

SIMMONS, J.:—The grounds raised in support of the application which I deem necessary to consider are:—

(*a*) That the information was laid before one only of the magistrates who tried the defendant.

(*b*) That the magistrates had no jurisdiction because the defendant was illegally brought before the magistrates, having been arrested without a warrant some time after the offence was committed.

(*c*) That the informant was interested in the result of the trial, as a moiety of the fine went to him under the Indian Act.

The cases cited in support of the first ground are *Ex parte White* (1897), 3 Can. Cr. Cas. 94, 34 N.B.R. 333, and *Reg.* v. *Ettinger* (1897), 3 Can. Cr. Cas. 387, 32 N.S.R. 176. Both the Nova Scotia and New Brunswick cases were prosecutions under the Canada Temperance Act. The remarks of Ritchie, J., in *Reg.* v. *Ettinger*, 3 Can. Cr. Cas. 387, 32 N.S.R. 176, clearly point out the distinction between the section of the Canada Temperance Act under the authority of which the information was laid and sec. 842, sub-sec. 3, of the Code, now section 708 of R.S.C. 1906, ch. 146.

But aside from this the wording of section 708 is so clear and unmistakable that I fail to appreciate the reasons that led counsel to raise this question.

As to objection (*b*) this matter was fully considered in *Reg.* v. *Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, and I have no hesitation in following this decision. Whether the defendant was illegally arrested or not is not material once he was before two magistrates having authority to deal with the charge laid against him by a proper informant. *Reg.* v. *Hughes*, 4 Q.B.D. 614, was followed in the Ontario Court of Appeal in *McGuiness* v. *Dafoe*, 23 A.R. (Ont.) 704, 3 Can. Cr. Cas. 139.

The third ground of objection, that the informant was interested in the result of the action, affects only the circumstances of the arrest and in no way has it any bearing on the question of jurisdiction of the magistrates. The Act distinctly provides in section 135 that "a moiety of such penalty shall belong to the informer or prosecutor."

The application is, therefore, refused.

*Discharge refused.*

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## Re BAPTISTE PAUL.

**(Decision No. 2.)**



*Alberta Supreme Court, Beck, J. September 25, 1912.*

1. SUMMARY CONVICTION (§ III—30)—ILLEGAL METHOD OF COMPELLING ATTENDANCE TO ANSWER CHARGE.

Where a statutory offence is made punishable upon summary conviction and a statutory method of compelling the attendance of the accused is provided, an omission of such statutory method and the illegal arrest of the accused as a means of bringing the accused before the magistrate will constitute a valid objection to a summary conviction obtained as a result of the illegal proceedings, where the irregular procedure was objected to by the accused.

[*Pearks* v. *Richardson*, [1902] 1 K.B. 91, 71 L.J.K.B. 18, applied; and see *contra*, *Re Paul* (No. 1), 7 D.L.R. 24.]

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RE BAPTISTE PAUL (No. 2).

2. SUMMARY CONVICTION (§ III—30)—OBJECTION TO ILLEGAL PROCESS—WAIVER.

Unless the accused who has been brought before a magistrate to answer a charge punishable on summary conviction objects before the magistrate to the illegal method whereby his attendance has been compelled, *ex. gr.*, by an arrest without warrant where a warrant is essential, the objection is considered as waived.

[*Regina* v. *Hughes*, 4 Q.B.D. 614, and *Dixon* v. *Wells*, 25 Q.B.D. 249, considered.]

3. HABEAS CORPUS (§ I C—12a)—ILLEGAL PROCEEDINGS—ARREST WITHOUT WARRANT—PROTEST BY ACCUSED.

A prisoner whose attendance for trial by a magistrate in a summary conviction matter has been compelled by arrest without warrant in a case where a warrant is required by law, will be discharged upon *habeas corpus* from the commitment following conviction, if he protested before the magistrate against the illegal procedure.

[See *contra*, *Re Paul* (No. 1), 7 D.L.R. 24.]

4. HABEAS CORPUS (§ I B—7)—RENEWAL OF APPLICATION ON SAME GROUNDS.

Subject to any statutory restriction of the right, an application for a writ of *habeas corpus* for the discharge of a prisoner from custody may be renewed before another judge of co-ordinate jurisdiction, notwithstanding that a similar application upon the same grounds had been refused by the judge to whom the application was first made.

[See also to the same effect, *R.* v. *Carter*, 5 Can. Cr. Cas. 401, *Re McKenzie*, 14 N.S.R. 481; *Re J. W. Black*, Cong. Dig. 614; but as to the effect of a statutory right of appeal, see *Re Hall*, 8 A.R. (Ont.) 135; *Re Harper*, 23 O.R. 63; *Taylor* v. *Scott*, 30 O.R. 475.]

Statement

MOTION for a writ of *habeas corpus* or for prisoner's discharge without the issue of the writ in respect of his conviction and commitment for supplying liquor to an Indian contrary to the Indian Act, R.S.C. 1906, ch. 81.

The order was made for discharge.

*J. MacKinley Cameron*, for applicant.

*F. S. Selwood*, for respondent.

Beck, J.

BECK, J.:—This is an application for a writ of *habeas corpus* or for discharge of the prisoner without the actual issue of the writ.

A similar application was before my brother Simmons and dismissed, *Re Paul* (No. 1), 7 D.L.R. 24. It is( nevertheless, my duty to consider the present application independently of and uninfluenced by the decision of Simmons, J., *Cox* v. *Hakes*, 15 A.C. 506, at 514, 523, 60 L.J.Q.B. 89.

One of the grounds taken on the prisoner's behalf is that the magistrate was without jurisdiction to try the prisoner, inasmuch as he had been brought before the magistrate by an illegal method and had not submitted to the magistrate's jurisdiction even impliedly, but on the contrary had protested and taken exception to it.

There is no doubt that where the jurisdiction of the magistrate extends to the class of offences with which the accused is charged, and to the class of persons of whom the accused is one, not only all irregularities in, but even the entire absence of,

process to compel the accused's appearance may be waived and will be deemed to be waived if the accused does not take and insist upon the objection. There is ample authority for this proposition. *Regina* v. *Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, was among the cases cited and, as pointed out in *Dixon* v. *Wells*, 25 Q.B.D. 249, 59 L.J.M.C. 116, the language of some of the Judges in the former case, though not necessary for the decision, indicate that in their opinion the protest of the accused would make no difference and would be of no avail.

The latter case, however, does recognize the distinction; that is, the effectiveness of a protest. It is again recognized by Lord Alverstone, C.J., in *Pearks, Gunston & Tee, Ltd.* v. *Richardson*, [1902] 1 K.B. 91, 71 L.J.K.B. 18. That view appears to be taken also in Halsbury's Laws of England, vol. 19, tit. "Magistrates," p. 594.

In my opinion there is good ground for the distinction, else, *e.g.*, for an illegal arrest, there would be no remedy except the many times worthless one of a civil action.

In the present case it appears that the accused was arrested without warrant by a constable. There seems to be no authority for an arrest without warrant in the circumstances of this case.

As objection was taken upon this ground to the jurisdiction of the magistrates and, as it was distinctly insisted on, I am of opinion the magistrates were without jurisdiction. My brother Simmons appears not to have adverted to the distinction which I have pointed out. I, therefore, direct the prisoner's discharge. I have not considered the various other grounds and points of argument raised before me.

*Order for discharge.*

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**RAMSAY & SON, Ltd. (plaintiff, respondent) v. TURCOTTE et vir (defendant).**



*Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. October 25, 1912.*

1. FRAUDULENT CONVEYANCES (§ VIII—41)—TO WHOM REMEDY IS AVAILABLE—UNPAID CREDITOR WHOSE GOODS ARE SOLD—BULK SALES ACT, 1 GEO. V. (QUE.) CH. 39.

Under the Quebec Bulk Sales Act, 1 Geo. V. (Que.) ch. 39, only the unpaid creditor whose goods are included in the bulk sale to a third party has the right to attack the sale made without the formalities required by law, i.e., without the purchaser having obtained from the vendor an affidavit containing the names, addresses of, and amounts due to the unpaid creditors whose merchandise is being transferred by the bulk sale.

2. FRAUDULENT CONVEYANCES (§ VIII—41)—UNPAID CREDITOR WHOSE GOODS ARE NOT SOLD—RIGHT TO ATTACK—C.C. (QUE.) ART. 1033.

An ordinary unpaid creditor or one whose goods have not been disposed of by their debtor by means of a bulk sale have no interest in attacking a sale even though made without the due formalities, such creditors having their ordinary common law right guaranteed by C.C. (Que.) 1033 *et seq.*, in case the sale is made in fraud of their rights.

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RAMSAY & SON, LTD.
v.
TURCOTTE.

APPEAL from a judgment of the Superior Court for the district of Richelieu, Bruneau, J., rendered at Sorel, on November 2, 1911, maintaining with costs the contestation of the declaration of the garnishee, appellant by the plaintiff, respondent.

The appeal was allowed.

*G. E. Mathieu*, for appellant.

*J. C. Wurtele*, for respondent.

Tellier, J.

Montreal. TELLIER, J. (translated):—On May 26th, 1911, by judgment rendered at Sorel, the defendant, who carries on business at St. Joseph, in the district of Richelieu, under the firm name of "J. E. Seneeal & Co.," was condemned by default to pay the plaintiff the sum of $106.52, the price of goods sold and delivered by the plaintiff to the defendant. In execution of this judgment the plaintiff took, on June 24th, 1911, a seizure after judgment in the hands of the garnishee, who declared that he had nothing in his possession belonging to the defendant, and that he owned and would owe nothing to the defendant, but the garnishee admitted that he had bought *en bloc* all the stock in trade of the defendant at Sorel as per inventory, for a price of about $500 paid by means of four promissory notes, one of which was already paid, and the remainder of which were payable at intervals of one month; and the garnishee further admitted that he had neither asked nor obtained from the defendant an affidavit containing the names and addresses of the unpaid creditors who had sold to the defendant the goods and effects comprised in the stock sold *en bloc* to him the garnishee, and the amounts due or to be paid to each of the said creditors.

The plaintiff, thereupon, contested the garnishee's declaration on the ground that the garnishee had bought the defendant's stock *en bloc*, and owed the defendant a large part of the price thereof, that this sale had been made contrary to law and without the formalities required by law (C.C., 1569*b*), to the plaintiff's prejudice inasmuch as at the time of said sale plaintiff was an unpaid creditor of the defendant for goods sold and delivered for the trade and commerce of the defendant.

In other words the plaintiff contestant contends that this sale *en bloc* is null and void and can have no effect until the *bona fide* creditors of the defendant have been paid by the defendant or by the purchaser and that the goods and effects thus sold contrary to law are still the pledge of the ordinary creditors of the defendant. Hence, says the contestant, the garnishee should have so declared instead of denying that he owed the defendant or had anything in his possession to him belonging.

The garnishee replied in brief that the notes given in payment of the merchandise bought by him did not remain in the defendant's hands, but were discounted by the Bank of Hochelaga and paid by him; that the garnishee bought these goods in

good faith and in ignorance of the plaintiff's claim and of any other claims; and that, in any event, as none of the goods sold by the plaintiff to the defendant had been bought by him, the garnishee, from the defendant, the plaintiff had no interest in raising the present contestation.

The facts established by the evidence may be summed up as follows:—The price of the goods sold and delivered by the plaintiff to the defendant for a total amount of $106.52—for which judgment was rendered and execution issued—has not yet been paid. The goods thus sold were disposed of in the ordinary course of the defendant's business at St. Joseph of Sorel, and no part thereof remained in the defendant's stock when the same was sold to the *tiers-saisi* in May, 1911. This sale of May, 1911, was, as a matter of fact, a sale *en bloc* within the meaning of C.C. 1569*a*, but it did not comprise any of the merchandise originally sold by the plaintiff. The garnishee paid the price of his purchase by means of four notes, all of which have been honoured, one into the hands of the defendant and the other three to the transferee, the Bank of Hochelaga. No affidavit as required by C.C. 1569*b* was obtained by or given to the garnishee at the time of this sale.

The judgment appealed from held the contestation well founded and the garnishee's declaration incorrect and concludes as follows:—

> Déclare nulle et de nul effet, quant à demanderesse, la vente faite en bloc par la défenderesse au tiers-saisi; déclare que lors de la signification du bref de saisie-arrêt en cette cause, le tiers-saisi était endetté envers la défenderesse, et avait et a encore actuellement entre les mains et détenat et détient pour la défenderesse, comme gage de ses créanciers tout le fonds de commerce acheté d'elle; déclare que lors de la signification du dit bref de saisie-arrêt en cette cause, le tiers-saisi était endetté envers la defenderesse en la somme de $145.25 avec intérêt; ordonne que les dits effets de commerce et marchandises soient vendus par autorité de justice, pour, sur le prix de la dite vente être la demanderesse, payée de son dû, condamne le tiers-saisi à payer à la demanderesse la dite somme de $145.25, etc.

We find there is error in this judgment of November 2, 1911. Article 1569*b* of the Civil Code enacts that:—

> Any person who, directly or indirectly, buys in bulk a stock in trade or merchandise . . . shall, before paying the purchase price, wholly or in part, and whether in cash or on time, obtain from the seller or his agent . . . an affidavit containing the names and addresses of the persons who have sold him the said stock in trade or merchandise, and who have not been paid, and the amounts due or to become due to each of such persons as price or part of the price thereof. The affidavit mentioned in this article shall, so far as possible, be in the form of the schedule annexed to this chapter, and the seller . . . shall be bound to make the same.

According to the schedule the form should read as follows:—

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Tellier, J.

I.....of.....seller (or agent of the seller), being duly sworn, depose and say:—

That I have sold (or agreed to sell) my stock in trade or merchandise, situate.....for the sum of $....;

That the following names and addresses are the names and addresses of all my creditors (.....) who have supplied me (.....) with the effects or merchandise, or any part thereof, which I have sold or agreed to sell (.....), and that the amounts opposite their names are the amounts which are due to them or which are still to become due.....; that I have not (.....) any other creditors than those hereinbefore mentioned, so far as the said effects or merchandise or any part thereof are concerned.

And C.C. 1569c says:—

Every sale made in contravention of article 1569*b*, if the buyer has not paid the price of the effects or merchandise to the *bonâ fide* creditors of the seller mentioned in the affidavit referred to in the said article shall, as regards every such creditor, be null and of no effect, until such creditor is paid or settled with. The sale shall, nevertheless, be valid if the buyer, after having paid his seller, pays the amount of the purchase price to the *bonâ fide* creditors of his seller, and, in such case, he may recover from the seller the amount so paid.

And C.C. 1569*d*:—

The buyer after having received the affidavit hereinabove mentioned, shall pay to the creditors therein mentioned, out of the purchase price, rateably and in accordance with the contracts between them and the seller, the sums which are due them for such effects or merchandise. If one or more of such creditors is or are absent from the province, or in case of contestation between them with respect to their claims, the buyer may, after having, in the latter case, given eight clear days' notice to the interested parties, deposit the price of such effects or merchandise in the hands of the Provincial Treasurer, in conformity with articles 1484 to 1486 of the Revised Statutes, 1909.

Now these new articles which were added to our Civil Code by 1 Geo. V. ch. 39 (Que.), were adopted simply in order to protect and safeguard the rights of creditors over the unpaid merchandise and stock in trade sold by them to their debtor and by the said debtor resold to a third party by a bulk sale of his stock, and in order to allow the purchaser of such stock to give full effect thereto by paying the creditors, rateably and according to their contracts with the debtor, from the purchase price, the sums due on the unpaid merchandise or effects.

So that where a sale is made contrary to C.C. 1569*b* and the purchaser has not paid the price of the effects or merchandise to the *bonâ fide* creditors of the vendor, who are mentioned in the affidavit above referred to, the sale is only null and void as regards those creditors who have seen their unpaid goods and merchandise pass by bulk sale to a third person, and only in so far as the creditors of the vendor have not been indemnified or paid of the sums due on these goods. And these particular dis-

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positions introduced by recent statute have not done away with the general right of the creditors to attack in their own name the acts and payments made by their debtor in fraud of their rights as provided by C.C. 1033 *et seq.*

In the present case the plaintiff has not established that in this bulk sale were included unpaid goods sold by it to the defendant; it has not even been established that any unpaid goods at all were transferred to the garnishee under this bulk sale, or that any amount whatsoever was due thereon to any creditors whatsoever.

This merchandise is no longer the common pledge of the defendant's creditors. The garnishee is in possession after proper delivery and payment. The plaintiff has under these circumstances no right nor interest to avail itself of the dispositions of C.C. 1569*a et seq.*, and to complain of the absence of affidavit in this case.

The appeal is therefore allowed and the plaintiffs' contestation dismissed with costs of both Courts.

*Appeal allowed.*

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Sept. 14.

**(Decision No. 2.)**

*Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. September 14, 1912.*

1. EVIDENCE (§ XII A—920)—SUFFICIENCY OF EVIDENCE IN PROVING UNUSUAL CONTRACT.

Where the agreement under which the plaintiff seeks to hold the defendant liable is an unusual one, and there is nothing in writing to support the statements of the plaintiff, which are directly denied by the defendant, a very clear case must be made by the plaintiff to succeed and his evidence as to the terms of the alleged agreement should be clear and specific.

[*Kinsman* v. *Kinsman*, 5 D.L.R. 871, reversed.]

2. APPEAL (§ VII L 3—485)—FINDINGS OF COURT—REVIEW—REVERSAL BY APPELLATE COURT—CREDIT OF WITNESSES.

Where the Judge at the trial has seen and heard the witnesses for the plaintiff, but the evidence of those for the defendant has been taken *de bene esse* and read at the trial, and it appears to an appellate Court that the evidence for the defendant was given with clearness and candour, while that for the plaintiff is discredited by the plaintiff's own letters, and the agreement sued upon by the plaintiff is, under the undisputed circumstances, a very improbable transaction, the appellate Court may reverse findings of fact in favour of the plaintiff, and may hold that he has not made out his case, in spite of the fact that the trial Judge has expressly given credit to the witnesses on his behalf.

[*Kinsman* v. *Kinsman*, 5 D.L.R. 871, reversed.]

Statement

APPEAL by the plaintiff, Emily S. Kinsman, from the judg-

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ment of Riddell, J., 5 D.L.R. 871, 3 O.W.N. 966, in favour of the defendant Maria L. Kinsman on her counterclaim.

The appeal was allowed.

*I. F. Hellmuth*, K.C., and *W. M. McClemont*, for the appellant.

*A. Weir*, for the respondent.

Meredith, C.J.

MEREDITH, C.J.:—The action was brought by the appellant and E. Palmer Kinsman against the respondent and her husband, Homer F. Kinsman, for the delivery up and cancellation of a promissory note, dated the 2nd January, 1911, made by the appellant and E. Palmer Kinsman in favour of the respondent, and the delivery up and cancellation of another promissory note for $1,000, bearing the same date, made by the appellant and her husband in favour of the respondent, or the cancellation of the appellant's signature to it, on the ground that they had been obtained by the respondent, through her husband as her agent, by fraud.

The defendants pleaded as a defence to the action a denial of the fraud alleged, and that the promissory notes were given in pursuance of an agreement entered into between the appellant and the respondent, that, in consideration of the respondent subscribing for $3,500 of the capital stock of the R. E. Kinsman Lumber Company Limited, if she at any time desired to get her money back for the stock, the appellant would take the stock from her and pay her the face value of it; and the respondent and her husband, by way of counterclaim, repeat the allegations of their statement of defence, and claim against the appellant the $3,500 on her undertaking and agreement to take the shares and pay for them.

By the judgment pronounced at the trial it was ordered and adjudged that the note for $2,500 should be delivered over to the plaintiffs in the action to be cancelled, and that the signature of the appellant on the note for $1,000 should be cancelled, but that it should "remain as far as the signature of R. E. Kinsman thereon is concerned," and that in all other respects the action should be dismissed; and it was further ordered and adjudged that the respondent should recover on her counterclaim against the appellant $3,500; and it is from the judgment on the counterclaim that the appeal is brought.

There was a direct conflict of testimony as to the agreement alleged to have been made by the appellant which forms the subject-matter of the counterclaim; and, if the case turned upon the oral testimony only, and the learned Judge had reached his conclusion as to the credibility of the witnesses after seeing and hearing all the witnesses, his finding could not properly be disturbed.

I am, with great respect, of the opinion that the documentary evidence adduced at the trial, and that put in by leave on the hearing of the appeal, is quite inconsistent with the existence of an agreement by the appellant to take the shares off the respondent's hands at face value or on any other terms, and makes it clear, I think, that any agreement on the subject that was made, if any was made, was an agreement by the husband of the appellant and by him alone.

According to the testimony of the respondent, the appellant was on her way to visit some one in Holland, Michigan, and with her husband stopped over at the respondent's house in Sarnia, and on this occasion she was applied to by the appellant and her husband to subscribe for shares in the company; that she at first refused to do so, but offered to lend them some money on a mortgage "if they wanted to mortgage their place;" that the appellant said she owned the place and that it was unencumbered, and that she would not mortgage it, but that "they wanted to sell the stock very much," that if the respondent would take stock that at any time "she wanted her money back" she would take it over; they would take over the stock and pay" the respondent her money back; that no conclusion was then come to, and the appellant went on to Holland, and on her return stopped over at the house of the respondent; on this occasion she said she hoped that the respondent had decided to take the stock, that she need not be afraid, that at any time she wanted the money back "they would take it back and they would take the stock over themselves and pay me my money back;" nothing was concluded on this occasion, but the respondent says she asked the appellant what her place was worth, and was told that it was worth $6,000 and increasing in value; and that she said she would go to Hamilton and look at the place before taking the stock; that she went to Hamilton in the fall of the same year, and looked the place over. What occurred on this occasion is thus stated by the respondent, p. 48:—

"Q. What conversation had you with her on that occasion? A. Well, she told me that her father had built the place, had done the carpenter work, for a while she had lived with them, and that the place was good security, that I need not be afraid. Well, I said, 'I may want this money in a great hurry, I may want it in a short time. I suppose you would have no difficulty in raising it for me, because I would not be lending anything like the value you say your place is. I suppose you could raise that amount any time I should want it, if I should want it in a hurry,' and she said she would."

And after this the respondent "took the stock."

The respondent also testified that she attended a meeting of the company in January, 1910, that the appellant met her

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at the train and that the respondent told her that she wanted her stock "out," that the appellant said: "Perhaps after the meeting I would decide to leave it there as they had had a very good year," but that the respondent refused to do so and said she wanted it.

What followed is thus detailed:—

Q. And what did she say as to that? A. She told me to see her husband about it, they would arrange to pay it. They would have to pay it if I wanted it, and that whatever arrangement they made she would be perfectly willing.

Q. Did you see him about it? A. Yes, I did, after the meeting.

Q. And why was it not arranged then? A. It was. He said he could not pay it all just then, but she would take the $1,000 and pay me a $1,000 on it and take back this stock right away.

Q. Yes? A. He was to send me that $1,000 in cash in a couple of weeks when I was down there at that meeting.

Q. In January, 1910? A. Yes.

Q. And the $1,000? A. Inside of a month anyway, he said he would do it.

Q. Pay that $1,000? A. And if he could not send the money he would send a note at short date.

Q. Did the $1,000 come? A. No, it did not.

Q. Or the note? A. Nothing.

The respondent testified that she next saw the appellant in Hamilton on Thanksgiving Day in the same year. What occurred then is detailed by her as follows:—

Q. And what took place on that occasion? A. I told her I had come down to see why they had not paid me, they would have to arrange it right away.

Q. And what did she say? A. She said I need not be afraid, I need not worry myself, they would take back the stock, and I knew she owned the house, and that her husband had been sick or they would have paid me long before, I was not to worry them just then, I was just to let it stand at that until he got better. She did not want me to see him at all, she did not want me to talk with him about business or any business. She said it was impossible for me to talk to him about business.

Q. Did you see him? A. I insisted on seeing him, just before I left, and just before I left I saw him in a room. I would not leave unless I saw him—he came into the back parlor and I saw him there.

Q. What took place? A. He kept out of my way, they were trying to avoid this.

His Lordship: You had better stick to the story—what took place between you and him?

A. He agreed at that time, she said there was a lot of

money coming in out of his own private fund, and he agreed at that time to send me the money within a very short time, I guess probably three weeks or else a note signed by his wife and himself for that, and the $2,500, he was to pay at the same time you know.

The testimony of the respondent is corroborated in the main by that of her husband, and Margaret Kinsman, a 14-year-old daughter of the respondent, corroborates the testimony of her mother as to a conversation said to have taken place Thanksgiving Day in the year 1910, between her and the appellant, although there are some important differences in their statements of what was said. The respondent says nothing as to any amount being mentioned, while according to the daughter's testimony, the first thing said was said by her mother, and was that "she wondered why they had not sent her the $1,000 before this," and that the appellant replied "that they would only her husband had been sick that summer," and that the respondent said she wanted them to send the other $2,500 as soon as they could. The daughter also testified that "Mother said that if Emily Kinsman's husband signed a note for $1,000 instead of the money, mother would rather have her money, but if she did send a note Emily Kinsman would have to sign it, and Emily said she would and mother said if they sent notes for any of the rest of the money Emily Kinsman would have to sign them, and she said she would sign them," p. 60. Not one word of all this about the notes or about the $2,500 was told by the respondent in her account of the conversation, on pp. 50 and 51, which I have quoted. The only mention the respondent makes of $2,500 is in her account of a conversation at the same time with R. E. Kinsman, in which she says he promised to send her the money "within a short time, I guess probably three weeks or else a note signed by his wife and himself for that, and the $2,500 he was to pay at the same time you know," p. 51.

The alleged agreement to take back and pay for the stock, as well as the conversations deposed to by the respondent, were categorically denied by the appellant and her husband.

Even if there were no correspondence to throw light upon the transaction, and nothing but the oral testimony to guide, I should have hesitated long before coming to the conclusion that the agreement which the respondent sets up was proved. The evidence on the part of the respondent is, as I have said, met by directly contrary evidence on the part of the appellant; and, in my judgment, a very clear case should be made by the respondent in order to fasten upon the appellant the liability which is sought to be imposed upon her, without a scrap of writing to support the statements of the respondent and her husband as to

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the making of the somewhat unusual agreement which the appellant is alleged to have made.

The testimony of a party seeking to fasten such a liability on another, as to what were the terms of the agreement alleged to have been made, should at least be clear and specific; and in that respect the testimony of the respondent is wanting, and, in my opinion, unsatisfactory, as appears from the extracts I have made.

As I have said, however, the correspondence, in my opinion, makes it clear on which side the truth lies.

The correspondence on the subject of taking stock in the company begins with a letter from R. E. Kinsman to the respondent's husband, bearing date the 12th February, 1906, in which the latter is informed that the writer has turned his "business into a limited liability company," and is told that the writer would like him to buy some shares preferably of the preferred stock. The letter also contains this statement, "Now if you feel so inclined and can subscribe for a good number of shares, all right, but if not, take a few anyway. If there is any further explanation you would like regarding it, the next time I am in London I will run up and spend the night with you and give you such explanation."

There is a postscript to this letter, written by the respondent's son Palmer, which reads: "Cheer up, Homer, and get in on the ground floor. It has steamboating all beat to death."

The next letter is dated 10th April, 1906, and is from R. E. Kinsman to the respondent's husband; it gives further particulars as to the prospects of the company, and says: "Now, as I said, while I don't want to be too pressing about the matter, I want, of course, to sell a good deal of this preferred stock, and would like you to take some, but, of course, if you decide not to, why there is no harm done."

Nothing appears to have been done until the close of the year, 1906, when, as appears from a letter from Palmer Kinsman to the respondent's husband, dated 3rd January, 1907, an application was sent in by the latter for $2,000 of the preferred stock; on receipt of this application, four certificates were made out, each for $500 shares in the name of the respondent; the money to pay for the shares appears not to have accompanied the application, but was probably sent afterwards by express, as suggested in this letter.

The letter which accompanied the application, if there was one, is not among the exhibits, nor is it among those produced by the appellant on the argument.

$1,000 of common stock were subscribed for by the respondent on the 4th March, 1907, but there is no correspondence produced with regard to this subscription.

A certificate for 5 additional shares of preferred stock was issued to the respondent on the 31st December, 1907. No correspondence with regard to these shares is produced, except a letter from the respondent's husband to R. E. Kinsman, dated 30th December, 1907, in which the writer asks that "the certificate for 5 shares we are taking from J. A. Brown," be dated January 1st, 1909, and forwarded with the stock Palmer transferred to the writer. A letter, dated 6th January, 1908, from R. A. Kinsman to the respondent's husband sending the certificates as requested; a letter dated 10th January, 1908, returning the certificate, which had been made out to the respondent's husband instead of as intended to the respondent, and asking to have it corrected; and a letter of 13th January, 1908, from the company to the respondent's husband, returning both certificates.

Brown had been induced by the respondent's husband, who was canvassing for subscribers, to subscribe for these shares upon the promise that the respondent, when Brown wanted his money, would take the shares off his hands; and in accordance with this arrangement Brown got back his money and transferred the shares at first and by mistake to the husband—the mistake being afterwards corrected.

There is some further correspondence in January, 1908, and in February, 1908, and 1909, but it is unimportant except as shewing that the respondent's husband was canvassing for subscribers for preferred stock.

After the last of these letters, there is a gap in the correspondence until 30th March, 1910, when the respondent wrote to R. E. Kinsman the following letter:—

"Dear Ed.:— "Sarnia, Mar. 30th, 1910.

"I was very much disappointed in not getting the money for that common stock. As I told you I need it now and although I have lost that piece of property I told you of (The Bell Telephone Company having bought it), there is a piece on the other side that will suit us just as well. You speak of a large sum coming in in April that you expected before, and that you could let me have the money then. I would be very glad if you could take it off my hands by then. I may not need the money for a great length of time, but cannot say for sure. No doubt you will want the stock yourself, and I would rather have preferred when I take any more, but just now I want the money and as you agreed to take it over if I did not want it I hope you will try and oblige me as soon as possible.

"We did not write sooner as we were expecting every day to hear about the dividends and word as to when you could take the stock.

"Very sincerely,

"MINA KINSMAN."

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It is to be observed that in this letter the arrangement as to taking over the stock is said to have been made with R. E. Kinsman, and to have had relation to the common stock, and not a word is said as to any agreement that the appellant should take it over.

I am quite unable to understand how this letter can be reconciled with the testimony of the respondent, or its being consistent with the existence of any such agreement as she sets up.

On the 18th of the following April, the respondent writes to R. E. Kinsman saying that his wife had received no answer to her letter, and asking if it had been received. This letter contains this sentence: "When Mina took stock in the company it was on your assurance that if at any time she needed money out of it, you would take over sufficient of the stock to make up what she required, this you assured her of in my hearing, and she is only asking you to do as you said you would do."

How is it possible to reconcile this statement of what the arrangement was with the writer's testimony as to what it was?

The letter indicates what possibly was the understanding of the parties at the time, that there was to be no legal obligation to take over any of the stock, for in it the writer speaks of R. E. Kinsman "straining a point to oblige Mina" (his wife).

R. E. Kinsman's answer to this last letter is dated 22nd April, 1910, and as it appears to have an important bearing on the matters in dispute, I set it out in full. It reads as follows:—

"I received your second letter this morning before leaving for Toronto, where I am writing from. I would have answered the first one (should have done so), but have been hoping from week to week to be able to send the amount of your dividends and to be able to say something definite regarding the sale or taking over the $1,000 of Com. stock, thus the time has gone by. I guess it's worried me more than you, for I always like to use others as I would like them to use me, but when I can't it worries me. Upon my return home we will send you cheque for dividends. I can't, however, send the cash for the stock. There are those now owning stock could and would buy it at a disc. so as to make something more than dividends, but I hold out no such inducement.

"As I said, however, I will take it over myself, but cannot do so just now. You must remember I do not pretend to have any money to speak of, and what I have is in the business. When you took stock and I said I would take it over if you should want to dispose of it and could not sell to someone else, I naturally expected (though don't think I said so), as any busi-

ness person would, that you would let me know sometime before you would want the transaction completed (the length of this time in proportion to the amount and conditions). Now, I think, if you just think of it you will conclude a month or three months is not a reasonable time within which to expect me to come up with $1,000 cash. If I had money at command it would be different. Then consider we have been paying out money on logs all winter and these are now ready to be sawn, which calls for cash, and in order to do this I have had to privately do some financing for the company. Yourselves are worth many times what I am and in negotiable shape, still if you were called on for this amount you might find you needed a little time within to raise it. Just as you would like to feel you should do so, so as not to cause you a loss. The sum of money I wrote we expected in Jan. but did not get and would not until April, has not come yet, or only a small part of it. As soon as I can possibly raise the $1,000 I will do so. In the meantime if you like I will give you my own notes to that amount, you at the time transferring the stock to me, and agreeing to renewing a reasonable part of these notes, a reasonable time if upon their maturity I can't pay them in full, and the notes to bear 7% per annum interest. I am anxious to cause you as little uneasiness as possible, and no one would be better pleased than I if I was able to hand over the $1,000 cash now or 3 months ago as soon as I knew you wanted it. If, however, I had cash available like that I would be buying all the stock (not waiting to be asked to buy it or any portion of it). Let me know which way you prefer and in the meantime believe me I am doing my best and will continue to do so to accommodate you.

"We are all well as usual and will be glad to see either of you and the children whenever you can come or call to see us.

"Having a lot of writing to do, I must close.

"Your cousin,

"ED."

This letter, like those of the respondent and her husband, treats whatever promise was made as to taking over the stock as being the promise of R. E. Kinsman and not the promise of his wife or of both of them.

It is important also as it contains the first reference to the giving of a note for the price of the common stock. The suggestion is that the writer will give his own notes to that amount on the $1,000 of common stock being transferred to him.

There is no reply to this letter produced.

The next letter is from R. E. Kinsman to the respondent's husband, and is dated 27th April, 1910, and sends $258 to pay the dividends of the respondent and her husband on their shares.

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There is now another gap in the correspondence; the letter next in date produced is from the respondent to the appellant and is dated 7th November, 1910—a few days after the Thanksgiving visit to which reference has been made. I refer to it only because its tone is very different from what I would have expected if what is said by the respondent and her daughter to have happened on that occasion had actually occurred.

On the 17th December, 1910, R. E. Kinsman writes to his "dear cousins" (the respondent and her husband) that owing to a heavy loss it is impossible for him "to raise the money now," and he adds "so can do nothing for some months; this is poor satisfaction I know. All I can do is keep this $1,000 in mind."

On the 25th of the same month the respondent's husband writes to R. E. Kinsman, and referring to a rumour that the dividend is to be passed, to which he is opposed, says:—

"It is this sort of question coming up that makes Mina dissatisfied with her common stock and as you said in your last letter that you are not in a position to take over the $1,000 of common stock Mina has decided to "let you have it and is willing to take your notes as you offered to do in a letter you wrote us last fall. This will not inconvenience you in any way and will really amount to the same thing as Mina taking preferred for it, except that the notes will mature while the preferred would stand, and we want to use the money."

It is, in the face of such a letter as this, impossible for me to believe that there was a binding contract with the appellant to take over not only the $1,000 of common stock but also the $2,500 of preferred. There is not in the letter a suggestion, much less a stipulation, that the appellant should join in the notes with R. E. Kinsman for the $1,000, and this too, but a few weeks after, according to the testimony of the respondent and her daughter, the respondent had insisted that the appellant should join in the notes for the stock if R. E. Kinsman was unable to pay and desired to give notes for it, and according to the respondent's testimony R. E. Kinsman had promised that his wife would do, and according to the testimony of the daughter the wife herself had promised to do.

The next letter bears date the 19th January following and is from the respondent's husband to R. E. Kinsman. In it the writer suggests that the result of the arrangement to which his wife had assented would be that if a dividend was declared on the common stock R. E. Kinsman would get the benefit of it, and says that that would not be fair to his wife, and that they expected to be allowed what the stock had earned, even though it was not declared as a dividend, and that his wife was willing to take preferred stock for the common if the

profits were allowed as shewn by the year's business, which would enable R. E. Kinsman to take over the $1,000 of preferred at the end of the year, and that would do away with personal notes, and would, he thought, be the better way. The writer goes on then to say that his wife would prefer to have the money than the note or the preferred stock, and asks to be informed if R. E. Kinsman concurs in what he had written about the profits, "seeing that Mina is going out of the common stock."

On the same day a friendly letter was written by the respondent to the appellant. The only reference to business it contains is a statement that the business meeting (i.e., of the company) would be soon, and that it was likely that she or her husband would go down to it; that her husband wished her to go, that he thought she would understand all about it if she attended the meetings, and that she would perhaps go. Not a word as to sending the money for the stock or a reference to a note for it in which the appellant was to join if the money was not available.

The next letter is dated 1st February, 1911, and is from the respondent's husband to R. E. Kinsman. In it the writer says that he had not received a reply to his last letter, and that his wife was becoming very much annoyed at R. E. Kinsman's neglect, and the letter concludes with the following:—

"It is a simple matter for you, as president of the company, to change the 10 shares of common to preferred, and then at the end of the year it will be quite a usual act of a company to redeem that portion of the preferred stock, and the common you receive in exchange for the preferred is certainly worth the extra undeclared dividend above par."

R. E. Kinsman's reply to this letter is dated 2nd February, 1911, and in it he proposes to undertake to make up to the respondent 7 per cent. per annum from the time she took this $1,000 of common stock to 31st December, 1910, and says that this should be satisfactory to her, and he would "do as stated in my conversation, take this $1,000 of common and give you my note at one year at 7 per cent. per annum from Dec. 31st, 1910, you at the same time transferring the stock to me." Then follows a calculation shewing the amount he is to pay to make up the 7 per cent. per annum to be $66.60, which he promises to pay "sometime about July."

In a postscript he adds: "This is my own private matter, mind. I simply step into your place."

On the 9th of the same month, the respondent's husband replied to this letter as follows:—

"Your delayed letter of February 2nd received, and your offer regarding the taking over of the stock and the dividends

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you are allowing, viz.: the 7 per cent. for the time the common stock has been held, is entirely satisfactory to us, and for your kind consideration of our wishes you will please accept our sincere thanks.

"I must point out to you, however, that your statement of dividends paid on the said common stock is incorrect in the first item, as the amount received for the part of the first year we held it was only $55.89 instead of $80, which will make amount due to make up the 7 per cent. to be $90.71.

"I do not quite understand what is required re the transferring of the stock to you; but if you will send the necessary instrument for so doing, when you send the note, Mina will sign it and return it the next day together with the stock certificate which she holds.

"We are all well and hope you are continuing to improve in health."

The proposition of R. E. Kinsman to give "my note" is accepted on the terms proposed by him, and he is thanked for his kind consideration "of our wishes." Not a word as to the appellant joining in the note; on the contrary, R. E. Kinsman's offer to give his note is said to be "entirely satisfactory to us."

The respondent's husband wrote again to R. E. Kinsman on 9th March, 1911, saying that he had written several weeks ago "accepting your arrangement," and not having received a reply he wondered if his letter had miscarried, and asking for a reply.

R. E. Kinsman's note for the $1,000 is dated the 1st June, 1911, and is payable in one year with interest at 7 per cent.

There is no correspondence to shew when or how this note came to the hands of the respondent, but according to the testimony of the respondent's husband it was received in July, 1911 (p. 70), and a letter from the respondent's husband to R. E. Kinsman dated 29th July, 1911, is produced in which the writer says: "We expected to have been in Hamilton soon and to have taken the stock certificate with us, but have had to change our plans. We are mailing same to you to-morrow or Tuesday," and adds that his wife would like to have the difference in dividends, payment of which in July had been promised.

According to the testimony of the respondent's husband (p. 70), after receiving the note he had a conversation with R. E. Kinsman in which he told him that he had brought down the certificate for the $1,000, also his note which was to have his wife's name on it, and he would give up the stock certificate in exchange for the note if his wife would sign it; that R. E. Kinsman said his wife was ill, probably at the point of death, and could not sign the note; and that it was then arranged between them that he should hold the certificate until the note

was signed by the wife. The date of this conversation is not given, but it is said to have taken place in Hamilton after a meeting of the shareholders which the respondent's husband had attended.

I am unable to reconcile this testimony with the correspondence as to the note or with the letter of the 29th July. The statement of the letter as to sending the certificate is quite inconsistent with any such conversation having taken place or any such arrangement having been made.

The letter of the 29th July was acknowledged and replied to by R. E. Kinsman on the 10th August following, in which he says that the certificate was not enclosed, but he supposed "you omitted it," and referring evidently to the $90.71, the difference in the dividend which he had promised to pay in July, adds: "That account I can't pay now, but hope to later."

The next letter, dated 23rd August, 1911, is from R. E. Kinsman to the respondent's husband, and refers to his having been in Hamilton the other afternoon, and promises to send a statement as soon as his son Horace returns.

The next letter is from the respondent's husband to R. E. Kinsman, and bears date the 31st of the same month, and evidently refers to a proposition R. E. Kinsman had made to give a note for the $90.71, and asks him to make it at not more than 60 days.

The respondent's husband again writes to R. E. Kinsman on the 13th September, and complains that he had not heard from him as promised in the letter of the 23rd August.

To this letter R. E. Kinsman replied on the 18th September, saying that when the respondent's husband was in Hamilton he had intended sending his note, but as things had turned out he saw no way of paying it in the near future, and there was no use of sending a note, that he would have to wait until he could get the money or a portion of it, that he was not going to give any more notes or accept any more drafts from any person until he saw a way of paying them.

With this last letter the correspondence appears to have ended.

The company made an assignment for the benefit of its creditors on the 2nd September, 1911, and turned out to be hopelessly insolvent.

On the 25th September the signature of the appellant to the $1,000 note which her husband had given was obtained by the respondent's husband, and the joint note of herself and E. Palmer Kinsman for $2,500 which had been ordered to be delivered up to be cancelled, was also obtained by him.

Were it not that the learned trial Judge had accredited him "as transparently honest," I should have been inclined to think

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that the signatures to these notes were obtained by the fraud of the respondent's husband; that finding that the company was insolvent and that the money which his wife had invested in its shares was probably lost, he concocted the plan of representing that it was necessary that these signatures should be obtained in order that a large payment to a creditor might be attacked as a preferential one, and the assets of the company bought in by himself and the directors, so that they could be realized to the best advantage for the benefit of the shareholders, and "if need be of the creditors," in order that by means of this plan he might obtain the signatures and shift the burden of the loss from the shoulders of his wife to those of the appellant and her son.

His testimony as to the reason he gave for wanting the signatures to the notes and for antedating the $2,500 note is scarcely intelligible, and not at all satisfactory. Why should the appellant and her son be willing to put the respondent in a position to "enter" a "*lis pendens*" against their properties, and why should E. Palmer Kinsman become liable for the $2,500?

The learned trial Judge has preferred the testimony of the respondent's husband as to what occurred when the notes were signed to that of the appellant and her son. I prefer the latter. My learned brother had, no doubt, an opportunity of seeing and hearing the witnesses to whom he has given credit, but he did not see the appellant or her husband, as their testimony was taken *de bene esse* and read at the trial. A reading of the testimony of the appellant leads me to the conclusion that her evidence was given with clearness and candour, and it is quite possible that had my learned brother seen and heard her and her husband a different conclusion as to the credibility of the witness might have been reached by him.

However that may be, the testimony of the respondent and her husband is discredited by their own letters; and it is, to my mind, out of the question that, against the denials of the appellant and her husband, and in the face of these letters, it should be determined that the respondent has satisfied the onus of establishing the agreement which she sets up in her counterclaim.

Almost any one of the letters I have quoted is sufficient to turn the scale in favour of the appellant; but the cumulative effect of the whole correspondence is, in my opinion, to lead irresistibly to the conclusion that the case attempted to be made by the respondent is disproved.

I am, for these reasons, of opinion that the judgment directed to be entered on the counterclaim should be set aside, and that judgment should be entered dismissing it with costs, and that the respondent should pay the costs of the appeal.

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Having come to that conclusion, it is unnecessary to consider whether, had the promise alleged to have been made been proved, the respondent would have been entitled to recover $3,500. It may be open to serious question whether in that case she would have been entitled to recover in respect of the $1,000 of common stock subscribed for on the 4th March, 1907, or the $500 of preferred stock subscribed for by Brown and transferred by him to her.

Teetzel, J.

TEETZEL, J.:—While the judgment is supported by the evidence of the respondents, if believed, it is so inconsistent with the plain inferences to be drawn from the letters written by the respondent between the time of the alleged agreement and the failure of the Kinsman Company that I think if those letters, some of which were first produced on the argument of the appeal, had been pressed upon the attention of the learned trial Judge he would not have accepted it.

To begin with, the alleged agreement was a very improbable transaction under the undisputed circumstances. The letters referred to are entirely consistent with the evidence of the appellant, and, as I have said, inconsistent with that of the respondent as to the alleged agreement, and I think that giving them proper effect the appeal should be allowed.

Kelly, J.

KELLY J.:—For the reasons set forth in the judgment of his Lordship the Chief Justice, I concur in that judgment.

*Appeal allowed.*

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## EDGAR v. CASKEY.

**(Decision No. 2.)**

*Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, and Walsh, JJ. October 4, 1912.*

1. BROKERS (§ II A—7)—REAL ESTATE AGENT—AGENT PURCHASING FROM PRINCIPAL BOUND TO DISCLOSE HIS IDENTITY—VALIDITY OF CONTRACT.

A real estate agent purchasing from his principal the lands which the latter has listed with him for sale is bound to disclose to the latter that he is the purchaser; and, although the sale may be fair and reasonable in other respects, yet if the vendor has not been made aware that the real purchaser is his agent, such a sale cannot be supported unless the principal chooses to ratify it after knowledge of such fact.

[*McPherson* v. *Watt*, 3 A.C. 254, 263, followed; *Edgar* v. *Caskey*, 4 D.L.R. 460, reversed.]

2. BROKERS (§ II A—8)—REAL ESTATE AGENTS—EMPLOYMENT OF SUB AGENT.

The business of selling real estate is one in which the right of an agent to employ another to dispose of the lands listed with him may reasonably be presumed.

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3. PRINCIPAL AND AGENT (§ III—41)—SUB-AGENT OR SUBSTITUTE—PRIVITY OF CONTRACT.

The general rule involved in the maxim *delegatus non potest delegare* merely prevents an agent from establishing the relationship of principal and agent between his own principal and a third person without the authority of his principal as regards the service which the agent has personally undertaken to perform, but the rule is relaxed where the instructions necessarily may have to be carried out by another, in which case the original agent may appoint a sub-agent or "substitute" and thus constitute in the interests and for the protection of the principal a direct privity between the principal and such "substitute" (or sub-agent).

[*De Bussche* v. *Alt*, 8 Ch. D. 286, at 310; *Powell* v. *Jones*, [1905] 1 K.B. 11, followed.]

4. EVIDENCE (§ II E 2—152)—IDENTITY—PRESUMPTIONS — SIMILARITY OF NAME.

It is not to be inferred merely from the similarity of name of the proposed purchaser in a written offer of purchase and of a member of the firm of real estate agents as disclosed upon the printed letterhead accompanying such offer that the proposed vendor, on whose behalf the real estate firm were commissioned to sell the property, knew that such purchaser was the identical person who belonged to the firm, particularly where the firm were charging him a commission as for an alleged sale to which they would not legally be entitled on a sale to one of themselves for their joint benefit.

[*Edgar* v. *Caskey*, 4 D.L.R. 460, reversed.]

5. EVIDENCE (§ II E 5—165)—ONUS—PURCHASE BY AGENT ON HIS OWN ACCOUNT—NOTICE.

The onus is upon the agent who seeks to enforce against his principal an alleged purchase on his own account of the principal's property which he had been employed to sell to establish to the satisfaction of the Court that he disclosed to his principal the fact that the offer was on his own behalf.

6. APPEAL (§ VII L 3—485)—TRIAL WITHOUT JURY—DRAWING DIFFERENT INFERENCE FROM FACTS BEFORE TRIAL JUDGE.

Where it is evident upon an appeal, in a case tried without a jury, that the trial judge based one of his conclusions entirely upon the inferences which he drew from certain facts to which he referred in his opinion or written reasons for judgment, and the appellate Court is of opinion that he erred in such conclusions, it may draw from the same facts the inferences which it considers to be the proper ones, and dispose of the case upon its own finding of the effect of the transaction in question.

7. SPECIFIC PERFORMANCE (§ I A—13)—RIGHT TO REMEDY—READINESS OF PARTY SEEKING TO ENFORCE.

A party cannot call upon a court of equity for specific performance unless he has shewn himself ready, desirous, prompt and eager, to perform his own part of the contract. (*Per* Simmons and Stuart, JJ.)

[*Milward* v. *Earl of Thanet*, 5 Ves. 720*n*; *Eads* v. *Williams*, 4 De G. M. & G. 674, 691, referred to.]

Statement

APPEAL by defendants from the judgment of Scott, J., *Edgar* v. *Caskey* (Decision No. 1), 4 D.L.R. 460, in which the plaintiffs were adjudged to be entitled to specific performance, in an action brought by them for possession of land and damages for breach of contract. At the trial they were allowed to amend so as to claim specific performance.

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The appeal was allowed with costs, the plaintiffs' action dismissed, and defendants' counterclaim allowed.

*Frank Ford*, K.C., for plaintiff (respondent).

*O. M. Biggar*, for defendant (appellant).

HARVEY, C.J.:—I concur with the judgment of Walsh, J.

Harvey, C.J.

STUART, J.:—I concur with the judgments of Simmons and Walsh, JJ.

Stuart, J.

SIMMONS, J.:—The plaintiffs carried on business at Edmonton as real estate agents.

Simmons, J.

The defendant Caskey, through the agency of the defendant Dale, purchased lot 252, block 4, Hudson Bay Reserve, for speculative purposes, and agreed with Dale that the latter should share equally with him in the profits when the said lot should be sold.

The plaintiffs independently of the defendants ascertained that Dale claimed an interest in the lot and on May 18th, 1911, wrote Dale at Kitscoty, Alberta, as follows:—

> Understanding that you are the owner of lot 252, block 4, in the Hudson Bay Reserve here, we should be glad to have your price and terms as we have buyers for the property in that neighbourhood.

and on May 19th, Dale replied as follows:—

> My price is $2,000, half cash, balance in 6 and 12 months at 8 per cent. There is another man interested in this, so in making out the papers leave name blank and I will have papers sent to him to sign.

On May 20th, the plaintiffs replied as follows:—

> John Dale, Esq.
> Kitscoty, Alta.
>
> Dear Sir,—Your letter to hand and enclosed please find cheque for $50 as a deposit on lot 252, block 4, in the Hudson Bay Reserve here. The agreement will be made out and left blank as you direct and be sent down on Monday night's train together with the balance of the first payment less commission.
>
> Trusting this will be satisfactory to you,
>
> Yours truly,
>
> (Sgd.) EDGAR-AGAR CO.
> *per* A.B.A.

On the same day Dale replied as follows:—

> Your letter to hand with cheque $50.00 re lot 252, blk. 4, H.B.R. I had a wire from party interested with me this morning accepting the sale at $2,000—half cash, balance 6-12. Send me the papers and I will forward them East to be signed, in the meantime will give your party receipt for payment.

Dale had in the meantime on the 21st of May wired Caskey at Madoc, Ontario:—

> Sold lot for two thousand, half cash, balance six and twelve months: is big price. Sending papers to sign. Will give them temporary transfers. Answer.

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and had received an answer as follows:—

Price and terms acceptable. Will sign papers and return through the bank.

To Dale's letter of the 20th, plaintiffs replied as follows:—

Enclosed please find agreements for lot 252, block 4, in the Hudson Bay Reserve as stated in our letter of the 20th inst. and duly signed by our party here and witnesses. The other names were left blank as you desired and I shall be glad if you will get them filled in and witnessed, returning the agreements with drafts attached for $875 to the Traders Bank here.

The amount of the draft is made up as follows:—

| | |
|---|---|
| To cheque for deposit | $50.00 |
| To commission which we are holding | 75.00 |
| To balance of 1st payment of $1,000.00 | 875.00 |
| Total | $1,000.00 |

Trusting this will be satisfactory to you.

Yours truly,
(Sgd.) EDGAR-AGAR CO.

Dale on receipt of this letter and the agreement sent them by mail to Caskey at Madoc, but they never reached Caskey and on June 15th, he wrote Dale enquiring why they had not come to hand. Dale then went to Edmonton and explained to the plaintiffs the miscarriage of the agreement, and procured from them a new agreement in duplicate and sent them to Caskey with a cheque for $50, the deposit received by him from plaintiffs, and asked Caskey to execute same and "draw on the man for the balance less $75.00 commission," and also stating "If you could let me have my share of profit less the $75.00 commission paid it would help me out."

Caskey received the agreement and executed it in duplicate and attached a draft for $875.00 on the purchaser Thos. D. Edgar to one original and forwarded through a private firm of bankers at Madoc to the Canadian Bank of Commerce at Edmonton. Through the carelessness of the bank, the draft was not presented to the purchaser Thos. D. Edgar, but was by the bank returned to Madoc with the endorsement "Notified and held. No attention paid." This was incorrect as no notice reached Edgar in regard to the draft.

Nothing more happened till August 24th when the plaintiffs wrote Dale inquiring why the papers had not been returned. Dale immediately wrote Caskey for an explanation and on August 30th, Caskey replied that draft had been returned with papers and as no attention had been paid to it he concluded the purchaser had decided to forfeit his deposit and abandon the purchase. In their letter of the 24th to Dale the plaintiffs said:—

If we cannot get the property as promised we shall at least be glad if you will send the $50.00 deposit back.

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On September 27th Caskey sold the lot through another firm of real estate agents in Edmonton to the defendant Horner. On October 2nd, 1911, Thos. D. Edgar filed a caveat in land titles office claiming an interest as purchaser and on October 5th, 1911, Horner filed his caveat claiming also as purchaser.

At the trial the learned trial Judge allowed an application of the plaintiffs to amend their claim by claiming on behalf of the plaintiffs specific performance of the agreement of the 23rd June, 1911, or if that should not be allowed by substituting Thos. D. Edgar as plaintiff and claiming specific performance on his behalf. The judgment appealed from held that the plaintiffs were not guilty of such laches as should disentitle them to specific performance and expressed doubt as to whether the plaintiffs were the agents of Caskey and indicating that they were only the agents of Dale. The defendants' appeal is based on two grounds: (*a*) Laches on behalf of plaintiff and (*b*) non-disclosure by plaintiffs that they were buying for themselves while purporting to act as agents for the owner. The letter of inquiry of the plaintiffs and Dale's reply thereto does not in any way suggest an agency between the plaintiffs and Caskey the owner. There is implied an agency for prospective purchasers only. Their letter of May 22nd in which they charge a commission of $75.00 does imply an agency relation between them and Dale. If Dale had held himself out as merely an agent of Caskey, it is doubtful if this letter could be held as establishing the relation of principal and agent between the plaintiffs and Caskey. Dale however held himself out as owner because the plaintiffs addressed him as "owner" and he replied "my price is two thousand dollars—there is another man interested."

Dale was not a part owner but was only interested in the proceeds of sale with the result that it is rather difficult to define the actual relations between the parties, in so far as the law of principal and agent may apply.

I do not think it necessary to define this relation as I am of the opinion that the plaintiffs must fail on account of their own laches.

> A party cannot call upon a Court of equity for specific performance unless he has shewn himself ready, desirous, prompt and eager. *Per* Lord Alvanley, M.R., in *Milward* v. *Earl of Thanet*, 5 Ves. 720*n*.
>
> Specific performance is a relief which this Court will not give unless in cases where parties seeking it come promptly and as soon as the nature of the case will permit. *Per* Lord Cranworth, in *Eads* v. *Williams*, 4 DeG. M. & G., 674, at p. 691.

The sale was not consummated on account of an inadvertence for which neither of the parties was to blame.

If the plaintiffs intended to vigorously assert their right to performance of the contract surely on August 24th when they

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wrote the defendants they should have indicated this intention. Nearly two months had elapsed since the execution of the documents and their attitude is

> if we cannot get the property as promised we shall at least be glad if you will send the $50.00 deposit back,

and on September 12th, 1911, they had formal notice from Dale that defendants considered the deal was off.

The fact that the land was being purchased by them for speculative purposes is important and it would be manifestly unfair to the defendants if the plaintiffs could play fast and loose as real estate prices might fluctuate.

The defendant Caskey had not yet (September 12th) resold and the plaintiffs by their delay allowed the defendants to be placed in a position where specific performance will work a hardship upon them, they having in the meantime resold with the result that a decree against them would subject them to an action by their purchaser Horner.

I would therefore allow the appeal with costs; defendants' counterclaim allowed and plaintiffs' caveat ordered to be removed. The $50.00 deposit paid by plaintiffs to be credited to them on taxation of defendants' costs against them.

Walsh, J.

WALSH, J.:—The defendant Caskey who lives in Ontario is the registered owner of a lot in the city of Edmonton, which he authorized the defendant Dale, who lives at Kitscoty, Alberta, to sell for him. The plaintiffs who are real estate agents carrying on business in Edmonton, opened negotiations with Dale in a letter dated on the 18th of May, 1911, asking his price and terms for the same "as we have buyers for property in that neighbourhood." Dale replied giving the required information and stating that "there is another man interested in this," though not naming him. The next day the plaintiffs forwarded to Dale by letter their cheque for $50 as a deposit and stated that the agreement would be forwarded later "with the balance of the first payment less the commission." Dale acknowledged the receipt of this on the same day, concluding his letter by saying "in the meantime will give your party receipt for payment." The plaintiffs on the 22nd of May, 1911, forwarded to Dale an agreement for the sale of this lot in conformity with the understanding thus arrived at in which the name of Thomas D. Edgar of Edmonton, real estate agent, appears as the purchaser. The covering letter asked that the agreement be executed and returned to the Traders Bank in Edmonton with draft attached for $875, which according to this letter was the balance of the cash payment of $1,000 after deducting $50 paid on account and $75 "commission which we are holding." This agreement when so forwarded to Dale had been signed by Edgar or as the covering letter says "duly signed by our party here." Dale

forwarded this letter with the accompanying agreement to Caskey but they never reached him. Caskey whom Dale had advised by telegram of the sale and who had replied by wire confirming it, wrote Dale under date of June 15th, 1911, stating that he had received no papers and asking for information about the deal in which he says, "I don't even know to whom you sold the property." Upon the receipt of this letter a new agreement was prepared and executed by Edgar and was, on the 29th of June, 1911, forwarded by Dale to Caskey with a cheque for the $50 paid by the plaintiffs. Dale's accompanying letter instructed Caskey to "draw on the man for balance less $75.00 commission." This letter with its enclosures reached Caskey who executed the agreement and attaching to it a draft on the purchaser for $875, forwarded the same through his bankers to the Canadian Bank of Commerce at Edmonton with instructions to surrender the agreement to the purchaser on payment of the draft. On July 25th, 1911, a notice was sent from the office of this bank in Edmonton intended for Edgar informing him that it held this draft for acceptance. This notice never reached him and in ten days after sending it the bank returned the agreement and draft to Caskey's bankers as, because of the fact that this notice had not been received Edgar had paid no attention to it. On the 24th of August, 1911, the plaintiffs, who apparently had heard nothing of the matter since May, wrote Dale for information and in their letter they say that they sent him the agreement on May 22nd "duly signed by our party here" and in which they further say "if we cannot get the property as promised, we shall at least be glad if you will send the $50 deposit back." On the next day Dale wrote Caskey asking what had become of the papers, his letter commencing "Edgar wrote me this morning, etc."

On August 30th Caskey wrote Dale explaining that as the agreement had been returned by the bank with the draft unpaid he concluded that "the purchaser had decided not to take the lot and to forfeit the deposit of $50" and concludes "in that case I cannot see how Edgar is entitled to any commission." The only other communication produced at the trial is a letter from Caskey to Dale dated October 2nd, 1911, which shews upon its face that it was written in reply to a telegram from Dale advising him that Edgar was suing him and that the draft was returned in error and asking him to re-draw. The letter then goes on to say that Caskey has sold the property to another purchaser and winds up by saying "I cannot see why Edgar can collect his commission from you" and "when his client failed to meet the payment, no sale was made." By writing dated on the 26th of September, 1911, Caskey agreed with the defendant Horner for the sale of this lot to him. Edgar recorded a caveat

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on the 2nd of October, based upon the agreement in question in this action and Horner recorded a caveat on the 5th of October based upon his agreement of the 26th of September. The action is brought by the Edgar-Agar Company, the parties with whom Dale's correspondence was carried on, it being admitted that Thomas D. Edgar whose name appears in the agreement as the purchaser was at its date a member of this firm and that the property was really bought for the firm and taken in Edgar's name for convenience. The plaintiffs claim as amended at the trial is for specific performance and the defendant Caskey by his counterclaim prays for the removal of the plaintiffs' caveat. Judgment was given after the trial of the action in favour of the plaintiffs decreeing specific performance of the contract in question and directing the removal of the defendant Horner's caveat from the title. From this judgment the defendant Caskey appeals.

The appeal is based upon two grounds, namely,

(1) that the plaintiffs while acting as the defendants' agents for the sale of this lot bought it for themselves without disclosing that fact to the owner, and

(2) that the plaintiffs were guilty of such delay and laches as disentitle them to relief by way of specific performance.

The plaintiffs in their factum contend that they were not the agents of the defendants Caskey and Dale for the sale of these lands and they submit that the learned trial Judge was right in holding that they were not such agents. No such finding and in fact no express finding of any kind was made upon this question by my brother Scott who tried the case. He simply suggests a doubt as to "whether the plaintiffs were the agents of Caskey or anything more than the agents of Dale" but says nothing even to indicate his view of that question. I would certainly think from this, that he held the opinion that the plaintiffs were the agents of either the one or the other. I did not understand the plaintiffs' counsel to urge this point very seriously in his argument, but as the question of agency lies at the threshold of the enquiry into this branch of the case it is essential to deal with it.

I have set out very fully the material parts of all of the correspondence which deals with this phase of the case. Everything that took place between the parties so far as the question as to the footing upon which the parties were dealing is concerned rested in this correspondence.

It is manifest from it that the plaintiffs at the start placed themselves in the position of agents for the sale of this land and I do not see how in the face of their own letters and in the light of their conduct in deducting a commission from the purchase price their right to which was assented to by both Caskey



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and Dale, they can be heard to say that they were not. A commission could only have been claimed by them on the assumption that they had done something to earn it and that something in this instance could only have been the selling of the land.

I am inclined to think that the plaintiffs were not the agents of Caskey but were simply authorized by Dale to sell the land. The learned trial Judge has found that Dale "had practically unlimited powers as to the disposal of the property." Dale as a matter of fact was entitled under his arrangement with Caskey to one-half of the profit resulting to Caskey on the resale of this lot which he had originally purchased through Dale and in this way he had a substantial interest in it. While the general rule appears to be that there is no privity of contract between a principal and a sub-agent and that a right or a duty arising out of a contract between an agent and a sub-agent can only be enforced by or against the parties to it, it is equally true that the agent may under certain circumstances make another the agent of his principal. The principle is so clearly stated in the judgment of Thesiger, L.J., delivering the judgment of the Court of Appeal in *De Bussche* v. *Alt*, 8 Ch. D. 286 at p. 310, which was followed in *Powell* v. *Jones*, [1905] 1 K.B. 11, that I cannot do better than reproduce his words here:—

> As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emerg-

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encies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself.

This is a case to which I think the principle of *De Bussche* v. *Alt*, 8 Ch. D. 286, should be applied. Caskey knew by his correspondence with Dale that the sale had been made through the intervention of an agent other than Dale and he not only did not object, but expressly consented to this method of disposition. The business of selling real estate is one in which the right of an agent to employ another to dispose of the same might reasonably be presumed. It is common knowledge that this is a very usual method employed by real estate agents in this country. I think, therefore, that not only from the conduct of Caskey and Dale but also from the nature of the particular business which Dale was employed to transact it may reasonably be presumed that they originally intended that Dale should have the right to dispose of the property through the efforts of some one other than himself.

In my view of the facts the plaintiffs were agents for the sale of this property and though appointed by Dale and in that sense his sub-agents, they became in the circumstances of their appointment responsible to Caskey for the proper discharge of their duties and clothed with all of the responsibilities and subject to all of the disabilities which would have followed their direct appointment by him.

The plaintiffs then, being not only the agents for the sale of this property, but the purchasers of it through themselves as such agents, two questions arise upon the solution of which the determination of this branch of the appeal must rest, namely, what duty did the plaintiffs owe to Caskey under these circumstances and did they discharge that duty in a manner which entitles them to insist upon the performance of this agreement by him.

There is no room for doubt as to the answer that must be given to the first of these questions. My brother Scott in his reasons for judgment says: "It is a well-settled principle of law that an agent purchasing from his principal is bound to disclose to the latter that he is the purchaser." The correctness of this statement of the law upon this subject is beyond question. This principle has been acted upon so often of late not only by this Court, but by Courts in other jurisdictions that it should be unnecessary to cite authorities in support of it. I will content myself therefore, with simply quoting the language of the Lord Chancellor in *McPherson* v. *Watt*, 3 A.C. 254 at p. 263:—

> My Lords, it is here that the pointed observations made by Lord St. Leonards in this house, in the case of *Lewis* v. *Hillman*, 3 H.L.C. 607 and 630, become so very material. They were not observations laying down any new rule of law, for the same principles had already been applied in numerous cases, but what Lord St. Leonards said in that case was this: Take the case of a sale of any kind, which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported, yet if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent, if the purchase has been made in the name of some other person for that law agent, that is a sale which cannot be supported. My Lords, so say I here. Assume, if you please, that in every respect as to price, and as to all other things connected with the sale, this was a sale which might have been supported had the McPherson family been told that Watt was the purchaser. In my opinion it cannot be supported from the circumstance that that fact was not disclosed to them.

It is true that the agent in *McPherson* v. *Watt*, 3 A.C. 254, was a law agent, but I know of no reason why the language which I have quoted should not apply with equal force to these plaintiffs, who are charged with doing what the law agent there was accused of, namely buying the property which he was employed to sell without disclosing his interest. It is clear also that the onus is upon the agent of establishing to the satisfaction of the Court that he did make the disclosure. It must not be left to mere suggestion or inference that the principal must have known but must be established by the agent as an actual fact that the disclosure of his purchase was really made to the principal. The fairness of the transaction cannot validate it in the absence of this disclosure. The fact that the principal, if he had known of his agent's interest, would have concluded the sale finds no place in the consideration which the Courts give to such a transaction. The principal is entitled to be informed of the agent's interest and unless he is, nothing but the ratification of the contract by the principal after he is made aware of the facts can give validity to it.

The learned trial Judge finds that Dale

> was aware that Edgar, whose name appeared in the agreements as purchaser, was a member of the plaintiffs' firm, as on the letter-heads of all the letters written by them to him Edgar's name appears as a member of the firm.

He also assumes that Caskey must have known that Edgar was an agent or one of the agents for the sale,

> as he appears to have recognized Edgar's claim to a commission and in his letter of the 30th August, 1911, his only objection to its payment was merely that Edgar had not fulfilled his agreement to purchase.

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Upon this finding and upon this assumption the learned Judge says:—

> I cannot hold that there was any underhand dealing on the part of the plaintiffs.

The underhand dealing which is referred to is doubtless the failure to disclose their interest as that is the only thing in the way of such a dealing that is suggested. The remarks which I have quoted are all that appear in his reasons for judgments by way of a finding that disclosure was made and of the reasons for such finding and as it is evident that he based his conclusion entirely upon the inferences which he drew from the facts to which he has referred, it is open to this Court to draw from these same facts the proper inferences if of opinion that he erred in so doing.

The fact that the name "T. D. Edgar" appeared as a member of the plaintiff's firm in the letter-heads on the paper upon which all of their letters to Dale were written, in my opinion falls very far short of a disclosure of the fact that the plaintiffs were buying this property for themselves. The very best that can be said for it is that there was no attempt on their part to conceal the fact that a man bearing substantially though not absolutely the same name as the purchaser named in the agreement was a member of their firm. As the learned Judge himself said at page 132 of the appeal book, when the evidence was nearly all in,

> All he knew was that a man named Thomas D. Edgar was the purchaser named in that agreement.

If Dale had noticed this name in the letter-head it might perhaps have occurred to him that a member of the firm might be the purchaser. But instead of there being any evidence in support of the theory that he did see this name in the letter-paper the very opposite conclusion is to be drawn from the evidence. And even if he had seen it, was he to be left to guess that one of his agents was the purchaser simply because of this identity of name. He was entitled to be told and should not have been left to guess. My brother Scott has clearly made his finding as to Dale's knowledge upon the bare fact of Edgar's name appearing in the letter-head. For the reasons which I have given, I think that the inference which he drew from that fact was not properly drawn.

The assumption that the learned Judge makes from Caskey's letter of the 30th of August is not, I think, with great deference, warranted. The letter says:—

> I concluded that the purchaser had decided not to take the lot and to forfeit the deposit of sixty dollars. In that case I cannot see how Edgar is entitled to any commission.

He draws a plain distinction between the purchaser and Edgar and, in my reading of the letter, there is nothing in it

from which it can be said that Caskey knew that the Edgar who bought was the Edgar who made the sale.

The only other fact insisted upon at the argument in support of the contention that the plaintiffs had done their full duty in this respect is that it appears from Dale's evidence that he first met Edgar when he called at the plaintiffs' office for the second set of papers, and we are asked to find from what he said with reference to that visit that he then discovered the identity of that man with the purchaser. I have carefully read this evidence and I can find absolutely nothing in it to justify this contention. There was no pretence that he said that Edgar or anyone else told him that this man was the purchaser. His evidence proves nothing more than that he saw a man named Edgar who was a member of the plaintiffs' firm, a fact of which he must have already been aware from the partnership name. Mr. Ford laid particular stress upon the answers to the concluding questions of his examination of Dale at page 129, but I can see nothing in them which leads me to think that the identity of this Edgar with the purchaser was made known to Dale.

There is no pretence that the plaintiffs ever told either Caskey or Dale that they were the purchasers and we are forced therefore to look to their correspondence to see what they did represent to them. The plain inference from the use of the words "we have buyers," "signed by our party," etc., throughout the plaintiffs' letters is that they were concealing the fact that they were themselves the purchasers, perhaps with no more sinister motive than to secure to themselves the commission which, if they had disclosed the facts, would have been denied them. It is equally plain from a reading of the defendants' letters that they did not realize that they were selling to one of their agents. I have no difficulty whatever in finding as I do that the plaintiffs did not make to the defendants any disclosure whatever of their interest and for this reason I would allow the appeal with costs and dismiss the plaintiffs' action with costs and adjudge that the defendants' counterclaim be given effect to by the removal of the plaintiffs' caveat from the certificate of title with costs.

It is unnecessary for me to consider the question of laches and delay as the plaintiffs' claim is disposed of so far as this Court is concerned upon the other ground.

I think that we should do as we did in *Dunlop* v. *Bolster* (No. 2), 6 D.L.R. 468, 21 W.L.R. 695, namely, order the return to the plaintiffs of the fifty dollars deposit which will be done by crediting that amount upon the costs which the defendants tax under this judgment.

*Appeal allowed.*

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Sept. 6.

## WEBBER v. COPEMAN.

*Saskatchewan Supreme Court, Wetmore, C.J. September 6, 1912.*

1. CONTRACTS (§ II D 4—187*a*)—CONSTRUCTION OF CONTRACT TO CUT, STACK, BALE, HAUL AND LOAD HAY.

One who agrees verbally to cut, stack, bale and haul to the station the hay growing on a piece of land owned by the other party to the agreement, and to load it on the cars as that party shall order, for a stated price per ton, is bound to cut all the hay upon the land which is capable of being cut.

2. CONTRACTS (§ I B—9*a*)—IMPLIED AGREEMENT AS TO TIME IN WHICH PERFORMANCE OF CONTRACT IS TO BE MADE—REASONABLENESS.

Where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do the act within a reasonable time under the circumstances; and, if some unforeseen cause over which he has no control prevents him from performing what he has undertaken within that time, he is responsible for the damage.

[*Ford* v. *Cotesworth*, L.R. 4 Q.B. 127, followed.]

3. CONTRACTS (§ II B—135)—ENTIRETY—LIABILITY FOR PARTIAL PERFORMANCE.

Where one agrees to cut and deliver at a given point all the hay upon a piece of land owned by another for a stated price per ton, the agreement is an entire agreement, but the owner must nevertheless pay for each ton as it is delivered.

[*Johnston* v. *Keenan*, 3 Terr. L.R. 239; and *Taylor* v. *Kinsey*, 4 Terr. L.R. 178, followed.]

4. DAMAGES (§ III P—340)—FAILURE TO DELIVER HAY AGREED TE BE CUT AND DELIVERED—LOSS OF PROFIT—MEASURE OF DAMAGES.

Where one who has agreed to cut and deliver at a given point a certain quantity of hay belonging to another fails to deliver all the hay agreed upon, the owner may recover the profit which he would have made by a sale of the hay not delivered.

Statement

AN action to recover the amount due under an oral agreement entered into between the parties which provided that the plaintiff was to cut, stack, bale and haul to the railway and to load on to cars, as directed, the hay growing upon a particular half section of land owned by the defendants. The defendant counterclaimed for damages for breach of the contract.

Judgment was given for the plaintiff for $230 and costs, and the counterclaim was allowed to the extent of $410 with right of set-off.

*J. F. Frame*, for plaintiff.
*N. R. Craig*, for defendant.

Wetmore, C.J.

WETMORE, C.J.:—There is a conflict in the testimony of the parties to this action as to when the agreement in question in this action was made, and as to what it contained. The agreement was entirely a verbal one. I find that it was made some-

where about the middle of June, 1909, and according to its terms the plaintiff agreed to cut, stack, bale and haul into Drinkwater station the hay growing on a half section of land owned by the defendant and load it on cars there as the defendant ordered it to be done, for which the plaintiff was to be paid $6 a ton. The plaintiff himself testified on his examination for discovery that all hay contracts in that part of the country are supposed to be cut before frozen; and I also find under the evidence that hay is not hurt by frost after it is cut and, I assume, cured. There was no frost to injure the growing hay until about the 17th September. The defendant wrote to the plaintiff before the 1st November that he would require fifty tons of the hay on the 1st November, fifty tons on the 1st December, and the balance at the rate of two or three cars per week. There is no evidence that the plaintiff ever got that letter. But I find that the defendant, before the 1st November, told the plaintiff verbally that he would have to have fifty tons by that date and fifty tons on the 1st December, and the balance at the rate of two or three cars per week, and he also told him that he had contracted for all the hay on that half-section; and the plaintiff testified on his examination for discovery that the defendant told him that he wanted to get some of the hay in November and that he appeared as though he was very anxious to get some of it on the market.

I will now proceed to put my construction on the agreement. There was no express provision that the plaintiff was to cut, etc., all the hay on the half-section. The plaintiff testified in effect, in answer to one question on his examination for discovery, that there was such a provision, but he withdrew or rather qualified it by a subsequent answer. I hold, however, that the effect of the agreement as I have found is that he was to cut, etc., the whole of the hay on the land that was capable of being cut. It never could have been the intention that he could go on and cut just and only what suited him; the agreement bound the plaintiff to cut and have the hay ready for delivery within a reasonable time. In *Ford* v. *Cotesworth*, L.R. 4 Q.B. 127, at p. 133, Blackburn, J., in delivering the judgment of the Court, lays down the following:—

> We agree that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage.

The plaintiff did not comply with the terms of the contract in two respects:

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(1) He did not cut all the hay on this land that was capable of being cut.

(2) He did not have the hay ready for delivery within a reasonable time.

As to not cutting all the hay, the plaintiff excused himself on the ground that the land uncut was too rough for the sweeper. The evidence satisfies me that such was not the case. He also attempted to excuse himself on the ground that the agreement was entered into so late in the season that the frost came before he could get it cut. Seeing that I have found that the agreement was entered into about the middle of June, that contention cannot be supported. But even assuming that the agreement was entered into when he says it was, namely on the 23rd August, according to his evidence in the examination for discovery there was ample time to get the whole of the hay on the land cut before the frost came. The fact is that he was working his own land instead of devoting his attention to the agreement. It was attempted to set up that it was part of the agreement that he was only to work at the defendant's hay when he was at liberty to do so by reason of his not having to attend to the working of his own farm. I find that that was not part of the agreement.

As to his not having the hay ready for delivery within a reasonable time, he ought to have had some of it ready for shipment by the 1st November and the whole of it ready for shipment by the 1st January, he attempts to set up that he had hay ready for delivery whenever the defendant ordered it. As a matter of fact, he did not have the hay he engaged to cut ready for delivery; he had to deliver other hay; and he knew the defendant was anxious to get the hay as far back as November, which was a reasonable time within which to require it. The fact of the business is that he did not up to or at that time have a baler, and could not bale the hay. He had informed the defendant about the time the agreement was made that he had ordered a baler. He swore at the trial that shortly after starting baling he got an order for a car between the 25th and 30th January, 1910. As a matter of fact, he did not get a baler until the 7th February, and as he swore on his examination for discovery he did not commence baling until the middle of that month, I find that this was to a large extent the cause of all the delay in finishing his contract and of the hay being damaged as hereinafter stated. The plaintiff hauled to Drinkwater station, as he alleges, 120 tons of hay under the agreement. This is not contradicted, but at the same time it is not very clear, because he hauled hay of his own to the same station at or about the same time, and he mixed his own hay with that which he cut under the agreement, so that they could not be distinguished. I find, however, that he did haul to that station 120 tons of hay, whether

it was hay he cut for the plaintiff on this land or hay that was taken in substitution therefor by the defendant. Of this, 45 tons were shipped to the defendant. I rather gather from the evidence that he shipped more than that, but 45 tons is the quantity stated in the statement of claim, and, as I understand, was assumed at the trial by each party to be the correct quantity. I must, therefore, be mistaken, and the plaintiff is bound by his pleading. A very large portion of this hay so shipped was shipped before the middle of February, when the plaintiff commenced to bale; in fact, it was shipped before he got his baler; it could not, therefore, have been hay got under the agreement. As, however, the defendant accepted it, I must assume that he took it in substitution to that extent for hay got under the agreement. I hold that the defendant was, under the agreement, liable to pay for the hay ton by ton as it was delivered, and by that I mean shipped, and that notwithstanding I have found in effect that the agreement was an entire agreement in that the plaintiff agreed to cut all the hay that was capable of being cut on the land in question. The agreement was to pay $6 a ton.

In *Johnston* v. *Keenan*, 3 Terr. L.R. 239, and *Taylor* v. *Kinsey*, 4 Terr. L.R. 178, I held that upon a servant hiring for a specified term at a stated amount per month as wages, such wages were payable at the end of each month while he remained in the service, although he was not justified in leaving unless, as in *Owen* v. *James*, 4 Terr. L.R. 174, there was an agreement that such wages should not be paid until the end of the term of engagement. I am unable to distinguish this case in principle from *Johnston* v. *Keenan*, 3 Terr. L.R. 239, and *Taylor* v. *Kinsey*, 4 Terr. L.R. 178. I, therefore, allow the plaintiff on his claim for 45 tons of hay at $6 a ton, which amounts to $270, less $40 paid to Ostrander, leaving a balance of $230. I cannot allow him the price for the balance of the hay he hauled, for he never delivered it; nor can I allow him damages as claimed in par. (*b*), sub-par. (2) of his prayer for relief, because he was in fault in not having the hay ready for shipment according to the agreement. I may state here that I find the plaintiff's testimony and conduct very unsatisfactory. His version of the agreement is in many respects unreasonable and unlikely. He performed or attempted to perform his part of the agreement in a very casual and indifferent manner, and some portions of his testimony are in important particulars inconsistent with other portions of it.

The 75 tons, being the remainder of the 120 tons, were never shipped. The plaintiff states that this was caused by two snow storms, one on 15th May, 1910, and the other on the 30th May of that year, which entirely ruined the hay and rendered it unfit for shipment; it was rendered unmerchantable, so much so that it was burned by order of the town council of Drinkwater. I

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find, as a matter of fact, that the hay not having been baled until the middle of February, when owing to the general inclemency of the weather at that season of the year, when snow was liable to get into the bales, snow did get in and that had more to do in affecting the quality of the hay than the storms in May did. I find, moreover, that if the plaintiff had carried out his agreement according to its terms, that is, had the hay ready for shipment within a reasonable time, the hay would have been taken away from Drinkwater a long time before those snow storms took place, and consequently the damage was the consequence of the plaintiff's default. Moreover, the plaintiff, not having delivered the hay according to his agreement, it was at his risk. I also find that the bales might have been so piled that the storms in question would have caused very little damage. I am inclined to the opinion that the plaintiff is not including in the 45 tons any hay shipped after April 20th, 1910. The shipment of 29th July set out in exhibit A is evidently a mistake; it should be 29th January. I find that at least 250 tons of hay ought to have been cut on the land and stacked, baled, and hauled in to Drinkwater according to the agreement. I credit the 45 tons as shipped by the plaintiff on account of that agreement, which leaves a balance of 205 tons altogether either not got and delivered under the contract or spoiled by the carelessness or bad work of the plaintiff or destroyed while at his risk. I find, averaging it all round, that the defendant lost a profit of $2 a ton, or $410, which amount I award him as damages under his counterclaim.

There will be judgment for the plaintiff on the claim for $230 and costs, the taxing officer to determine whether Rule 721 of the Rules of Court is applicable. There will be judgment for the defendant on the counterclaim for $410 and costs. One judgment to be set off against the other, and the party in whose favour the balance is to have execution therefor.

*Judgment accordingly.*

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Oct. 25.

## BUCKNALL v. BRITISH CANADIAN POWER CO.

**(Decision No. 2.)**

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. October 25, 1912.*

1. DEEDS (§ II C—30)—CONSTRUCTION—LEASE FROM THE CROWN—REPUGNANCY—INTENTION.

Where a deed by way of lease from the Crown in its operative clause demises and leases to the defendant a specific tract as a water-power location, and in the same clause expressly grants to him the right to overflow a larger area (including the smaller tract) of Crown lands, and where a later clause of the same instrument assumes to

limit the overflow privilege to the *smaller* tract; upon a construction of the entire instrument, it will be read as leasing for the purpose of overflowing the *larger* area, in order to give effect to every clause and to avoid a repugnancy.

[*Bucknall* v. *British Canadian Power Co.* (No. 1), 5 D.L.R. 574, reversed on appeal.]

2. MINES AND MINERALS (§ I C—21)—LICENSEE—TENANT AT WILL—MINING LOCATION—ADVERSE GRANT OF CROWN—LOCATOR'S RIGHTS.

A tenant at will under the Crown holding an unpatented mining claim under the Mining Act of Ontario, 8 Edw. VII. ch. 21, has no status to attack an express adverse grant of the Crown, nor to set up a claim for damages against the adverse grantee.

[See *Re Clarkson and Wishart* (1912), 6 D.L.R. 579, 27 O.L.R. 70, 3 O.W.N. 1645, analyzing and passing upon licensee's rights to each stage up to patent.]

Statement

APPEAL by the defendants from the judgment of Middleton, J., *Bucknall* v. *British Canadian Power Co.*, 5 D.L.R. 574, 3 O.W.N. 1138.

The appeal was allowed.

*J. Bicknell*, K.C., and *J. Lorne McDougall*, for the defendants.

*R. McKay*, K.C., for the plaintiffs.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—Most of the material facts are mentioned in my learned brother's written reasons for judgment. It may be well to supplement his statement in one or two particulars.

The lease to the defendants read: "demise and lease . . . all and singular that certain parcel or tract of land and land covered by water . . . more particularly described as follows and designated as water power location R.L. 450 composed of land and land under the water." Here follows a description, and the document proceeds: "together with the right to hold and maintain the waters in the Bass Lakes and the Mabitchewan River and tributaries to a height of not more than forty feet above the high water mark at the ordinary stage of the water in First Bass Lake . . . and the right to overflow any Crown lands along the shore of said Mabitchewan River and its lake expansions and tributaries which may be overflowed by the raising and maintaing of the water to the said height."

Clause 13 reads: "13. The said lessees shall not have the power or authority under these presents to overflow or cause to be overflowed any land or lands other than those hereby demised: and it is distinctly understood and agreed that, should any lands other than those hereby demised be overflowed or damaged, the Crown or the Government of Ontario shall in no wise be responsible for damage done thereto to the owner or owners thereof."

It is admitted that to raise the water to the 40 ft. level would necessitate an overflow of the plaintiffs' claims to a depth of 10 feet.

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It is argued that the "lands . . . hereby demised" mentioned in cl. 13 are simply the "water power location R.L. 450" specifically mentioned and described in the operative part of the deed: and effect was given to this in the trial Court. But in the operative part of the deed an express right is given to overflow Crown lands; and, if the "lands hereby demised" were only the location, there would be a repugnancy. It is, of course, necessary to read the deed so as to give effect to every clause—and that can be done by considering the deed as leasing for the purpose of overflowing the Crown lands which would be overflowed along the river and lake when the water was raised to the 40 feet level—otherwise this part of the express grant would be rendered wholly nugatory.

The next question is as to the effect of this conveyance on the rights of the plaintiffs.

We had recently, in *Re Clarkson and Wishart* (1912), 6 D.L.R. 579, 27 O.L.R. 70, 3 O.W.N. 1645, to consider the position of the owner of an unpatented mining claim. The matter was considered from a somewhat different point of view in that case, and it may be that some of the conclusions arrived at were not necessary for the judgment. I have, however, reconsidered the question with the assistance of the very able arguments advanced in this case, and I am unable to depart from the opinion expressed in that case. The result is, that the plaintiffs had no rights as against the Crown, and the act of the Crown was not ultra vires. The Crown had the right to give and did give the defendants the right to overflow the claims as they have done.

I am of opinion that the appeal should be allowed with costs and the action dismissed with costs.

*Appeal allowed.*

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H. C. J.
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Sept. 24.

## DICK & SONS v. STANDARD UNDERGROUND CABLE CO.

*Ontario High Court, Boyd, C., in Chambers. September 24, 1912.*

1. STAY OF PROCEEDINGS (§ I—5)—MECHANICS' LIEN PROCEDURE—CONTRACTOR AND OWNER—CLAIM FOR DAMAGES FOR BREACH OF CONTRACT—JURISDICTION OF OFFICER.

Under section 37 of the Mechanics' and Wage Earners' Lien Act, 10 Edw. VII. (Ont.) ch. 69, all things necessary to work out mechanics' liens, *quoad* the land, are within the jurisdiction of the officer hearing the mechanics' lien actions; but such officer has no power, merely because there are mechanics' lien actions already pending against both the contractor and the owner, to stay proceedings in an action by the contractor against the owner for damages for breach of an alleged agreement to supply materials to carry on a construction contract made between them, in which action the contractor is not claiming a lien.

Statement

APPEAL by the plaintiffs from an order of a Local Judge perpetually staying this action, on the ground that the matters in

controversy therein were before the Court in a proceeding to enforce a mechanics' lien.

The order staying proceeding was vacated.

*E. C. Cattanach*, for the plaintiffs.
*G. H. Levy*, for the defendants.

BOYD, C.:—The plaintiffs claim a large amount of damages, $100,000, against the defendants for breach of contract in not supplying materials to carry on a construction contract made by the plaintiffs with the owners of the land, the defendants. This action was launched after mechanics' lien proceedings had been begun by an alleged lien-holder, on behalf of himself and all others, against the contractors and the owners. To determine what should be paid for liens, it may be necessary to consider the rights of the contractors and owners inter se; but the contractors do not propose to claim any lien on the property, and refuse to bring in any such claim in the mechanics' lien proceedings. They are claiming a much larger sum than the value of the land, by way of damages against the owners; and their claim, if successful, will not interfere with the right of those having liens to be paid under the Act. The plaintiffs do not propose to make any claim under the Act; and I do not think the statute is of sufficient stringency to enable the judicial officer charged with the mechanics' lien contest to bar the plaintiffs in their independent action and stay all proceedings therein perpetually. All things necessary to work out the liens quoad the land are within his jurisdiction, but I do not think a wider scope should be given to the provisions of the Act 10 Edw. VII. ch. 69, sec. 37.

I vacate the order to stay procedings, with all costs of motion and appeal to be in the cause to the plaintiffs.

*Appeal allowed.*

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## CHINIQUY v. BÉGIN.



*Quebec Superior Court. Trial before Greenshields, J. June 21, 1912.*

1. LIBEL AND SLANDER (§ II B—18)—PUBLICATION OF STATEMENT THAT PARENTS WERE NOT LEGALLY MARRIED—CHARGE OF BASTARDY.

A statement published in a newspaper to the effect that a deceased man and woman were not legally married and that the woman was the concubine of the man is a libel under Quebec law upon the child or children born of such union for which they have an action at law to recover damages from the writer and publishers of the article.

2. EVIDENCE (§ XII F—952)—SUFFICIENCY OF PROOF OF MARRIAGE—CERTIFICATE OF FOREIGN COUNTY COURT CLERK.

A certificate under the seal of the clerk of a County Court of a foreign state certifying to the fact that two persons were joined in matrimony is *primâ facie* proof of marriage in accordance with the law

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of such foreign state, and it is immaterial whether or not that marriage is considered ecclesiastically valid in view of the rules and regulations of a religious body to which either of them may have belonged.

3. EVIDENCE (§ XII F—952)—SUFFICIENCY OF PROOF OF MARRIAGE—BAPTISMAL REGISTER—LEGITIMACY OF CHILDREN.

An extract from the baptismal register of a Presbyterian church in a foreign country certifying to the baptism of a child born of the marriage of two persons and signed by the officiating pastor is proof that such clergyman who signed such certificate is the custodian of records and authorized to issue certificates of baptism; and such proof coupled with that of an uninterrupted public status of legitimacy is abundant evidence of filiation.

4. EVIDENCE (§ II M—363)—LIBEL.—PLEA OF THE PUBLIC INTEREST.

Under a plea of truth and public interest brought to an action for libel, the onus of proof lies on the defendant.

5. LIBEL AND SLANDER (§ III C—105)—JUSTIFICATION—MATTERS OF PUBLIC INTEREST—ATTACK ON PRIVATE CHARACTER.

It is no justification to plead to an action for libel that the deceased was a Roman Catholic priest and that according to the Roman Catholic religion he could never marry and any marriage contracted by him was null and void; attacks on the deceased's theories and opinions might be matters of public interest, but statements as to his private life are not.

6. LIBEL AND SLANDER (§ III C—111)—JUSTIFICATION—BELIEF IN TRUTH—IMMATERIALITY OF MOTIVE OR INTENTION.

Inasmuch as the rule of law is that the motive or intention of the writer is immaterial to the right of action, the fact that the writer wrote as a Roman Catholic addressing himself to Roman Catholic readers is not a ground of justification for the publication of an absolute statement that two persons were not legally married when the fact was merely that their marriage was not recognized as valid by the Roman Catholic church.

7. LIBEL AND SLANDER (§ III C—106)—CHARGING INVALIDITY OF MARRIAGE OF PERSON DECEASED—LACK OF KNOWLEDGE THAT THE DECEASED LIBELLED HAD CHILDREN SURVIVING.

The fact that the writer did not know that the deceased he has libelled had left children still living is an aggravation and not a mitigation of a libel charging that the deceased had not been legally married.

8. LIBEL AND SLANDER (§ III C—108)—PLEA OF JUSTIFICATION AS EVIDENCE OF MALICE—ABANDONMENT—AGGRAVATION OF DAMAGES.

Pleading justification is not, by itself, evidence of malice in a libel action but it will tend to aggravate the damages if the defendant either abandons the plea at the trial or fails to prove it.

[See also Odgers on Libel and Slander, 5th ed., 192*a*, 393; *Patterson* v. *Plaindealer Co.*, 2 A.L.R. 29.]

Statement

AN action for damages for the publication of an alleged libel, in a newspaper owned by the defendant, charging that the parents of the plaintiff had not been legally married and that the plaintiff's mother was merely her father's concubine.

Judgment was given for the plaintiff.

*Desaulniers & Vallée*, for the plaintiff.
*Lamothe, Saint-Jacques, & Lamothe*, for the defendant.

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GREENSHIELDS, J.:—The plaintiff, the wife of Joseph L. Morin, one of the professors of McGill University, complains of an article published on the 18th day of November, 1911, in the issue of a weekly newspaper called "La Croix," which is entitled, "On appelle un chat, un chat, et Chiniquy un apostat," and asks, by her action, a condemnation in damages against the defendant, the proprietor of the paper. The article is printed in the French language, and is as follows:—

> Quand on est catholique sans épithète, on évite, en écrivant, de se servir de termes capables de fausser, tant soit peu, les idées sur la doctrine de l'Eglise. La Vérité a relevé la semaine dernière les expressions malsonnantes dont un journal catholique de Montréal s'est servi pour annoncer la mort d'Euphémie Allard, que l'apostat Chiniquy avait prise pour compagne et décorée du titre d'épouse. Aux remarques de la Vérité, nous allons ajouter quelques mots.
>
> Chiniquy tout court, tel est le nom qu'on doit donner à ce malheureux apostat. Il est prêtre, son caractère est ineffaçable pour son malheur. Mais quand on veut parler de lui, il faut dire l'ex-abbé Chiniquy; et si l'on s'aventure de parler de la malheureuse personne qu'il a voulu associer à son apostasie, il faut le faire de façon à ne pas donner à entendre qu'elle était sa femme. Chiniquy, apostat, ne pouvait pas plus contracter un mariage, que n'importe quel prêtre ou religieux, lié par les vœux solennels.
>
> Par conséquent, Euphémie Allard n'était pour Chiniquy qu'une concubine.

The plaintiff alleges, in brief, in support: that she is the daughter of the late Rev. Charles Chiniquy and Euphémie Allard, referred to in the article, who were united in marriage, according to the laws of the State of Illinois, one of the United States of America, on the 13th day of January, 1864, by the Rev. Mr. Desroches, pastor of a Protestant church, at St. Anne, in the State of Illinois; that the defendant is the proprietor and publisher of the weekly newspaper, "La Croix," and did, on the 18th day of November, in the issue of the paper of that day, print and cause to be published the article above set forth; that previous to the 3rd day of August, 1858, Charles Chiniquy was a member of the communion of the Roman Catholic church, and was a priest in holy orders of that body; that on the last-mentioned date, he renounced, formally and solemnly, his adherence to, and membership in, the said church; that the article in question was written, printed and published, with a view of insulting, injuring and defaming the memory of the father and mother of the plaintiff, and did insult, injure and defame their memory. The plaintiff further alleges that the article clearly means, intends, and inferentially states, that she is the illegitimate daughter of Charles Chiniquy and Euphémie Allard, the whole to her great humiliation and damage, which damage she fixes at the sum of $10,000, and for which sum she prays judgment in her favour.

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The defendant's plea to the action, in effect, is as follows: He says to the plaintiff—I am entirely ignorant whether you are the legitimate daughter of the marriage of the late Charles Chiniquy and the late Euphémie Allard; I am entirely ignorant, even, as to whether the late Charles Chiniquy left any children; I am entirely ignorant whether Charles Chiniquy and Euphémie Allard were, on the 3rd day of January, 1864, married according to the laws of the State of Illinois; I am entirely ignorant whether you are the legitimate wife of Joseph L. Morin, professor in McGill University. Then follows the admission, that he is the proprietor and publisher of the newspaper, "La Croix," but he denies that it has a large circulation in the Province of Quebec and elsewhere. With regard to the article itself, the defendant is contented with saying that it speaks for itself. He reaffirms his ignorance as to whether the Chiniquy referred to in the article he published, is the legitimate father of the plaintiff. He admits that the late Charles Chiniquy was born in the catholic religion; that he took orders and became a priest, and made solemn vows of perpetual chastity and perpetual obedience to that church; but denies that he solemnly and officially renounced his adherence to the church, on the 3rd day of August, 1858.

Again, the defendant states his entire ignorance as to whether Euphémie Allard, referred to in the article, was the legitimate mother of the plaintiff. Then follows a statement, by way of defence, that the interpretation placed upon the article by the plaintiff, is erroneous; that he never wished or intended to make allusion therein, in any way, to the plaintiff, of whose existence, even, he was entirely ignorant; he denies formally, that the article did, or could, mean, or was intended to mean, that the plaintiff was the illegitimate child of Charles Chiniquy and Euphémie Allard; denies that the article, in its words and expressions, is calculated to insult and defame the memory of the father and mother of the plaintiff; he denies that the article, either by inference or direct statement, charges that the plaintiff was illegitimate, or that Charles Chiniquy and Euphémie Allard had cohabited without marriage; he denies that the article, in question, is of a nature to cause, or did cause to the plaintiff any damage, or wounded her in her honour and sensibilities, or wounded the honour or blackened the memory of her parents, and denies that the article could, or would, expose the plaintiff to the execration and contempt of her fellow citizens. Then follows a denial of any right of action to the plaintiff, and a denial of relief to her under the circumstances.

Proceeding, then, by way of affirmation, the defendant alleges, that Charles Chiniquy, in his lifetime, was a devoted and warm exponent of certain ideas and views; that he attacked

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with violence and virulence the Roman Catholic Church of which he was a priest; ridiculed the beliefs of its members, in public audiences, and by his writings; in his latter years, he made violent attacks on the dogmas, doctrines and the authority of the Roman Catholic Church; that his views, as set forth in his writings, became, were, and still are, the fair subject of public criticism, and were publicly criticised, and he, the defendant, as editor and proprietor of a catholic paper, had the right to take part in such discussion and criticism; he had the right to criticise the man himself, the holder of the ideas, and the writer of the articles, and, says the defendant, my criticism and statements were true, and were made in the public interest. Then he adds, that Charles Chiniquy, as a priest of the Church of Rome, was incapable of contracting a valid marriage, particularly owing to his solemn vows of perpetual chastity, made to his God and his Creator. The quality of priest, says he—which never could be abandoned—is an absolute impediment to marriage, according to the law which has always prevailed and still governs this country, according to which a marriage has always been, and still is a religious act.

Qualifying his paper, then, the defendant asserts, that it is a catholic paper, as is shewn by the article itself, and by the paper's title. It is a paper, says he, that combats all ideas opposed to the Roman Catholic belief—on the question of marriage and upon all other questions. Then, adds he, it is from this point of view, in particular, that the article was written and published. The article is in conformity with the ideas of the readers of the paper, and is in conformity with the truth, and was written, printed and published in good faith and in the public interest; that the article, and the expressions used therein, the general tone thereof, and the character of the paper in which it appears, clearly shew that the article had for its object, to convey, to its readers, the fact that the marriage of Charles Chiniquy, contracted outside this country, was a marriage tainted with irregularity from a Roman Catholic point of view, and from the point of view of the laws governing this province. And finally, and in conclusion, the defendant adds: that the plaintiff, suing alone, has no right to complain of the article, has no right to claim damages; her prayer is unfounded in law and in fact, irregular, illegal, and he concludes for the dismissal of her action.

By her answer, the plaintiff puts in issue the truth of the allegations of fact affirmatively alleged in the plea, and alleges that, even if they are true, they constitute no answer in law to the plaintiff's action. Abstraction made of technical and legal phraseology, the clear cut issues between the parties, may be summarized as follows:—

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(*a*) The plaintiff asserts her right of action; alleges the responsibility of the defendant, and states her damages;

(*b*) The defendant denies the right of action, justifies the publication of the article, for the reasons given, and, as a consequence, confidently states, that no condemnation in damages can in law be pronounced against him.

Before entering upon the consideration of the article itself, and of the defendant's affirmative defence, there are two preliminary questions to be disposed of: firstly, whether legal proof of the status or quality of the plaintiff has been made, and, secondly, her status and quality being established, whether, if the article is found defamatory and libellous, the law gives her relief by way of civil action.

Dealing with the first: I have before me a certificate under the seal of the clerk of the County Court of the county of Kankakee, in the State of Illinois, certifying that on the 10th day of January, A.D. 1864, the Rev. Charles Chiniquy and Miss Euphémie Allard were joined in matrimony, by Rev. Desroches, Christian minister. I have before me the proof, that from that date, Charles Chiniquy and Euphémie Allard lived together, publicly, as man and wife. I take the proof as made by the document referred to, and oral testimony given, as, at least, *primâ facie* proof of the marriage of these two persons, according to the law of the State of Illinois. Proof of a general character was made, that the validity of that marriage had been questioned by advocates and exponents of the doctrines of the Roman Catholic Church. By no competent authority, either of a Court or legislature, has that union been declared void or invalid. I am not called upon to decide, nor do I determine, whether that marriage was valid or invalid. For the purposes of my judgment in the present case, it is sufficiently, abundantly and legally established, that Rev. Charles Chiniquy and Euphémie Allard were united in matrimony, and lived as man and wife, until the union was severed by the death of the husband. No proof is before me as to what was the civil law of the State of Illinois at the time of their union.

Says the defendant, from the view point of the Roman Catholic Church, that marriage is invalid. I declare that for the purposes of my judgment, it is immaterial whether such be a correct statement of the doctrines or dogmas of the Catholic Church, or not. In matters purely civil, as distinguished from matters purely religious, if I may use such an expression, no church, be it the great and powerful Roman Catholic Church, or the equally great and powerful Anglican Catholic Church, possesses any authority to override the civil law. Such authority as the church has in civil matters, is given to it by the law of the land, and is subservient to and in no sense dominates the law. I hold, therefore, that so far as it is necessary, the plain-

tiff has legally established the matrimonial union of Charles Chiniquy and Euphémie Allard, and leaving the defendant to discuss with those who wish to discuss with him the doctrines of the Roman Catholic Church, I proceed to consider the proof of the plaintiff's filiation.

Again, I have before me an extract of the baptismal register of the First English Presbyterian Church of St. Anne, Illinois. It certifies, under the baptismal No. 26 of the year 1868, that, on the 18th day of October, there was baptised, Rébecca, born the 18th day of July, of the marriage of Charles Chiniquy and Euphémie Chiniquy. That extract or certificate is signed by the pastor of the First English Presbyterian Church of St. Anne. If the law of the State of Illinois is the same as our law, and no proof to the contrary being offered, it is presumed the same, says the defendant's counsel, then, the clergyman signing the certificate is the custodian of the records and authorized to issue certificates of baptism and the same should be accepted. The identification of the parties therein mentioned is fully established. The plaintiff lived as the recognized legitimate daughter, issue of the marriage of Rev. Charles Chiniquy and Euphémie Allard; to her greater or lesser world of acquaintances and friends, she was always known as such. Until the publication of the article complained of, to use the words of our code, she enjoyed the uninterrupted possession of the status of a legitimate daughter, and our own code is kinder far to the plaintiff, than is the defendant. Art. 228 says, the uninterrupted possession of a status of legitimacy is sufficient, even in the absence of an act establishing such. On this point again, I rule against the defendant, and hold that the filiation of the plaintiff, as by her alleged, is legally and abundantly established.

Arriving at this conclusion, there remains to be given an answer to the question, whether, under the law of this province, an action is given to the plaintiff for the causes, and in the manner and form by her alleged and set forth. Without hesitation, I answer in the affirmative. That the law of this province gives to the living descendant a right of action in damages for defamatory libel, without justification, on the memory of a dead ascendant, there can be no doubt. To make my statement entirely in accord with the law and jurisprudence of this province, and entirely in accord with the law and jurisprudence of France, well established and unvaried, I should only add, that words spoken, in the case of slander, or written and published, in the case of libel, calculated, by reference to the dead, to injure, defame, humiliate and damage the living descendant, such living descendant, suing alone, is given relief. This doctrine is clearly laid down, and forcibly upheld in the following

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cases adjudged in this province: *Huot* v. *Nouiseux*, 2 Que. Q.B. 521; *Roy* v. *Turgeon*, 12 Q.L.R. 186.

As to the law of France, I content myself with one citation:

> L'injure envers les morts peut donc être poursuivie, mais seulement sur la plainte d'un ou plusieurs des héritiers directement et personellement atteints par cette injure dans leur honneur ou leur considération.

(Fuzier-Herman, Répertoire, vol. 24, p. 377, no. 190.)

Under the common law of England, criminal prosecution lies by way of indictment, against the publisher of defamatory words upon the dead, and is punishable by fine and imprisonment. By our law, the plaintiff's action is undoubtedly given to her. Indeed, at the argument, eminent counsel for the defendant did not seriously contend the contrary. Having thus expressed my opinion as to the status of the plaintiff and her right to sue, there remains to decide, whether the article is defamatory and libellous, and whether the defendant has justified its publication. That the article in itself, on its face, is, and the words used in themselves, are, defamatory and libellous, I have no doubt. I shall have a further word to say on this in a moment, but consider it sufficient here, to state, that, in unmistakable terms, the article charges Charles Chiniquy and Euphémie Allard with having lived and cohabited as man and wife, without marriage. In unmistakable terms, it charges Euphémie Allard with being his concubine, and, by irresistible inference, it charges the illegitimacy of the plaintiff.

But the defendant pleads justification: a plea which, if well founded in fact and in law, is a complete answer to the action. He finds justification in the statement, that the article is true, and that it was published in good faith, and the public interest. Has the defendant proved the truth of the article? I seek in vain in the record before me, for an answer in the affirmative, and with equal futility I seek an affirmative answer in any law, statutory or common of this province. Pleading the truth of his article, it was for the defendant to prove the same. I quote the words of a well-known writer on the subject of Libel and Slander:—

> The truth of any defamatory words, if pleaded, is a complete defence to any action of libel or slander. The onus, however, of proving that the words are true, lies on the defendant. The falsehood of all defamatory words is presumed in the plaintiff's favour, and he need give no evidence to shew their falsity.

Realizing that to a plea of truth, in a defamatory attack on private individuals, the public interest must be pleaded, the defendant adds:—the article was written and published in the public interest.—I had, says the defendant, the right to criticise and discuss the public man:—I, as the proprietor and

publisher of a Catholic paper, was entitled to take part in adverse criticism of the acts, writing and conduct of the public man, Charles Chiniquy, and had a right to criticise even the man himself. Public interest is a mixed question of law and fact, and here, it is proper to make the briefest possible statement of the facts as they appear in the record before me. Charles Chiniquy was born of parents professing belief in, and adherence to, the Roman Catholic Church. Arriving at such age as he could make a choice, he yielded his adherence to that faith; in due time, and presumably, according to the forms and dogmas of the Roman Catholic Church, he became a priest in holy orders; he officiated as such. At a subsequent date, for reasons which are of no interest in the present case, he utterly and entirely renounced his adherence to the faith and to the church of his childhood and early manhood. Alleges the plaintiff: "He solemnly and formally renounced his belief in, and adherence to, the doctrines of the church."

It was urged by the defendant's learned counsel, that such renunciation was not properly and legally established. The fact is abundantly proved. If the renunciation, by Charles Chiniquy, of his belief in, and adherence to, the faith of the Roman Catholic Church, lacks proof by the plaintiff, as to its form, that proof is overwhelmingly supplied by the established fact that the Roman Catholic Church did, on a certain date, pronounce and issue, against Charles Chiniquy, its decree of excommunication. By excommunication, the authority and power to do which I freely concede, Chiniquy was put beyond the pale of the Church; was excluded from its sacraments, and had no voice in its administration during his life, and when dying, was denied its consolations. If his renunciation failed in form, most effectively the church implemented his incomplete act. Five years, or thereabouts, after such renunciation and excommunication, he decorated (to use the words of the article) Euphémie Allard with the title of wife. Before that time, he had commenced a polemic against the Roman Catholic Church, by word, by pen, in private, and in public. In bitter words, verging on violence and virulence, approaching even fanaticism, he attacked the dogmas, doctrines, beliefs and system of the Catholic Church. Extravagant he may have been in his statements; in his opposition, he was consistent and persistent to the end of his life. He became and was an openly avowed enemy and opponent of the Church, in the communion of which he had at one time held high office. He became the subject of bitter attack by the upholders of the Church he had forsaken, and which had substantially forsaken him. Books were written by him; sermons were preached by him—all directed against the teachings and doctrines of the Roman Catholic Church, and

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then, he died, and he died thirteen years before the publication of the article in question. All this time, and during all these years, he lived with Euphémie Allard, as man and wife, and the plaintiff possessed the status of a legitimate child.

But again, says the defendant, I had the right to criticise and discuss the public man, the man in the public eye. The right of the defendant and of his paper, to refute, criticise and condemn the teachings of the late Charles Chiniquy must be conceded, but that does not involve the right of the defendant or his paper to besmirch, defame and villify his memory by gratuitous statements, alleged to be facts, concerning his private life. An able writer on the subject, whose words clearly state the law, says criticism

> deals only with such things as invite public comment. It does not follow a public man into his private life, or pry into his domestic concerns. Criticism never attacks the individual, but only his work. Such work may be either the policy of a government, or speech, or action of a member of parliament, a public entertainment, a book published, or a picture exhibited. In every case, the attack is on the man's acts or some *thing* and not upon the man himself. A true critic never indulges in personalities, or recklessly imputes dishonourable motives, but confines himself to the merits of the subject-matter before him. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object, beyond the fair discussion of matters of public interest, and their judicious guidance of the public taste. He will carefully examine production before him, and then honestly and fearlessly state his true opinion of it.

To quote the words of a distinguished jurist of our own province, the late Sir Francis Johnson:—

> Free discussion does not include falsehood to the prejudice of another, and liberty does not imply groundless insult.

On what possible ground of public interest can the article be justified? Its appearance in the defendant's paper followed shortly after the death of Euphémie Allard. She was, in no sense, in the public eye. Her private life is befouled and besmirched. Surely, the fact of her death did not provoke an attack upon her private life. But, again, says the defendant—my paper is a catholic paper; the readers of my paper are Roman Catholics, and I want them, as Roman Catholics, to know that, in my opinion, Euphémie Allard was the concubine of Charles Chiniquy. Says the defendant again, in justification—lest the readers of my paper should be ignorant of the fact, I wanted them to understand, and well understand, a fact about the private life of this dead woman—because I am a member of the Roman Catholic Church, and because my paper is, above all things, a Roman Catholic paper, I claim that right. And just because the defendant is Roman Catholic, and just because his paper is a Roman Catholic paper; just as if the defendant were

a member of the Anglican communion, and just as forcibly as if his paper could be called an Anglican paper, he cannot claim that right. No man, and no paper, be it Presbyterian, Anglican, Methodist or Roman Catholic, has the right to say in public print, in utter disregard of the civil law, and even in ignorance of the law under which the marriage took place, and concerning a private individual:—

> According to the dogmas, doctrines and teachings of my church, you are a concubine, and your offspring are bastards.

I trust the defendant stands alone, among the members of his Church, in the assertion of this right. However that may be, he has no right to put his own interpretation on the article he has published. But again, says the defendant, I was speaking only as a Roman Catholic, and I insist that my interpretation be given to the article I have published. And again I answer by quotation from high authority:—

> As a rule, unless the occasion be privileged, the motive or intention of the speaker or writer is immaterial to the right of action. The Court looks only at the words employed and their effect on the plaintiff's reputation.

But the defendant urges and seeks comfort and benefit from the statement, "Once a Roman Catholic, always a Roman Catholic." Whether the defendant has made a correct statement of the doctrines of his Church, I am on this point not in a position to say; all I can say is, that I find no sanction for it in the law of our land. As a matter of internal administration, it may exist, and for that purpose it may be useful. Further than that, it does not and cannot go. If union with the Church of Rome creates a contractual relationship in law, that relation may be subject to all the penalties of a broken contract. Excommunication, with all its present and future consequences, would probably be the penalty.

To sum up the whole matter, so far as I am concerned, and that there may be no uncertainty as to my holding, without hesitation, and with all the emphasis and force that words can lend or give to the expression of a firm conviction, I hold the article published by the defendant in his paper on the 18th of November, 1911, to be grossly defamatory, libellous to the memory of Charles Chiniquy and Euphémie Allard. In like manner, I declare it to be insulting, humiliating and damaging, in the extreme, to their daughter, the present plaintiff. With like lack of hesitation, and with equal force and emphasis, I pronounce the article to have been published without excuse or justification, either in law or in fact. On the contrary, I declare it to have been published with a malicious and reckless disregard of the most sacred feelings that find their lodgment in the human breast.

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Under the Judicature Act in force in this province, occupying as I do the dual capacity of Judge and jury, I have to decide questions of law, to find on questions of fact, and assess damages. My opinion on the law has been given; my finding of fact is now of record; there remains only the assessment of damages. The defendant in his plea boldly states:—

> I never knew of the existence of the plaintiff: I never knew, even, that Charles Chiniquy, or his wife, left behind them any offspring: I never knew when or where Charles Chiniquy was married, or pretended to have been married.

Testifying on his own behalf, he unconcernedly informed the Court that he did not know what he would have done, if he had known, at the time the article was published, that the plaintiff was the daughter of Euphémie Allard.

In my opinion, this is an aggravation instead of a mitigation of his offence. Before he branded the dead as the maintainer of a concubine, and the other as the maintained concubine of the man with whom she had lived as wife, he should have made some enquiries to ascertain if there were any to whom the memory of the deceased was dear, and who would suffer pain and anguish by reason of his uncalled for onslaught on their memory. Is it too much to say he should have well ascertained if any there were, who, by irresistible inference, would be branded as bastards? Further aggravating his offence, he pleads—"It is true," and that without proof offered. Again I quote from high authority:—

> Placing justification on the record, is not, by itself, evidence of malice on the part of the defendant, but it will certainly tend to aggravate the damages, if the defendant either abandons the plea at the trial, or fails to prove it. A plea of justification is always construed strictly against the party pleading it.

The defendant persisted in his libel by his plea, and persisted even to the last word that fell from his lips as he stepped from the witness-box. I hasten to pay tribute to the frankness, fairness and the courtesy of the eminent counsel who represented the defendant's interests at the trial; but I have only words of condemnation to express my views as to the attitude assumed by the defendant himself. By the article, an irresistible inference and deduction is forced upon the believing reader, that the plaintiff is without a name.

In assessing the damages, I take into consideration the gravity of the charge made. I take into consideration the high position occupied by the plaintiff as the wife of Professor Morin; I take into consideration the fact that spoken words may be forgotten, but, when written, they remain. In seeking a motive for the publication of the article, I have not forgotten the words and expressions used and the attitude assumed by the defendant

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before this Court. I assess the damages at the sum of $3,000. I dismiss the defendant's plea, as absolutely unfounded in law and in fact. I maintain the prayer of the plaintiff. I condemn the defendant to pay to the plaintiff the sum of $3,000, with legal interest from this day. As to the prayer of the plaintiff for the imprisonment of the defendant, in default of payment, I am not called upon, nor can I adjudicate thereon. I reserve that for further adjudication at the proper time and place.

*Judgment for plaintiff.*

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**BUTLER v. MECHANICAL EQUIPMENT CO. of Canada Ltd.; DOMINION IRON AND STEEL CO. v. MECHANICAL EQUIPMENT CO. of Canada Ltd.**

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*Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.*

1. CONTRACTS (§ D 4—64)—ACCEPTANCE—CONTRACT PROVED BY CORRESPONDENCE—PLACE WHERE LETTER OF ACCEPTANCE IS POSTED.

Contracts by letter correspondence are only completed where there is absolute agreement between the parties as to the object, price and conditions of the contract, and the place where the contract is completed is the place where the letter of actual acceptance is posted irrespective of whatever offers and negotiations may have preceded it.

[See also *Magann* v. *Auger*, 31 Can. S.C.R. 186.]

Statement

APPEALS from the judgments of the Superior Court at Montreal, Laurendeau, J., May 4th, 1912, dismissing with costs the declinatory exceptions of the defendants, appellants.

The appeals were dismissed.

The judgment appealed from is as follows:—

Laurendeau, J.

LAURENDEAU, J. (translated):—The plaintiff claims from the defendants the sum of $13,000, the price of two "Farrow Automatic Rail Spike Machines" which it manufactured for the defendants. In virtue of the contract entered into between the parties, it manufactured three machines, but one has been delivered and paid for.

The defendants reside in Nova Scotia and the action was served on them there.

The defendants have filed declinatory exceptions alleging that the contract between the parties was made in Nova Scotia and not in Montreal as claimed by the plaintiff.

The contract is one by correspondence and results from the following letters:—

Montreal, Aug. 24th, 1910.

Mr. W. C. Mitchell,

*Dear Sir*,—In reference to our conversation this morning, in the matter of the Farrow Automatic Railway Spike Machine, beg to say that we would build five (5) of these machines for your company for thirty-two thousand five hundred dollars ($32,500), f.o.b. Montreal.

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The machines will be made of steel and weigh about 12 tons each. The first machine could be delivered in about three months, and one machine every subsequent month. We would be pleased to furnish you with any further particulars that you may desire.

Awaiting your reply, we remain,

Yours truly,

THE MECHANICAL EQUIPMENT CO., LTD.,
(Signed) S. DAVIS,
*Manager.*

Montreal, August 26th, 1910.

Mr. W. C. Mitchell, Gen'l Sup't.,
Dominion Iron & Steel Co., Ltd.,
Sydney, Nova Scotia.

*Dear Sir,*—Referring further to our conversation of the 24th inst., in the matter of the Farrow Automatic Railway Machine, beg to say that it would be difficult for us to arrange to build those machines at your works, as we expect considerable export trade this winter that would necessitate our men in this vicinity.

However, if you favour us with your order, you will receive immediate attention as we are making arrangements with some of the larger shops to handle this work.

Awaiting a reply, we remain,

Yours truly,

THE MECHANICAL EQUIPMENT CO., LTD.,
(Signed) S. DAVIS,
*Manager.*

Sydney, N.S., Sept. 1st, 1910.

The Mechanical Equipment Co. of Canada,
645-653 St. Lawrence Boulvd,
Montreal.

*Dear Sirs,*—I am in receipt of your letter of the 26th ult., and note that you think it would be difficult for you to build your machines at my works, as you expect considerable export trade this winter that would necessitate your men in your vicinity.

Would you not consider selling me drawings and the right to build and use one or more of the Farrow Spike Machines myself, these machines to be for my own use only. You would then only have to send a man to inspect the machines when completed.

Yours truly.

Montreal, Sept. 5th, 1910.

Mr. W. L. Mitchell, Gen'l Supt.,
Dominion Iron & Steel Co.

*Dear Sir,*—In reply to your favour of the 1st inst., beg to say that we could not consider a proposition to sell our drawings for the Farrow Automatic Railway Spike Machine, however, we could supply you with these machines in the time specified in our previous letter.

Awaiting your reply, we remain,

Yours truly,

THE MECHANICAL EQUIPMENT CO., LTD.,
(Signed) S. DAVIS,
*Manager.*

Montreal, Oct. 3rd, 1910.

Mr. W. C. Mitchell, Supt.,
Dominion Iron & Steel Co.,
Sydney, N.S.

*Dear Sir,*—Since writing to you last week, we have closed a deal with an American firm for the installation of two of our Spike Machines, and this will necessitate shipping our patterns over the border.

We are desirous therefore to know whether you intend ordering machines for your company at once, as we could then run off castings before shipping patterns, and giving you early deliveries.

Awaiting your reply relative to same, we remain,

Yours very truly,
THE MECHANICAL EQUIPMENT CO., LTD.,
(Signed) S. DAVIS,
*Manager.*

6th October, 1910.

Messrs. Mechanical Equipment Co., Ltd.,
645 St. Lawrence Boulvd,
Montreal.

*Dear Sirs,*—Referring to your correspondence with Mr. W. C. Mitchell of this company you will please prepare for us

3 Farrow Automatic Rail Spike Machines—delivery in about 3 months for the first machines and one each subsequent month.

Price to be $6,500 each.

While I am ordering this machine, and the Dominion Iron & Steel Company will be responsible for the payment thereof, it is not to be entered by you as an order from the Dominion Iron & Steel Company. You will ship the machines to Sydney, but another company will probably own them after they reach here.

Yours truly,
*2nd Vice-President and General Manager.*

If the contract was completed by the letter of October 6th, the declinatory exception should be maintained, but if completed only by the letter of October 11th, 1910, it should be dismissed.

In order that a contract may be complete the parties must have agreed on the object and on the price, and their consent must be unequivocal.

In the present case the plaintiff by its letter of August 24th, declared its readiness to manufacture five machines for the defendants for a price of $32,500, f.o.b., Montreal, and by its letters of September 5th and October 3rd the plaintiff again declared its readiness to fulfil the order solicited in its letter of August 24th.

On October 6th the defendants instead of giving an order according to the terms of the plaintiff's letter of August 24th, or of accepting purely and simply the plaintiff's order as contained in such letter, ordered three machines at a price of $6,500 each, on condition that the order be not considered as coming

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from the defendant, although it was to be responsible therefor, and on condition that the machines be shipped to Sydney.

The plaintiff might have been ready to manufacture five machines for the sum of $32,500, which represents in reality $6,500 per machine; but there is nothing to shew its readiness to manufacture three machines for the sum of $19,500, or $6,500 each.

The letter of the defendants, of October 6th, 1910, therefore required a reply from the plaintiff, reply which was given by the letter of October 11th, and in which the order of October 6th is accepted.

For these reasons I am of opinion that the consent to the contract was only given by the plaintiff by its letter of October 11th, and that it was this consent which completed the contract. This letter of October 11th was mailed at the Montreal post office to the defendants' address and the contract was therefore completed in Montreal. The declinatory exceptions are dismissed with costs.

The defendant appealed.

*G. H. Montgomery*, K.C., for appellants.

*R. Chenevert*, for respondent.

Carroll, J.

CARROLL, J. (translated):—This is an appeal from an interlocutory judgment, dismissing a declinatory exception and the point in issue is whether the contract, over which there is litigation, originated at Sydney as claimed by the appellant or at Montreal as contended by the respondent.

The action is for $13,000 in recovery of the price of two automatic railway spike machines.

The contract is one by correspondence; it comprises seven letters written from Montreal to Sydney.

These are set out in chronological order, in the judgment of Laurendeau, J.

If the letter of October 6th contains all the elements of a contract, then the contract originated in Sydney. Otherwise it only became perfect by the letter of October 11th, and then it would have originated in Montreal.

As will be seen, the respondent, by its letters of the 24th August, and of the 3rd and 5th October, offered to make five machines for $6,500 each, a total sum of $32,500, deliverable f.o.b., Montreal.

By its letter of October 6th the appellant says it is ready to take three machines for $6,500 each, but adds that this order should not be considered as an order of the Dominion Iron and Steel Co., although this company is to be responsible therefor. And, moreover, the machines are to be shipped to Sydney instead of being delivered f.o.b., Montreal.

In fact the question to be decided is this: was the respondent obliged to execute a contract for three machines to be delivered at Sydney? If not so bound the contract was not completed.

Now, it might very well have suited the respondent to manufacture five machines for $32,500, but it might not have suited it to manufacture three of them for $6,500 each, and it might not have suited it to accept the risk of shipment to Sydney.

The parties were, therefore, not bound by the letter of October 6th. It follows that they only became bound by the letter of October 11th, sent from Montreal, accepting the conditions of the letter of the 5th, and the contract was completed at Montreal.

The judgment dismissing the declinatory exception is therefore well founded, and the appeal is dismissed.

*Appeal dismissed.*

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## ZUFELT v. CANADIAN PACIFIC R. CO.



*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, and Meredith, JJ.A. September 27, 1912.*

1. APPEAL (§ VII L 2—475)—RIGHT OF APPELLATE COURT TO REVIEW VERDICT OF JURY—ABSENCE OF ERROR OR OTHER SUBSTANTIAL GROUND.

Although an appellate Court may think that the preponderance of testimony is in favour of the unsuccessful party in an action tried with a jury, it cannot substitute its opinion for that of the jury, or interfere with the jury's conclusions except upon some error or other substantial ground.

2. TRIAL (§ V C—285)—SUFFICIENCY OF FINDINGS OF JURY—SECOND TRIAL—DAMAGES—APPELLATE COURT'S ESTIMATE OF THE WEIGHT OF EVIDENCE.

Where an action has been twice tried with a jury, and upon the second trial the jury have found in favour of the same party, but have reduced the damages, a third trial will not be ordered merely because the findings of the jury at the second trial are contrary to what the appellate Court regards as the weight of evidence, if there is some evidence upon which the verdict can be sustained.

Statement

APPEAL by the defendants from the judgment of Teetzel, J., in favour of the plaintiffs for the recovery of $2,000, upon the findings of a jury, at the second trial of the action.

The facts are stated in the report of the judgment of the Court of Appeal, 23 O.L.R. 602, 2 O.W.N. 1063, directing a new trial.

The second appeal was dismissed, Meredith, J.A., dissenting.

*I. F. Hellmuth*, K.C., and *Angus MacMurchy*, K.C., for the defendants.

*W. M. Douglas*, K.C., and *G. F. Mahon*, for the plaintiffs.

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GARROW, J.A.

GARROW, J.A.:—The case was in this Court before, when a new trial was directed. It has now been tried again; and, for the second time, upon essentially the same evidence, a jury has found in favour of the plaintiffs, while reducing the damages awarded at the former trial.

The defendants still complain, saying that the verdict is contrary to the evidence and that the damages are excessive.

I do not see how we can properly interfere on either ground.

It cannot, I think, be said that there was no evidence to go to the jury; and, while I may think—as I certainly do—that the preponderance of testimony is in favour of the defendants, I cannot substitute my opinion for that of the jury or interfere with its conclusions, except upon some error or other substantial ground, which, so far as I can see, does not appear.

No objection was taken to the learned Judge's charge; and, from a perusal of it, I cannot say that the findings of the jury could, in any proper sense, be called perverse. That they are contrary to what I regard as the weight of evidence, is not alone, in my opinion, under the circumstances of the case, a sufficient justification for directing a third trial, which in all probability would afford the defendants no substantial relief.

Nor do I perceive any sufficient ground to interfere upon the question of damages. There was, I think, some evidence upon the subject; and the quantum—within reasonable limits of course, which, I think, have not been exceeded—was very much a question for the jury.

I would dismiss the appeal with costs.

MOSS, C.J.O. MACLAREN, J.A. MAGEE, J.A. MEREDITH, J.A.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The uncertainty which prevailed after the first trial of this action by reason of the jury not having been polled, or the facts as to how they were divided in their findings not otherwise ascertained, do not now prevail: the jury were polled at the last trial, and in that way it was made plain that the same ten persons were in favour of the plaintiffs in all things essential to a verdict in their favour; that is to say, that, had the jury been composed of those ten jurors only, these would have been unanimously in favour of the plaintiffs upon all the questions submitted to them; so nothing now stands in their way in that respect.

And in regard to negligence in respect of sounding the whistle and ringing the bell, of that negligence being the cause of the disastrous collision out of which this action arises, and of absence of contributory negligence, this jury also has found altogether in the plaintiffs' favour. It may be that such findings, some of them, do not commend themselves to some judicial minds; but that is not the question; the single

question really is, whether there was any evidence upon which reasonable men could have so found; and I am bound to say now, as on the former occasion, that there was. The fact that a second jury—a special jury summoned at the instance of the defendants—have so found, may be far from conclusive upon the question; but, when added to that is the learned trial Judge's view that the question was so difficult an one that he was glad that the onus of solving it did not rest upon him, as well as the unquestionable fact that, upon the evidence for the plaintiffs alone, it would be impossible to argue reasonably that there was no reasonable proof of these things, and equally so upon the evidence adduced for the defence upon these questions if the testimony of the trainmen be excluded, it comes to this, that the charge of unreasonableness rests upon the evidence of men more or less interested, whom the jury, after seeing and hearing them, have discarded—with these things added, as I have said, I find it quite impossible to say that there was no case to go to the jury in these respects; or that the verdict is anything like a perverse one; or that it ought to be set aside, and another trial directed, because against the weight of the evidence. The case was, in my opinion, one for the jury in these respects, and they, as the Judges of fact chosen by the parties, having taken the responsibility of finding as they have found, in the plaintiffs' favour, for a second time, there would be, in my opinion, no legal justification for disturbing such findings now.

But upon the question of damages I am in favour of allowing this appeal. There was no reasonable evidence of any pecuniary loss to the plaintiffs by reason of the death of either son or daughter killed in this lamentable accident. Two things are indisputable: (1) that recovery can be had, in such an action as this, for pecuniary loss only; and (2) that such loss must be proved so that reasonable men can, upon their oaths, say that the sum awarded is a fair measure of such loss. There was no such proof in this case. According to the evidence, the plaintiffs and their sons and daughters were living as one household upon a farm which was owned by two of the sons, one who was killed and one who yet lives. The death of the two children has not altered that state of affairs, hitherto, in any manner, and there is no evidence whatever that it is likely to. It is said that the young man died intestate and unmarried; and, that being so, not only has the plaintiffs' position in the household not been prejudicially affected, but it has, in a legal sense, been very much strengthened, giving all of the family a legal interest in the farm, where, before, all but the two sons, nominally at all events, had no interest whatever except in the bounty of such sons. And there is no evidence to

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indicate any less ability in the family to manage and work the farm than there was before.

On this ground, the appeal should, I think, be allowed and the action dismissed; but there should be no order as to any costs. If this point had been raised and relied upon on the former appeal, this action should then have been dismissed, and subsequent costs saved; therefore, the defendants should pay all subsequent costs, and receive costs down to that appeal: and, setting the one set of costs off against the other, it is reasonable to make no order as to costs and so save further costs.

*Appeal dismissed;* MEREDITH, J.A., *dissenting.*

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Sept. 21.

## Re ST. DAVID'S MOUNTAIN SPRING WATER CO. AND LAHEY.

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. September 21, 1912.*

1. EVIDENCE (§ II E 9—205)—CONTRACT—SILENCE AS CONSENT—REBUTTAL.

The fact that one of the parties to an alleged contract with a corporation embodied in a corporate resolution, although present when the resolution was read, raised no objection or dissent, is not conclusive of his assent by silence, as such party is entitled to adduce evidence in explanation of his silence.

2. COURTS (§ II D—190)—REASONS FOR CONCLUSIONS—APPEALS FROM COUNTY JUDGES.

County Court Judges should incorporate the reasons for their conclusions in decisions which are subject to appeal.

3. ESTOPPEL (§ III E—79*a*)—DISPUTING LANDLORD'S TITLE—PROOF OF TENANCY—OVERHOLDING TENANTS ACT (ONT.).

Where, in proceedings against an alleged overholding tenant, certain evidence tendered by the alleged tenant in contradiction of the lease was improperly rejected by the trial Judge, the question of estoppel from disputing the landlord's title does not arise until evidence for and against the making of the lease has first been fully introduced, although it is competent for and the duty of the trial Judge to determine both questions (tenancy and estoppel) in their proper order.

Statement

THE company, claiming to be the owners of certain property in the possession of Lahey, whom they alleged to be their tenant, served him with a notice to deliver up possession. Upon his refusal to do so, they took proceedings under the Overholding Tenants Act, before the Judge of the County Court of the County of Welland. The Judge made an order for possession; and Lahey appealed therefrom, upon the grounds that the Judge's decision was wrong in law and in fact and that evidence was wrongly excluded.

The appeal was allowed and a new trial ordered.

*O. H. King,* for Lahey.

*W. M. Douglas,* K.C., for the company.

FALCONBRIDGE, C.J.:—I think that Lahey should have had the opportunity to develop his case in evidence.

There must be a new trial. I thought Lahey ought to have his costs of this appeal, but will not dissent from the view of my learned brothers as to costs.

BRITTON, J.:—It is to be regretted that the evidence tendered by Lahey in explanation of his alleged silence, when the resolution mentioned was read and passed in his presence, was rejected. Lahey was entitled in law to tell his whole story in regard to the particular transaction relied upon by the landlords to establish Lahey's tenancy. Simply because of the improper rejection of part of the evidence Lahey was prepared to give, I agree that there should be a new trial—and on the terms mentioned by my brother Riddell. I entirely agree with the contention of counsel for the landlords that, as the law now is, it is competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it, and that the Judge may do this on conflicting evidence. Re Fee and Adams, 1 O.W.N. 812, and Moore v. Gillies, 28 O.R. 358, are in point.

RIDDELL, J.

RIDDELL, J.:—The evidence, so far as admitted, shews that (Lahey being in possession of the property) at a meeting of the company the secretary called attention to the unsatisfactory condition of affairs, owing to there being no definite agreement with Lahey, whereupon a resolution was passed in the following terms: "Resolved to give the house and farm to Mr. Lahey rent free in consideration of his keeping the front trees cultivated and looked after; such arrangement, however, to be terminated at any time at the will of the directors." Lahey was present when the resolution was passed, and it was read over to him. Lahey swears that he said nothing, but was not allowed to explain why he said nothing. The president of the company, on the contrary, says: "He thanked the directors for appointing him, and told them that he would get out at any minute they asked him:" This Lahey specifically denies.

It is rather indicated than proved that the property had been purchased by the company from Mrs. H. D., acting for herself, and, as Lahey asserted (at least) in part for him, he claiming a one-third interest. Counsel for Lahey stated to the County Court Judge—upon the Judge saying, "He can't dispute the landlord's title"—"He has no title over us—we are as much owner as he is." Whereupon the learned Judge said: "That doesn't make any difference. I suppose the law goes this far, that, if Mr. Hill is the owner of property, and he accepts a lease from you, although he may have an interest in the prop-

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erty, he can't dispute your title." And it is quite manifest that the County Court Judge proceeded on the assumption that there was an acceptance by Lahey of the provisions of the resolution already spoken of. If the learned Judge so found after hearing all the evidence properly admissible, no one could quarrel with his determination—but he seems to have reached his conclusions with the fact before him that Lahey swore that he stood silent when the resolution was read, and without an explanation being permitted of his silence.

No doubt, "silence gives consent" in many cases—and, no doubt, in many other cases silence implies assent. But silence is not conclusive: it may be explained. I can conceive of more than one explanation which would nullify every adverse inference to be drawn from this silence—I do not mention any, in view of a continuation of the trial being the proper course, in my opinion.

The Court was called upon to pass upon the question whether Lahey accepted the terms of the resolution. That depended upon: (1) the relative credibility of Murphy and Lahey; and (2) the construction to be placed upon the facts as found by the Court to be. Lahey should have been allowed to give his explanation in order to enable the Judge to determine the amount of credit to be given to his testimony. It is a matter of every day experience that a trial tribunal forms a low opinion of the credit of a witness for a time, only to change it when his full story is told. The explanation, too, would or might determine whether silence (if his story were accepted) was an assent.

It has been suggested that Lahey is, in any case, bound by another kind of estoppel. It is argued that his silence (if there was silence) and his conduct led the company not to take proceedings—that the company acted upon this silence. It is sufficient to say that there is no tittle of evidence of any such result.

I think there should be a new trial—the evidence already taken to stand, but to be supplemented as may be thought best. No doubt, the full facts of the title will be gone into unless the County Court Judge finds an estoppel.

As it may turn out that all the evidence adduced will not advance matters, I think the costs of this appeal and of the new trial, as well as the proceedings heretofore had, should be in the discretion of the County Court Judge.

The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at: it seems necessary to repeat this once more.

*New trial directed.*

## DUBE v. THE CITY OF MONTREAL.

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Oct. 31.

*Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ.*
*October* 31, 1912.

1. MUNICIPAL CORPORATIONS (§ II G 2—225)—LIABILITY FOR DAMAGES—NEGLIGENCE OF POLICE—DUTY TOWARDS AN ARRESTED PARTY.

Where constables in the ordinary course of their duty and in pursuance of civic by-laws take into custody a person in a state of intoxication, they are bound to exercise every reasonable care and precaution to afford their charge proper protection and failure to do so renders the city which employs them liable in damages for injuries that may result from imprudence and negligence.

2. POLICE (§ I—5)—NEGLIGENCE IN TAKING CARE OF A DRUNKEN MAN UNDER ARREST—DANGEROUS STAIRWAY.

It is an act of imprudence and neglect to lead a practically helpless drunken man down a dangerous stairway under the charge of but one constable; and where under such conditions the prisoner misses his foothold, falls and breaks his neck the constables' employer is liable; and the fact that the constables knew of the infirmity of their prisoner obliged them to use all the more care.

[Beven on Negligence, 3rd ed., 159, approved; see also *Clayards* v. *Dethick*, 12 Q.B. 439, 445, 116 Eng. Rep. 932; *Lax* v. *Darlington*, 5 Ex. D. 28, 35; *McMahon* v. *Fields*, 7 Q.B.D. 591, 594; *Thomas* v. *Quartermaine*, 17 Q.B.D. 414, 417, 18 Q.B.D. 685.]

3. DEATH (§ II B—13)—WHO MAY MAINTAIN ACTION FOR—RIGHT OF MOTHER.

The mother has a pecuniary interest in the life of a son who is killed giving her the right to sue in damages those responsible for his death even though at the time of such death her own husband be quite able to support her.

Statement

THIS was an appeal from a judgment of the Superior Court, Dunlop, J., rendered at Montreal, on March 28, 1911, dismissing with costs the action taken by the plaintiff-appellant against the city, respondent, for $1,999 damages resulting from the death of her son.

The appeal was allowed with costs.

*V. Cusson*, K.C., for plaintiff, appellant.

*W. Damphousse*, for the respondent.

Greenshields, J.

GREENSHIELDS, J.:—The facts in the present case are free from difficulty and may be briefly stated as follows:—

On the 20th of August, 1909, between three and four o'clock in the afternoon, a young man, Ernest Racine, twenty-five years of age, was brought, in a patrol waggon, to No. 2 police station, one of the police stations owned and in charge of the city, defendant. The charge against him was entered as drunkenness.

Arriving at the station, Racine was brought in and received by Constable Lemieux. He was brought to the wicket and searched, and it was decided to take him down stairs to the cells. To reach the cells it was necessary to descend a narrow, steep stairway of eight steps. Half way down the stairway was an iron bar, giving entrance to the cell proper.

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It should be remarked here, that the prisoner offered no resistance of any kind but was perfectly quiet; and although the constables state that he was able to walk, it would appear that he was in such an advanced state of drunkenness that he could scarcely speak.

Brown, another constable present with Lemieux, took him by the left arm, and was about to start down the stairway with him, when Lemieux said to him, "I am going to get my keys," and turned into the office of the lieutenant for that purpose.

Brown started down the stairway with Racine and arriving near the wooden door, four steps down, Racine made a movement as if to catch the top of the door, either to stop his descent, or to steady his movements. His hand missed the door; his right foot missed the step; he fell midways; his weight carried Constable Brown with him; Brown's shoulder struck the side of the door; he lost his hold of Racine, and the latter fell sideways and struck the back of his head, or the side of his head against the iron bar or cement floor at the bottom of the steps. Death resulted.

The plaintiff, the mother of the deceased, sues the city in damages for the sum of $1,999, and after alleging the facts as above set forth, alleges that the death of her son was due to the negligence of the constables, employees of the defendant, who failed to exercise prudent care in conducting the deceased to the cell in question. She alleges that he was unmarried and contributed to her support, and that she suffered the damages alleged.

The defendant denying the essential allegations of the plaintiff's declaration, alleges that the city contributed neither directly nor indirectly to the death of Ernest Racine; that it was beyond its power to prevent the accident which resulted in his death, and that his death was due entirely to his own fault; that if the plaintiff received any money from the deceased, it was pure gratuity, and he was under no obligation to pay the same.

The issues are joined by a general answer.

The learned trial Judge dismissed the plaintiff's action.

The chief considerants of the judgment are that the plaintiff totally failed to prove that the death of Ernest Racine was due to the negligence of any of the city's employees or constables; that, on the contrary, the said constables seemed to have employed all necessary prudence; that the defendant did not contribute directly or indirectly to the death of the said Ernest Racine, and that it appears that his death was due to his own fault and to the condition in which he was taken to the police station for protection.

A careful examination of the proof leaves no doubt whatever

in my mind, that Racine was in such a condition of intoxication when brought to the station and when placed in charge of the two constables, Lemieux and Brown, that the greatest care should have been exercised in conveying him down a narrow and steep stairway at the bottom of which was an iron door with an iron bar across it and a cement floor. It should have been known, and must have been known to the constables that if Racine, in the condition in which he was, missed a step and fell, that the consequences would be serious.

The immediate cause of the death of Racine was that being in a condition of drunkenness, and while in charge and under the care of the defendant's employees, he was allowed to fall down a steep stairway and meet with injuries resulting in his death.

Taking the only version of the accident, that given by the constables, who naturally make it as favorable as possible to the defendant, the deceased fell because he missed his hold and his step, and Brown, who alone was in charge of him, was not sufficiently strong, or had not a sufficiently firm grip on him to prevent him falling.

This, in my opinion, creates a presumption of imprudence and negligence which can be only rebutted or destroyed by positive proof that the accident resulted from something beyond the control of the defendant's employees, or was due to a fortuitous event or irresistible force. This, in my opinion, the defendant has failed entirely to prove.

The learned trial Judge in finding the deceased Racine to be at fault, apparently finds that fault in the condition to which he brought himself by his excesses.

But the drunkenness of Racine was not the immediate cause of his death. It is true that had he not become intoxicated, the probability is that he would not have been in the police station. It is equally true that if he had not been intoxicated, he would not have fallen down the stairway. It is equally true that with the men and means at the disposal of the city, he would not have fallen, had he been carefully and prudently, and wisely conducted down a dangerous stairway. The immediate cause of his death was the imprudence of one man attempting to conduct a practically helpless drunken man down a dangerous way. Racine was perfectly quiet—offered no resistance, and did only what might be expected from a man in his drunken and helpless condition.

These constables, and both of them, were accustomed to the handling of drunken men, and they should have foreseen the possibility of the happening of that which actually took place.

It would be useless to argue, that what the constables decided to do with Racine, viz., to place him in a cell, could not

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have been done with perfect safety to themselves and to the deceased in the condition in which he was. If the constables of the city take charge of a drunken man and place him in a position of danger, it is their duty to protect him against the danger to which their act has exposed him.

I find against the defendant upon the proof. I find it an act of imprudence and negligence on the part of Brown and Lemieux to allow Brown alone, unaided, to attempt to take Racine where he was being taken when he met with the accident.

It has been held in our Courts, that a railway company undertaking the transportation of a passenger while in a state of drunkenness, owes to that passenger protection, and it is a fault if the employees of the company, knowing of the state of intoxication of the passenger, allows him to stand upon the platform and allows the train to start while he is on the platform and damage results: see *Ducharme* v. *Canadian Pacific R. Co.*, 16 Rev. de Jur. 27.

As to the American jurisprudence, see American and English Railroad Cases, Annotated, vol. 39, N.S. 534.

In the case of *Price* v. *The St. Louis Railway Company*, 39 A. & E. R. Cas. N.S. 534, it was clearly stated, that if a conductor of a train accepts a person as a passenger, whom he knows to be unattended and knows to be insensible from intoxication and thereby unable to protect himself from danger and injury, the company owes him the duty to exercise such care as may be reasonably necessary for his safety. While the company is not an insurer of the person of one who has been received as a passenger in such condition being cognizant thereof it is bound to exercise all the care that a reasonable prudent man would to protect one in such insensible and helpless condition from the dangers incident to his surroundings and mode of travel.

In the present case the constables knew of the condition of Racine, he was taken in charge because he was in that condition. The constables knew the danger to which he was exposed by being taken down this stairway while in that condition, and it was their duty to exercise the greatest care in his conduct.

This principle is well recognized by the English Courts:—

> Further, the mere fact of an injured person being of unsound mind or drunk or blind, or deaf, does not of itself deprive the right to recover in the event of injury. . . . .
>
> While deafness or blindness, or any similar infirmity, does not put the sufferer under civil disabilities, neither does it confer greater rights unless the existence of it is known to the injured person. If, however, he comes to the knowledge that the person in front of him is deaf or blind, or lame, he must regulate his conduct accordingly. Knowledge engenders a greater duty. Beven's Law of Negligence, 3rd ed., vol. 1, pp. 159, 160.

Applying this to the case under consideration, certainly

Racine was suffering from an infirmity—temporary though it may have been. The constables had full knowledge of its existence. He was taken in charge just because of his temporary infirmity and, as already stated, knowing his infirm, helpless condition, they placed him in a place of extreme danger, and they failed properly to protect him. I find negligence proven.

As to the responsibility of the city, the learned trial Judge found, that if negligence was proven the city could not escape responsibility. In this I agree with the judgment. In fact, the learned counsel for the city practically abandoned that defence at the hearing.

The constables at the time of the act, were clearly acting within the scope of their authority as employees of the city; were acting in virtue of a by-law passed by the city, and the city is responsible for their negligent act of omission or commission.

As to the damages, this young man was not the sole support of his mother; in fact, she admits that her present husband is quite able to support her; nevertheless, in my opinion, she is entitled to compensation. She has pecuniary interest in the life of her son; if the occasion arises when his support is required, she has a legal right to enforce it.

I find no contributory negligence on the part of the deceased. After he was taken in charge by the constables, he did nothing that he should not have done to bring about the resulting conditions.

I would assess the damages at $400.

*Judgment for plaintiff.*

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## CAMPBELL v. TAXICABS VERRALS LIMITED.



*Ontario High Court, Boyd, C. September 19, 1912.*

1. CORPORATIONS AND COMPANIES (§ I B—7)—DELAY IN ORGANIZING—LETTERS PATENT—LIABILITY OF SOLICITORS ENTERING AN APPEARANCE.

Where letters patent incorporating a company have been obtained under the Ontario Companies Act, and, though no steps have been taken towards its organization, its corporate powers have not been forfeited by delay, the company is an existing legal entity, and solicitors entering an appearance on its behalf cannot be made personally liable for the costs of the action as having appeared for a non-existing client.

[*Simmons* v. *Liberal Opinion, Ltd., In re Dunn*, [1911] 1 K.B. 966, distinguished.]

2. CORPORATIONS AND COMPANIES (§ I G 2—117)—POWER OF DIRECTORS TO DEFEND AN ACTION IN NAME OF COMPANY.

The directors of a company have power to defend an action in the name of a company.

[See Lindley on Companies, 6th ed., vol. 1, p. 378.]

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3. SOLICITORS (§ II B—25)—AUTHORITY OF SOLICITORS—CORPORATION DEFENDANT—RIGHT TO QUESTION AUTHORITY.

Where solicitors have appeared for a company and the action has been contested down to judgment, neither the company nor the plaintiff can then raise any question as to the authority of the solicitors on the ground of defects or omissions in the organization of the company of which the latter had no notice.

[*Thames Haven Dock and Railway Co.* v. *Hall*, 5 M. & Gr. 274; and *Faviell* v. *Eastern Counties Railway Co.*, 2 Ex. 344.]

Statement

MOTION by the plaintiff for an order setting aside an appearance entered in the name of the defendant as a company, and all subsequent proceedings, and directing the solicitors who entered the appearance and defended the action to pay the plaintiff's costs, upon the grounds that the defendant never authorised the defence, and had never been organised as a company, and had never appointed officers, and had never appointed any person to accept service, and had given no instructions to the solicitors to defend.

The action was for damages for injuries sustained by the plaintiff on or about the 9th November, 1910, by reason of the negligence of the driver of a taxicab engaged by the plaintiff from the defendant's garage. The plaintiff recovered judgment against the defendant; but found no assets to realise upon.

The application was dismissed.

*J. MacGregor*, for the plaintiff.

*J. M. Godfrey*, for the defendant and the solicitors who defended the action.

BOYD, C.

September 19, 1912. BOYD, C.:—This motion was launched on the authority of *Simmons* v. *Liberal Opinion Limited, In re Dunn*, [1911] 1 K.B. 966, the head-note of which suffices to shew its scope: "A solicitor assuming to act for one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority." The defendant in that case was sued as a company; it turned out that, though some preliminary steps had been taken to form, the matter had not been consummated by registration, so that in fact there was no company—it was non-existent. That is the radical difference as compared with this case, where the defendant, sued as a company, had been legally constituted a company by letters patent of Ontario dated the 27th October, 1910. No steps appear to have been taken to organise the company in the usual way; and, after the charter issued, so matters remained till lately, when a meeting was held, and the directors ratified what had been done in defending this action. The charter has not become forfeited under any of the provisions of the Companies Act by reason of its inaction.

So far as appears, the vehicles which are sent out in response to calls made by telephone on the "Taxicabs Verrals" are owned

by George Verral. The writ was served upon him, and he forwarded it to an indemnity company in the United States, and that company undertook the defence, and instructed the solicitors who are now called upon by this motion to pay all the costs of litigation. There is nothing to shew that these solicitors had any knowledge of the defects or omissions in the organisation of the defendant, which are now relied on as nullifying the conduct and the results of this action: a very different position from that occupied by the solicitor in the English case. At most, or at least, in this instance, there is a defendant which has a legal entity, with unused powers it may be, but still other than a non-existent body. The statute under which the defendant was incorporated declares (sec. 16) that notice of incorporation shall be given by the Provincial Secretary in the Ontario Gazette, and the corporation shall be deemed to be existing from the date of the letters patent incorporating the same (7 Edw. VII. ch. 34, O.) Upon incorporation, the corporation is in possession of the powers specified in the Act (see secs. 17, 18, etc.). Section 21 declares that if a corporation does not go into actual operation within two years after incorporation or for two consecutive years does not use its corporate powers, the powers, except as far as is necessary for the winding-up of the corporation, shall be forfeited—but that forfeiture shall not prejudicially affect the rights of creditors.

This company, being incorporated on the 27th October, 1910, had not defaulted under this lapse of time when the action was begun or when this application was made. It was an existing body, in possession of unused powers, and with its original directorate holding office (see secs. 79 and 85). The directors, of whom George Verral was one, had power to defend this action in the name of the company (Lindley on Companies, 6th ed., vol. I, p. 378); and the solicitors had no knowledge or intimation that this was not a *bonâ fide* defence. That the company had no property is nothing to the purpose of this application. Many an action against a company is frustrated for want of assets after judgment has been obtained.

The solicitors having appeared for the company, and the suit having been contested down to judgment, it does not appear relevant to inquire in what manner the solicitors were appointed; the company cannot raise any objection to their authority, nor can the plaintiff: *Faviell* v. *Eastern Counties R.W. Co.* (1848), 2 Ex. 344, and *Thames Haven Dock and R.W. Co.* v. *Hall* (1843), 5 M. & Gr. 274.

I do not further pursue this inquiry; I see no ground to interfere with the record or to order payment of costs of the action by the solicitors.

The application is dismissed, with costs to be set off against the costs taxed to the plaintiff in the action.

*Application dismissed.*

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Sept. 30.

## REIFFENSTEIN v. DEY.

*Ontario Divisional Court, Boyd, C., Middleton, and Latchford, JJ.*
*September 30, 1912.*

1. NEW TRIAL (§ III B—16)—ERRONEOUS VERDICT—UNSATISFACTORY FINDINGS—TRIAL BY JUDGE WITHOUT A JURY.

Where, in an action which has been twice tried, the jury have disagreed upon the first trial, and, upon an appeal from the verdict at the second trial, the appellate Court is of opinion that some of the findings are so entirely against the evidence that it is apparent that the jury must have given effect to some improper consideration or have acted unreasonably, and the plaintiff, by whom the jury notice was first given, desires a trial without a jury, the appellate Court will direct a new trial before a Judge without a jury.

2. NEW TRIAL (§ II B—16)—ERRONEOUS VERDICT—UNSATISFACTORY EVIDENCE—APPELLATE COURT REMITTING FOR NEW TRIAL.

Where an appellate Court is of opinion that some of the findings of a jury are against the weight of evidence, but there is conflicting evidence upon some of the issues raised, the Court will not itself determine the case, but will direct a new trial.

Statement

MOTION by the plaintiff for a new trial, or for judgment in the plaintiff's favour, after trial before Riddell, J., and a jury, at Ottawa, and judgment dismissing the action.

The action was brought by two ladies to recover damages for injuries sustained as the result of a running-down accident, occasioned, it was said, by the negligence of the defendant.

The motion was allowed and a new trial ordered.

*G. F. Henderson*, K.C., for the plaintiffs.
*A. E. Fripp*, K.C., for the defendant.

Middleton, J.

MIDDLETON, J.:—The jury have answered in the defendant's favour all the questions submitted by the trial Judge; and, in ordinary circumstances, their decision would be final. But upon some of the questions it is clear that the answers of the jury are not warranted by any possible view of the evidence. Upon other questions there was evidence from which the findings might well be in the defendant's favour.

After careful and anxious consideration, we have come to the conclusion that the answers of the jury to some of the questions are so entirely against the evidence that it is apparent that for some reason the jury must have given effect to some improper consideration, or have acted unreasonably, and that there has not been a fair and impartial trial. We have spoken to the learned trial Judge, and he agrees with us that the result must be regarded as unsatisfactory.

In view of the fact that the case had already been tried before Mr. Justice Britton—when the jury disagreed—and of the fact that the jury notice was given by the plaintiff, and

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the plaintiff now desires trial without a jury, we think it proper to direct a new trial before a Judge without a jury.

We are much impressed by the view that a new trial ought not lightly to be given; but in this case the danger of a miscarriage of justice, if the present verdict is allowed to stand, appears so great that we think this case may be treated as exceptional.

We were pressed by the plaintiff's counsel to pass upon the evidence ourselves, instead of directing a new trial. We do not think we should do this, in view of the conflicting evidence upon some of the issues raised.

As a new trial is directed, it is not desirable that we should now comment upon the evidence.

No costs of the last trial or of this appeal.

Latchford, J. Boyd, C.

LATCHFORD, J., agreed with MIDDLETON, J.; and BOYD, C., agreed in the result.

*New trial without a jury directed.*

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Nov. 2.

## REX v. ACKERSON.

*Nova Scotia Supreme Court, Drysdale, J., in Chambers. November 2, 1912.*

1. APPEAL (§VIII C—677)—ENFORCEMENT OF AFFIRMED JUDGMENTS—WARRANT OF COMMITMENT ISSUED BY APPELLATE JUDGE.

Section 150 sub-sec. (*e*) of the Liquor License Act, R.S.N.S. 1900, ch. 100, which provides that, upon the affirmance on appeal of a conviction thereunder, if it is adjudged by the conviction that the person convicted "shall be imprisoned," the county court judge hearing the appeal may issue his warrant of commitment, applies only where the commitment imposed imprisonment in the first instance without the alternative of a fine, and the county court judge has no authority to issue a warrant of commitment because of the default of the unsuccessful appellant in paying the fine which the conviction imposed although the conviction provided that in default of payment the defendant should be imprisoned unless the fine were sooner paid.

[*Ex parte Abell*, 33 C.L.J. 626, followed.]

2. COURTS (§ II A 6—179)—JURISDICTION OF COUNTY COURT JUDGE ON AN APPEAL FROM CONVICTION UNDER THE LIQUOR LICENSE ACT, R.S.N.S. 1900, CH. 100, SEC. 149.

A county court judge hearing an appeal from a summary conviction under the Liquor License Act, R.S.N.S. 1900, ch. 100, sec. 149, is a statutory officer and, as such, is strictly limited to the authority which the statute confers.

Statement

MOTION on notice to the Judge of the County Court of district No. 1 at Halifax, and the prosecutor the chief inspector of licenses for the city of Halifax, to discharge the defendant under writs of *habeas corpus* and *certiorari* in aid thereto, from the city prison at Halifax, where he was imprisoned under a warrant of commitment in execution made on October 31, 1912, by the Judge of the County Court for district No. 1 at Halifax.

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Statement

The defendant has been convicted under the Liquor License Act, Rev. Stat. N.S., 1900, ch. 100, secs. 86 and 135 by the stipendiary magistrate of the city of Halifax on July 2, 1912, for unlawfully selling liquor in the city of Halifax by retail, without the license required by law, within six months previous to the date of the laying of the information on June 22nd, 1912, and was adjudged, etc., to pay a penalty of $50 and $4.15 costs and in default, etc., sixty days at hard labour unless the said sums and the costs and charges of conveying him to gaol were sooner paid.

He appealed under sections 149 and 150 of the said Act to the County Court for district No. 1 at Halifax, and the appeal was dismissed, the conviction was affirmed and it was adjudged "that process of this honourable Court should issue for the enforcement of the said conviction." The appeal Judge then made the warrant above referred to under sec. 150(*e*) of the Act, which recited the steps leading to and the conviction made by the stipendiary magistrate, and directed enforcement according to its terms.

*J. J. Power*, K.C., for the prisoner.

*J. R. Johnston*, for the inspector.

Drysdale, J.

DRYSDALE, J., in an oral judgment held that the Judge on appeal being a statutory officer was limited strictly to the authority conferred on him by the statute, and as sec. 150(*e*) of the Act related to a conviction made in the first instance for a term of imprisonment absolute as distinguished from imprisonment to enforce payment of a penalty, his warrant was bad and without jurisdiction, and the prisoner held under it was entitled to be discharged: *Christie* v. *Unwin*, 11 A. & E. 373, 379, 113 Eng. R. 457, *per* Coleridge, J., and *Ex parte Abell*, 33 C.L.J. 626, may be referred to.

*Prisoner discharged.*

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Oct. 4.

## DENMAN v. THE CLOVER BAR COAL CO., Limited.

*Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Simmons, JJ. October 4, 1912.*

1. CORPORATIONS AND COMPANIES (§ IV G 2—117)—RIGHT OF DIRECTOR TO CONTRACT WITH COMPANY—ABSENCE OF ANY ADVANTAGE BEING TAKEN.

One who contracts with an incorporated company, of which he is a director, must shew that the contract is a fair one and that he has taken no advantage of the company.

2. CONTRACTS (§ V C 3—402)—CORPORATION'S RIGHT TO RESCIND CONTRACT INDUCED BY MISREPRESENTATION OF ONE OF ITS DIRECTORS.

Misrepresentation by the director of an incorporated company inducing a contract between him and the company, gives the company the right, not merely to a future judicial rescission of the contract by a judgment of the Court, but to repudiate the contract by its own act.

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3. CONTRACTS (§ V C 2—397)—RESCISSION OF CONTRACT BY CORPORATION —RESTORATION OF BENEFITS—CONTRACT INDUCED BY MISREPRESENTATION OF A DIRECTOR.

The repudiation by an incorporated company of a contract with one of its directors, on the ground of misrepresentation, must be made promptly after the discovery of the misrepresentation, and while the company is still in a position to restore matters, not necessarily to their precise original position, but to a position which shall be just with reference to the rights which the director had before the contract.

[*Adam* v. *Newbigging*, 13 A.C. 308, referred to; see also Kerr on Fraud and Mistake, 4th ed., pp. 365 *et seq.*]

4. EVIDENCE (§ II E 7—187)—ONUS OF ESTABLISHING AFFIRMATIVELY TRUTH OF REPRESENTATIONS—CONTRACT WITH CORPORATION TO REPUDIATE AS BEING INDUCED BY MISREPRESENTATION.

Where an incorporated company attacks a contract between itself and one of its directors on the ground of misrepresentation, the onus is upon the director to prove affirmatively the truth of the representation complained of.

[*Imperial Mercantile Credit Association* v. *Coleman*, L.R. 6 H.L. 189; *Gibson* v. *Jeyes*, 6 Ves. 266, referred to; see also Kerr on Fraud and Mistake, 4th ed., p. 147; and Bowstead on Agency, 5th ed., p. 137.]

5. CORPORATIONS AND COMPANIES (§ IV G 2—117)—RIGHT OF MANAGING DIRECTOR TO COMPROMISE OR RELEASE A LIABILITY OF ANOTHER DIRECTOR—CONTRACT INDUCED BY MISREPRESENTATION.

It is not within the authority of the managing director of an incorporated company to compromise or release the liability of another director in respect of misrepresentations made by that director inducing a contract between him and the company.

Statement

APPEAL by the defendants from the judgment of Stuart, J., at the trial without a jury in favour of the plaintiff in an action for damages for breach of an alleged agreement.

The appeal was allowed with costs, and an account directed, costs of trial reserved, to be dealt with by a single Judge after the accounts are taken; SIMMONS, J., dissenting in part.

*O. M. Biggar*, for the plaintiff, respondent.

*J. H. Leech*, for the defendants, appellants.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from my brother Stuart, who in his reasons for judgment has stated the facts so fully as to make it unnecessary for me to state them here.

Dealing first with what may be referred to as the second agreement, viz., that arranged between the plaintiff and Robertson, for the breach of which the learned trial Judge gives the plaintiff damages, it appears to me that there was no agreement of which there was any breach. The agreement made with Robertson was of temporary character, the terms being those of a proposed agreement between the plaintiff and the company through its directors but the time being only until the directors should formally deal with the matter. This is perfectly clear from the plaintiff's letter of May 1st, 1909, in which he speaks of "the agreement now pending signature by the directors of

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the company," and says: "Should the same not be accepted by them then after notice of non-acceptance the original agreement shall remain in full force." By an agreement of that temporary character it was in my opinion quite within the power of Robertson as general manager to bind the company. Acquiescence by the directors in what was intended to be only a temporary arrangement could not make it something it was not intended to be, though binding the company by its terms so long as they permitted it to continue. When on 15th February, 1910, the company refused to deliver any more coal which the plaintiff was receiving under that arrangement they thereby terminated the agreement made by Robertson, which the agreement recognized their right to do. The refusal to supply coal was a repudiation of any right of the plaintiff to act as defendants' sales agent under the original agreement of 27th June, 1908, as well, and it does not appear to me to be necessary to consider whether that agreement was effectively rescinded before the agreement with Robertson was entered into, because it was not subsequently acted on and it clearly was repudiated by the refusal to supply coal on February 15th, 1910.

I am of opinion that the defendants had a right to rescind that agreement. When it was made the plaintiff occupied the position of director and general manager and the co-directors were entitled to place confidence in him and actually did rely on the information he gave them respecting the working of the mine. In the portion of the examination for discovery of the co-director, A. W. Denman, put in evidence by plaintiff's counsel, it is stated that the plaintiff represented the cost of the coal as from 85c. to $1.05, giving a dollar a ton profit in addition to the 50c. commission to be allowed the plaintiff under the contract and that it was on the strength of that statement that he got the contract. It seems well established that a person occupying the position of trust that the plaintiff did, must shew that the contract he entered into with his beneficiaries is a fair one and that he has taken no advantage of them. If the statements made and relied on are untrue the beneficiaries are not bound by the bargain and may repudiate the contract when they learn that they have been deceived.

There is much evidence of probable cost of production on which, in my opinion, not much reliance can be placed. There are, however, in evidence, statements of actual operations, furnished by the plaintiff, for the year 1907. These statements do not satisfy me that the cost of production was as low as was stated and much less do the opinions of the witnesses. Indeed from the statements I find myself unable to come to any other conclusion than that the cost of production was much greater than the plaintiff admits he stated it to be, viz., 96c. to $1.05 a

ton. My brother Beck has made some computations and the lowest sum he is able to arrive at is $1.40 a ton. In my opinion that is even more favourable than the figures warrant. It may be noted that in the statement shewing the profit for the year as $11,177.71 the assets current account are given as $11,986.50, whereas the account itself gives only $8,386.50, considerably more than half of which is for bills and accounts receivable. The most favourable computation for the plaintiff I can make shews the cost of production as $1.60 a ton. It is probable that the directors were more influenced by the statement that there would be a profit of $1 a ton for the company after paying 50c. commission to the plaintiff. It may be said that this was a statement of expectation, but even if it be so treated unless there were a proper foundation of fact to support it, it must be treated as a misstatement of fact.

If the profit for the year 1907 had been in reality $11,177.71 as given in the statement, this would have been nearly $1 a ton that the company received, but as I have already pointed out, the figures by which this amount is obtained are not the figures of the other statements, and there seems no reason why the price of all the improvements should be added. There would no doubt be improvements each year, but allowing one-half the value as a special and extraordinary charge against the first year operations and all the preliminary expenses and deducting only 10 per cent. of the accounts and bills receivable and assuming that nothing was advanced by the owners to the business, the profits would not appear to be more than $5,361.60, which would be less than 50c. a ton. Then we find a statement of the profits for January and February, 1908, probably the two best months of the year. The amount shewn as profits for these two months is $710.05. In January and February, 1907, 3,725 tons were mined. If the same amount was mined in January and February, 1908, this profit would be less than 20c. a ton. Moreover, the whole trouble, which is referred to at length in the reasons for judgment of the learned trial Judge, was that at no time was the mine paying. It seems never to have made any substantial profit and I feel, no doubt, that the assurance that the plaintiff gave that a profit of $1.00 a ton would be derived from the mine after paying his commission of 50c. a ton was entirely unwarranted by the facts which were or should have been within his knowledge. The weight of evidence is also that 50c. a ton for the work he was to perform as sales agent was not a fair or usual commission but was excessive.

The directors were, therefore, entitled to rescind the agreement of 27th June, 1908, when they learned of the facts. They did in fact pass a resolution for that purpose in March, 1909. There is a dispute as to whether notice was given to the plaintiff

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but it is, I think, as I have already said, unnecessary to determine that point because there is no doubt that he became aware very shortly after that there was dissatisfaction with that contract and new terms were discussed and arranged between him and Robertson, the general manager, to which reference has already been made, and he did not suppose that he was continuing under the first contract, after that. The plaintiff, therefore, cannot claim under the contract of 27th June, 1908, and in the account between him and the company he should be allowed for his services upon the basis of *quantum meruit* up to the first of May, 1909, when the new arrangement was made with Robertson, which arrangement should be the basis for the remainder of the time he was in the company's employ, allowance being made also for his services as general manager while he acted as such.

As to the claim in respect to what is called the Bush property, it is quite clear that the defendants are entitled to a conveyance of this upon satisfying whatever claim the plaintiff may have. The account to be taken between the parties should be general and should include this. After the report is made and the state of the account is ascertained, further directions can be given.

The appeal should be allowed with costs and the account should be taken upon the basis I have indicated. The costs of the original action should be reserved to be dealt with by a single Judge after the accounts are taken.

Scott, J.

SCOTT, J.:—I concur with the judgment of Beck, J.

Beck, J.

BECK, J.:—This is an appeal from the judgment of Stuart, J., at a trial before him without a jury. He gave judgment for the plaintiff on his claim and directed an account against the plaintiff on the defendant's counterclaim. The learned trial Judge has set out the facts so fully that I need not repeat them.

One of the questions raised on the appeal is the question whether the agreement between the plaintiff and the defendant company of the 27th June, 1908, is binding upon the defendant company. That agreement the learned trial Judge has summarized as follows:—

The company appointed the plaintiff their sales agent and gave him in general terms the exclusive right to handle and sell the output of the defendant company's mine for a period of five years from the 1st September, 1908, and the plaintiff was to receive fifty cents per ton of all coal sold. The plaintiff agreed to give his whole time and attention towards effecting sales, to provide such office or offices and office staff as might be necessary and to bear all the expense of selling, collecting, bookkeeping, etc., to arrange for delivery of the coal except where delivery should be accepted by the purchaser at the pit mouth or on

board cars, but the cost of such delivery was to be ultimately borne by the company. The plaintiff was to be responsible for the price to be paid by the purchaser and to meet all bad debts and to pay demurrage where not caused by the fault of the company. He was to account for and pay over in cash on the 5th of each month the price of all coal sold except in cases of special contracts approved by the mine superintendent in which case the terms of such contracts should govern. The company agreed to "mine and produce such quantity of coal as having regard to the season and conditions affecting the same may be reasonably possible." Sales were not to be made below current market prices except with the consent of the mine superintendent. The plaintiff agreed to remain as general manager for the company until September 1st, 1908, when the contract was to become operative and then to resign. All moneys received by the plaintiff for sales of coal were to be considered the property of the company subject to the deduction of 50 cents a ton and, as was, of course, understood, the cost of hauling, but the company was not to be liable on contracts made by the plaintiff. There were other clauses in the agreement not necessary to be mentioned here.

This agreement is attacked by the defendant company on the ground that the plaintiff at the time it was entered into occupied a fiduciary relationship towards the company; that he misrepresented to the company what had been hitherto the cost of production or at all events did not make that full and fair disclosure with regard to the cost of production which, in view of the fact that he alone knew or was in a position to ascertain the cost and of his fiduciary relationship, he was called upon to make before concluding the agreement.

The learned trial Judge deals at some length with this part of the case. He says:—

> The misrepresentation alleged was that he (the plaintiff) had assured Rogers and A. W. Denman (two of the directors and the holders of almost the whole of the subscribed stock) that coal could be mined and was being mined at a cost of from 96c. to $1.05 a ton and the defendants allege that it was in reliance upon this assurance that Rogers and A. W. Denman had entered into the contract on behalf of the company and that, in fact, the cost of production had been and continued to be a much larger amount.

Then the learned Judge, after discussing the evidence of Rogers and one Smith, says:—

> Both these circumstances tend to confirm the plaintiff's statement that whatever he said was given as an estimate and had reference to the contemplated installation of more perfect machinery. . . . Whatever truth there may be in the defendant company's complaints on this score, and as I have indicated, I think there is very little, and even assuming that there never was any valid change in the original

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contract, I am clearly of opinion that the company through its directors must be held by the course of conduct which I have described to have acquiesced in the agreement in question and to be debarred from setting up misrepresentation or breach of trust according to the principle laid down in the case of *Erlanger* v. *New Sombero Phosphate Co.*, 3 A.C. 1261.

As I interpret the learned Judge's reasons for judgment he upholds the agreement of the 27th June on the ground of acquiescence without forming any definitive opinion upon the question of misrepresentation. At all events, in fulfilling the duty which falls upon me of considering the correctness of the learned trial Judge's findings of fact I have the less hesitancy in differing from him, in case the evidence should lead me to a different conclusion, than if it had appeared to me that he had based his decision upon a fully considered and definitively stated finding of fact against misrepresentation.

The clear purport of the plaintiff's evidence (pp. 74 and 75) is this, that he shewed Rogers and A. W. Denman a statement which he had prepared shewing that up to that time the company had been making "about a dollar a ton profit," that during this time the company was to pay his salary ($150 a month) and the expenses of the city office; that continuing with the same methods of operation this profit might be somewhat reduced by reason of new competition; that taking as a basis this profit in the past of nearly a dollar a ton the company might, with a contemplated installation of new plant and construction of a spur line of railway look for a profit of a dollar a ton clear after deducting the proposed commission of fifty cents a ton to himself, he, it is to be remembered, bearing the expenses of the city office and ceasing to be manager.

Going further back in the plaintiff's evidence he states quite definitely and distinctly (pp. 67, 68, 69) that the statement he produced shewed that the cost of production had been ninety-six cents per ton; that this was for all the coal that had been sold which consisted almost entirely of screened coal, "a very, very small part" being nut coal, as to which he says: "We threw away a lot of nut coal which is considered a by-product of the mine. It is not considered always a saleable article and mine managers don't generally consider that in the cost of production" (p. 68).

On p. 869, the plaintiff says:—

> I had them (certain books) at the time I made up the cost of production that I gave to the board of directors of 96 to 105.

On pp. 927-8 this occurs:—

> Q. If I were to tell you that your brother swore, Mr. Denman, that you stated to him in Mr. O'Connor's office that it cost 96c. to $1.05 to produce coal, would that statement be correct? A. It would.
>
> Q. You made that statement to him there? A. I did.

Q. Although you denied having made that statement? A. No, no. I never denied. I always said that was the price I told him it did cost.

Q. You also told Mr. Rogers the same thing? A. Yes.

This evidence, even without reference to the evidence of Rogers and A. W. Denman, shews beyond question, it seems to me, that the plaintiff represented positively and as basing his representation upon the actual results, that the cost of producing the coal up to that time had been from 96c. to $1.05 for all the coal sold which consisted almost entirely of screened coal and that it was in no sense any estimate of what could be accomplished in the future under improved conditions.

Counsel for the plaintiff takes this view of the evidence. His factum puts it in this way (p. 5):—

When these negotiations were going on certain statements made in April were submitted by the plaintiff which shewed that, taking all the coal sold, it was costing from 96c. to $1.05 to produce and he so stated then and so swears now.

This is a conclusion from the evidence which differs from that of the trial Judge, who, in view of the enormous mass of evidence in the case which occupied thirteen days, may very readily be supposed to have forgotten some of the evidence.

Having, as I find, made these representations and they having been the inducement for the agreement of the 27th June, 1908, and the agreement being attacked by the defendant company, the other party to it, the plaintiff, standing at the time in a fiduciary relationship to the company as he undoubtedly did (*Imperial M. C. Association* v. *Coleman*, L.R. 6 H.L. 189) is called upon to prove affirmatively their truth: *Gibson* v. *Jeyes*, 6 Ves. 266 at p. 276; Kerr on Fraud and Mistake, 4th ed., p. 147; Bowstead on Agency, 4th ed., pp. 137-8. As far as I can discover he has not only failed to do this but the most reliable evidence upon the matter points strongly to the conclusion that his representations as to the cost of production cannot be substantiated.

Exhibit 10, pp. 1015 *et seq.*, is a statement made upon an audit by one Toll. The statement was prepared by the plaintiff's direction and was issued by him (p. 77). It appears to be the most reliable and satisfactory evidence on which to calculate the cost of production from the 1st December, 1906, to the 31st December, 1907. The difference between the revenue and the expenses would shew the entire cost of carrying on the business. To ascertain the cost of production there should obviously be deducted from the expenses all expenses which are not properly part of the cost of production, such as haulage, the greater part of the salaries of the managing director, of the city office staff, of the rent and maintenance of the city office, all advertising, and an allowance for interest on investment. The statements

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comprised in exhibit 10, though they may not furnish us with sufficient details to enable us to make an exact calculation either of the entire expenses or of the cost of production, appear to be sufficient for an approximate calculation, as against the plaintiff. Taking them as they are, counsel for the defendant company contends that they shew that the cost of production was not less than $1.55 per ton, or at all events that they appear to shew this and that if they shew a less cost it lies upon the plaintiff to establish it.

He puts it in this way:—

| | | |
|---|---|---|
| The total revenue from the sale of coal is stated to be | | $49,963.60 |
| The cost of hauling | $18,226.00 | |
| The net profit | 11,177.71 | |
| | | 29,403.71 |
| Cost of production | | 20,559.89 |

Divide that by the number of tons 13,256.47 and the result is $1.55 per ton.

In this calculation it seems to me some things have been overlooked. In ascertaining the profits (p. 1020) the total of the preliminary expenses $822.36 (p. 1017-18) and the total of the improvements $3,450 (p. 1016) making together $4,172.36 have been charged instead of only a proportionate part, for instance one-tenth, that is $417.23 should be added to the estimated profits.

Besides this, it would appear that in respect of the capital account amounting to $248,231.10 (p. 1022) some allowance should be made for interest on the investment; though I should think it ought to be assumed that a year's interest was paid and charged upon $220,000, the balance of the original purchase price of the land.

There should therefore, I think, be taken into account 1 month's interest on $220,000 as follows:—

| | | |
|---|---|---|
| Interest on $11,000, at 8 per cent. | $ 73.33 | |
| Interest on $15,400, at 7 per cent. | 89.83 | |
| Interest on $203,600, at 6 per cent. | 1,018.00 | |
| | | $1,181.16 |
| 13 months' interest at say 8 per cent. on $5,643. ($248,231.10 less $242,588.00) | | 489.06 |
| | | $1,670.22 |

This amount should be deducted from the estimated profits. Then, we should allow for the salaries of the manager and his assistants in the city office and other expenses, what would seem more than sufficient (see pp. 49-50) $4,500 and add to it 1/12 for the thirteenth month $375 making $4,875. About 2/3 of this latter amount, $3,250 should be taken to be cost other than cost of production and like the item for hauling deducted from the revenue from coal. No other items by way of correction of

the defendant's counsel's calculation occur to me. The result would be as follows:—

| | |
|---|---|
| Total profits | $11,177.11 |
| Add | 417.23 |
| | 11,594.34 |
| Deduct | 1,670.22 |
| | 9,924.12 |
| Add cost of hauling | 18,226.00 |
| | 28,150.12 |
| Add | 3,250.00 |
| | 31,400.12 |
| Total revenue | $49,963.60 |
| Deduct | 31,400.12 |
| | $18,563.48 |

This amount divided by 13,256.47, the number of tons, leaves $1.40 as the cost of production per ton. I do not see how the amount can be much further reduced from anything that appears in the evidence and I therefore think that the plaintiff has failed to shew that his representation as to the cost of production was true; not only so but, as far as can be ascertained by any of the evidence which can be relied upon with any sense of satisfaction at all, the cost was in fact higher than he represented.

This state of things, in my opinion, gave the defendant company the right, not merely to a future judicial rescission by a judgment of this Court, but the right to repudiate, by its own act, the contract of the 27th June, provided the company did so promptly after discovering the falsity of the representation and provided that the company was still in a position to make not strictly a *restitutio in integrum* but only "to that which shall be a just situation with reference to the rights which he held antecedently to the transaction though not precisely to that position": Kerr on Fraud and Mistake, 4th ed., ch. 7, pp. 365 *et seq.*, especially pp. 369-70; *Adam* v. *Newbigging*, [1888] 13 A.C. 308. On the 1st March, 1909, the directors of the company passed a resolution purporting to cancel the agreement of the 27th June, 1908. As I understand the evidence, it seems to me tolerably clear that this step was taken mainly because the directors had come to the conclusion that the business was not paying, which, it seems to me, was in effect that the plaintiff had misrepresented the cost of production.

The making by H. H. Robertson on behalf of the company, of what is called the second or amended agreement of the 1st May, 1909, is said to estop the defendant company from setting

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up their repudiation of the agreement of the 27th June, 1908, or from now obtaining its rescission.

What the learned trial Judge says about it is this (p. 1272):—

> With regard to the amended agreement, I have come to the conclusion that it is binding upon the defendant company if the plaintiff chooses to act upon it. All the directors knew about it for months and these directors were practically the only shareholders. Robertson informed both Rogers and A. W. Denman about it. Race's reports refer to it again and again. Robertson was local director. Indeed he claimed at one time to be both general manager and mine superintendent. The plaintiff was never informed that the second agreement was not accepted by the company. Every officer of the company, including the mine manager, Dunn, knew all about it, as I say, for months. It was a contract within the ordinary routine of the company's business and I think, in these circumstances, that the company cannot repudiate it.

The terms of what is spoken of as the amended or second agreement appear in engrossment of a draft proposed agreement between the plaintiff and the company. It is exhibit 3 (p. 1000). It was never executed either by the plaintiff or by the company. The following letter (exhibit 2, p. 1,000) referring to it was proved:—

> May 1st, 1909.
>
> Mr. H. H. Robertson,
> Gen. Mgr. Clover Bar Coal Co., Ltd.,
>
> Dear Sir,—Confirming the verbal agreement re my contract as sales agent, you agree to accept all sales made as being under the agreement now pending signature by the directors of the company. Should the same not be accepted by them, then after notice of non-acceptance, the original agreement shall remain in full force but all sales made and new contracts made in the interim period to be accepted as in the new contract (*and then added in ink by Robertson*) but not to prejudice H. H. Robertson or others in any way (*and then added in ink it is disputed by whom and when*) in their consideration of it.
>
> Respectfully yours,
> (Sgd.) J. J. DENMAN,
> *Sales agent.*
>
> (Sgd.) Harry H. Robertson,
> *General manager.*

There are some expressions in this letter deserving of careful consideration and a consideration of them leads, in my opinion, to a conclusion different from that of the learned trial Judge.

The words, "the agreement now pending signatures by the directors"—and it is to be observed that the form contemplates signature by the president, vice-president and secretary-treasurer and the affixing of the company's seal—shew that regular and formal execution of the proposed agreement was contemplated to bring it into effect, involving a meeting of the directors. The words, "Should the same not be accepted by them. . . .

all sales made and new contracts made in the interim period to be accepted as in the new (proposed) contract," clearly to my mind indicate that the plaintiff was himself proposing to Robertson, not that he should attempt to bind the company, as then managing director, to the terms of the proposed new contract but merely that he should in that capacity bind them to a mere temporary arrangement to which those terms should apply as far as applicable to such an arrangement. The words added by Robertson seem to be intended to add restriction even to this.

It is no doubt true as the learned Judge has said that both Rogers and A. W. Denman knew about this proposed agreement but it appears that their knowledge of it was conveyed to them in letters from Robertson asking their approval of it and that they never gave their approval.

It is also, no doubt, true that Race's reports refer to it again and again; but there is no evidence that either Rogers or A. W. Denman ever saw these reports.

In my opinion, such a contract, extending over a period of five years, is not one which would come within the powers of a general manager, at all events, of one in the position which Robertson is shewn to have occupied. But if it were so, Robertson not only never purported to enter into an agreement for that period, but expressly limited the agreement he made for an indefinite temporary period for the purpose of meeting the pressing temporary need of the company to have some satisfactory arrangement for the disposal of the output of the mine, pending the making of a definite and permanent arrangement for that purpose. Robertson himself refers to the above quoted letter (exhibit 2) and the form of agreement (exhibit 3) as a "tentative arrangement" or "tentative agreement" (pp. 518 *et seq.*).

In my opinion too, it was not within the authority of Robertson to compromise or in any other way to discharge the plaintiff from his liability to the company in respect of his misrepresentations or to confirm or validate the agreement of the 27th June, 1908, which the company by formal resolution had cancelled. I think it would not have been within his authority had he been really a managing director. In fact he was little more than general manager in name only as, of course, the plaintiff quite well knew. I think, therefore, that Robertson had no authority to agree to the plaintiff's words, "Should the same (the new proposed agreement) not be accepted by them (the directors) then, after notice of non-acceptance, the original agreement shall remain in full force." However, even while appearing to agree to this, he, I think, prevents it being more than a proposal to the directors, by adding to the plaintiff's words, "but not to prejudice H. H. Robertson or others in any way." Robertson says (p. 524) that when he came to the point of signing this letter: "I

told him (the plaintiff) I had no authority to sign, that is to bind the company. That is why I wrote that on the bottom of the letter, it wasn't to prejudice me." There is a disagreement between Robertson and the plaintiff as to the addition of the further words, "in their consideration of it." Robertson says that they are not in his handwriting and that they had not been added when he put his signature to the letter; that he never saw them until the letter was produced to him on his examination for discovery, and that in his belief they are in the plaintiff's handwriting. I believe this evidence. A careful examination of the original and a comparison of the written portion with proved or admitted handwriting of Robertson and of the plaintiff, convinced me that these words are in the handwriting of the plaintiff. The learned trial Judge thought their addition makes no difference in the sense. In this, it seems to me, he is mistaken. Without them, Robertson's "but not to prejudice H. H. Robertson or others in any way" are general and extend to the whole management; with them, they are perhaps restricted to the consideration of the new proposed agreement.

As I have said, in my opinion, it was beyond Robertson's authority, had he purported to do it, to reinstate the old agreement, and there is no evidence that I have been able to discover on which to base a suggestion of ratification. There is no evidence that Robertson informed the directors or any of them, in any way, that he had assumed to interfere in any way with the action of the directors in cancelling the old agreement.

The result of what I have said is that in my judgment,—

1. The plaintiff has no right of action for breach of the agreement represented by the letter of the 1st May, 1909; that was a merely temporary arrangement terminable at will; though for the period during which it remained in force, the account between the plaintiff and defendant ought to be taken on the basis of it;

2. That the defendant company were justified in repudiating the contract of the 27th June, 1908, on the ground of misrepresentation of the cost of production, and that that agreement was not afterwards ratified, and that therefore in the account between the plaintiff and the defendant company, the plaintiff is entitled to compensation for his services during the term of that agreement only on the basis of a *quantum meruit*.

With regard to what is spoken of as the "Bush" matter, the matter referred to in the second paragraph of the judgment, the evidence does not satisfy me that the amount paid by the plaintiff was raised—admittedly it was raised in the bank—independently of the credit and name of the defendant company, and, whether or not that was the case, that, as the plaintiff had the handling of the defendant's moneys, the amount was not ulti-

mately paid out of the defendant's moneys. As there must be an account, I think justice will best be served by allowing the title to the land to remain in the plaintiff as security for any sums which may ultimately be found due to him in the account to be taken, and that the account should include this particular transaction.

I have sufficiently indicated what, in my opinion, the judgment of this Court ought to be. I would dispose of the costs as proposed by the Chief Justice and reserve the further consideration of the case, for a single Judge.

Beck, J.

SIMMONS, J.:—I agree with the finding of the trial Judge that the defendants have failed to establish misrepresentation by the plaintiff in regard to the contract of June, 1908, for the sales agency of coal, which agency was to commence on September 1st, 1908, and whereby the plaintiff was to receive 50 cents per ton on all the coal sold by him. He, it is true, represented that the estimated cost of production would be 96 cents to $1.05 per ton. He based his estimate on the result of prior operations and seems to have disclosed the results of these prior operations to his co-partners and after the incorporation of the joint stock company to his co-directors up to the time of entering into the sales agency contract of June, 1908. The mine was during the period prior to the contract of June, 1908, working from a level drift and was not equipped with machinery such as is usually included in an operative coal mine. The estimate made by the plaintiff contemplated the installation of mining machinery and a consequent reduction in the cost of production of coal. None of the parties to this action had at the time of entering into the contract any experience in coal mining beyond what they had acquired during the operation of this mine and in view of the pioneer methods under which they had worked the mine, their knowledge of the practical operation of a modern properly equipped coal mine, and of the probable cost of production in the same, could not have been very much extended by their former operations. Both the plaintiff and defendant were inclined to colour the outlook as to probable profits with too rosy a hue—a tendency not at all unusual in mine promoters.

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I am of the opinion that the defendants have not made out even a *primâ facie* case against the plaintiff as to actual wilful misrepresentation further than this, that the plaintiff made an estimate which he thought was capable of realization, but which subsequent experience proves was too high, and the defendants relied to some extent at least upon it and to that extent they were misled by the plaintiff.

There was a failure by both plaintiff and defendants to appreciate their mutual lack of knowledge of a business enterprise, namely, the probable cost and probable selling price of coal over

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an extended period of five years, and involving as the contemplated enterprise did, large expenditures for mining machinery and large expenditure for installation of same and for development of the mine. The rudimentary operation of the mine from which they had derived their knowledge and on which they very foolishly based their estimate could give very little valuable information as to these added factors which they contemplated. The usual result followed, the results did not come up to the estimates. The defendants then sought to relieve themselves of what turned out to be a very bad bargain so far as they were concerned. The defendants by a resolution of March 1st, 1909, purported to cancel the agreement of June, 1908, as to the sales agency, but did not serve any written notice of same on plaintiff and while the learned Judge at the trial has made no positive finding as to verbal notice, he has not found, as a matter of fact, that the plaintiff had even verbal notice.

At any rate in May, 1909, there was an arrangement (exhibit 2) entered into by Harry H. Robertson, then acting manager, and the plaintiff and which was communicated by Robertson to his co-directors and under which both parties acted until the defendants on February 15th, 1910, refused to deliver coal to the plaintiff, thereby terminating the sales agency. Robertson says the agreement (exhibit 2) was a tentative one, and he did not consider he had authority to bind his co-directors or the defendant company.

It seems to me that the plaintiff has allowed himself to be placed in this position—either that there was a tacit acknowledgment by him that the sales agency agreement of June, 1908, was one which the defendants could not reasonably carry out on account of the cost of coal exceeding to so great an extent his estimates—or in the alternative, that Robertson did tell him (as he, Robertson, says) that the defendant had cancelled his contract. How can the plaintiff account for his entering into negotiations with Robertson, looking to a new contract which would be manifestly better for the defendants unless on one or other of the above grounds? In either case it seems to me that he has no claim in damages against the defendant. If the first agreement was based upon incorrect premises, which rendered it so onerous as to be impossible of performance by one party, surely then aside from any action of the parties the Court can grant equitable relief and terminate it.

The general rule is, "that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity": Story's Equity Jurisprudence, 2nd ed., page 86. The rule requires ignorance or mistake as to a fact material to the contract. It is quite clear that the contract (exhibit 1) was entered into under the belief by both parties that the

defendants would have a profit of $1.00 per ton after paying the plaintiff a commission of 50 cents per ton, and that the defendants' expectations in this regard were to a large extent the result of plaintiff's incorrect estimates, and the plaintiff was in a better position to know than his co-directors. There was here clearly a material ingredient in the contract which disappointed the intention of the parties by mutual error: Story, page 92.

The defendant company never formally ratified the tentative agreement (exhibit 2) and were within their rights in determining it in March, 1910.

The position of the parties when Robertson entered into the tentative agreement (exhibit 2) with the plaintiff was this—the company was in financial difficulties; the plaintiff had a contract with them from which they were entitled to be relieved; the company were receiving from the plaintiff advances by way of loans to help them from time to time. On account of the financial stress hanging over their heads and their inability to relieve it other than by obtaining assistance from the plaintiff, they were not in a position to assert the right which they purported to exercise when they passed the resolution of March, 1909.

The plaintiff took an unfair advantage of defendants' stress to obtain a new contract or in the alternative a revocation of the resolution of March, 1909, by providing in the tentative agreement with Robertson that if same were not ratified by the company, that the original sales contract should be maintained. The result is, that the plaintiff's claim for damages fails. In view of the result it does not seem necessary to consider the charges of misconduct made against the plaintiff as a ground of rescission.

I quite agree with the findings of the trial Judge as to the Bush contract. I am of the opinion, therefore, that the judgment below should be varied to the extent of dismissing the plaintiff's claim for damages.

*Appeal allowed,* SIMMONS, J., *dissenting in part.*

**Annotation — Corporations and companies (§ IV G 2—117)—Directors contracting with a joint-stock company.**

**Annotation**

Director's contract with company

(By ALEX. HANNAH, Barrister, Calgary.)

The circumstances which lead to a director contracting with a company of which he is a director can arise in either of two ways, (1) directly on behalf of himself, or (2) indirectly through his being a shareholder of a company, contracting with the company of which he happens to be a director. The principle involved in both instances is the same and the law regards the difference between a director contracting directly with a company as opposed to contracting indirectly as only one of degree.

Directors are agents and trustees of a company and the utmost care must be exercised in the matter of a director contracting with a company as the law is jealous of the rights of those who impose their confidence in

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**Annotation** (*continued*)—**Corporations and companies** (§ IV G 2—117)—**Directors contracting with a joint-stock company.**

a body of directors and elect them to a position of trust for the purpose of protecting and furthering their interests.

The well-settled rule that an agent cannot, without the knowledge or consent of his principal be allowed to make any profit out of the matter of his agency beyond his proper remuneration, applies with peculiar stringency to the directors of joint-stock companies.

Lord Cairns, L.C., in the case of *Parker* v. *McKenna*, 10 Ch. 96, 118, says: "It is a rule founded upon the highest and thoroughest principles of morality. No man can in this Court, acting as an agent be allowed to put himself into a position in which his interest and duty will conflict."

This view is confirmed in the decision of Lord Herschell, in the case of *Bray* v. *Ford*, [1896] A.C. 44, 51. Delivering judgment in that case Lord Herschell said: "It is an inflexible rule of a Court of equity that a person in a fiduciary position such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit, he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule, is as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is a danger in such circumstances of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases without any breach of morality, without any wrong being inflicted, and consciousness of wrong doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services."

The strictness with which the rule is adhered to in the case of joint-stock companies is illustrated in the case of *The Aberdeen R. Co.* v. *Blakie*, decided in 1853, by the House of Lords, 1 Macq. 461, 9 Sc. Rep. H.L. 365, where it is laid down: "It is a rule of universal application that no trustee shall be allowed to enter into engagements, in which he has, or can have, a personal interest, conflicting or which may possibly conflict with the interest of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness, or unfairness of the transaction, for it is enough that the parties interested object. It may be that the terms on which a trustee has attempted to deal with the trust estate, are as good as could have been obained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted."

In determining whether a director is entitled to enter into a contract with a company much depends upon the powers contained in the articles of association. Unless the articles contain powers enabling the directors to contract with a company, no director in respect of his fiduciary relation toward the company can contract with the company: *Albion, etc., Co.* v. *Martin*, 1 Ch. D. 580.

It is, therefore, necessary in each case to carefully scrutinize the articles of association of the company. The subject is accordingly hypothetical,

**Annotation (*continued*)—Corporations and companies (§ IV G 2—117)—Directors contracting with a joint-stock company.**

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but two of the most common instances of provisions contained in articles of association of a company may be cited.

1. The articles of association may provide that the office of a director will be vacated on his contracting with the company without any direct permission to enter into contracts with the company. This provision is most frequently qualified to the extent that no director is to vacate his office by reason of his being a member of any company which has entered into contracts with or done any work or which is concerned in or participates in the profits of any contract with the company with which he is contracting. In the instance cited it is clear that no director can directly enter into contracts with the company of which he is a director except that he vacates his office as director but any company of which he happens to be a member may contract with the company of which he is a director.

A provision in the articles on the terms above set out has the effect of automatically vacating the office of director, but the disqualification does not continue longer than the continuance of the contract itself and if on the termination of the contract the person interested is re-elected as a director the election is good, although the fact of interest has not been previously discovered: *Re Bodega Co.*, [1904] 1 Ch. 276.

It is well settled that any man who is a shareholder in another company contracting with the company of which he is a director is interested in the contract.

The second instance which may be taken of the powers contained in the articles of association of a company is where the articles distinctly authorize a director to contract with a company either directly or indirectly provided that the nature of his interest in the contract is disclosed at the meeting of directors at which the contract or arrangement is determined on. It is advisable that this provision should be inserted in all articles of association of a company as the only question left to be disposed of is that of what constitutes a sufficient disclosure.

The cases in which the question of disclosure has been pointedly discussed are: *Imperial Association* v. *Coleman*, L.R. 6 H.L. 189, 6 Ch. 558; *Southall* v. *British Mutual*, 6 Ch. 614; *Adamsons Case*, 18 Equity 670; *Costa Rica Company* v. *Forwood*, [1901] 1 Ch. 746.

From these cases it may be generally laid down that if sufficient information is placed by the interested director before his co-directors to enable them to scrutinize fully the contract being entered into and to have the whole facts before them, the contract, provided that the articles of association of the company do not negative it, can be competently entered into.

Of course, the law imposes upon a director, contracting with the company within the powers contained in its articles of association, all the other legal essentials which it demands in the case of a contract between private parties and places both the company and those contracting with it under the same legal disabilities.

The one very important point to be kept in view is that the rule as to the fiduciary relationship between a director of the company and the com-

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**Annotation** (*continued*)—**Corporations and companies** (§ IV G 2—117)—**Directors contracting with a joint-stock company.**

pany itself in the matter of contracts between these two parties, is that a company may unquestionably waive the benefit of the rule: *Imperial, etc., Association* v. *Coleman*, 6 Ch. 558, L.R. 6 H.L. 189; *Southall* v. *British Mutual, etc., Society*, 6 Ch. 614; *Black* v. *Mallalue*, 7 W.R. 303; *Adamsons Case*, 18 Eq. 670; *Kaye* v. *Croydon Tramways Co.*, [1898] 1 Ch. 358; *Costa Rica R. Co.* v. *Forwood*, [1901] 1 Ch. 746.

Ratification by shareholders of a contract with directors is in every instance a question of proof and the Courts will demand very clear evidence to prove that the rule governing the fiduciary relationship between directors and a company has been waived.

In addition a company in general meeting may sanction a contract in which the directors are interested: *Grant* v. *United Switchback R. Co.*, 40 Ch. Div. 135.

Where, however, a contract is to be submitted to a meeting for confirmation in which directors are interested, the notice convening the meeting should set forth the particulars of the directors' interest: *Kaye* v. *Croydon Tramways Co.*, [1898] 1 Ch. 358; *Tiessen* v. *Henderson*, [1899] 1 Ch. 861; *Normandy* v. *Ind, Coope & Co.*, [1908] 1 Ch. 84.

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ALTA.

S. C.
1912
Oct. 18.

## WALLACE v. POTTER.

*Alberta Supreme Court, Walsh, J. October* 18, 1912.

1. WRIT AND PROCESS (§ II C—35)—WRIT OF SUMMONS—SUBSTITUTED SERVICE—SUFFICIENCY.

Where the end aimed at in an order for substituted service is service upon defendant's brother, service upon a brother other than the one designated in the order may be confirmed and allowed as sufficient

2. JUDGMENT (§ I A—2)—DEFAULT OF APPEARANCE—CLAIM BY POSSESSION—PERSONAL SERVICE.

When the claim is for a declaration that plaintiff has acquired a title to land by possession, the Court will not grant judgment in default of appearance without an examination of the witnesses in open court, if the writ has not been served personally.

3. EVIDENCE (§ II E 3—156)—ABSENCE FOR SEVEN YEARS—PRESUMPTION OF DEATH—APPOINTMENT OF COUNSEL TO REPRESENT ESTATE.

In an action to declare valid a title by possession where the party named as defendant has not been heard of for seven years, the court may act upon the presumption that he is dead, and appoint counsel to represent his estate under Alberta Rule 57.

4. COSTS (§ II—25)—PARTY PRESUMED DEAD—COUNSEL APPOINTED TO REPRESENT ESTATE.

Where an order is made under Alberta Rule 57, for the representation as defendant of the estate of a person presumed to be dead because he had not been heard from in seven years, the court may at the same time direct that the costs of such counsel in attending at the hearing and examining witnesses shall be paid by the plaintiff.

Statement

AN application for judgment in default of appearance, the writ of summons, statement of claim and order having been served on the defendant substitutionally.

The application was refused, the action placed on the list for trial and counsel appointed to represent the defendant.

*S. Brownlee*, for the plaintiff.

WALSH, J.:—The order allowing substituted service of the writ directed the publication of a certain notice in ten newspapers and service of the writ, statement of claim and order on a brother of the defendant at Mount View, Washington. This order has been fully complied with except that service was made upon a brother of the defendant at Ottawa, Canada, instead of at Mount View, Washington. The end aimed at was service upon a brother of the defendant and that has been as effectively accomplished by service at Ottawa, as if it had been made at the place named in the order. I therefore allow the service. No appearance has been entered and the time limited therefor has elapsed. Under the rules judgment cannot be entered "until the Judge is satisfied by such proof as he may require of the justice of the claim." The action is for a declaration that the plaintiff has acquired a title by possession to 160 acres of land of which the defendant is the recorded owner. I do not think that effect should be given to such a claim as this where personal service has not been made upon the defendant except after an examination of witnesses in open Court. The plaintiff may place the action on the list for trial at the November sittings in Calgary or at any subsequent Calgary sittings.

The material upon which the order for substitutional service was made is suggestive of the death of the defendant. He does not appear to have been heard of or from for more than seven years, and this raises a presumption of death. Although the evidence falls very far short of conclusive proof of death or even of the fact that the defendant has not been heard from for seven years, I intend for the purpose of this application to act upon the presumption to which I have referred and appoint a person to represent him or rather his estate under rule 57. Although the case made by the plaintiff's material seems very strong I do not think that it would be right to take the defendant's property away from him behind his back unless he or his estate is represented on the hearing. I appoint Mr. E. A. Dunbar, of Calgary, to represent the defendant in the subsequent proceedings. His costs will be paid by the plaintiff. I do not think that so far as the trial is concerned, he need do more than appear at the hearing and take such part in the examination of the witnesses as he may think necessary. He should communicate with the brother at Ottawa upon whom service was made informing him of this order so that the brother may give him any information which he may be disposed to communicate. The plaintiff's solicitor will on Mr. Dunbar's request furnish him with a copy of the statement of claim and of any of the material

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on file and will give him such further information and supply him with such further material as he would under the practice be entitled to if he was the solicitor in the record for the defendant. If the defendant's brother instructs Mr. Dunbar to participate in the defence of the action more actively than I have intimated that he should, he may, of course, act upon such instructions, but not at the expense of the plaintiff, unless, of course, costs are awarded to him by the trial Judge upon a dismissal of the action.

*Order accordingly.*

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H. C. J.
1912
Oct. 21.

## WELSH v. HARRISON.

*Ontario High Court, Riddell, J., in Chambers. October 21, 1912.*

1. JUDICIAL SALE (§ VI—45)—DEPOSIT PAID INTO COURT—INTEREST.

Where a purchaser at a judicial sale has paid a deposit on purchase-money into court in conformity with the conditions of sale in a partition action, but the sale goes off without any fault on the purchaser's part, the interest, earned thereon and credited to the court ledger account of the funds in that action while the money was in court, belongs to the purchaser to be repaid to him with his deposit.

2. COSTS (§ II—28)—COMMISSION IN LIEU OF COSTS—PARTITION ACTION—CON. RULE (ONT.) 1146.

The commission and disbursements allowed in lieu of taxed costs in partition actions (and administration suits) under Con. Rules (Ont.) 1897, rule 1146, include all future costs to the close of the case as well as the costs up to the date of the report whereby the amount is certified, the proper future disbursements being included therein and fixed in advance.

Statement

MOTION on behalf of all parties to a partition proceeding for distribution of the moneys in Court in accordance with the report of the Local Master at Whitby.

*J. A. Campbell*, for all parties.

Riddell, J.

RIDDELL, J.:—On the 7th December, 1908, an order was made herein by Mr. Justice Britton, at the Whitby Assizes, for partition or sale of lands. Paragraphs 2, 3, and 4 of the order correspond with paragraphs 2, 3, and 4 of Form 158—with a reference to the Master at Whitby: paragraph 5 directs an account of rents and profits received by four of the defendants; and paragraph 6 an account of the goods and chattels of the deceased received by the said defendants. The plaintiff and the defendants were tenants in common of the land.

The Master directed a sale of the lands, and an advertisement was issued for a sale by auction on the 20th March, 1909. The defendant Catherine Harrison was declared the highest bidder, but her offer was accepted subject to the consent of the others interested, she being a party to the action. I do not know why this was necessary: Con. Rule 725: but no one complains of this, and there may have been some good reason.

It proved impossible to get this consent, and subsequent attempts were made to sell by auction on the 7th May, 1910, and by tender on the 1st July, 1910, 15th June, 1911, and 1st August, 1911, all of which attempts proved abortive.

Catherine Harrison's bid had been $3,650: she paid at the time $365 to the plaintiff's solicitors, and he paid it into Court. Subsequently the lands were sold by tender in separate parcels to four persons—one of them Catherine Harrison—and by a perfectly proper agreement her payment of $365 was allowed on her purchase-money. All the purchase-money was paid into Court, and vesting orders have been issued therefor. The Master's report has become absolute by lapse of time.

The Master has properly allowed a commission in lieu of costs, under Con. Rule 1146.

I am now asked to make an order: (1) that Catherine Harrison be paid the interest upon her payment of $365 from the time it was paid into Court until the time at which she could have been required to pay for her final purchase. (I may say that, by a strange oversight, the date of this sale does not appear in the Master's report or in the affidavit filed); (2) that the costs of this application may be paid out of the fund in Court; (3) that payment out may be made in terms of the report.

All parties consent to the last two. As to (1), this is a proper order to make in any case: Catherine Harrison paid money into Court which she should not have paid—and the other beneficiaries are not entitled to have any advantage of the interest upon that sum.

As to (2), the application must be refused: the commission covers all costs other than disbursements. When the disbursements are taxed by the Master, he takes account of all disbursements proper to be allowed, future as well as past—and the commission covers all costs, future as well as past.

As to (3), subject to what I have said in respect of (1), the order may go.

It seems to be necessary again to call the attention of practitioners to the necessity of filing all the papers which are to be used on motions—it is too much to expect the Court to act the solicitor's clerk and hunt up the missing documents.

I have recently pointed out also that the Court does not act as a conduit pipe to draw orders through, just because parties desire them. Mere consent will not justify the issue of an order wrong in principle.

*Order accordingly.*

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Oct. 23.

## KEDDY v. DAUREY.

*Nova Scotia Supreme Court. Trial before Russell, J. October 23, 1912.*

1. CONTRACTS (§ I D—51)—MEETING OF MINDS—MUTUALITY—ILLITERATE MARKSMAN.

Where an illiterate person signs by his mark a contract to sell standing timber and it appears that the instrument was not, before signature, read or explained to him and that he did not know its wording when he made his mark thereto, such circumstances constitute in his favour a valid ground of defence against the enforcement of the contract by the other party thereto, particularly where the written contract was materially different from the oral agreement in conformity with which the illiterate person might reasonably have supposed the writing to have been drawn.

Statement

TRIAL of an action brought to recover damages for breach of an agreement in writing by which it is claimed that the defendant sold to plaintiff the timber on three hundred acres of land for $60, to be paid in instalments of $20, the first payment to be made when 100 logs were taken off and subsequent payments of $20 each to be made at later stages, the plaintiff to have three years to cut the timber. The defendant was an illiterate person who signed the documents as a marksman and the defence was that he did not know what he was signing. The papers were prepared by a county magistrate who is no longer living, and the mark was witnessed by a clerk in the store in which the papers were executed, who said that he did not pay much attention as the matter did not concern him.

The action was dismissed.

*V. J. Paton*, K.C., for plaintiff.

*S. A. Chesley*, K.C., and *McLean*, K.C., and *Margeson*, for defendant.

Russell, J.

RUSSELL, J.:—When the papers were drawn up the area of land was stated as five hundred acres. It is not disputed that this was an error. At least the defendant Daurey objected to this quantity and the document was amended by the interlineation of a description containing only three hundred acres. Daurey says that he asked for two other changes, first that six inches instead of five should be the minimum size to be cut, and secondly, that the payment of $60 should be paid on the execution of the documents instead of in instalments, the first of which under the terms of the agreement might not be payable until the third year of the period allowed to the plaintiff to cut the timber. He says that he put his mark to the document supposing that these alterations had been made. It is a circumstance which seems to me to confirm his contention that when he called on the magistrate soon after he had executed the agreement he expected to find that Keddy had signed it and that he had left the purchase money with the magistrate for him. The

plaintiff's cross-examination appears to be based on the theory that it was the failure of plaintiff to pay this amount that caused the defendant to break the agreement. But defendant could not have expected this amount to be paid if he had not been under a misapprehension as to the contents of the writing. My impression as to the facts is that the defendant never agreed to a postponement of the payments in the manner provided in the agreement nor to the permission given to cut trees down to five inches in diameter. I think that these features of the agreement were not made clear to him before he signed it and that he affixed his mark believing that the document provided for the payment of the sixty dollars at once and for a minimum of six inches. It is likely enough that his reason for declining to go on with the transaction was that the money had not been paid rather than that the documents were wrongly filled out. He probably did not know at that time that they were not correctly drawn up. I think his impression was that when he got back the two documents that he executed as he says for Keddy he had cancelled the transaction, and it was only after he took them home and his wife read them that he discovered that they were wrong.

It does not seem to me to matter whether four papers were signed or only two. I should have explained that there were two agreements, one as to the land and another relating to a mill. Both agreements appear to be executed in duplicate and defendant's marks to all four and witnessed by the attesting witness on all the four papers. Defendant says he put his mark to two only. Probably he is in error here, though there is an expression used by the witness about the execution of "two papers each time," which would seem to be inappropriate if all the four documents were signed at the same time. The truth is that the recollection of the witness is confessedly hazy as to the circumstances attending the execution.

It has been suggested that the defendant Daurey's reason for breaking his agreement was that he could get a better price for his timber from the other defendant, Aulenbach, to whom he sold it at a later date. But he broke with the plaintiff three weeks or thereabouts after the dating his agreement, which was December 18, 1908, while his sale to Aulenbach did not occur until January 25, 1910. I think it is very improbable that Daurey would have made the sale to Aulenbach if there had been a document executed embodying the terms of his previous agreement with plaintiff. He would surely have had sense enough to know that if the writing was in accordance with the terms of the actual agreement he was bound by it and would have to answer in damages for the breach. His conduct is consistent with his theory. Of course this consideration, if it

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stood alone, would not amount to very much, as men do knowingly break their agreements and the defendant may well have done so.

I think the defence is available under the pleadings, but if an amendment were necessary to cover it, I should not hesitate to grant it. The plaintiff's claim will be dismissed.

*Action dismissed.*

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Oct. 24.

## CANADIAN PACIFIC R. CO. v. CANADIAN NORTHERN R. CO.

*Alberta Supreme Court, Walsh, J. October 24, 1912.*

1. INJUNCTION (§ I A—4)—INCONVENIENCE OF DEFENDANT—GROUNDS FOR REFUSING—DAMAGES IN LIEU OF.

The ordinary rule is to grant damages in lieu of an injunction in cases where (*a*) the injury to plaintiff's legal rights is small, and (*b*) is capable of being estimated in damages, and (*c*) can be adequately compensated by a small money payment, and (*d*) where it would be oppressive to defendant to grant an injunction.

[*Shelfer* v. *City of London Electric Lighting Co.* (No. 1), [1895] 1 Ch. 287, at 322, approved.]

2. DAMAGES (§ I—4*a*)—INJURY NOT YET COMMITTED—JURISDICTION TO AWARD IN LIEU OF INJUNCTION.

Where an injury has not been actually committed, but is threatened, it is still a matter of doubt, whether the court which might grant an injunction to restrain the threatened injury has any jurisdiction to award damages in lieu of an injunction which would have been preventive only and not mandatory.

[*Martin* v. *Price*, [1894] 1 Ch. 276, considered.]

3. INJUNCTION (§ I A—4)—INCONVENIENCING DEFENDANT—GROUNDS FOR REFUSING—RAILWAY COMPANY—TEMPORARY BRIDGES.

Where a railway company had agreed in building its road to erect permanent bridges over plaintiff's irrigation ditches and it appeared that, without first erecting temporary bridges, and maintaining them for some months, the agreement could only be performed with great difficulty and considerable delay and consequent loss to the company and there was no proof that plaintiff would sustain more than nominal damages, the court has a discretion to refuse an interim injunction to restrain the railway company from erecting the temporary structures, leaving it open for the court at the trial to make a mandatory order for their removal or to award damages or to do both, and this particularly in view of an express statutory power to award damages in lieu of, or in addition to an injunction for breach of contract.

Statement

MOTION to continue an interim injunction restraining the defendants until trial from crossing certain ditches dug by the plaintiffs, with temporary wooden structures, contrary to the terms and conditions of an agreement entered into between the parties hereto and dated August 24, 1910, under which the defendants were authorized to take possession, for right-of-way purposes, of a strip of land in an irrigation block of the plaintiffs, but subject to the condition that the structures carrying the defendants' line of railway over the plaintiffs' ditches should be of a permanent character conforming to specifications

satisfactory to and approved by the plaintiffs' superintendent of irrigation.

The motion was refused.

*G. A. Walker*, for the plaintiffs.

*M. S. McCarthy*, for the defendants.

WALSH, J.:—These two companies entered into an agreement under date of the 24th of August, 1910, by which it was agreed that an order should be made by the Board of Railway Commissioners authorizing the defendant to take possession of, and use and occupy for right-of-way purposes a strip of land in the irrigation block of the plaintiff on certain terms and conditions. The only condition which is relevant here is that which calls for the construction by the defendants of a concrete, rail and culvert of certain specifications over each of the plaintiffs' ditches to be crossed by the defendants' railway in this block, to the satisfaction and approval of the superintendent of irrigation for the time being of the plaintiff and so as not to interfere in any way with the plaintiffs' works and their operation and maintenance. The Board of Railway Commissioners has since, by various orders, authorized the construction of the defendants' line across different parts of this irrigation block subject to the conditions contained in the said agreement. The defendant is now preparing and intends to construct its railway across this land and to carry the same across the plaintiffs' ditches by means of temporary wooden structures and it is to prevent the defendant until the trial of the action from crossing any of these ditches except upon structures of the character called for by the agreement that this application is made. It is alleged in the affidavit of A. T. Fraser, the defendants' district engineer, that the defendants' line of railway has been constructed to the north territory of the plaintiffs' land and that it is necessary for it to construct these temporary structures so that the material for the building of the permanent structures called for by the agreement may be brought forward as otherwise its line of railway will be tied up at the first irrigation ditch requiring rail culverts long enough to let the concrete set, which he says would take at least forty days. It appears that there is practically no gravel in this locality and that it is necessary therefore to haul it from some distant point. What the defendant in effect says is that it cannot build the permanent structures until it gets its material on the ground, that it cannot get its material on the ground without making temporary crossings unless it builds its permanent structures, of which there are said to be 24, one by one and giving to each one forty days for the setting of the concrete. This would practically mean that it would take nearly three years for the defendant

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to build its railway across the plaintiffs' land. There is some contest in the affidavits as to the nearest place at which gravel can be secured but there is no dispute over the fact that it must be brought from a distance. I do not find any material dispute as to the other facts alleged in this connection.

However that may be, it is manifest that what the defendant proposes to do is not to substitute these crossings for the structures called for by the agreement but merely build them as a means of enabling it to live up to its agreement in this respect. The plaintiffs' material establishes that it is the defendants' intention to cross the ditches by means of temporary wooden structures, while the affidavits of the defendant shew that if this method is not interfered with, "the temporary structures can be removed and the permanent structures installed on or about the 1st day of May, 1913." Counsel for the defendant offered his undertaking to the removal of the temporary structures by that date.

The only allegation of injury to the plaintiff is contained in paragraph 10 of the affidavit of the plaintiffs' engineer, Mr. Hyde, which says:

> very grave injury is likely to result to the plaintiffs' irrigation works if the defendants are not restrained by injunction from constructing their said railway in violation of the terms of the said agreement.

No particulars whatever are given of this alleged injury. I am left to find out therefore as best I may how the plaintiff is likely to be injured if I refuse this application.

It is shewn by the defendants' evidence and not contradicted, that the season during which the plaintiff is bound to supply water through its ditches closes on the 1st of October in each year and does not open again until the 1st of May following. If, therefore, these temporary crossings form any obstacle to the flow of the water through the ditches their removal by that day will put an end to possibility of injury from that source.

The only other injury possible to the irrigation works that I can think of is damage to the beds or sides or banks of the ditches and of this there is not the slightest suggestion in any of the plaintiffs' affidavits. The affidavit which the defendant files of Mr. Hervey, who was at one time in the plaintiffs' employ as assistant superintendent of operation and maintenance of the western section of its irrigation block, shews that "the plaintiff itself crosses these same ditches with its Langdon-Acme branch which has been in operation for three years, on temporary structures similar to those sought to be restrained herein." This statement, the correctness of which is in no manner disputed, seems to me to meet fully the vague allegation of grave injury in so far as that might mean damage to the ditches themselves.

The affidavits of the two engineers, Fraser and Hervey, filed by the defendant, in which they express the opinion that no injury will result to these ditches by those temporary crossings, more than meet the bald statement of grave injury sworn to by Mr. Hyde in the language which I have quoted. That temporary structures are not *per se* injurious is evident from the agreement itself which provides that during certain periods of time which have now elapsed, the defendant might construct temporary structures over the main and secondary canals of the plaintiffs' system built to a design first submitted to and approved by the plaintiffs' superintendent of irrigation.

Upon the material submitted to me I find without hesitation that no injury is likely to result to the plaintiff from the construction of these temporary crossings across the ditches.

That injury most serious and far-reaching will result to the defendant if it is stopped is patent. Its march to Calgary will be halted and the completion of this particular branch will be indefinitely postponed. It is not necessary for me to say more than this to shew what serious consequences will follow the plaintiffs' success in this action.

The facts as I find them on the material before me may be thus summarized. The defendant proposes to temporarily cross the plaintiffs' ditches on structures which are not in conformity with the agreement of the parties at a time of the year when the ditches are out of use for irrigation purposes, and in a manner which will do no harm to them, which crossings will be removed before the irrigation season of 1913 opens with no resulting loss to the plaintiff and the saving to the defendant of months, if not years, in the completion of this branch of its railway. What order should I make upon these facts on an application which has for its object the stopping of the construction of these crossings until the trial of this action? If the covenants of the defendant were negative in form I would have no option in the matter. If a man by binding agreement contracts with another that he will not do a certain thing he will not be allowed to do it and the Court will, by injunction, restrain his breach or attempted breach of this covenant regardless of all considerations of damage to the defendant or injury to the plaintiff. But the covenants of this agreement are not negative in form at least; they are affirmative. Each of the parties covenants with the other as to what it will do in the events therein provided for; and a different rule prevails where the aid of the Court is sought in restraint of the breach of such a covenant. Let me quote the words of Lord Chancellor Cairns in the House of Lords case of *Doherty* v. *Allman*, 3 A.C. 709, at 720:—

> But, my Lords, if there be not a negative covenant but only an affirmative covenant, it appears to me that the case admits of a very

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different construction. I entirely admit that an affirmative covenant may be of such a character that a Court of equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interpose to prevent that being done which would be a departure from, and a violation of, the covenant. That is a well-settled and well-known jurisdiction of the Court of equity. But in that case, my Lords, there appear to me to come in considerations which do not occur in the case of a negative covenant. It may be that a Court of equity will see that, by interposing in a case of that kind, in place of leaving the parties to their remedy in damages, it would be doing more harm than it could possibly do good, and there are, as we well know, different matters which the Court of equity will, under those circumstances, take into its view. It will consider, for example, whether the injury which it is asked to restrain is an injury which if done cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will ask also this question: Suppose the act to be d[illegible], would the right to damages for it be decided exhaustively, once and for all, by one action or would there necessarily be a repetition of actions for the purpose of recovering damages from time to time? Those are matters which a Court of equity would well look to, and on the other hand a Court of equity would look to this: If we interfere and say, in aid of this affirmative covenant, that something shall not be done which would be a departure from it, no doubt we shall succour and help the plaintiff who comes for our assistance. But shall we do that? Will the effect of our doing that be to cause possible damage to the defendant, very much greater than any possible advantage we can give to the plaintiff? Now, in a case of that kind, where there is an amount of discretion which the Court must exercise, those are all considerations which the Court will carefully entertain before it decides how it will exercise its discretion.

Now, this Court has express statutory power in all cases in which it has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement to award damages to the party injured either in addition to or in substitution for such injunction. It may be, therefore, that upon the trial of this action it would be competent for the Court, bearing in mind the considerations which Lord Cairns points out should be carefully entertained, "before it decides how it will exercise its discretion," to decline to enjoin the defendant and to direct instead an assessment of damages against it for this breach of its covenant.

Lord Justice A. L. Smith, in *Shelfer* v. *City of London Electric Lighting Co.* (No. 1), [1895] 1 Ch. 287, at 322, says:—

> In my opinion it may be stated as a good working rule that:—
>
> 1. If the injury to the plaintiffs' legal rights is small;
>
> 2. And is one which is capable of being estimated in money;
>
> 3. And is one which can be adequately compensated by a small money payment;
>
> 4. And the case is one in which it would be oppressive to the defendant to grant an injunction;
>
> then damages in substitution for an injunction may be given.

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Upon the facts of this case as established before me the Court might reasonably and properly apply this rule here as it has been applied in many cases decided in England since it was formulated in 1894. I am not unmindful of the fact that it is by no means certain that damages can be awarded in such a case as this where the injury has not yet been committed but is only threatened and intended. The last reference which I have seen to the question is in *Martin* v. *Price*, [1894] 1 Ch. 276, in which Lindley, L.J., delivering the judgment of the Court of Appeal, at p. 284, says, that the question is

> by no means free from difficulty. On the one hand this Court in *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D. 316, expressed a clear opinion against the existence of such jurisdiction. On the other hand it has been very commonly assumed and there are several observations by eminent Judges favouring the view, that there is such a jurisdiction, and in *Holland* v. *Worley*, 26 Ch. D. 578, the late Mr. Justice Pearson did award damages in lieu of an injunction which if granted would have been simply preventive and in no sense mandatory.

It is plain from this that the Court of Appeal as then constituted considered the question unsettled. Nor do I forget that the defendants' covenant is in such form that it may be said that the placing of these permanent structures is a condition precedent to its right to build its railway across these ditches, and that this may make a difference in the application of the principle of compensation in lieu of an injunction.

I think, as I have already indicated, that there is a substantial question to be investigated and which I am powerless to dispose of here, that being whether the defendant shall be enjoined or made to pay damages. That being so, the only other question that I have to determine is whether or not the *status quo* should be maintained pending the trial.

In vol. 17 of Halsbury's Laws of England, at page 318, and section 483 under the heading "when an interlocutory injunction will be granted" it is said

> the plaintiff must also be able to shew that an injunction until the hearing is necessary to protect him against irreparable injury; more inconvenience is not enough. By the term "irreparable injury" is meant, substantially, injury which could never be adequately remedied or atoned for by damages.

The plaintiff, as I have already said, absolutely failed to shew injury of any kind from the building of these temporary crossings, and I cannot see how it can possibly be injured in any way by my refusal to grant the injunction asked for. This action will be tried long before the 1st of May next, which is the earliest date by which, on the material before me, the plaintiff will need the unobstructed flow of water through its ditches. If the Court holds upon the trial of the action that the award of

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damages cannot, in this case, be substituted for an injunction it will have the power by mandatory injunction to compel the removal of the temporary structures built in the meantime and the restoration of the ditches to their former condition and the payment of the damages, if any, which the plaintiff has sustained by their erection. It seems to me that it is the defendant which is taking all of the risk of damage and loss.

I dismiss the plaintiffs' application, which means, of course, that the *ex parte* injunction taken out by the plaintiff no longer stands. The order may, if the plaintiff so desires, contain the undertaking offered by Mr. McCarthy for the removal of these temporary structures by the 1st of May, 1913. The costs of this motion are reserved for disposition by the trial Judge.

*Motion refused.*

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Oct. 29.

**TWO MOUNTAINS DOMINION ELECTION; SAMUEL FAUTEAUX** (petitioner, appellant) **v. J. A. C. ETHIER et al.** (respondents, respondents).

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. October 29, 1912.*

1. ELECTIONS (§ III—85)—IRREGULARITIES—TECHNICAL OR FORMAL OBJECTIONS.

Technical or formal objections to nomination papers filed with the returning officer under the provisions of the Dominion Elections Act, R.S.C. 1906, should not be permitted to defeat the manifest purpose and intention of the statute.

2. ELECTIONS (§ III—83)—NOMINATION PAPERS—ABSENCE OF PLACE OF RESIDENCE AND ADDITION OF NOMINEE—DOMINION ELECTIONS ACT, R.S.C. 1906, CH. 6, SECS. 94 AND 100.

Papers proposing the nomination of a candidate for election as a member of the House of Commons, under the Dominion Elections Act, which do not mention the residence and addition or description of the candidate proposed in such a manner as sufficiently to identify him do not constitute a nomination in the form that is specified as essential by section 94 of the Act. This being, in the present case, a patent and substantial defect, it became the duty of the returning officer to give effect to the objection, taken by an opposing candidate and to reject such proposed nomination on the ground that the essential requirements of the statute had not been complied with, and such rejection could properly be made after the expiration of the time limited for the nomination of candidates by section 100 of the Act.

[*Fauteux* v. *Ethier*, 42 Que. S.C. 235, affirmed on appeal.]

3. EVIDENCE (§ II L—354*a*)—PAYMENT OF DEPOSIT—DOMINION ELECTIONS ACT—PRESUMPTION AS TO REGULARITY OF NOMINATION.

The receipt for the required deposit of $200, accompanying the nomination papers, given under the provisions of section 97 of the Dominion Elections Act, is evidence merely of the production of the papers and not of the validity of the nomination.

Statement

APPEAL from the decision of the Superior Court (Que.), Robidoux and Laurendeau, JJ., dismissing a petition under the Controverted Elections Act (Can.).

The appeal was dismissed with costs and the judgment appealed from, 42 Que. S.C. 235, affirmed.

*Atwater*, K.C., and *Mignault*, K.C., for applicant.
*Perron*, K.C., and *Genest*, for respondents.

FITZPATRICK, C.J., concurred in the opinion stated by Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the Superior Court for the district of Terrebonne, dismissing with costs the appellant's contestation of the election of the respondent Ethier.

On the nomination day two persons put in nomination papers, the respondent, Mr. Ethier, and Mr. Guillaume André Fauteux; Fauteux's nomination paper consisted of two large double sheets of paper, the first page of each double sheet containing a printed form of the nomination of some person as a candidate, with blank spaces to fill in the nominee's name, residence and occupation, and with spaces below for the nominating electors to sign their names, professions and residences. At the foot of the page below where the electors' signatures are to be placed, was a clause also printed with blanks to be signed by a witness to the electors' signatures, and also a printed form of acceptance by the person nominated of the nomination, with an attesting clause by a witness.

On the inside of each of these double sheets was printed the form of "oath of attestation of the nomination paper."

These forms were in accordance with those required by the statute (Forms H. and I.).

One of these large double sheets with the form of nomination at the top not filled in, containing thirteen names of electors, had a witness's name attached at the foot of the names, with residence and addition certifying that the paper had been signed by the said electors in his presence and also had, at the foot of the same page, the form of acceptance by the person nominated filled up and signed. On this double sheet the form "I" of the oath of attestation of the nomination paper was filled up by a witness and contained the names not only of the thirteen electors whose names appeared on the front page of that large double sheet, but also the names of nineteen electors whose names appeared on another double sheet of the same kind and character as that containing the thirteen names.

On this latter double sheet the form of the oath of attestation was printed in blank and was not filled up and the form at the foot of the nominating electors' names providing for the witness to their signatures and also that for the acceptance by the candidate of his nomination, were both struck out.

On the other hand, this double sheet containing the nineteen names had the blank at the top of the first page filled up nomin-

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ating Mr. Guillaume André Fauteux as a candidate, but without any residence or addition or description of him.

These two double sheets were not in any way attached or fastened together, though they were handed in together and, some of the witnesses at the trial said, folded together.

A written objection was fyled by Mr. Ethier, the respondent, who had also been nominated as a candidate, to the reception of these papers as a valid nomination of Mr. Fauteux on the ground, 1st, that they did not mention his domicile or his occupation, and 2ndly, that they were not signed by 25 electors conformably to the law. He demanded in consequence that he should be declared elected by acclamation.

The returning officer, after taking time to consider and consult counsel, acceded to Mr. Ethier's objection and demand, and returned him by acclamation accordingly.

It was against this return that the election petition was fyled. The learned Judges upheld both objections.

In the view I take of this case, it is unnecessary for us to express any opinion whether the two double sheets, unattached to each other, but delivered to the returning officer on the nomination day in the manner I have described, should have been accepted by him as a valid nomination paper.

Assuming therefore, without deciding, that the returning officer should have treated both sheets as really one nominating paper and that the candidate's acceptance and the witnesses' attestation were all right and should have been treated as applying to both double sheets, the question still remains, did they together contain the essential requisites of a valid nomination?

To determine this we must have recourse to the Dominion Elections Act, but before setting out the relevant and controlling section of that Act, I desire to point out that neither in the body of the nomination paper itself, in which section 94 and Form H require "the name, residence and addition or description" of each person proposed, nor in the witnesses' "oath of attestation of the nomination paper," nor in the candidate's acceptance of the nomination, was there any attempt made to comply with the statute's requirements as to the nominee's residence, addition or description, and so make up as it were for the defect in the nomination paper itself. On the face of the nomination papers, including the candidate's acceptance and the attesting witnesses' oath, these requirements were entirely absent.

The sections of the Act which, on the particular point I am discussing, are controlling, are the 94th, 97th, 107th and 314th. They are as follows:—

> 94. Any twenty-five electors, except in the province of Saskatchewan and Alberta and the Yukon Territory, may nominate a candidate, or as many candidates as are required to be elected for the electoral dis-

trict for which the election is held, by signing a nomination paper in form H, stating therein the name, residence and addition or description of each person proposed, in such manner as sufficiently to identify such candidate and by causing such nomination paper to be produced to the returning officer at the time and place indicated in the proclamation, or to be filed with the returning officer at any other place, and at any time between the date of the proclamation and the day of nomination.

97. The returning officer shall give to the candidate or his agent a receipt for such deposit, which shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate and of the payment therein mentioned.

107. On a poll being granted, the returning officer shall cause to be posted up notices of his having granted such poll, indicating the names, residences and occupations of the candidates nominated, in the order in which they are to be printed on the ballot papers.

2. Except in the Yukon Territory, such notices shall, as soon as possible after the nomination, be placarded at all the places where the proclamation for the election was posted up.

3. Such notices shall be in Form K., except in the provinces of Saskatchewan and Alberta, where they shall be in form L.

4. In Prince Edward Island, the returning officer shall, in addition to such notices, cause to be placarded at the same time and places such notice or advertisement regarding the qualification of voters as is required under the provincial law to be posted.

314. No election shall be declared invalid by reason of non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the persons signing a nomination paper received by the returning officer under the provisions of this Act, or of any mistake in the use of the forms contained in schedule one of this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election.

The contentions on the part of the petitioner (appellant) are, 1st, that section 94 is directory only and not imperative in its requirements, that the identification called for was for the satisfaction of the returning officer only, and that he knew well who the M. Guillaume André Fauteux really was and, therefore, that the statute was satisfied; 2nd, that the receipt given by the returning officer of the $200 was conclusive, and that in any event, sec. 314 prohibited the election from being declared invalid by reason of the alleged non-compliance with the Act.

In construing the sections of such an important public Act as the one under consideration, I think that while we should be careful on the one hand not to allow merely technical or formal objections to prevail so as to defeat the manifest purpose and intention of the Act, on the other we should not attempt to rewrite the Act or to strain the clear, precise language of its sections so as to render them innocuous.

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As Lord Coleridge, Ch.J., said in the case of *Mather* v. *Brown*, 1 C.P.D. 596 at 601:—

> It must be remembered that, in dealing with cases under these Acts, we are sitting as a final tribunal of appeal, in the exercise of a duty cast upon us under peculiar circumstances and as a sort of compromise between conflicting parties in the legislature, and, therefore, are more especially bound to keep ourselves strictly within the letter of the Acts, and to abstain from any attempt to strain the law. Therefore, although I yield reluctantly to the objection, conceiving it to be a fair one, I do so without hesitation.

In a later case, *Gothard* v. *Clarke*, 5 C.P.D. 253 at 265, Lopes, J., says, line 8:—

> I entirely agree with the Lord Chief Justice when he said in *Mather* v. *Brown*, 1 C.P.D. 596 at 601, that in construing these Acts it is a duty with which the Court is entrusted to keep strictly to the Acts themselves.

Now applying these rules and principles to the sec. 94 under consideration, how can this Court say that any 25 electors may legally nominate a candidate for an electoral district by "signing" a nomination paper in form H. while omitting to state the name, residence and addition or description of the person they nominate in such a manner as sufficiently to identify such candidate?

The essential conditions of a legal nomination paper are the signatures of 25 electors as nominators, and the name, residence and addition or description of the person proposed "stated therein."

The Court certainly could not declare valid a nomination paper with only 24 electors' names attached. If the name of the candidate was incorrectly spelled, or there was some inaccuracy in the residence and addition or description of the person nominated, there might be much room for argument that the language used was sufficient to identify the candidate. The result would depend altogether upon the extent of the inaccuracy of the language used.

But where there is no inaccuracy of language or spelling to construe or give effect to, but a total omission of any residence, addition or description, and this omission extends as well to the acceptance of the nomination and to the oath of attestation of the witness to the signature to the nomination paper, so that on the face of the papers as delivered there was absolutely nothing to identify the person nominated, I cannot see how the Court can hold such paper a legal nomination paper. It does not "state therein" any of the statutory requisites, and it seems to me, with deference, that to construe such language as directory merely would be to do violence to the expressed intention of the legislature. As well might the Court declare that less than 25 nominees' names would suffice or that a paper signed in blank with

the name subsequently filled up was good. The "name" may not require the insertion of each and all of the nominee's Christian names in full, but at least there must be a surname and such Christian name or abbreviation as would sufficiently identify the party nominated.

Then as to the receipt. If the nomination is bad, the receipt certainly cannot cure it. The nomination paper must stand on its intrinsic merits and the receipt is good just for what the statute says, "sufficient evidence of the production of the nomination paper, of the consent of the candidate, and of the payment therein mentioned." Evidence of the production of the nomination paper, not of its validity. If it was the latter, then it would cure the cardinal defect of want of the proper number of nominators.

The importance of the language requiring the name, residence and addition or description of the candidates is seen by the 107th section, which requires the returning officer on a poll being granted to post up notices "indicating the names, residences and occupations of the candidates."

If the nomination paper does not itself give him this essential information, where else can he acquire it? In many small constituencies it is said the candidates are well known. That may be true, but this Act relates to constituencies all over Canada and it is reasonbly certain that no such assumption could be made with respect to the returning officers in many of the larger thinly populated districts.

The returning officer is not authorized to hold any Court of inquiry so as to ascertain the identity and the residence and occupation of the candidate. But he is bound to give that information to the electors in the notices he puts up of his having granted a poll. He must find the information on the face of the nomination paper, and to allow him to go outside of such paper and obtain information elsewhere might lead to much gross injustice and defeat the express purpose of the Act that the identical candidate proposed by the 25 electors and no one else shall be published as the candidate.

The defect in these nomination papers is one apparent on their face, and not one requiring any inquiry or investigation on the part of the returning officer to ascertain or determine. Being a patent and substantial defect in the omission of a specific statutory requirement, it became the duty of the returning officer, when at the proper time his attention was called to it, to give effect to the objection and reject the nomination.

Then with reference to sec. 314, a most useful section to prevent mere technicalities defeating the expressed will of the electors, the only possible part of the section which could be

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invoked in this case is that referring to "a mistake in the use of the forms."

But those defects complained of in this nomination paper are in no possible sense mistakes in the use of the forms. The proper form was used. But the essentials necessary to make the form a living and valid nomination paper were wanting.

The decisions in the English Courts which I have consulted, are chiefly upon statutes relating to municipal elections. They are nevertheless of value, because they cover analogous cases to the one we have now before us and outline principles which should control Courts in deciding upon statutes relating to elections and the distinction between matters of form and those of substance: *Mather* v. *Brown*, 1 C.P.D. 596; *Gothard* v. *Clarke*, 5 C.P.D. 253; *Harmon* v. *Park*, 7 Q.B.D. 369; *Marton* v. *Gorrill*, 23 Q.B.D. 139; *Queen* v. *Deighton*, 5 Q.B.R. 896.

The appeal should be dismissed with costs.

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IDINGTON, J. (dissenting):—The first duty of a returning officer, on receipt of a nomination paper, is to inspect it and ascertain if it appears to be conformable to law, and if found defective to point out wherein he finds it so; and then if duly rectified, or if originally in appearance correct, to require, pursuant to section 99 of the Dominion Elections Act, the person or persons presenting it to take before him the oath or oaths of verification required by said section. When that has been duly done and deposit made, his next duty is to give, in obedience to section 97, a receipt for the deposit, which is the assurance the law gives the parties promoting the candidature of any person, that he has been duly and properly nominated.

This section is so comprehensive and complete in its terms that it is, for me, difficult to see how anyone who has accepted the office of returning officer, desiring to discharge his duties with fairness to all concerned, could, after complying with its imperative direction, see his way to attempt a revocation of his act.

The section is as follows:—

> 97. The returning officer shall give to the candidate or his agent, a receipt for such deposit which shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate and of the payment therein mentioned.

The officer in question herein did point out certain defects, had them rectified in his presence, and then administered the oath of verification to the agent who had presented the paper or papers.

The signatures of the alleged electors appear on two sheets of paper, which, if joined together in an orderly way as the act of the officer in administering the oath implies to have been done, and the contents of that oath naming the several parties who had signed, clearly demonstrates was intended to be the case, ought

to have sufficed for the purpose then in hand. At its best, the mode of joining was slovenly. A pin or fastening of some kind to keep these sheets together in their proper order of sequence would have saved a world of trouble.

When separated, these papers were misleading.

The evidence of how this separation happened is conflicting, but the officer, his acts and their consequence, I submit, must be passed upon in light of the transaction as it must have appeared to him when he administered the oath, and not by weighing this conflict of evidence arising later and elsewhere.

It is to be noted that the Act provides for the presentation of a nomination paper at any time between the date of proclamation and the day of nomination.

Unless the determination of the officer as evidenced by the receipt for the deposit, is treated as irrevocable, so far as he is concerned, the door would be thrown open for frauds, and worse results than any I can conceive of as possible from holding such determination as irrevocable.

I am much more puzzled as to the proper disposition of the question of costs than I am by the merits of the case.

The appeal, I submit, should be allowed with costs thereof to the appellant against respondents, and the election be set aside; and, as at least a deterrent against such slovenly work hereafter, I think the several parties should be allowed to bear their respective costs of the proceedings in the Court below.

I confess I fear this division of costs may encourage the late taking of such objections as were taken here. The temptation appellant's slovenly work held out was no doubt great. But for the view taken by the learned Judges in the Court below, I should have been disposed to order the returning officer to pay all costs.

DUFF, J. (dissenting):—I have come to the conclusion that the judgment under review cannot be sustained. For the purposes of this judgment I shall assume that the nomination paper is (on one or both of the grounds upon which the respondent's objections rest) defective in some essential requirement of the statute so that if a poll had been held and the appellant had been returned on account of receiving the larger number of votes (and the question had come before an Election Court in a proper proceeding under the Controverted Elections Act) the respondent (the now sitting member) must, on account of the invalidity of the appellant's nomination, have been declared entitled to the seat. The very short ground on which I think the return of Mr. Ethier ought to be declared null is this: The returning officer having received the paper professing to nominate the appellant along with the appellant's consent and the

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sum required by law to be deposited, and having given his receipt for that sum pursuant to sec. 97 of the Dominion Elections Act—and the time for nominating candidates having expired—the status of the appellant as a candidate (as affecting proceedings under the control of the returning officer) was finally determined and it was the duty of that official to proceed with the poll.

For the sake of clearness and convenience of reference, I set out here in full the enactments of the Dominion Elections Act which are comprised in the fasciculus bearing the title "Nomination Papers" (secs. 94 to 103 inclusive):—

94. Any twenty-five electors, except in the provinces of Saskatchewan and Alberta and the Yukon Territory, may nominate a candidate, or as many candidates as are required to be elected for the electoral district for which the election is held, by signing a nomination paper in form H, stating therein the name, residence, and addition or description of each person proposed in such manner as sufficiently to identify such candidate and by causing such nomination paper to be produced to the returning officer at the time and place indicated in the proclamation, or to be filed with the returning officer at any other place, and at any time between the date of the proclamation and the day of nomination.

95. Each candidate shall be nominated by a separate nomination paper; but the same electors, or any of them, may subscribe as many nomination papers as there are members to be elected.

96. No nomination paper shall be valid or acted upon by the returning officer unless it is accompanied by—

(*a*) The consent in writing of the person therein nominated, except where such person is absent from the province in which the election is to be held, when such absence shall be stated in the nomination paper; and

(*b*) A deposit of two hundred dollars in legal tender or in the bills of any chartered bank doing business in Canada; or a cheque for that amount drawn upon and accepted by such bank.

97. The returning officer shall give to the candidate or his agent a receipt for such deposit which shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate and of the payment therein mentioned.

98. The sum so deposited by any candidate shall be returned to him in the event of his being elected or of his obtaining a number of votes at least equal to one-half the number of votes polled in favour of the candidate elected; otherwise, except in the case hereinafter provided for, it shall belong to His Majesty for the public uses of Canada, and shall be applied by the returning officer towards the payment of the election expenses, and an account thereof shall be rendered by him to the Auditor General of Canada.

2. The sum so deposited shall, in case of the death of any candidate after being nominated and before the closing of the poll, be returned to the personal representatives of such candidate.

99. The returning officer shall require the person, or one or more of

the persons producing or filing as aforesaid any such nomination paper, to make oath before him that he knew or they knew that —

(*a*) The several persons who have signed such nomination paper are electors duly entitled to vote;

(*b*) They have signed it in his or their presence; and

(*c*) The consent of the candidate was signed in his or their presence, or as the case may be, that the person named as candidate is absent from the province or territory.

2. Such oath may be in form I, and the fact of its having been taken shall be stated on the back of the nomination paper.

100. At the close of the time for nominating the candidates, the returning officer shall deliver to every candidate or agent of a candidate applying therefor a duly certified list of the names of the several candidates who have been nominated.

101. Any votes given at the election for any other candidates than those nominated in the manner provided by this Act shall be null and void.

102. Whenever only one candidate, or only such a number of candidates as are required by law to be elected to represent the electoral district for which the election is held, have been nominated within the time fixed for that purpose, the returning officer shall forthwith make his return to the clerk of the Crown in Chancery, in form J, that such candidate or candidates, as the case may be, is or are duly elected for the said electoral district, of which return he shall send within forty-eight hours a duplicate or certified copy to the person or persons elected.

103. The returning officer shall accompany his return to the clerk of the Crown in Chancery with a report of his proceedings and of any nomination proposed and rejected for non-compliance with the requirements of this Act.

The Elections Act does unquestionably contemplate the possibility of nominations being "*proposed and rejected* for non-compliance with the requirements" of the statute, since sec. 103, in express terms, lays upon the returning officer the duty of making a report upon any such rejected nomination. But the Act does not seem to contemplate the rejection by the returning officer of a nomination paper (verified as required by sec. 99 and accompanied by the consent and the deposit provided for by sec. 96) which has been accepted by him and for which he has given a receipt in pursuance of sec. 97. Once that is done sec. 98 appears to come into play. The sum deposited is, by the provisions of that section, to be returned to the candidate only in one of three specific events: 1st, his election; 2nd, his obtaining a specified proportion of the votes cast; 3rd, his death after being nominated and before the closing of the poll. Otherwise the money deposited is to belong to His Majesty as part of the public funds of Canada. There is nothing to authorize the return of the money in the case in which after having signified his acceptance of the nomination paper by giving the receipt under sec. 97 the returning officer discovers some de-

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fect in it, which had previously escaped his observation. The enactments of sec. 98 are explicit, the money once deposited is to be the property of His Majesty except in one of the three events enumerated above. From this, the inference seems irresistible that the returning officer's authority to reject the nomination paper for nonconformity with the statute is at an end upon the giving of the receipt; for it is inconceivable that the Legislature should have conferred upon the returning officer authority to reject the nomination after receiving the deposit and in circumstances in which he is prohibited from returning the deposit. Even if this view of the effect of these proceedings were doubtful and it could fairly be argued the status of the nominee as candidate is not fixed by them, it still seems hardly open to doubt that his status as such is (as regards the duties of the returning officer) irrevocably fixed when (his nomination having been accepted) the time for nominating candidates has closed. That is made very clear by the provisions of sections 100 and 102. "*At the close of the time*" for nominating candidates the returning officer is, under the provisions of these sections, to deliver to "*any candidate*" applying therefor, a list of the names of "*the candidates who have been nominated.*" At that point of time—"*at the close of the time for nominations*"—if not before—the number and identity of the candidates is determined, a state of affairs obviously impossible, if after that point of time is passed, the returning officer has authority to reject a nomination already accepted. Sec. 102 again provides that when only "*one candidate*" has been "*nominated*" within the time fixed for that purpose," the returning officer shall "*forthwith*" make his return to the clerk of the Crown in Chancery that "*such candidate*" has been duly elected; and by sec. 103 this return is to be accompanied by a report upon nominations "*proposed and rejected for non-compliance with the requirements of this Act.*" This return and this report then are to be made "*forthwith*" on expiry of *the time fixed* for the purpose of nominating candidates; an enactment obviously proceeding upon the assumption that when that time has passed all questions touching the statutory sufficiency of nomination papers have been concluded in so far as it is within the province of the returning officer to deal with such questions.

The inference arising from the language of these sections receives support from that of section 124 which provides that if the number of candidates is greater than two the returning officer shall give effect to any agreement between them that their names shall be arranged on the ballot paper otherwise than in alphabetical order where such agreement is made "*within an hour after the time appointed for the nomination*": a provision which pre-supposes all questions as to what persons are

entitled to have their names placed upon the ballot papers to have been at the time mentioned finally determined.

It is argued, however, that the respondent must eventually have been returned since (the appellant's nomination being in point of law inoperative) the only candidate for whom ballots could validly be cast; and consequently, it is said the respondent has rightfully been elected. I assume, as I have already said, the appellant's nomination to have been invalid by reason of one or both of the objections raised by the respondent. On that hypothesis we are still, it seems to me (if I am right in the view I have just expressed touching the powers of the returning officer), under a necessity imposed upon us by law to declare that the respondent was not duly returned and that he is not under the law entitled to the seat. The jurisdiction conferred upon the Courts by the Controverted Elections Act is a very special one. At common law all questions touching the election and return of members to the House of Commons were questions exclusively within the cognizance of the House itself. By the Controverted Elections Act the duty of passing upon certain of such questions when raised by a proceeding authorized by the Act was imposed upon the Courts. But the jurisdiction of the Courts is strictly circumscribed by the limits which the Act prescribes. The Act, as it appears to me, leaves no other course open to us (if the returning officer exceeded his legal powers in returning the respondent as the elected member) but to declare that the return was not according to law.

The powers vested in the Court in such circumstances are to be gathered from two of the sections of the Controverted Elections Act. These sections are as follows:—

> 11. The petition presented under this Act may be in any prescribed form; but, if or in so far as no form is prescribed, it need not be in any particular form, but it must complain of the undue election or return of a member or that no return has been made, or that a double return has been made, or of matter contained in any special return made, or of some such unlawful act as aforesaid by a candidate not returned, and it must be signed by the petitioner, or all the petitioners if there are more than one.
>
> 58. At the conclusion of the trial, the trial Judges shall determine whether the member whose election or return is complained of or any and what other person was duly returned or elected, or whether the election was void, and other matters arising out of the petition, and requiring their determination, and shall, except in the case of appeal hereinafter mentioned, within four days after the expiration of eight days from the day on which they shall so have given their decision, certify in writing such determination to the Speaker, appending thereto a copy of the notes of evidence.
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> 2. The determination thus certified shall be final to all intents and purposes.

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The petition in this case complains of the undue election of the respondent and asks to have the return made by the returning officer declared a nullity. Under sec. 58 it was the duty of the trial Judges to pass upon these questions and report to the Speaker accordingly. In the view I have expressed these questions are of course susceptible of only one answer.

ANGLIN, and BRODEUR, JJ., concurred with DAVIES, J.

*Appeal dismissed with costs.*

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## McDONNELL v. CANADIAN PACIFIC R. CO.

*Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.*

1. DAMAGES (§ III I—192)—MEASURE OF DAMAGES—PERMANENT INJURIES—QUEBEC WORKMEN'S COMPENSATION ACT.

Under the Quebec Workmen's Compensation Act the annual payment to be made for permanent disability is one-half of the average yearly wage of which the injured party is deprived by reason of such incapacity.

2. DAMAGES (§ III I—192)—PERMANENT DISABILITY—QUEBEC WORKMEN'S COMPENSATION ACT—OPTION NOT AVAILABLE TO EMPLOYER.

The workman entitled to a permanent disability claim under the Quebec Workmen's Compensation Act has the option of accepting the annual income specified in the Quebec Workmen's Compensation Act or of demanding that the capitalization thereof (not exceeding $2,000) be handed over to an insurance company in order to purchase an annuity therewith, but no similar option is available to the employer to confess judgment for $2,000 or for the annuity which that sum would purchase, as in satisfaction of his liability.

[*Grand Trunk R. Co.* v. *McDonnell*, 5 D.L.R. 65, followed.]

Statement

Appeal in a Workmen's Compensation case.

*E. Vipond*, for appellant.

*A. R. Holden*, for respondent.

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—This case involves a judgment on a petition of the appellant to be authorized to sue the respondent for damages resulting from a labour accident. The petition prays that the appellant be authorized to bring suit for a yearly rent of $337.50 representing a rent equal to one-half of the loss of his earning powers as a result of the said accident. The respondent appeared on this petition and offered to confess judgment for the sum of $2,000 or an annual rent represented by such capital sum of $2,000.

The Court below thereupon granted *acte* to the respondent of this offer and adjourned the case to an ulterior date to allow the respondent to establish the amount of the rent which a $2,000 capital would yield to the appellant at his present age.

This is the judgment submitted to us for revision. This

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judgment was rendered on May 14th last, prior therefore to the judgment of this Court in the case of *Grand Trunk R. Co.* v. *McDonnell*, 5 D.L.R. 65. In the latter case we held that the right of option granted by article 7329, R.S.Q. 1909, of having a capital sum paid instead of an annual rent lies only in favour of the claimant and not in favour of the employer, and that only when the claimant does exercise this option does the provision of the last paragraph of article 7322 come into operation whereby in no case, except that of inexcusable fault of the employer, may the capital of such rent exceed the sum of two thousand dollars.

The respondent has not succeeded in convincing us that our judgment in *Grand Trunk R. Co.* v. *McDonnell*, 5 D.L.R. 65, is erroneous, and we persist in our opinion.

The appeal is, therefore, allowed, and the judgment set aside.

*Appeal allowed.*

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## PEARSON v. ADAMS.

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(Decision No. 2.)

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. August 27, 1912.*

1. COVENANTS AND CONDITIONS (§ II A—5)—CONSTRUCTION—GIVING EFFECT TO OBJECTS DESIGNED TO BE ACCOMPLISHED.

In order to ascertain the scope and effect of covenants, regard must be had to the object which they were designed to accomplish.

2. COVENANTS AND CONDITIONS (§ II A—5)—CONSTRUCTION—ORDINARY AND POPULAR READING TO LANGUAGE.

The language of a covenant is to be read in an ordinary or popular, and not in a legal or technical sense.

3. BUILDINGS (§ II—18)—RESTRICTION AS TO ERECTION OF DETACHED DWELLING HOUSE—APARTMENT HOUSE.

A covenant that certain land shall be used only for a detached dwelling house is broken by the erection of an apartment house upon the land.

[*Re Robertson and Defoe*, 25 O.L.R. 286, distinguished and doubted; *Pearson* v. *Adams* (No. 1), 3 D.L.R. 386, reversed on appeal.]

4. COVENANTS AND CONDITIONS (§ II A—6)—CONSTRUCTION—DISTINCTION BETWEEN A COVENANT AND A CONDITION.

If it be doubtful whether a clause in a deed be a covenant or a condition, the court will always incline to construe it as a covenant.

[*Rawson* v. *Inhabitants of School District*, 89 Mass. 125, referred to and approved.]

5. COVENANTS AND CONDITIONS (§ II A—6)—CONSTRUCTION—REQUISITES FOR CREATING A COVENANT.

No particular form of words is necessary to create a covenant, but it is sufficient if, from the construction of the whole deed, it appear that the party meant to bind himself, and, if that appear, it does not matter whether the words relied upon are in the recital or in any other part of the deed.

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6. COVENANTS AND CONDITIONS (§ III B—32)—RESTRICTIONS AS TO ERECTION OF DWELLING HOUSE.

The words "to be used only as a site for a detached brick or stone dwelling house" between the description and the habendum in a deed of land constitute a covenant by the grantor to erect no building other than a building of the kind mentioned, a breach of which will be restrained by injunction.

7. MAXIMS (§ I—1)—"EXPRESSIO UNIUS"—APPLICATION.

The maxim "*expressio unius est exclusio alterius*" is not of universal application, but depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction, and should not be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.

8. DEEDS (§ II A—19)—CONSTRUCTION—IN FORM OF A CONDITION IN REALITY A COVENANT—"EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS."

Where a deed contains words which, though in the form of a condition, are sufficient to create a covenant, and also covenants in the usual form, the maxim "*expressio unius est exclusio alterius*" has no application, and effect must be given to all parts of the deed.

9. COVENANTS AND CONDITIONS (§ III C I—36)—RESTRICTIONS AS TO USE OF PROPERTY—WHO MAY ENFORCE—PURCHASE OF NEIGHBOURING LANDS.

Where land is sold with a restrictive covenant, one who subsequently buys neighbouring land from the same owner can enforce the covenant.

Statement

MOTION by the plaintiff for an injunction restraining the defendant from erecting an apartment house upon certain lands on Maynard avenue, in the city of Toronto, in alleged breach of the provisions of a conveyance of the 18th April, 1888, which stipulated that the lands were "to be used only as a site for a detached brick or stone dwelling-house."

By consent of counsel the motion was turned into a motion for judgment.

The decision appealed from (*Pearson* v. *Adams*, 3 D.L.R. 386) was as follows:—

Middleton, J.

MIDDLETON, J.:—Apart from authority, binding upon me, I would have thought that an apartment house such as the defendant contemplates erecting could not be described as "a detached dwelling-house." I would have thought it clear that the building was in truth a series of separate dwellings, *attached*, and separated by the one main perpendicular wall and the two horizontal partitions. But this, as I understand the case of *Re Robertson and Defoe* (1911), 25 O.L.R. 286, is not the law here; and, yielding to the authority of that case, there is no alternative save to dismiss the action with costs. I do not think I should attempt to refine away that decision by making distinctions without any difference.

I think it better to adopt this course, and leave it to the plaintiff to take the case to a higher Court, rather than to adopt the alternative course of investigating the matter with such thoroughness as to enable me to say that I deem the decision

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referred to to be wrong. See sec. 81 of the Judicature Act. This relieves me from considering the other matters argued by the defendant's counsel.

The attention of the parties is drawn to the very recent decision in *Campbell* v. *Bainbridge*, [1911] 2 Scots L.T.R. 373.

The plaintiff appealed from the judgment of MIDDLETON, J.

The appeal was allowed, BRITTON, J., dissenting.

Argument

*J. H. Cooke*, for the plaintiff. This case, I submit, is distinguishable from *Re Robertson and Defoe*, 25 O.L.R. 286, by which Middleton, J., considered himself bound. The fact that the erection of a "three-suite dwelling-house" in that case may not have been a breach of the covenant there, does not make the erection of the building which is proposed here permissible under the stipulation in this deed. The stipulation or condition here is an implied covenant. To ascertain the scope of covenants, regard must be had to the object which they were intended to accomplish. In this case there was a general building scheme, and the intention was to build up Maynard place with a high class of private dwelling-houses: *Mackenzie* v. *Childers* (1889), 59 L.J. Ch. 188; Dart's Vendors and Purchasers, 7th ed., vol. 1, p. 579. It may be argued that there would be here an infringement of the rule against perpetuities. But I contended there would not. See *Mackenzie* v. *Childers*, *supra*, and *Coles* v. *Sims* (1854), 23 L.J. Ch. 258. As to the building itself, I submit that it is not "a detached dwelling-house" in the ordinary acceptation of the term: *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Ilford Park Estates Limited* v. *Jacobs*, [1903] 2 Ch. 522.

*J. M. Godfrey*, for the defendant. The stipulation here is a condition, not a covenant, and so can only be enforced by the original grantor. It is not even an implied covenant: Am. & Eng. Encyc. of Law, 2nd ed., vol. 6, p. 501; *Rawson* v. *Inhabitants of School District No. 5. in Uxbridge* (1863), 89 Mass. (7 Allen) 125; *Duke of Norfolk's Case* (1553), 2 Dyer 138 *b*; Shep. Touch., 133. The Massachusetts case is very much in point. As to the assumption of the right to sue, see *Clark* v. *City of Vancouver* (1903), 10 B.C.R. 31, which shews that after the conveyance there is no estate left in the grantor, but only a possibility of reverter, which is not assignable, and so no action lies. I also urge that there would be here a breach of the rule against perpetuities: *London and South Western R.W. Co.* v. *Gomm* (1882), 20 Ch. D. 562. On the main point, the erection of the proposed building would not be a breach. The building is a detached dwelling-house. One family could occupy the whole. I rely on *Re Robertson and Defoe*. See also *Campbell* v. *Bainbridge*, [1911] 2 Scots L.T.R. 373.

*Cooke*, in reply. As to the right to sue, see *Renals* v. *Cowlishaw* (1879), 48 L.J. Ch. 33, 830.

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RIDDELL, J.:—The plaintiff, an architect, purchased one of the few vacant lots on Maynard avenue—he knew that there were building restrictions as to the class of building to be erected upon that street, and knew by personal inspection that the houses then on the street were private dwelling-houses and worth between $7,000 and $10,000 each. He himself built a house costing him about $14,000, which he would not have done had he not believed that there were building restrictions sufficient to prevent the erection of such a building as is proposed by the defendant.

In 1888, Miss Maynard and Mrs. Atkinson, the executrices and devisees of the previous owner of the land (who had laid out Maynard avenue), sold a lot (No. 32) on this avenue to one Williamson, through whom the defendant claims, the husband of Mrs. Atkinson joining as grantor. The deed (which is numbered 4033) reads: "All and singular" (describing the land) "to be used only as a site for a detached brick or stone dwelling-house, to cost at at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots. To have and to hold," etc. After the usual covenants, the following covenant by the purchaser is found: "And the said party of the second part hereby, for himself, his heirs, executors, administrators, and assigns, covenants, promises, and agrees to and with the said parties of the first part, their heirs and assigns, that he, the said party of the second part, his heirs and assigns, or any person or persons claiming or deriving title or interest in the lands hereby conveyed or any part thereof, through, under, or in trust for him, shall not nor will at any time or times hereafter erect or maintain or suffer or allow to be erected or maintained upon said lands or any part thereof any building for manufacturing purposes nor carry on or permit to be carried on on said lands or any part thereof any dangerous or noisy or offensive trade or business which would be a nuisance in the neighbourhood."

Miss Maynard swears that it was always her father's intention that Maynard avenue should be built up with a uniformly fine class of private detached dwelling-houses, and she had endeavoured to sell and convey the lands still unsold at his death in such a way as to carry out his wishes—and it was with a view that there should be erected on lot 32 a private detached dwelling-house, which would be in keeping with the houses on the other and adjoining lots, that the condition already recited was put in the deed.

The defendant purposes to erect an apartment house, a six-suite apartment house, upon lot 32. The plaintiff, having taken an assignment from Miss Maynard of "all and any right as grantor in the said conveyance (*i.e.*, that to Williamson) to enforce the conditions imposed under the said conveyance," brings

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his action "for an injunction restraining the defendant from erecting an apartment house on lot number 32, plan 454 . . . and thereby violating the conditions and restrictions contained in deed . . . number 4033."

A motion for an interim injunction was, by consent, turned into a motion for judgment by Mr. Justice Middleton, and he dismissed the action with costs.

The plaintiff now appeals.

My learned brother thought that he was bound, on the authority of *Re Robertson and Defoe*, 25 O.L.R. 286, to hold that an apartment house such as the defendant intended to build is a "detached dwelling-house."

With much respect, I do not think so; I think that the learned Judge was, notwithstanding *Re Robertson and Defoe*, to follow his own opinion—and hold, as he would have held in the absence of authority which he considered binding upon him, "that an apartment house such as the defendant contemplated erecting could not be described as 'a detached dwelling-house'". In *Re Robertson and Defoe* there was a covenant that every residence erected on the land should be a detached house—the question (or one of the questions) was, was the erection of a "three-suite dwelling-house" a breach of this covenant? The learned Chief Justice of the Common Pleas held that it was not—but that is quite a different thing from saying that all apartment houses are "detached dwelling-houses." "In order to ascertain the scope and effect of . . . covenants . . . regard must be had to the object which they were designed to accomplish: *Ex p. Breull, In re Bowie* (1880), 16 Ch.D. 484; and the language used is to be read in 'an ordinary or popular and not in a legal and technical sense:' *per* Collins, L.J., *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 409:" *Robertson* v. *Defoe*, 25 O.L.R. at p. 288—that is what James, L.J., in *Hext* v. *Gill* (1872), L.R. 7 Ch. 699, at p. 719, calls the "vernacular".

In the particular case, the Chief Justice of the Common Pleas held that a certain apartment house was a detached house, and we are not called upon to consider whether his conclusion was what we should have arrived at. The learned Chief Justice does not, as I read the case, lay down any rule of law at all—if it be considered that the decision is such as to cover the present case, with much respect I should be unable to follow it. Within fairly wide limits, the question is not one of law at all but of fact.

Without at all saying that in some contracts, even in some statutes, under certain circumstances or in certain parts of the English-speaking world, an apartment house such as is contemplated might be called "a detached dwelling-house," I think it plain that it cannot be so called in Toronto and in this contract. No one using language here in its ordinary and popular vernacular sense would call an apartment house "a detached dwelling-house."

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It is, to my mind, of none effect to say that a family, if large enough, might occupy the whole building—that might be said of the King Edward Hotel—or to say that there is just the one front door, etc.—that might be said of the Alexandra or the St. George Mansions. No one would, I think, call this apartment house even a dwelling-house, except one who desired to build an apartment house where only a dwelling-house should be—or his architect or some one making an affidavit for him. And neither defendant, architect, nor neighbour here ventures to call the proposed building "a detached dwelling-house."

The next question is—Is the provision in question a covenant? It is either a condition or a covenant—it is not simply a mere nullity.

I do not know of any case in which the law is more clearly, concisely, and accurately laid down than *Rawson* v. *Inhabitants of School District No. 5 in Uxbridge* (1863), 89 Mass. (7 Allen) 125. Bigelow, C.J., delivering the judgment of the Court, says (p. 127): "A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional sale is otherwise clearly and unequivocally indicated. Conditions subsequent are not favoured in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction . . . Co. Litt. 205*b*, 219*b*; 4 Kent Comm. (6th ed.) 129, 132; Shep. Touch., 133; *Merrifield* v. *Cobleigh* (1849), 4 Cush. 178, 184. . . . The usual and proper technical words by which such an estate is granted by deed are 'provided', 'so as' or 'on condition'. Lord Coke says, 'Words of condition are *sub conditione, ita quod, proviso*'. *Mary Portington's case* (1614), 10 Co. 42*a*; Co. Litt. 203*a*, 203*b*. . . . In grants from the Crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention. . . . But this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons. If one makes a feoffment in fee, *ea intentione, ad effectum, ad propositum*, and the like, the estate is not conditional, but absolute, notwithstanding. Co. Litt. 204*a*; Shep. Touch., 123, Dyer, 138*b*. . . . Ordinarily the . . . nonfulfilment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate. . . . We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where

such purpose will not enure specially to the benefit of the grantor and his assigns. . . . If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. . . . Conditions subsequent are not to be favoured or raised by inference or implication." *Duke of Norfolk's Case* (Hil. Term, 3 & 4 Ph. & M.), 2 Dyer 138*b*: "It seems *ea inentione* do not make a condition, but a confidence and trust . . . :" *per* Saunders and Stamford, Justices of B.R., p. 139 (*a*).

"No particular form of words is necessary to create a covenant. It is sufficient if, from the construction of the whole deed, it appears that the party means to bind himself:" Elphinstone on the Interpretation of Deeds, p. 409, rule 151. "Wherever the intent of the parties can be collected out of a deed for the not doing or doing a thing, covenant will lie:" *per* Nottingham, C., *Hill* v. *Carr* (1676), 1 Ca. Ch. 294; *S.C.*, sub nom. *Holles* v. *Carr*, 2 Mod. 86, 3 Swans. 638. Lindley, J., points out in *Brookes* v. *Drysdale* (1877), 3 C.P.D. 52, at p. 60, that a covenant may be "in the form of a condition, a proviso, or a stipulation." And Parke, B., says in *Great Northern R.W. Co.* v. *Harrison* (1852), 12 C.B. 576, at p. 609: "No particular form of words is necessary to form a covenant: but, wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument."

To my mind, there can be no doubt, taking the deed as it stands, that the words employed enable the Court to collect that the vendee was engaging not to put up any building but "a detached dwelling-house;" and, if that is so, although the words are more like a condition, there is a covenant.

Nor does the well-known rule *expressio unius est exclusio alterius*, or, as it is otherwise stated, *expressum facit cessare tacitum*, prevent this from operating as a covenant.

This maxim " is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction:" *Saunders* v. *Evans* (1861), 8 H.L.C. 721, at p. 729, *per* Lord Campbell. "The maxim '*Expressio unius exclusio alterius*' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits:" *Colquhoun* v. *Brooks* (1887), 19 Q.B.D. 400, at p. 406, *per* Wills, J.

"I agree with what is said . . . below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio*

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is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice:" *S.C.* (1888), in appeal, 21 Q.B.D. 52, at p. 65, *per* Lopes, L.J.

Finally, the maxim has never been applied to a case in which a covenant would have been held to be created by the words of which it is desired to exclude the effect, and then covenants in the usual and regular form have been superadded. A covenant in the form of a condition is just as much *expressum* as one in the regular form of a covenant: and the whole of a deed must be given effect to wherever possible.

That the plaintiff, who bought from the owners after the deed under which the defendant claims, can take advantage of this covenant, is decided by *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Formby* v. *Barker*, [1903] 2 Ch. 539, at p. 551, and cases cited. This is not, indeed, contested, and I do not pursue the subject.

I am of opinion that the judgment below should be reversed, with costs of the motion and the appeal.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree in the result.

Britton, J.

BRITTON, J.:—The action was brought for an injunction restraining the defendant from erecting an apartment house on lot No. 32 on the east side of Maynard avenue, in Toronto. It is contended that such erection there is in violation of a condition and restriction contained in a deed of this property from the executrices and devisees under the last will and testament of the Reverend George Maynard, in his lifetime of the township of York, deceased, to John William Williamson. The plaintiff claims title under Williamson. The deed to Williamson was made on the 18th day of April, 1888; and , after the grant to Williamson, his heirs and assigns forever, of the land therein described—being the land now owned by the defendant—the words added, now invoked by the plaintiff as applicable to the present case, are these—"to be used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots." The express covenants of the grantee in that conveyance are against the erection or maintenance on the land of any building for manufacturing, and against carrying on, or permitting to be carried on, any part of the land, any dangerous or noisy or offensive trade or business which would be a nuisance in the neighbourhood.

The defendant proposes to build an apartment house. He calls it a dwelling-house, and in a sense it will be, if erected, a dwelling-house. He desires to rent it to or for six families—and the house will be fitted up to accommodate six tenants, and it will be a dwelling-house for these tenants. The architectural

design of the proposed house, its location, the material in its construction, are all unobjectionable. The objection is, simply, that it is to be an apartment house—and the Court is asked, upon reading the conveyance, and taking into consideration that the street was intended to be what is commonly known as a residential street, to say that this house is not "a detached dwelling-house," within the meaning of the conveyance and the understanding of the parties, when in April, 1888, the conveyance was made. In 1888, there were very few—comparatively—apartment houses in Toronto. Since then the number has increased, and they have increased in size and improved in finish and convenience. It is quite true that, even with the best architectural design, they are objected to in certain localities; and, when the objection is because of location out of line with other buildings on the street, or because of finish, such objection may be well-founded. That is not this case. This is the simple objection that an apartment house is not a detached dwelling-house. I am of opinion that an apartment house may be fairly called a dwelling-house—and in this case a detached dwelling-house. It appears to me that an apartment house, as an objectionable house, was not within the contemplation of either of the parties to the deed in question. No definition of "dwelling-house" was given by either of the parties. As to location, it was to be detached, and the same distance from the street as houses on adjacent lots. It was to cost not less than $2,000. Nothing was said as to maximum of size or cost. It was to be of fair architectural appearance. We are now asked to limit its size and its capacity to accommodate dwellers therein. That would be making a new conveyance, with more restriction than the grantee agreed to and more than the grantors asked. "The presumption is in favour of freedom."

The case of *Campbell* v. *Bainbridge* [1911] 2 Scots L.T.R. 373, seems to me expressly in point. In that case the prohibition was of "houses or buildings of any kind other than villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build," and it was held that the building of tenements was not prohibited. The Lord President (p. 375) said: "A tenement of dwelling-houses is just a dwelling-house. It is a dwelling-house with more or less accommodation in it. I cannot think that, in ordinary parlance, a set of flats could not be called a dwelling-house—they are dwelling-houses."

Having come to the conclusion as above, it is not necessary that I should discuss the other branch of the case, namely, that there was no covenant on the part of the grantee affecting the matter in question.

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

*Appeal allowed;* BRITTON, J., *dissenting.*

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## STECHER LITHOGRAPHIC CO. v. ONTARIO SEED CO.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. May 7, 1912.*

1. FRAUDULENT CONVEYANCES (§ III—10)—ASSIGNMENTS AND PREFERENCES ACT (ONT.)—INSOLVENT DEBTOR — SUBROGATION — SURETY'S STATUS ON FRAUDULENT PREFERENCE.

Where a surety in paying off a guaranteed debt of an insolvent debtor devises a scheme under which, in a roundabout way, he takes in fraud of the other creditors, a chattel mortgage and transfer of book debts covering all the assets of the insolvent debtor, contrary to the Assignments and Preferences Act, R.S.O. 1897, now sec. 5 of 10 Edw. VII. (Ont.) ch. 64, and where prior to the fraudulent mortgage the book debts were held under a valid assignment by the guaranteed creditor, the transfer of the book debts to the surety will stand, not by virtue of the fraudulent mortgage but under the surety's equitable right of subrogation to stand in the shoes of the guaranteed creditor.

[*Stecher Lithographic Co.* v. *Ontario Seed Co.*, 24 O.L.R. 503, varied; *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 22 O.L.R. 577, varied. See annotation to this case.]

2. FRAUDULENT CONVEYANCES (§ III—10)—SUBROGATION—INSOLVENT DEBTOR AND HIS SURETY—SCHEME FOR FRAUDULENT CHATTEL MORTGAGE—PRIOR SUBROGATION RIGHTS, HOW EFFECTED.

Where a surety is entitled by subrogation upon the payment of the guaranteed debt to a transfer of the book debts of the debtor, and instead of taking the transfer purely and simply he enters into a scheme to take, under a fraudulent transfer to another, not only the book debts, but also in fraud of the other creditors all the rest of the debtor's assets as security, the transaction growing out of the scheme is void as against creditors under the Assignments and Preferences Act (now sec. 5 of 10 Edw. VII. (Ont.) ch. 64), but the prior and independent subrogation rights of the surety will be allowed except in so far as his own scheme has interfered therewith.

[*Stecher Lithographic Co.* v. *Ontario Seed Co.*, 24 O.L.R. 503, varied; *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 22 O.L.R. 577, varied. See annotation to this case.]

3. FRAUDULENT CONVEYANCES (§ III—10)—ASSIGNMENTS AND PREFERENCES ACT—FRAUDULENT CHATTEL MORTGAGE—INSOLVENT DEBTOR—SURETY'S RIGHTS, WHEN IMPAIRED BY HIS OWN SCHEME.

Where a surety in paying off the guaranteed debt of an insolvent debtor as to which the guaranteed creditor holds a valid assignment of the debtor's book debts, chooses, instead of simply paying the debt and taking by subrogation a transfer of the book debts, to take in fraud of the other creditors, a chattel mortgage and transfer of book debts covering all of the assets of the insolvent debtor, as security, and where the book debts are thereupon, in a roundabout way, assigned to the surety and by him committed to the insolvent debtor who collects and appropriates the same, the surety cannot have equitable relief to collect their value in priority over the other creditors, out of the proceeds of the other property covered by the fraudulent chattel mortgage with which the sum so appropriated had become intermixed.

[*Stecher Lithographic Co.* v. *Ontario Seed Co.*, 24 O.L.R. 503, varied; *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 22 O.L.R. 577, varied. See annotation to this case.]

4. SUBROGATION (§ VI—25)—INSOLVENT DEBTOR—SECURITY FOR GUARANTEED DEBT—PERMISSION TO DEBTOR TO RETAIN—EFFECT OF.

Where a surety of a debt for an insolvent debtor pays it off and by subrogation takes over from the creditor an assignment of the deb-

tor's book debts, but instead of collecting them himself allows the debtor to retain and collect and appropriate same, he cannot demand as a preferred claim against the estate as against the other creditors the amount by which the insolvent estate had been enhanced in value by the mixing with it of the sum so collected and appropriated when no portion of the fund is ear-marked to any specific asset.

[*Stecher Lithographic Co.* v. *Ontario Seed Co.*, 24 O.L.R. 503, varied; *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 22 O.L.R. 577, varied. See annotation to this case.]

5. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—CLOAKING WITH WRONG NAME TO HIDE INTENT.

Where a surety, to increase his security, plans and carries out in fraud of the other creditors, a scheme in which his brother is used as his mere instrument in the transactions, equity will sheer the transaction of the brother's name and substitute that of the surety when necessary to shew the true nature of the transaction.

[*Stecher Lithographic Co.* v. *Ontario Seed Co.*, 24 O.L.R. 503, varied; *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 22 O.L.R. 577, varied. See annotation to this case.]

6. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE — SUBROGATION RIGHTS OF SURETY.

Where the plaintiff in a creditors' action attacks as fraudulent a chattel mortgage given by an insolvent debtor and it is set aside under the Assignments and Preferences Act (now 10 Edw. VII. (Ont.) ch. 64, sec. 5), the debtor's surety who was the party benefiting by the transaction, and who is found to have entered into it with intent to obtain an illegal preference, does not by reason thereof lose as against the insolvent estate the prior rights which he had against the insolvent at the time of the carrying into effect of the impeached transaction, the rights of the other creditors not extending beyond the removal of the fraudulent security. (*Per* Anglin, J.)

7. CHATTEL MORTGAGE (§ II A—5)—FRAUDULENT PREFERENCE — SURETY.

Where the object of a chattel mortgage made by an insolvent debtor is to withdraw all his assets from the reach of the other creditors in order to enable a surety to pay a debt of the insolvent which the surety had guaranteed, the chattel mortgage is invalid as against creditors under the Assignments and Preferences Act, 10 Edw. VII. (Ont.) ch. 64, as having been made for an unlawful purpose. (*Per* Idington, J.)

8. CREDITORS' ACTION (§ III—10)—FRAUDULENT PREFERENCE—CHATTEL MORTGAGE—PROPERTY NOT EXIGIBLE, EFFECT UPON.

Where the creditors of an insolvent debtor attack a transfer of certain personal property as fraudulent and as hindering and delaying the creditors, and where some of the property in question could never have become exigible to answer the claims of the creditors, the attack fails as to the non-exigible property. (*Per* Idington, J.)

9. FRAUDULENT CONVEYANCES (§ III—10)—SUBSTITUTION OF SECURITIES—GOOD FAITH.

Under sub-sec. 5 of sec. 3 of R.S.O. 1897, ch. 147 (now 10 Edw. VII. ch. 64, sec. 6) protecting the substitution in good faith of one security for another security for the same debt so far as the insolvent debtor's estate is not thereby lessened in value to the other creditors, the substitution itself, as well as the good faith must be established in order to sustain the transaction, and when the mortgage attacked treats in express words the one security as being in addition to the other and when the circumstances shew bad faith, no part of the transaction can, as against creditors, be sustained as a substitution. (*Per* Idington, J.)

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APPEAL by the plaintiffs from the judgment of the Ontario Court of Appeal in *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 24 O.L.R. 503, in an action brought by the plaintiffs on behalf of themselves and all other creditors of the defendant company, to set aside a chattel mortgage and assignment of book-debts made by the defendant company to the defendant Adam Uffelmann, on the ground that they were made with intent to defeat, hinder, delay, or prejudice the creditors of the defendant company, within the meaning of sub-sec. 1 of sec. 2 of R.S.O. 1897, ch. 147. The defendant Uffelmann cross-appealed asking that the action be dismissed.

The plaintiffs' appeal was allowed and the cross-appeal dismissed with costs to the plaintiffs, varying both the judgment of the Court of Appeal and the judgment of a Divisional Court, *Stecher Lithographic Co.* v. *Ontario Seed Co.*, 22 O.L.R. 577, at p. 582.

Section 1 of 13 Eliz. ch. 5, as reinacted in Ontario, R.S.O. 1897, ch. 334, sec. 1, is as follows:—

> For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days, than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been, and are, devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose and intent to delay, hinder, or defraud, creditors and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevysaunce, between man and man, without the which no commonwealth or civil society can be maintained or continued: All and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common, or other profits, or charge, out of the same lands, tenements, hereditaments, goods and chattels, or any of them by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, only as against that person and his assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be, in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing, to the contrary notwithstanding.

Sub-secs. (1) and (2) of sec. 2 R.S.O. 1897, ch. 147 (now sec. 5, 10 Edw. VII. (Ont.) ch. 64) provide as follows:—

(1) Subject to the provisions of section 3 of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall, as against the creditor or creditors injured, delayed or prejudiced be utterly void.

(2) Subject to the provisions of section 3 aforesaid, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor with intent to give such creditor an unjust preference over his other creditors or over any one or more of them, shall as against the creditor or creditors injured, delayed, prejudiced or postponed be utterly void.

The provisions of sec. 3 of R.S.O. ch. 147, material to be set out here are as follows:—

Sub-section (1): Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or with the consent of a majority of his creditors having claims of $100 and upwards computed according to the provisions of section 20 to another assignee resident within the Province of Ontario for the purpose in each of the said cases of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts; nor to any *bonâ fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor, nor to any *bonâ fide* conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as abovementioned, which is made in consideration of any present actual *bonâ fide* payment in money, or by way of security for any present actual *bonâ fide* advance of money, or which is made in consideration of any present actual *bonâ fide* sale or delivery of goods or other property; provided that the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

Sub-section (5): Nothing herein contained shall affect *The Act Respecting Wages*, or shall prevent a debtor providing for payment of wages due by him in accordance with the provisions of the said Act. Nor shall anything herein contained affect any payment of money to a creditor, where such creditor, by reason or on account of such payment has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor. Nor to the substitution in good faith of one security for another security for the

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same debt so far as the debtor's estate is not thereby lessened in value to the other creditors. Nor shall anything herein contained invalidate a security given to a creditor for a pre-exising debt where by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bonâ fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full.

The other sub-secs. (2) (3) (4) of sec. 3, it is not necessary to set out here. Attention may be called to the fact that sec. 3 (now sec. 6 of 10 Edw. VII. (Ont.) ch. 64) has been changed somewhat by the later enactment but that the transactions in question in this case took place before the passage of the later Act.

Prior to the incorporation of the defendant company in 1909, Herold and Kustermann carried on business as co-partners under the name of the Ontario Seed Company, and in December, 1909, presented a statement of their affairs to Jacob Uffelmann, a merchant of Waterloo, shewing a surplus of $14,000, upon which he indorsed notes for them, and finally gave his bond for $5,000 as security for their debt to the Merchants Bank. In the spring of 1909, the firm being then indebted, and pressed by their creditors, the defendant company was incorporated to take over the business. Jacob Uffelmann became a director and secretary-treasurer of the new company, taking $1,000 of stock. The new company was not floated successfully, only about $5,000 of the stock being taken up.

Defendant Adam Uffelmann is a brother of Jacob Uffelmann, and a clerk in his employ, worth about $11,000. He received a cheque for $7,000 from Struthers of London, handed to him by his brother Jacob, which he indorsed and handed back to Jacob, who deposited it to Adam's credit in the Merchants Bank on the 3rd August, 1909. He had not asked a loan from Struthers. The money was obtained by Jacob on his own note, without the knowledge of Adam.

The chattel mortgage in question, which also contains an assignment of the company's book-debts, is dated the 12th August, 1909, and covers all the personal property of the defendant company. At that date the defendant company was indebted to the Merchants Bank in the sum of $8,254.52, in respect of which Jacob Uffelmann, the secretary-treasurer of the company, was liable to the bank under a bond as surety for the company, and as indorser of notes discounted by the company, to the extent of about $7,700, and who was, therefore, found to be a creditor of the company, within the meaning of sub-sec. 5 of sec. 2 of R.S.O. 1897, ch. 147. The bank also held an assignment of the company's book-debts as further collateral security for this claim.

For some time before the chattel mortgage was executed, the company had been pressed by its creditors, some of whom had threatened and others had started actions, and the company was unable to meet its liabilities as they matured; and the trial Judge found as a fact that, at the date of the chattel mortgage, the company was in insolvent circumstances, within the meaning of sec. 2 of the Act in question. He also found as a fact that, when the chattel mortgage was executed, the company, through its officers, Otto Herold, vice-president, and Jacob Uffelmann, secretary-treasurer, knew that the company was insolvent, and that the company, through the said officers, when they executed the chattel mortgage in the name of the company, intended thereby to defeat, hinder, delay, or prejudice all the creditors of the company except the Merchants Bank and Jacob Uffelmann; and further, that it was the intention of the company, through the said officers, to defeat the objects of the said Act by raising the money advanced under the chattel mortgage to pay the claim of the Merchants Bank, and by paying the same to give an unjust preference to the bank and Jacob Uffelmann, as surety, over their other creditors, to the extent that at that time the bank and Jacob Uffelmann were not already protected by the assignment of book-accounts held by the bank. On the 13th August, the next day after the day the chattel mortgage was made to defendant Adam Uffelmann, he gave a cheque to the defendant company for $8,300, which was deposited to its credit in the Merchants Bank, and on the same day the defendant company gave a cheque to the Merchants Bank for $8,254.52, being the full amount of their account. On the 14th August, there was a further deposit to the credit of Adam's account in the Merchants Bank of $1,000, of which a part was obtained from Jacob and the balance borrowed from another source. These are the only entries in his bank book. And the trial Judge found as a fact that the $8,300 advanced to the company in the name of Adam Uffelmann was raised upon the credit of Jacob Uffelmann and placed in the hands of Adam Uffelmann to make the advance, and that Adam, in taking the mortgage in his own name, was allowing himself to be used by Jacob Uffelmann as an instrument to do what, under the law, Jacob Uffelmann could not successfully have done in his own name. He also found as a fact that the defendant Adam Uffelmann, if he did not actually know, ought, under the circumstances which were known to him, to have known that the company was insolvent, and that it was the intention of the company and of his brother, in raising the money under the chattel mortgage, to effect an unjust preference over the company's creditors other than his brother and the bank. That the transaction was really the affair of Jacob Uffelmann was found to be shewn by the following extract from Adam Uffelmann's examination for discovery put in at the trial:—

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"526. So that, reducing this matter to a few words, so far as the procuring of the chattel mortgage was concerned, the carrying out of it and arranging for the money and everything, you had really nothing to do with it? A. Very little.

"527. You had your brother act for you in the whole matter? A. Yes.

"528. He had guided and protected you? A. Yes.

"529. And he arranged everything for you? A. Yes."

The money advanced by Adam Uffelmann was only nominally his money. All but $200, which was furnished by Jacob out of his own funds, was raised on Jacob's credit, so that it was really Jacob's own money, which he could not himself lend to the company to satisfy his own claim without the transaction being void under sub-sec. 2 of sec. 2, R.S.O. 1897, ch. 147.

On the 7th September, 1909, the bank assigned to the defendant Adam Uffelmann all their interest in the book-debts held by them as security for their indebtedness, the assignment purporting to be in consideration of $8,254.52 "paid by Adam Uffelmann."

Teetzel, J.

The judgment at the trial of the case, 22 O.L.R. 577, was delivered by TEETZEL, J.:—I do not think, under all the circumstances, that the money could be said to have been given to the company in good faith, as the chief intent and object of the transaction was, so far as concerned the company and Jacob Uffelmann, to secure the payment in full of the bank's claim, and, therefore, to relieve Jacob Uffelmann from liability, the necessary consequence of which was and was known by them to be that all the other creditors were to be hindered and delayed, if not defeated, in their remedies.

It was part of the transaction that the bank should transfer to Adam Uffelmann the book-accounts which they held under assignment from the company, and which they subsequently assigned to him; and, while I think the facts above found bring the case within the principle of *Burns* v. *Wilson* (1897), 28 Can. S.C.R. 207, and *Allan* v. *McLean* (1906), 8 O.W.R. 223 and 761, I think the transaction can only be impeached to the extent of the difference between the actual value of the book-debts held by the bank on the 13th August, 1909, and $8,300, because it was in fact only to the extent of that difference that either the bank or Jacob Uffelmann, as surety, could be said to be unjustly preferred, and, therefore, to that extent only could the advance be said to have been *malâ fide* for the purpose of avoiding the statute. It appeared from the evidence that, after the mortgage, the company was allowed to collect the book-accounts and to use the proceeds for the purposes of its business, and that only a small amount remains uncollected.

There was nothing to shew that this was done in bad faith, and I can find no reason why the defendant Uffelmann should be deprived of the security to the extent of the value of the book-accounts which at the time of the transaction were held as security for part of the claim which was satisfied by the advance.

The judgment will, therefore, declare the chattel mortgage void as against the plaintiff and other creditors of the company to the extent of the difference between the actual value of the book-accounts on the 13th August, 1909, and $8,300.

An appeal was taken to a Divisional Court, a cross-appeal being taken by the defendant Adam Uffelmann. The judgment of Mr. Justice Teetzel was varied, and the whole transaction held to be void as against creditors, 22 O.L.R. 577, at p. 582.

Clute, J.

The judgment of the Court was delivered by CLUTE, J.:—The plaintiffs appeal and contend that the judgment should be varied by declaring the chattel mortgage void *in toto;* and the defendant Adam Uffelmann, by his cross-appeal, asks that the action be dismissed. It will be convenient to deal with the cross-appeal first.

Mr. Gibbons urged that the chattel mortgage was not invalid; that the question of preference was eliminated because the Merchants Bank and Jacob Uffelmann—the parties who, it is alleged, were benefited—are not parties to this action; and that it was not void as against creditors, upon the ground that it was made with intent to defeat, hinder, and delay creditors, because there was an actual *bonâ fide* advance in money, and the fact that one creditor was preferred is no offence either against the Statute of Elizabeth or our Act, R.S.O. 1897, ch. 147, sec. 2, sub-sec. 1, which corresponds to it.

It was clearly established that, at the time the chattel mortgage was given, the company was insolvent, and that the effect of the transaction was to give the bank a preference and indirectly to benefit Jacob Uffelmann, who was security to the bank, and that it was done with this object in view.

In *Mulcahy* v. *Archibald*, 28 Can. S.C.R. 523, it was held that a transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution, and to delay or defeat the creditors, is not void under 13 Eliz. ch. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.

In *Middleton* v. *Pollock, Ex p. Elliott*, 2 Ch. D. 104, Jessel, M.R., points out (p. 108) that "there is no law which prevents a man in insolvent circumstances from preferring one of his creditors to another, except the bankruptcy law. . . . It has been decided, if decision were wanted, that a payment is *bonâ*

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*fide* within the meaning of the Statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. Therefore, the mere fact of the deliberate intention of Mr. Pollock, if he entertained that deliberate intention, of preferring, in case of insolvency, this selected list of clients to the others, would not be sufficient to avoid this claim. Assuming, therefore, that it had been proved not only that he was insolvent, but also that he was insolvent to his own knowledge, I think that, looking at the words of the statute and the authorities, the payment was *bonâ fide* if it was intended to be a payment, and the security was *bonâ fide* if it was intended to be a security. The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor." This case was approved of by the Court of Appeal in *New Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19.

But a deed, though made for valuable consideration, may be affected by *malâ fides*: *Harman* v. *Richards* (1852), 10 Hare 81.

"The Court is to decide in each particular case, whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder or delay his creditors": *Thompson* v. *Webster* (1859), 4 Drew. 628, at p. 632, quoted with approval by Fry, J., in *In re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389, 392, where *Holmes* v. *Penney* (1856), 3 K. & J. 90, and *Freeman* v. *Pope*, L.R. 5 Ch. 538, are referred to.

In *Ex p. Games, In re Bamford*, 12 Ch. D. 314, it was held that a bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under the statute 13 Eliz. ch. 5. It will only be void if it is not made *bonâ fide, i.e.*, if it is a mere cloak for retaining a benefit to the grantor. In *Alton* v. *Harrison* (1869), L.R. 4 Ch. 622, Lord Justice Giffard says (p. 626): "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the Statute of Elizabeth." Applying these remarks, Thesiger, L.J., says, in *Ex p. Games, In re Bamford*, 12 Ch.D. at pp. 324, 325: "Taking the question to be, what it plainly must be, was the deed *bonâ fide*, or was it a mere cloak for retaining a benefit to the grantor, what are the facts? Undoubtedly there was good consideration given for the deed; though it was not good under the

bankruptcy law, it was perfectly good under the Statute of Elizabeth."

I have thus fully referred to these authorities because Mr. Gibbons insisted that they clearly shewed that the present case was not within the Statute of Elizabeth (and therefore not within R.S.O. 1897, ch. 147, sec. 2, sub-sec. 1); as the statute has no application to the case of a preference of one creditor over another. No doubt, this is so, but the statute has express reference to the case where the conveyance is made with the intent to delay, hinder, or defeat creditors.

A careful perusal of the evidence satisfies me that there is ample evidence to support the finding of the trial Judge that there was intent to delay and hinder creditors, quite apart from the question of preference. The case was, in my opinion, brought within the Statute of Elizabeth.

I think the case is also clearly within sub-sec. 1 of sec. 2 of the Assignments and Preferences Act. The directors and Jacob Uffelmann knew that, unless the creditors were held off in some way, the company must assign. It could not meet its obligations. Jacob knew this, and desired to have the bank paid off and to be discharged as surety. He planned and carried out the scheme, using Adam as his instrument. Adam must have known or should have known this condition of affairs. The money advanced, while in the bank in his name, was obtained and placed there for the purpose by Jacob Uffelmann.

In *Campbell* v. *Patterson, Mader* v. *McKinnon*, 21 Can. S.C. R. 645, a case somewhat like the present, Gwynne, J., says (p. 653): "The mortgagee William Mader . . . appears to have placed himself wholly as a puppet in the hands of his brother to be dealt with as the latter pleased, for the purpose of effecting a matter in which William Mader in reality had not and was not intended to have any *bonâ fide* interest and in respect of which he was not intended to be subject to any real obligation, but to be simply a tool in the hands of his brother." Every word of these observations applies to the present case.

Adam Uffelmann had not obtained the $7,300 on his own credit or with any intention, at the time the mortgage was given, of becoming liable to Struthers for the loan; nor did he in fact become liable until some time afterwards.

I think this case is within the language of sub-sec. 1 of sec. 2 of the Act, and that *Burns* v. *Wilson*, 28 S.C.R. 207, and *Campbell* v. *Patterson, Mader* v. *McKinnon*, 21 S.C.R. 645, and *Allan* v. *McLean*, 8 O.W.R. 223, 761, govern the present case. The defendant's appeal fails.

As to the plaintiffs' appeal, the learned trial Judge held that "the transaction can only be impeached to the extent of the difference between the actual value of the book-debts held by

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the bank on the 13th August, 1909, and $8,300, because it was in fact only to the extent of that difference that either the bank or Jacob Uffelmann, as surety, could be said to be unjustly preferred, and, therefore, that to that extent only could the advance be said to have been *malâ fide* for the purpose of avoiding the statute."

In *Commercial Bank* v. *Wilson*, 3 E. & A. 257, it was held that, under the very words of the Statute of Elizabeth, the judgment, if fraudulent as to part, is utterly void as against the creditor whose action is attempted to be defeated by it. This decision was followed in *Campbell* v. *Roche*, *McKinnon* v. *Roche* (1891), 18 A.R. 646. In appeal to the Supreme Court (*Campbell* v. *Patterson*, *Mader* v. *McKinnon*, 21 S.C.R. 645, 653), it was held that *Commercial Bank* v. *Wilson*, decided under the Statute of Elizabeth, is inapplicable under the Ontario statute, as the Statute of Elizabeth contained no exception corresponding to sec. 3, where the security is for a present actual *bonâ fide* advance of money. The judgment was affirmed upon the ground that it was proven that no part of the consideration was *bonâ fide*.

The bank did not assign its debt to Adam; it was paid off. No doubt it was part of the arrangement that Adam should have the book-debts, and they were included in the chattel mortgage. There was no advance specially in respect of the book-debts.

It is true that the company got the benefit of them as far as collected, and, if a *bonâ fide* advance had been made in respect of them, no doubt the mortgage to that extent would have been valid. But the whole advance was one transaction, made, in my opinion, to hinder and delay creditors, contrary to the statute. There being no *bonâ fide* advance by Adam, he has no equitable claim of any kind. He is not entitled to stand in the shoes of the bank and be subrogated to their position in respect of the book-debts. But, if he was, that would not entitle him to his present claim. He has allowed the company to exhaust this part of his security, and now seeks to have his loss made good out of the proceeds of the chattels, to which he has no legal right as against the other creditors. By his own laches he has lost his security, and cannot be heard to say, "True, I have neglected to enforce my claim in respect to that to which I had a title, and now I ask the Court to make good my loss from the proceeds of that to which I have no title."

The judgment of the Court below should be varied by eliminating the clauses having reference to book-debts and deductions on account thereof. The plaintiffs are entitled to the costs of this appeal and of the cross-appeal.

The judgment of the Divisional Court was reversed in part by the Court of Appeal, 24 O.L.R. 503, on an appeal by the de-

fendant Adam Uffelmann and the judgment of Mr. Justice Teetzel restored.

The judgment of the Court was delivered by

MEREDITH, J.A.:—No reasonable fault can be found with the findings of the trial Judge, upon the evidence adduced by the parties at the trial before him. The effect of such findings is, as I understand them, that the transaction in question was really that of Jacob Uffelmann, though the mortgage was taken in the name of the defendant, his brother, Adam Uffelmann; and that the purpose of the transaction, and the effect of the mortgage, was to delay all other creditors of the company and to give to Jacob Uffelmann, who was a creditor of the company, an unjust preference over all other its creditors. The findings are not inconsistent; the scheme was intended to stave off all other creditors in the hope that the company might recover itself, but, if not, that the defendant would have his preferential security; and therefore was, in my opinion, a transaction in violation of both the Statute of Elizabeth and the provincial enactment against unjust preferences.

The only substantial question in the case, as it seems to me, is as to character and extent of the relief which should be given to the plaintiffs. When the mortgage was given, Jacob Uffelmann was a guarantor of the Merchants Bank of Canada, who were creditors of the company, and who had security to a certain extent for their claims against the company, to the benefit of which Jacob Uffelmann, as such surety, was entitled; by the transaction in question the claims of the bank were all paid off, and so Jacob Uffelmann was released from his liability as surety. In these, and the other circumstances of the case, the plaintiffs are entitled to have the transaction in question wholly set aside; but, in my opinion, it does not follow from that that Jacob Uffelmann is also to lose the rights which he had against the company at the time of the carrying into effect of the impeached transaction. Why should he? What right have the plaintiffs at common law, under the Statute of Elizabeth, or under the provincial enactment, beyond the removal of the fraudulent security out of their way? The only penalty which the Courts can impose is that provided for in the Statute of Elizabeth, and that is not sought in this action. The parties should, in my opinion, be put in the same position as if the impeached transaction had never taken place; and that, as I understood him, was the position finally taken by Mr. Secord, in his argument of this appeal.

I may add that the facts of the giving of value for an impeached security, whilst entitled to great weight on the question of fact whether the intention was to defeat, delay, or hinder

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creditors, cannot, under the provincial enactment, save the transaction, if in truth made with such intention.

I would allow the appeal to the extent of restoring the judgment directed to be entered at the trial, and would dismiss it in other respects; the defendant should have the general costs of the appeal, but should pay the costs of that branch of it upon which he has failed, if there be any separable from the general costs.

The letter of the defendant company referred to by Mr. Justice Idington in his judgment delivered in the Supreme Court, as being written four days after the execution of the chattel mortgage is as follows:—

Waterloo, Ont., Canada, Aug. 16, 1909.

Stecher Lith. Co., Rochester, N.Y.

Dear Sir,—We beg to inform you that under date of April 22nd, the Ontario Seed Co., Limited, of Waterloo, Ont., has been duly incorporated under the Ontario Companies Act. The business formerly carried on by Messrs. O. Herold and C. H. Kustermann developed very rapidly and the prospects are the very best. The reason for incorporation was to enlarge the capital, which proved inadequate. At the statutory meeting on July 28th, the following directors and officers were elected:—

President—C. H. Kustermann, of Waterloo, formerly manager of the Ontario Seed Co.

Vice-President—O. Herold, of Waterloo, formerly agriculturist of the Ontario Seed Co.

Secretary-Treasurer—Jacob Uffelmann, of Waterloo, Ex-Mayor, General Merchant.

Director—Peter H. Roos, of Waterloo, Treasurer of the Dominion Life Ass. Co., of Waterloo.

Director—F. R. Brotherton, of Toronto, Traveller.

There is no doubt that the standing of the firm is enhanced by the new directors giving their assistance and large experience.

At a general meeting of the shareholders on August 12th, financial arrangements were made. It was found that allowing things to develop undisturbed, all liabilities could be paid within one year, as a large amount of stock is on hand, considerable amounts are outstanding and the crop most promising. However, some of the smaller creditors threatened to sue the company, which would have been disastrous to all concerned in forcing an assignment, which is always connected with considerable losses.

It was also necessary to provide funds for wages and other necessary expenses, until the outstanding money would come in, most of which is due September 1st. Further a loan from the bank to the old company had to be paid off. After due and careful consideration and investigation, also having consulted other financial authorities, the only practical way to be found was to secure a loan on the strength of a chattel mortgage covering the chattels, property, crops, etc., of the firm, and an assignment of the book accounts. In this way, we think we serve your interests best. This will give us time and thus

a chance to pay off every creditor in full, thus also avoiding that some of the creditors by threatening with suits would force us to pay them in full at once, to the detriment of the other creditors. About the middle of September, after outstanding money has been collected, we expect to be able to pay you the first instalment of your account and state definitely how soon the balance can be settled. We are convinced that we will be able to pay every one of our creditors in full with interest.

We trust, that, under the circumstances, you will find this step justified, as it was done in the best interests of everybody concerned.

For references, we would refer you to Mr. Butler, manager of the Merchants Bank of Canada, Berlin, and also to Mr. Carl Bergmann, manager of the Dominion Bank in Berlin, Ont., both of the gentlemen know the parties concerned personally.

Yours truly,
THE ONTARIO SEED CO., Limited..
J. Uffelmann, *Secretary-Treasurer.*

The Stecher Lithographic Company appealed to the Supreme Court of Canada, and the defendant Uffelmann cross-appealed for the dismissal of the action.

*Secord*, K.C., for the appellants. The chattel mortgage is clearly void under the Statute of Elizabeth and it cannot be void in part and valid in part: *Commercial Bank* v. *Wilson*, 3 E. & A. 257; *Mader* v. *McKinnon*, 21 Can. S.C.R. 645, at 652; *Totten* v. *Douglas*, 18 Gr. 341, at 359. The mortgagee was *particeps criminis* in procuring the mortgage and cannot obtain relief in equity: Kerr on Frauds, 4th ed., pp. 365 *et seq.*; *Cameron* v. *Perrin*, 14 A.R. (Ont.) 565.

*Sir George Gibbons*, K.C., and *Sims*, for the respondents. There was a *bonâ fide* advance by the mortgagee which prevents the mortgage being held void under the "Assignments and Preferences Act": *Mulcahy* v. *Archibald*, 28 Can. S.C.R. 523; *Middleton* v. *Pollock*, 2 Ch. D. 104. Even if the advance was made with intent to give a preference it was still *bonâ fide*: *Ex parte Games*, 12 Ch.D. 314.

THE CHIEF JUSTICE (SIR CHARLES FITZPATRICK) (oral):— This appeal should be allowed with costs. Fitzpatrick, C.J.

IDINGTON, J.:—I recognize to the full extent that, as has so often been said, a preferential assignment is not by reason of its preferential character obnoxious to the Statute of Elizabeth, said to be declaratory of the common law, against schemes for defeating, hindering or delaying creditors. I must also recognize as possible that a scheme may be formed having in it the elements which may render it obnoxious to both that law and the provision of R.S.O. 1897, ch. 147 (now ch. 64, Ont. statutes of 1910), aimed at preferential assignments. Idington, J.

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In this case I think the chief purpose of the parties to the chattel mortgage in question was clearly to prefer the claim of the surety and relieve him from the situation in which he had as such become involved. There is evidence, however, of its being only part of a wider scheme which involved at least the hindering and delaying of the creditors.

All the Courts below have found the chattel mortgage in question was the result of both designs to defeat, hinder or delay, and to prefer one creditor of an insolvent over another. I cannot say they are wrong in taking that view of the facts. But even if I could, and find that the sole purpose of the parties was the alleged preference and nothing else, how would that help the respondent, Adam Uffelmann?

When the immediate object of an agreement is unlawful the agreement is void. Therefore the object and, if you will, the sole object of the chattel mortgage, having been to withdraw certain assets of the insolvent debtor from the reach of other creditors in order to enable the surety to pay the debt he was surety for, and thus prefer one creditor over others, surely the entire object was unlawful.

*Primâ facie* the whole is tainted with illegality, for such is the presumption the statute has declared and created against such transactions when concluded within sixty days prior to attack thereon.

I am, therefore, with all due respect, unable to understand how the learned trial Judge and the Court of Appeal have been able to draw the line where the parties did not, if we have any regard to their language in expressing in this mortgage their intentions, and thereby sever the legal from the illegal.

I concede it was quite possible to have produced, whether lawfully or not, such an agreement as the learned trial Judge finds the parties had intended relative to their purpose. It was not, however, in the minds of the parties to create a security of which the parts and purpose could be severed in the way the judgment appealed from implies; and without doing violence to the language of the instrument and the manifest purpose of the parties thereto, we cannot find anything therein to justify such a severance or drawing of such a line between the legal and illegal as is attempted below.

Nor do we find anything in the language of sec. 10 (now sec. 13) of the statute upon which this action is founded, to warrant the giving only such conditional relief as given.

That section, sub-sec. 1, is as follows:—

> 13. (1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made shall have sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or

recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong not only to an assignee for the general benefit of the creditors of the debtor, but where there is no such assignment, to all creditors of the debtor.

I quote this just to point out that it does not countenance any such thing as has been done, and next to shew its limitations in relation to another point I am about to refer to in connection with the book debts.

I submit that the language "assignment or transfer of any property . . . which in law is invalid" lends no countenance to what has been done.

Are there, however, two or more agreements or assignments in this chattel mortgage? I think there are, for we have the assignment of the stock in trade and then a distinctly separate assignment by way of additional security of all book debts, etc., due the old company, and we have also another relative to the unpaid capital. It is conceivable in many ways that an instrument might well contain in this way a series of assignments of which some might be legal and others illegal, but in the language used relative to the stock in trade part of the mortgage, there is no room left for any such severance or suggestion as made, of the good from the bad. To do so on the lines laid down is, I respectfully submit, to construct a theory of what the parties might fairly have so designed as to bring them within one or more of the saving clauses of the statute, and constitute thereby a bargain they never dreamed of.

I incline to think the vicious purpose tainted each of the whole of these assignments in this instrument. But as to the collaterals, held by the bank, and called book debts, I think they were on his payment to the bank the property, or at all events the potential property of Jacob Uffelmann, for whom the respondent was acting and on behalf of whom he was entitled to receive said securities by virtue of his (Jacob's) right as a surety paying off the creditor holding same. The same day as the mortgage was given the company gave a direction to the bank to transfer these book debts to respondent, Adam Uffelmann, but as he clearly was but the substitute of Jacob, no violence is done to the actual intention or even the language used in attributing what was done to an assertion of Jacob's right as the surety who had in fact raised and in a needless roundabout way, paid off the bank. His right need not be rested upon the clauses in the mortgage and cannot be injured by any clause therein referring to the same subject. When these securities were transferred thus they formed an asset distinctly severed from the rest of the estate, and if Jacob took no care to collect them, but

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let the company do so, he lost his security to that extent and has no one but himself to blame. Indeed he may truly blame the illegal purpose of hindering and delaying the creditors for the year that was needed to enable them to pay, as evidently was the intention of those who concocted the circular issued four days later over Jacob's own hand as secretary of the company. If he permitted the collection and appropriation thereof by the company pursuant to such a scheme, how can any equity rest thereon to make good his consequent loss out of other property to which he was not at all entitled as against the other creditors to resort. If he permitted it through sheer neglect, how again can he resort for indemnity to a mortgage that the statute presumes, under the circumstances, void?

Again, let us look at the above quoted sub-section of sec. 10, read it closely, and we see that the right of appellant is bounded by and is limited to an account of the proceeds of that which would have been exigible had it "remained in the possession or control of the debtor," etc.

On the one hand the respondent has no right to claim any part of that which he has taken possession of by virtue of an instrument presumed to be illegal and void. And on the other, the appellant has no right to claim an account of those securities which clearly, under the circumstances, never could have become exigible to answer the claims of other creditors.

As to the argument rested on sub-sec. 5 of sec. 3, relative "to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors," where is the evidence of any such substitution in good faith or bad faith?

There never existed a foundation on the facts for alleging substitution of one or part of one for another. The mortgage treated in express words the one as being in addition to the other. And when we depart from it to the other basis of right to the book debts as security, the two subjects as security are entirely independent of each other, and the book debts free from any such pretension. No one ever thought of any substitution in regard to either or any part thereof. And, as clearly as can be, the debtor's estate has been, by what has taken place relative to book debts, lessened in value, if effect be given the judgment appealed from, to the other creditors.

I repeatedly pressed counsel to see if the proceeds could be traced to anything specific which now formed part of the estate, but was told it could not be done.

Now, as I take this saving clause, if the money had been found invested in some specific thing that has remained to answer for the condition I have quoted relative to lessening of the estate "in value to the other creditors," principles of equity would require, as well as the statute, relief to be given to that

extent. Or if some privileged claim over the whole estate, the payment of which would enhance the value of the whole estate to the creditors, had been paid off thereby, the same should be done in regard thereto. As it is there is nothing either in shape of agreement or actual results, to lay a foundation on which to apply such principles.

The appeal should be allowed with costs and the Divisional Court judgment be restored.

DUFF, J.:—I agree that this appeal should be allowed with costs.

ANGLIN, J.:—A study of the evidence has satisfied me that it fully supports the findings of the learned trial Judge that the impeached chattel mortgage, nominally given to Adam Uffelmann, was in fact the security of Jacob Uffelmann, and that it was given and taken with knowledge of the mortgagors' insolvency and with the intent and purpose that it should serve to "hinder" and "delay," though perhaps not to "defeat" or "prejudice," the creditors of the mortgagors other than the bank and Jacob Uffelmann. Unless, therefore, it comes within some one of the saving exceptions of sub-secs. 1 and 5 of sec. 3 of the R.S.O. 1897, ch. 147, I am convinced that, as against such creditors, it is void under sub-sec. 1 of sec. 2 of that statute.

Jacob Uffelmann, as surety to the bank for the mortgagors, was already their creditor for all of the $8,300 which the mortgage purports to secure, except about $500. The evidence makes it reasonably clear that the real object of the parties was not to secure this $500, but to secure Jacob Uffelmann in respect of his existing liability of upwards of $7,700 as surety, which he was by payment converting into a direct claim against the company. The additional $500 he had to assume in order to clear off the bank's claim and to obtain an assignment of the $6,000 worth of book debts held by it as collateral. The last of the exceptions made by sub-sec. 1 and the last under sub-sec. 5 of sec. 3, therefore, do not apply to the transaction.

The other exceptions under sub-sec. 1 and the first exception of sub-sec. 5, clearly have no application.

The bank is not a party to this action. The payment to it is not now in question. The second exception under sub-sec. 5 does not apply to the case as between the plaintiffs and the chattel mortgagee.

I shall presently give my reasons for thinking that the respondent has not brought himself within the only remaining exception made by sub-sec. 5, namely, "the substitution in good faith of one security for another security for the same debt." I am, therefore, of the opinion that the validity of the impeached

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instrument is not saved by anything in sub-sec. 1 or sub-sec. 5 of sec. 3.

I agree, however, with Meredith, J.A., that although

> the plaintiffs are entitled to have the transaction in question set aside . . . it does not follow from that that Jacob Uffelmann is also to lose the rights which he had against the company at the time of the carrying into effect of the impeached transaction.

I also agree that the plaintiffs have no right "beyond the removal of the fraudulent security out of their way." In his factum counsel for the appellants expressly disclaims any intention to attack in this action the assignment by the bank to the defendant Adam Uffelmann of the book debts held by it as collateral. As surety for the debtors, Jacob Uffelmann was entitled on paying the guaranteed debt to be subrogated to the rights of the creditor. I agree with the learned trial Judge that

> it was part of the transaction that the bank should transfer to Adam Uffelman the book accounts which they held under assignment from the company and which they subsequently assigned to him.

In taking this assignment Jacob Uffelmann did nothing fraudulent. He merely exercised a clear equitable right. It is not material to this part of the case that he took it in the name of his brother Adam.

But I am, with respect, unable to concur in the conclusion of the learned trial Judge and of the Court of Appeal, as expressed by Meredith, J.A., that, in the result, the defendant Uffelmann is entitled to retain, on account of his claim against the insolvent company, out of the proceeds of the property covered by the chattel mortgage, a sum equal to the value, at the time they were assigned to him, of the book debts formerly held by the bank as collateral. The statute provides that nothing contained in it shall affect

> the substitution in good faith of one security for another security for the same debt, so far as the debtor's estate is not thereby lessened in value to the other creditors.

But there is no evidence in the record that a substitution of chattel property for book debts as security was ever agreed upon or intended. Moreover, the finding of intent to hinder and delay creditors in the giving and taking of the chattel mortgage is incompatible with that good faith which would be essential to its validity had a substitution been contemplated. What the parties had in view was not the substitution of a new security for the same debt; it was rather to obtain security upon the chattel property in addition to the book debts, so that all would be out of the reach of other creditors, and also to secure the whole claim of $8,300 instead of the $6,000 already secured by the book debts. The debtor's estate was lessened in value to the other creditors.

The right of the defendant Uffelmann must, in my opinion,

be restricted to such of the book debts transferred to him by the bank as still remain outstanding. His title to those is distinctly severable from the claim which he asserts to the proceeds of the chattel property. It in nowise rests or depends upon the impeached chattel mortgage transaction. But for such of the book debts as he has allowed the debtor to collect, or to discharge by a set-off of contra-accounts, he cannot be allowed to have indemnity out of the proceeds of the chattels, to which his only claim is under an instrument found to be fraudulent. To give him the benefit of security upon this property, without any agreement or understanding that it was to be substituted for the released book debts, and notwithstanding the finding of *mala fides*, would be to give efficacy to a transaction which the Legislature has declared to be invalid.

I am, for these reasons, of the opinion that this appeal must be allowed and the cross-appeal dismissed, both with costs. The appellant is also entitled to his costs in the Court of Appeal. The judgment of the Divisional Court should be restored.

There may be some hardship in this result. Jacob Uffelmann appears to have been persuaded by Kustermann to lend himself to his schemes. He undoubtedly advanced substantial sums of money. He may even have thought that in taking the chattel mortgage in question he was giving the Seed Company a chance to retrieve itself and was thus, while temporarily helping it to stave off its other creditors, taking a step which would ultimately benefit them. He nevertheless contravened the statute when he took as security for his own claim a conveyance of his debtors' property with intent to hinder and delay other creditors; and that he knew he was entering into a transaction of very doubtful legality is manifest from the efforts he made to conceal the fact that the chattel mortgage was really taken for his benefit.

Brodeur, J.

BRODEUR, J.:—It has been found by the trial Judge that the chattel mortgage in question was made with intent to defeat, hinder and delay creditors, and that view has been confirmed by the Divisional Court and the Court of Appeal.

It is perhaps unfortunate for Uffelmann that he might lose as a result of this judgment the value of the book debts that had been transferred to the bank as a security for the debt for which he was also responsible. But instead of paying purely and simply that debt and becoming thereby possessed of the security, he tried through the respondent, his brother, to make a fraudulent transaction and take a chattel mortgage which the company in view of its insolvent situation could not legally grant and have a larger security that would cover the whole indebtedness of the company to him.

I am of opinion that the chattel mortgage to Adam Uffel-

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mann is illegal and should be set aside. As to the book debts I concur in the views expressed by Mr. Justice Idington, and Mr. Justice Anglin. The appeal is allowed and the cross-appeal dismissed.

*Appeal allowed.*

**Annotation.**

Surety

**Annotation—Subrogation (§VI—25)—Surety — Security for guaranteed debt of insolvent—Laches—Converted security.**

Under the caption of a surety's right by subrogation, as against creditors of an insolvent estate, to the security held for the guaranteed debt, a summary of the manner in which the decisions in the Courts below are affected by the above reported judgment of the Supreme Court may be of special interest. The decisions before the trial Judge and in the Divisional Court and the Court of Appeal for Ontario, are all, it will be seen, varied by the Supreme Court in so far as the surety's rights under the complex circumstances of the case are concerned. The final appellate decision indicates the distinction in equity between that part of a surety's subrogation security which by laches he has permitted to be converted and mixed without earmark into the general insolvent estate and that portion which remains intact and traceable.

The trial Judge (Teetzel, J.), the Divisional Court, and the Court of Appeal for Ontario held the entire chattel mortgage transaction void as against creditors.

The trial Judge held the surety's right to the original creditor's security as to the debtor's book debts to be complete and absolute by subrogation.

The Divisional Court held the surety disentitled to any subrogation rights whatever as to the book debts, with a subsidiary conclusion that if he had any subrogation rights he had lost this security by his own laches, as against the creditors.

The Court of Appeal for Ontario restored the judgment of the trial Judge holding that the surety retained full rights to the book debts by subrogation.

The Supreme Court of Canada, holds:—

(1) That the entire chattel mortgage transaction was void.

(2) That while the surety's subrogation right to the book debts (as his creditor's security for the guaranteed debt) remained intact so far as the effect of the fraudulent chattel mortgage transaction was concerned at the time of its execution; yet subsequently the surety as against the creditors deprived himself of the book debts *in part* by allowing the debtor to retain and collect and appropriate them, although as to the book debts *still outstanding and uncollected by the debtor* (if any) the surety's rights are by subrogation valid and undisturbed by the fraudulent transaction.

The decision of the Divisional Court is therefore varied as to surety's right by subrogation to the portion of the guaranteed debt security (*i.e.*, the insolvent's book debts) *still unconverted and unappropriated by the debtor* and is *restored* as to the *residue* of that security.

The decision of the Court of Appeal is, therefore, reversed in so far as it affirmed the surety's right by subrogation to that portion of the

**Annotation** (*continued*)—**Subrogation** (§ VI—25)—**Surety — Security for guaranteed debt of insolvent—Laches—Converted security.** CAN. Annotation. Surety

guaranteed debt security, *i.e.*, the insolvent's book debts, which had already been collected and appropriated by the debtor, but that portion of the Court of Appeal judgment which declared the surety entitled to the uncollected portion of the book debts is not disturbed.

The case does not disclose what proportion of the book debts had not been collected; but the legal distinction as to any not collected appears to be well defined by the Supreme Court decision.

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## Re STEELE.

ONT. H. C. J. 1912 Oct. 3.

*Ontario High Court, Riddell, J. October 3, 1912.*

1. WILLS (§ III G 4—137)—CONSTRUCTION—CONDITION SUBSEQUENT—PRESUMPTION AGAINST INTESTACY.

Where a sum is bequeathed to trustees to invest, paying the interest to a granddaughter "so long as she lives and is unmarried, and if she dies without having married or if married without issue" then the principal is specifically bequeathed over to another "at the granddaughter's death" and if the granddaughter "marries and has a child or children then the principal shall be paid to the granddaughter at such time thereafter as the trustees shall deem best in the interests of the granddaughter and her child or children," but the testator has not otherwise (either specifically or by residuary bequest or necessary implication) disposed of the corpus or its income during the childless period of the granddaughter's married life, the interest of the fund will be paid to the grand daughter during that period.

[*Bird* v. *Hunsdon* (1818), 2 Swans. 343, 1 Wils. Ch. 456, followed; *Humphreys* v. *Humphreys* (1867), L.R. 4 Eq. 457; *Roe d. Bendale* v. *Summerset* (1770), 5 Burr. 2608; *Ralph* v. *Carrick* (1877), 5 Ch. D. 984 (1879), 11 Ch.D. 873; *In re Springfield*, [1894] 3 Ch. 603, referred to.]

MOTION by Catherine Loretta Smith (formerly Steele), upon an originating notice, for an order determining a question arising upon the construction of the will of John Steele, deceased. Statement

*W. B. Northrup*, K.C., for the applicant.
*B. N. Davis*, for John Alexander Steele.

RIDDELL, J.:—The late John Steele in a codicil to his will made the following provision: "I hereby revoke the bequest to my granddaughter Catherine Loretta Steele contained in the fourth (4th) paragraph of my said will and in place of said paragraph I hereby will give and bequeath unto my grandson John Alexander Steele of Sidney aforesaid farmer and Robert Fraser of the town of Trenton in said county of Hastings Customs officer the sum of two thousand dollars ($2,000.00) upon trust to place the same at interest either in some chartered bank in Canada or upon first mortgage upon lands in Ontario and shall pay over the interest accruing therefrom from time to Riddell, J.

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time annually or oftener to my said granddaughter Catherine Loretta Steele so long as she lives and is unmarried and if she dies without having married or if married without issue then the said sum of two thousand dollars shall at her death go to and be paid over to my said grandson John Alexander Steele and in case of his having died before such period then to such of his children as may be living at the period of the death of my said granddaughter, but if my said granddaughter Catherine Loretta Steele marries and has a child or children then the said trustees shall pay the said principal sum of two thousand dollars ($2,000.00) to my said granddaughter at such time thereafter as the said trustees shall deem best in the interests of my said granddaughter and her child or children."

There is no residuary clause in will or codicil.

The granddaughter is married, without issue; and the question arises, "Is she entitled to the interest upon $2,000."

I made an order that John Alexander Steele should represent all those in esse or otherwise who would be entitled to this interest, in case the granddaughter is not.

It seems to me that the case may fairly be said to be covered by *Bird* v. *Hunsdon* (1818), 2 Swans. 343. There the provision was: "The rest of money to be put into government security . . . and the said Mary Morris to have the said interest to maintain her as long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children." Mary Morris married, but had no child. The Master of the Rolls (Sir Thomas Plumer) said (pp. 345, 346): "The testator contemplated three periods: 1st, her minority; 2nd, her remaining single, without a child; 3rd, the interval between her marriage and death. . . . To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying, either that there is an intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative. I cannot suppose that the testator meant to leave a partial interest in the property undisposed of; and that, on the marriage of Mary Morris, the dividends, during her life, should devolve on those for whom the will expresses no intention to bequeath more than a legacy of £50 to one."

Theobald on Wills, 7th ed., p. 735, says: "Some of the earlier cases, in which a life interest has been implied, would probably not now be followed;" and mentions *Bird* v. *Hunsdon*. But in *Humphreys* v. *Humphreys* (1867), L.R. 4 Eq. 475, at pp. 478, 479, Sir John Stuart, V.-C., says that *Bird* v. *Hunsdon* has

never been overruled—and I cannot find that any later case deals with the matter. *Roe d. Bendale* v. *Summerset* (1770), 5 Burr. 2608, may also be looked at. In *Ralph* v. *Carrick* (1877), 5 Ch.D. 984, at p. 995, Hall, V.-C., mentions *Bird* v. *Hunsdon* without disapproval, and distinguishes that case from the case he was then considering. *Ralph* v. *Carrick*, 5 Ch.D. 984, and (1879), 11 Ch. D. 873, and *In re Springfield*, [1894] 3 Ch. 603, shew us how careful we must be in applying *Bird* v. *Hunsdon*, but they by no means overrule it.

Were there nothing more here than a gift to John Alexander Steele of the $2,000 upon the death of Loretta without issue, these cases would or might apply; but there is more. There are substantially the characteristics which differentiated *Bird* v. *Hunsdon*, spoken of by Hall, V.-C., in *Ralph* v. *Carrick*, 5 Ch.D. 984, at p. 995, as "a trust of the income for maintenance of the person named, and a gift over after her death." With the proper changes, the result is not very unlike *Bird* v. *Hunsdon*. The testator here contemplated: 1st, the time before her marriage; 2nd, the time thereafter before a child was born; 3rd, the time thereafter. For the first period, he has provided by giving her the income; for the third by giving her the principal; but for the second, which may last for the whole of her married life, he has made no provision in so many words. Must he not, however, have meant that during that period also she was to be provided for? The very tempting argument was advanced that what the testator must have meant was that when she got married her husband should take care of her—and when she had a child she would receive the principal for the support of herself and child. But the husband in *Bird* v. *Hunsdon* might equally well be expected to support Mary Morris.

Without overruling that case, I think I should hold that Loretta is entitled to be paid the interest during her life—and, although I am not wholly satisfied with the reasoning in the principal case or its exact application to the present case, I will so declare.

Costs of all parties out of the corpus of the $2,000 fund.

*Order accordingly.*

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## REX v. ROGER HICKS.



*Alberta Supreme Court, Walsh, J. October* 15, 1912.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—POWER OF JUSTICES TO COMMIT FOR TRIAL.

Under the Criminal Code it is not competent for a magistrate who is holding a summary trial after hearing all the evidence on both sides to decide to commit for trial instead of disposing of the case himself; the right to commit for trial being limited as to time by the terms of Cr. Code, sec. 786, directing that the magistrate may "before the accused person has made his defence" decide not to adjudicate summarily upon the case.

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2. HABEAS CORPUS (§ I C—12*a*)—COMMITMENT FOR TRIAL—ILLEGALITY—RIGHT TO DISCHARGE.

The fact that a warrant of committal for trial was illegally issued on a charge of assault and occasioning actual bodily harm after the justices before whom the accused had been brought to answer the charge had with his consent entered upon a summary trial thereof, which trial had proceeded to the close of the evidence for the defence, is a ground for discharge upon *habeas corpus*.

3. HABEAS CORPUS (§ I C—12*a*)—DISCHARGE OF PRISONER—REMITTER TO MAGISTRATE—DISCRETION.

Where the court has power upon *habeas corpus* instead of discharging a prisoner from custody under an invalid commitment to remit the case to the magistrate under section 1120 of the Criminal Code (1906), consideration will be given to the imprisonment already suffered and to the costs to which the accused has been put in moving against the illegal warrant of commitment.

Statement

AN application on behalf of the prisoner for a writ of *habeas corpus*, or for his discharge from custody.

An order discharging the prisoner was made.

*A. McDonald*, for prisoner.

*L. F. Clarry*, for Crown.

Walsh, J.

WALSH, J.:—The accused, who is confined in the guard room at Fort Saskatchewan, under a warrant of commitment issued by a justice of the peace, applies for a writ of *habeas corpus* or for his discharge from custody without the actual issue of the writ. He was summoned before this justice upon a charge of having assaulted his wife and occasioned actual bodily harm to her. At the conclusion of the proceedings, which were carried on before two justices, he was committed for trial at the next Court of competent jurisdiction and it is under this commitment that he is now in custody.

The ground upon which his application is based is that the justices with his consent undertook to summarily try him upon this charge but that after he had made his defence before them, they refused to dispose of the charge summarily and instead committed him for trial.

Sec. 784 provides that under certain circumstances the magistrate may "before the accused person has made his defence decide not to adjudicate summarily upon the case." This is the only provision which entitles a magistrate who has undertaken to summarily try a person charged before him, to refuse to do so. The right so given can be exercised only in the terms of the section which confers it. It is therefore not competent for a magistrate who is holding a summary trial after hearing all of the evidence on both sides to decide to commit for trial instead of disposing of the case himself. After the accused has made his defence the magistrate is the only tribunal clothed with power to try the charge and he must dispose of it.

Upon the material before me I have no doubt whatever but that upon the hearing before the justices the accused consented

to a summary trial and that the justices undertook to so try him and that the trial proceeded upon that understanding until all of the evidence on both sides was before them and that it was then and not until then that they decided to commit instead of disposing of the case themselves. And so finding, it follows that the justices erred in committing the accused for trial and that he is wrongfully detained in custody under the warrant. Mr. Clarry asked me in the event of my conclusion being as above, not to order the discharge of the accused but instead to remit the matter to the justices under sec. 1120 of the Code so that they might do what they should have done in the first place, namely either dismiss the charge or impose upon the accused the punishment which in their opinion should be meted out to him. I have not considered with any degree of care the question as to whether or not the aid of this section can be invoked by the Crown in such a case as this, for I think, that even if it can, it should not be under the circumstances here present. This section authorizes me to do such act, as in my opinion, "may best further the ends of justice." I think that the ends of justice have been fairly well served by the punishment which this man has already undergone. By the time that this order can be acted upon he will have been imprisoned for very nearly a month and he will have paid a considerable sum for his costs of defence and of this application which may be looked upon perhaps as somewhat in the nature of a fine. The maximum penalty fixed for this offence under sec. 781 is six months' imprisonment and a fine of $100. It is true that the assault upon his wife was of a violent character. In giving his own evidence, however, the accused was most frank and candid in his admissions of wrong-doing so far as this particular charge is concerned. One cannot read his evidence without a strong feeling of pity for the man, for it is apparent from it, if he is telling the truth, that he is the victim of an ungovernable temper which is hereditary with him and which is responsible for the events which led up to this prosecution. I understood from what was said in argument and I gather from something that appears in the material used before me, that since the hearing his wife has gone to England to live, her departure doubtless being the result of this assault. In addition therefore to the imprisonment which he has undergone, and the expense to which he has been put to he is under the further punishment of having driven his wife from him. While it is quite true that a longer term of imprisonment and a heavier fine might without injustice have been imposed upon him, I think that I "may best further the ends of justice" by ordering his discharge, which I do. The order will contain a clause protecting from liability the justices and all persons who have acted under the warrant.

*Order discharging prisoner.*

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## CANADIAN NORTHERN PACIFIC R. CO. v. DOMINION GLAZED CEMENT PIPE CO., LTD.

*British Columbia Supreme Court, Murphy, J. October 26, 1912.*

1. COURTS (§ E—315)—RULES OF DECISION—PROVINCIAL COURTS FOLLOWING DECISION OF PRIVY COUNCIL—RAILWAY ACT (B.C.)—ANALOGY TO CANADIAN RAILWAY ACT.

Under the British Columbia Railway Act upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where the principle applicable to such an appeal has already been laid down by the Privy Council under the Canadian Railway Act, 1888, which is, so far as material, identical in language with the British Columbia Statute, that construction will be adopted.

[*Atlantic and North-west Railway Co.* v. *Wood*, [1895] A.C. 257, L.J. P.C. 116, applied.]

2. APPEAL (§ VII L—470)—REVIEW OF FACTS—AWARD—EMINENT DOMAIN —RAILWAY ACT (B.C.)—SCOPE OF APPELLATE JURISDICTION.

Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the court will not supersede the arbitrators but will review the award as it would review the judgment of a subordinate court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law.

[*Atlantic and North-west Railway Co.* v. *Wood*, [1895] A.C. 257, 64 L.J.P.C. 116, followed, under which a similar question under subsec. 2 of sec. 161 of the Canadian Railway Act, 1888, being sec. 168 of 3 Edw. VII. (Can.) ch. 58, was decided.]

3. APPEAL (§ VII L—470)—REVIEW OF FACTS—AWARD — RAILWAY ACT (B.C.)—FINDINGS, WHEN SUSTAINED—QUANTUM OF DAMAGES.

Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where conflicting views as to the quantum of damages were apparent but the estimate made in the award cannot be said to be unreasonable or manifestly incorrect, the findings of the arbitrators will not in that respect be disturbed, the arbitrators having seen and heard the witnesses and viewed the land in question.

Statement

AN appeal from the award of arbitrators fixing damages under eminent domain proceedings.

The appeal was dismissed.

*J. N. Harvey*, K.C., for appellants.

*D. Armour*, for respondents.

Murphy, J.

MURPHY, J.:—The principle applicable to this appeal has been laid down by the Privy Council in *The Atlantic & North-west Railway Co.* v. *Wood*, [1895] A.C. 257, 64 L.J.P.C. 116, where the statute construed was, so far as is material, identical in language with the British Columbia statute under which these proceedings are taken. It is to the effect that it was not the intention of the Legislature that the Court should entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits on the facts as well as the law; that, in short, they should

review the judgment of the arbitrators as they would that of a subordinate Court in a case of original jurisdiction, where review is provided for. I have read the evidence herein and whilst conflicting views as to the quantum of damages can be urged thereon, yet, in my opinion (mindful that the arbitrators saw and heard the witnesses and viewed the land in question), to use the language of the Court appealed from in the case cited, the estimate made in this award cannot be said to be unreasonable nor manifestly incorrect, and I do not feel warranted, therefore, by substituting my discretion for theirs to adopt an estimate of damages which might be open to equal criticism and even less defensible according to the evidence by which both they and I are bound.

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The appeal is, therefore, dismissed.

*Appeal dismissed.*

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**LOVE (applicant) v. BILODEAU (execution creditor).**

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*Alberta Supreme Court, Scott, J. November 6, 1912.*

1. Officers (§ II A—74)—Registrar of land registration district—Homestead exemption—Duty as to certificate.

A land owner within a land registration district in Alberta is not entitled to demand from the registrar of the district an official certificate that the land in question is a homestead and as such exempt from a certain execution issued under a judgment against the applicant and registered under the Executions Ordinance, Revised Ordinances, 1911 (Alta.) ch. 27, as it is not the duty of the registrar to determine whether or not the property is a homestead and as such exempt, that being a question for a competent court; the registrar for the purposes of his official certificates of his records must treat the execution as a charge upon the land with priority according to the date of its registration.

2. Homestead (§ III—23)—Homestead exemption—Waiver of exemption.

The right of exemption of a homestead from seizure under execution under Alberta law, Revised Ord., 1911 (Alta.) ch. 27, although once complete, may cease by reason of some act or conduct on the part of the owner forfeiting his claim to exemption.

Statement

An application under the provisions of the Execution Ordinance, R.S. ch. 27, for an order directing the registrar of a land registration district to register a mortgage exempt from an execution issued upon a judgment obtained against him.

The application was refused.

*J. W. G. Morrison*, for applicant.
*C. L. Freeman*, for execution creditor.

Scott, J.

Scott, J.:—On 11th October last the applicant, who is the owner of the south-east quarter of section 22, township 49, range 6 west of fourth meridian, obtained

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an originating summons on an application for an order directing the registrar of the Northern Alberta land registration district to register a mortgage from him to the British and American Mortgage Company, clean and exempt from an execution upon a judgment obtained by the execution creditor against the applicant and to issue an abstract of title and general certificate shewing such mortgage as a first charge upon the property in priority to the execution.

The registrar in a reference made by him dated 20th September, 1912, states that the property is claimed by the applicant as his homestead, and that he (the registrar) is unable to determine whether the mortgage should properly be registered free from the execution.

The registrar on 19th September, 1912, issued an abstract of title to the property shewing that the applicant is the holder of a certificate of title to the property subject to the execution and mortgage referred to above, the latter being dated 25th March, 1912, and registered on 27th April following.

The evidence upon the question whether the applicant is entitled to claim that the property is his homestead consists of his own affidavit and his cross-examination thereon. They satisfy me that from a time prior to the registration of the execution referred to up to the date of his cross-examination upon his affidavit (24th October, 1912) he was entitled to claim the exemption of the property as his homestead and to create an incumbrance thereon which would have priority over an execution.

It follows, therefore, that the interest which the mortgage company acquired in the property prior to the time of that cross-examination is entitled to such priority. I can deal only with the situation of the parties as it existed at that time, as the property may at any time thereafter have ceased to be exempt as a homestead. The applicant might immediately or at any time thereafter, by some act or conduct on his part, forfeit his claim to such exemption.

It has not been shewn what amount, if any, the mortgage company had advanced upon its mortgages prior to that time or the extent of the interest it was then entitled to claim. I, therefore, cannot hold that it was entitled to priority to the amount specified in its mortgage.

As to the reference by the registrar, I am of opinion that it was his duty to treat the execution as a charge upon the property with priority according to the date of its registration. He is not, in my view, bound to ascertain and determine whether the execution debtor is entitled to claim that his property is exempt from it as that question appears to me to be one for the Court to decide.

*Application refused.*

## CAMPBELL v. PUGSLEY.

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*King's County Court, New Brunswick. Trial before Borden, J. August* 15, 1912.

1. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—NOT DANGEROUS PER SE—POWER AND SPEED.

While the automobile is not dangerous *per se*, its freedom of motion, speed, control, power, and capacity for moving without noise give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways.

[*Fisher* v. *Murphy*, 3 O.W.N. 150; Beven on Negligence, 3rd ed., 439, 440; *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, referred to. See also *Stewart* v. *Steele*, 6 D.L.R. 1.]

2. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—DANGER—GREATEST CARE.

The driver of an automobile is to be considered in law as being in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation.

[*Fisher* v. *Murphy*, 3 O.W.N. 150, specially referred to and applied. See also *Stewart* v. *Steele*, 6 D.L.R. 1.]

3. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—FRIGHTENED HORSE—MOTORIST'S DUTY.

Where an automobile on the highway is meeting a horse and buggy and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence suggests and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with his horse; and the greater the danger capacity of the car the greater is the degree of care and caution incumbent on the motorist in its use and operation.

[See also *Stewart* v. *Steele*, 6 D.L.R. 1.]

4. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—MOTOR MEETING HORSE AND BUGGY—DIVISION OF HIGHWAY.

Where an automobile is meeting a horse and buggy on the highway, it is, under the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. ch. 19, sec. 4, sub-sec. 1, the motorist's duty "reasonably to turn to the left of the centre of the highway so as to pass without interference."

5. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—STATUTORY REQUIREMENTS—PENALTY — CIVIL DAMAGES — CUMULATIVE.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and under the provisions of the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. ch. 19, sec. 4, sub-sec. 4, the motorist, violating its provision in not stopping his car, incurs a fixed penalty by way of fine for the violation, this penalty is additional to, not in lieu of, civil damages to the person injured by the motorist's negligence.

[Beven on Negligence, 3rd ed., 439, referred to.]

6. AUTOMOBILES (§ I—5)—NEGLIGENCE — STATUTE — VIOLATION OF STATUTE, WHEN EVIDENCE IN ITSELF OF NEGLIGENCE.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and fails to comply with the direct provisions against negligence enacted by the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. ch. 19, his violation constitutes evidence of negligence.

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7. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—STATUTE AND COMMON LAW CUMULATIVE.

The statutory requirements of the Motor Vehicles Act (N.B.), 1 Geo. V. ch. 19, for the public regulation and control of the use on highways of automobiles, do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends.

[Beven on Negligence, 3rd ed., 440, referred to.]

8. AUTOMOBILES (§ I—5)—NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — THE LAW OF THE ROAD IN NEW BRUNSWICK—CUSTOM—STATUTE.

In an action by the plaintiff for personal injury for negligence against the driver of an automobile on meeting a horse and buggy on the highway, and the consequent frightening the horse, it is not contributory negligence by the plaintiff to whip up his horse and pass the motor car on the embankment side of the road, where the evidence shewed that the plaintiff was accustomed to driving horses and that the means he took, by using the whip, to urge his horse ahead and keep it on the road, were reasonable and proper under the circumstances, and that the law of the road in New Brunswick required the plaintiff to pass on the left-hand side where the embankment was.

[*Davies* v. *Mann*, 10 M. & W. 546, 12 L.J. Ex. 10, 6 Jur. 954, referred to.]

9. AUTOMOBILES (§ I—1)—PUBLIC REGULATION — "BADLY FRIGHTENED" HORSE—QUESTION FOR JURY.

Where the Motor Vehicles Act (N.B.), 1 Geo. V. ch. 19, sec. 3, sub-sec. 4, provides that in case a horse appears "badly frightened" in meeting a motor the motorist shall stop the car, it is a question for the jury to determine upon the evidence, in a negligence action against the motorist, just what may be the condition that should be termed "badly frightened."

10. DAMAGES (§ III E—135*a*)—QUANTUM — HORSE AND WAGGON — AUTOMOBILE COLLIDING WITH RIG.

Where a motor collides with a waggon and in a negligence action against the motorist, the jury assess damages against him taking into consideration upon the evidence (1) repairs to the waggon; (2) necessary painting and that it would still be a patched-up waggon; (3) a valuable horse made lame and still lame; a verdict of $100 will not be disturbed as excessive.

[*Wentworth* v. *Hallett*, 4 N.B.R. 560; *Haden* v. *White*, 4 N.B.R. 634; *Prescott* v. *Wallace*, 13 N.B.R. 230, referred to. See also *Vanhorn* v. *Verral*, 4 D.L.R. 624, upon the quantum and increasing of damages.]

11. EVIDENCE (§ XII A—921)—ADMISSIBILITY — OPINION—FACTS—JURY.

In an action for negligent driving in a collision case where the defendant is asked by his counsel "whether anything more could have been done than was done to prevent the collision which occurred," the question may properly be excluded as being the point which the jury has to decide, the proper procedure being that the defendant should state the facts without giving his opinion and leave it to the jury to determine whether he could have done anything more than he did to avoid the collision.

[*Courser* v. *Kirkbride*, 23 N.B.R. 404, followed.]

12. APPEAL (§ VII M—535)—CUSTOM — JUDICIAL NOTICE OF—EVIDENCE UNNECESSARY—ADMISSION NOT GROUND FOR SETTING ASIDE VERDICT.

Where evidence was, against defendant's objection, received by the court tending to prove a custom of which the court could take judicial notice without formal proof, its admission is not a ground for setting aside the verdict.

[*McKenzie* v. *Scovil*, 12 N.B.R. 6, referred to.]

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13. AUTOMOBILES (§ I—1)—PUBLIC REGULATION — STRANGE OBJECTS TO HORSES—MOTORIST'S DUTY TO KNOW.

Where an auto on the highway is liable to meet a horse and buggy and to frighten the horse because in that locality the auto may still be a strange and startling object to the horse, it is the motorist's duty to know this and increase his care and caution accordingly.

[*House* v. *Cramer*, 134 Iowa 374; *Word* v. *Meredith*, 77 N.E. 118, 220 Ill. 66, referred to. See also *Stewart* v. *Steele*, 6 D.L.R. 1.]

14. AUTOMOBILES (§ I—1)—PUBLIC REGULATION — ELEMENTS OF DANGER —NOTICE OF, WHEN PRESUMED.

That automobiles are vehicles of great speed and power, whose appearance and puffing noise are frightful to most horses unaccustomed to them, and that from their freedom of motion laterally they are much more dangerous than street cars and railroad trains, are elements of danger calling for the utmost care and caution to protect the public in their operation.

[*Christy* v. *Elliott*, 216 Ill. 31; *Commonwealth* v. *Kingsbury*, 199 Mass. 542; *Weill* v. *Kreutzer*, 134 Ky. 563; *Fisher* v. *Murphy*, 20 O.W.R. 201, referred to. See also *Stewart* v. *Steele*, 6 D.L.R. 1.]

Statement

A MOTION by the defendant to set aside the verdict in favour of the plaintiff for $100 on the trial of the action with a jury, for a nonsuit, or in the alternative for a new trial. The action was brought to recover damages for injuries to the plaintiff's horse and carriage, sustained while driving along a highway by reason of the alleged negligence of the defendant, who, when approaching the plaintiff in his automobile, failed to stop on being signalled to do so, which resulted in the injuries complained of.

The grounds on which the motion was made are as follows:—

1. There was no evidence of negligence or improper management of the automobile.

2. That the horse passed the automobile safely and there was no evidence that it was frightened, nor that the plaintiff requested the defendant to stop running the motor.

3. That the plaintiff was in fault by whipping his horse and passing on the embankment side of the road.

4. That no evidence justified the damages given by the jury.

5. That evidence as to the stopping of the motor long enough or in time to prevent an accident, was improperly rejected.

6. That the evidence as to custom was improperly admitted.

7. That the Judge was in error in charging the jury to the effect that it was the duty of automobile drivers to take more than ordinary care and that the mere frightening of an animal is evidence of negligence; that there was evidence that might point to negligence; that the defendant was guilty of negligence at common law; that if the jury believe the evidence all through of the plaintiff, they should find the defendant guilty of negligence.

The motion was dismissed.

*Dr. W. B. Wallace*, K.C., for the defendant.
*Geo. W. Fowler*, K.C., for the plaintiff.

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BORDEN, COUNTY JUDGE:—This, I think, is the first case tried in this province involving the use of the automobile on the highway, and I have thought it advisable to give my reasons and authorities for the conclusions at which I have arrived quite fully.

The evidence in this case was very conflicting. The plaintiff and his witness, who was apparently a very intelligent and disinterested person, gave evidence that the defendant did not stop his car; while the defendant and his witness, who was travelling with him in the car, also a very intelligent and apparently disinterested person, both gave evidence that the car was stopped on the signal of the plaintiff. In other particulars the evidence was conflicting.

The status of the automobile and the rights and liabilities, in connection with its use on the streets and highways, have been the subject of legislation in most civilized countries. It is a vehicle of modern times, having come into general use within the last fifteen years. During that time, however, a large number of cases have come before the Courts, principally in the United States.

While the judgments of the United States Courts are not binding in Canada, the learned and able decisions and views of the laws of these Courts are very instructive and helpful in determining similar cases in this country, especially as new rights and liabilities are involved, in the use of this modern vehicle, which have not been settled by previous decisions of our own Courts. I have referred to a number of these cases, as I have not had access to many decisions of the English Courts.

The Courts, generally in the United States and Canada, do not consider the motor vehicle an outlaw, or as dangerous *per se*, or that it should be placed in the same category as locomotives, gunpowder, dynamite and similar dangerous machines and agencies, but generally hold that the nature of the machine, by reason of its great power and speed, etc., makes it the duty of those operating it to use care commensurate with its qualities and the conditions of its use.

The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicle, so as to prevent its use on the streets and highways. It is conceded that they have the right to go on and use the highway, as well as other users of the highway.

While this is so, the Courts and Legislatures have recognized the fact that there are peculiar conditions in connection with its use, rendering necessary certain restrictions and regulations peculiar to motor vehicles.

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The Court of Appeals of Georgia, in *Lewis* v. *Amorous*, 3 Ga. App. 50, in rather a humorous way makes some remarks that will be appreciated by the Judges of this province, especially Judges of the County Courts.

> It is not the ferocity of the automobile that is to be feared, but the ferocity of those who drive them. Until human agency interferes they are usually harmless. While by reason of the rate of pay allotted to the Judges of this State, few, if any of them, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them, and we have, therefore, found out that there are times, when these machines not only lack ferocity, but assume such an indisposition to go, that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules and the like.

In Beven on Negligence, 3rd ed., 439 and 440, some general principles relating to automobiles and the legislation, as to their use are laid down.

After referring to the various provisions of the statutes and the penalties, fines, etc., which are quite similar to our own, it is remarked, at 440:—

> These alterations in the law, while they permit the use of motor cars and regulate their uses, are directed to the public and police aspect of the case, and do not affect individual rights or remedies. The statutes referred to come within Willes, J., first class; (*Wolverhampton New Waterworks Co.*, v. *Hawkesford* (1859), 6 C.B.N.S. 356), they leave the common law remedy, but they give other remedies directed to other ends. The statutes, except in imposing a penalty for failure to stop in case of accidents, bring nothing under the purview of the law that was not so before. Reckless or negligent driving, or to the common danger, is not permitted, and when injury results to a passenger on the highway was and is actionable, whether the offending vehicle is a motor car or the meanest conveyance. The duty on the driver of a motor-car is greater the more powerful and complicated the engine he drives is; for the duty to use care increases, in proportion to the danger involved in dealing with instruments, which, for a man's own purposes, he brings into relations of proximity to his neighbours.

Compare *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491.

There is no vehicle operated in the public streets and highways that bears much similarity to the automobile. The motor car's freedom of motion, speed, control, power, existence or non-existence of noise necessarily stamps it with a status different from that attached to other vehicles. Recent legislation has given the automobile a status of its own.

The 1st and 3rd grounds of motion involve the questions of defendant's negligence, and the plaintiff's contributory negligence. These are matters of fact and were left to the jury; and the jury found for the plaintiff. The question now arises as to

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the sufficiency of the evidence to sustain this verdict. It appeared to me, at the trial, that the jury believed the evidence of negligence to justify a verdict. As to the credibility of witnesses, I think, under the ruling of our Supreme Court, in *Wortman* v. *Marter*, 3 Allen 309, and other cases, I could not withdraw that question from the jury.

As to evidence of defendant's negligence, I think he should have, irrespective of the provisions of the statute, stopped his car and motor, whether the plaintiff held up his hand or not, when he saw the horse was frightened.

In *Simsone* v. *Lindsay*, Pennewill's Del. R. 224, Judge Pennewill says:—

> It is the duty of a person operating an automobile upon the public highway to use reasonable care in its operation, to move it at a rate of speed reasonable under the circumstances, and cause it to slow up or stop, if need be, when danger is imminent, and could, by the exercise of reasonable care, be seen or known in time to avoid accident. The more dangerous the character of the vehicle or machine, and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation.

In *McDonald* v. *Yoder*, 80 Kansas 25, it was held:—

> That it is the duty of one, in charge of an automobile, driving upon a public street or highway, to look ahead and see all persons and horses in his line of vision, and that in case of accident, he will be conclusively presumed to have seen what he should have seen, in the proper discharge of such duty.

In *Gecchi* v. *Lindsay*, Del Super. 1910, it is said:—

> It is the duty of a person, operating an automobile or any other vehicle upon the public highway, to use reasonable care in its operation, to move at a rate of speed reasonable under the circumstances, and to slow up or stop, if need be, when danger is imminent.

In *Shinkle* v. *McCullough*, 116 Ky. 960, it is remarked:—

> It is the duty of one operating a motor car to take all proper precautions against frightening horses or other domestic animals met on the highway. If he knew or could have known, by the exercise of ordinary care, that the machine in his possession and under his control has so far excited a horse as to render the horse dangerous and unmanageable, it is the motorist's duty to stop his automobile and take such other steps for the traveller's safety, as ordinary prudence might suggest.

The plaintiff's evidence shews that defendant did not stop his car, although he held up his hand twice. His evidence also states that the defendant's auto passed very close to his waggon and that there was ample spare room on the other side of the auto or the plaintiff's right. The defendant's evidence also shews that there was space to the left of the defendant's auto, on the road.

The N.B. Act, 1911, 1 Geo. V. ch. 19, sec. 4, sub-sec. 1, provides:—

That the person operating a motor vehicle shall seasonably turn to the left of the centre of such highway so as to pass without interference.

While it does not appear by the evidence just where the defendant was, as to the centre of the road, it does appear that he was very close to the plaintiff's waggon and had room to spare on the other side. This state of facts might have been taken by the jury to indicate negligence on the part of the defendant.

The plaintiff's evidence shews that he held up his hand twice for defendant to stop, but that he did not do so. The provisions of our statute, above referred to, sec. 3, sub-sec. 4, are very explicit on this point; but it was contended by defendant's counsel that the neglect of the defendant to comply with the statute, in that respect did not render him liable for damages in this case, as the statute provides a penalty for the violation of that section of the Act.

It appears to me this contention cannot be maintained. If this were so, a motorist might drive ever so recklessly, do ever so much damage, or kill people or animals and only be liable to a fine under the statute. Further, the sec. 4, sub-sec. 3, of the N.B. Act seems to preserve all the common law rights, notwithstanding any provisions of the Act. I can hardly conceive of any stronger evidence of negligence than a failure to comply with the direct provisions of the law. The provisions of sec. 3, sub-sec. 4, emphasize and strengthen the common law right of the defendant to stop where he sees he is frightening a horse; and indicates that the Legislature recognized the greater danger arising from such conditions and imposed the penalty in addition to any civil remedies the person injured might have. I think the reference to Beven, pages 439 and 440, quoted before sustains this view, as well as the following cases in the United States Courts.

In *Murphy* v. *Wait*, 102 App. Div. (N.Y.) 121, it is held:—

It is a common statutory provision at the present time to require a motorist to stop upon a signal by the driver of a horse or other domestic animal, and to remain stationary long enough to allow the horse or domestic animal to pass. A motorist must obey such a statute or be liable for the consequences.

In *Christy* v. *Elliott*, 216 Ill. 31, it is laid down:—

Independently of such a statute or the giving of a signal, the automobilist should stop when he sees that he is frightening a horse by proceeding.

The defendant's counsel in his argument for setting aside the verdict urged that there was evidence of contributory negligence on the part of the plaintiff as set out in his third ground.

The verdict of the jury, I think, settled this contention. The evidence shewed that the plaintiff was accustomed to driving horses, and the means he took, by using the whip, to urge his

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horse ahead and keep it on the road, no doubt were considered reasonable and proper by the jury under the circumstances.

I hardly see how the plaintiff can be charged with negligence, by passing on the embankment side. The embankment was on his left-hand side of the road. The custom of passing, the law of the road, is on the left-hand side, and the N. B. statute referred to, sec. 4, sub-sec. 1,* requiring the motorist to turn to the left of the centre of the road in passing, of necessity required the plaintiff to turn to his left. If the plaintiff had not done so, he would have made himself liable. The presumption is against the person on the wrong side.

The general rule, as to contributory negligence, as laid down in *Davies* v. *Mann*, 10 M. & W. 546, 12 L.J. Ex. 10, 6 Jur. 954, is:—

> "That although there may have been negligence on the part of the plaintiff, yet, unless he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover.

In *Dublin, Wicklow & Wexford Ry.* v. *Slattery*, 3 App. Cas. 1155, 39 L.T. 365, it is held:—

> A man is not necessarily to be regarded as having caused or contributed to his own injury by acting in a manner *primâ facie* dangerous and imprudent, if there is evidence of acts or omissions by which he might have been put off his guard.

I am of the opinion, therefore, that the verdict of the jury should not be disturbed on either the first or third ground.

Second ground. I think the verdict of the jury answers this ground. Sub-sec. 4 of sec. 3 of N.B. Act says:—

> Provided that in case such horse or animal appears badly frightened, etc., such person shall cause the motor to cease running, etc.

It would appear from the evidence that the horse shewed considerable fright. It is difficult to define just what may be the condition that should be termed "badly frightened." It is a question for the jury.

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*The Amended Motor Vehicle Law (N.B.) 1911, 1 Geo. V. ch. 19, sec. 4, sub-sec. 1.

Whenever a person operating a motor vehicle shall meet on a public highway, any other person riding or driving a horse, or horses, or other draft animals, or any other vehicle, the person so operating such motor vehicle shall seasonably turn the same to the left of the centre line of such highway so as to pass without interference. Any such person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass on the right side thereof, and the rider or driver of such horse, draft animal, or other vehicle shall as soon as practicable turn to the left so as to allow free passage on the right. Any such person so operating a motor vehicle shall, at the intersection of public highways keep to the left of the intersection of the centres of such highways, when turning to the left and pass to the left of such intersection when turning to the right. Nothing in this section, however, shall be construed as limiting the meaning and effect of the provisions of sec. 3 of this Act.

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Fourth ground. While it might appear, in view of the evidence of the plaintiff as to probable cost of repairing the carriage, that the damages found were large, it must be taken into consideration that there was evidence, that after the repairs to the waggon mentioned, it would have to be painted and would be a patched-up waggon; that the plaintiff's horse, a valuable one, was made lame and has been lame ever since; it is possible the jury took all these into consideration, I, therefore, think the verdict should not be disturbed on this ground: *Wentworth* v. *Hallet*, 2 Kerr 560; *Haden* v. *White*, 2 Kerr 634; *Prescott* v. *Wallace*, 2 Han. 230.

Fifth ground. I am still of opinion that the evidence referred to in this ground was properly rejected.

The judgment of the Court in *Courser* v. *Kirkbride*, 23 N.B.R. 404, seems to be in point, where it was held:—

> In an action for negligent driving, the defendant was asked by his counsel, whether anything more could have been done than was done to prevent the collision which occurred; held improper as being the point which the jury had to decide, and that the defendant should have stated the facts without giving his opinion, and left it to the jury to determine whether he could have done anything more than he did to avoid the collision.

Sixth ground. The evidence here allowed as to the custom of passing by turning to the left, might be considered unnecessary, as the Court will take judicial notice of the custom, and the statute requires it. I, therefore, think its allowance would be no reason for setting aside verdict: *McKenzie (Curator)* v. *Scovil*, 1 Han. 6.

Seventh ground. Section A. This section does not correctly state my charge to the jury on that point. It goes no further than to hold it the duty of the defendant to use reasonable care under the conditions stated, and I did not say that "the mere frightening of animal is evidence of negligence."

I am of opinion that my charge to the jury goes no further than is proper on this point, and is in accord with the previous reference to Beven, page 440, and cases cited, and the rulings of the Courts in the United States.

In *House* v. *Cramer*, 134 Iowa 374, it is held:—

> It is incumbent upon a person driving an automobile along a highway, to take notice that motor cars are, as yet, usually strange objects to horses, and are likely to startle the animals when driven in front of them at a rapid rate.

In *Ward* v. *Meredith*, 77 N.E. 118, 220 Ill. 66, the Supreme Court says:—

> Just when a horse is about to become frightened and just when he is actually frightened is very difficult to determine and we think the plain meaning of the statute is to require persons using such vehicles as automobiles, calculated to frighten horses, to stop the same whenever a horse shews indications of fright upon their approach.

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In *Rochester* v. *Bull*, 78 S. Car. 249, 58 S.E. 766, it is laid down:—

> It is a fact of which Courts will take judicial notice that automobiles on highways, especially when they are infrequent, have a tendency to frighten animals. The duty therefore devolves upon drivers of such machines to exercise due care to prevent accidents. The amount of necessary care varies with the various circumstances and acts which, in a given case, might be negligence, in another might be due care. Therefore, it is almost absolutely necessary that what actions amount to due care must be a question of fact. From the evidence it was held that the present case was one in which great care was required.

In *Christy* v. *Elliott*, 216 Ill. 31, the Supreme Court of Illinois held:—

> That it is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a noisy vehicle a source of danger to pedestrians and persons travelling on the highway in vehicles drawn by horses.

In *Commonwealth* v. *Kingsbury*, 199 Mass. 542, the Supreme Court of Massachusetts remarks: —

> Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger. In order to protect the public great care should be used in the use of them.

In *Weil* v. *Kreutzer*, 134 Ky. 563, the Court says:—

> An automobile is nearly as deadly as, and much more dangerous than a street car or even a railroad car. They are propelled along fixed rails, and all the travelling public has to do is to keep off the tracks, but the automobile can be turned as easily as can an individual, and, for this reason, is far more dangerous to the travelling public than either the street car or railway train.

In a recent case in Ontario, *Fisher* v. *Murphy*, 3 O.W.N. 150, 20 O.W.R. 201, it is said:—

> While it is true a motor is not an outlaw, it must be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation.

Ground seven, sec. (b). I have, in this case, at the trial and in this judgment, considered the evidence of the plaintiff and defendant describing their actions, respectively, while very conflicting, should be left to the jury, and the jury having found for the plaintiff, I have now to consider the evidence of facts from the standpoint of the jury's finding, and I consider if the jury believed the evidence of the plaintiff, as they appear to have done, there was evidence of negligence on the part of the defendant, as I pointed out in the earlier part of this judgment.

Ground seven, sec. (c). I have previously referred to the action of the defendant in driving close to the plaintiff's waggon, or crowding him while plaintiff was close to the edge, as he said, while there was room on the other side of the auto, as evidence of negligence on the part of the defendant at common law.

In *Pfeiffer* v. *Radke*, 142 Wis. 512, it is stated:—

> Evidence tending to shew that, upon a travelled track twenty-two feet wide, with a ditch on each side, plaintiff had driven his single horse, so far as he could, to the right, and had stopped as defendant approached with his automobile; that defendant could have kept wholly to the right of the centre of the road, but, instead of doing so, he turned his machine to the left and passed so close to plaintiff's buggy, that there was but from one to two feet between the wheel track of the buggy and that of the car; that water and slush were splashed towards the horse as the car passed, and that the horse, though not ordinarily afraid of automobiles, suddenly lurched and overturned the buggy, was held sufficient to sustain a verdict to the effect that the defendant was negligent, and that his negligence proximately caused the injury.

As to the question of negligence for not stopping his car as required by the statute, it appears to me that, irrespective of the statute, at common law, the defendant was bound to stop his car when requested by plaintiff, also to stop his car and motor engine when he saw the plaintiff's horse was frightened even without request.

In *National Casket Co.* v. *Power*, 137 Ky. 156, it is laid down as follows:—

> In constructing statutes, relating to automobiles, it is decided that an Act, regulating the speed of automobiles at highway intersections and curves, and requiring the giving of a warning by signalling with a horn, bell or other device, when approaching persons on the highway or a horse or other draft animals; the taking of precautions not to frighten such animals; in case they appear frightened to reduce the speed, and if apparently necessary for the safety of such person or animal, to bring the machine to a stop, having due regard to the safety of the passengers in such motor vehicle, is declaratory of the common law of negligence, adding to it certain standards of care, on the part of the drivers of the machine, which *per se* constitute negligence, and which if injury ensues to another, is a sufficient basis for an action to recover damages for the injury.

I think the fact that the Legislature has seen fit to make provision by statute for doing or not doing certain things by motorists and has imposed penalties for their violation, which the motorists would be liable to pay, whether injury resulted from their action or not, shews most conclusively that any violation of the statute resulting in injury, is an act of negligence. It cannot be supposed that the Legislature intended to take away the common law remedy of the injured party for damages, in such cases, imposing fine in its stead.

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Ground seven, sec. (d). I have in this judgment pretty fully discussed my reasons for holding that the evidence of the plaintiff, if believed by the jury, shewed that the defendant had been guilty of such negligence as would entitle the plaintiff to recover; I could not withdraw the credibility of the witnesses on either side from the jury, and whether the actions of the parties under the circumstances set out in the evidence amounted to negligence, was a question of fact which was within the province of the jury to determine. I left the whole evidence of the plaintiff and defendant to the jury. They appear to have believed the plaintiff.

Dr. Wallace, in his argument for a new trial, brought up the point that the charges to the jury did not make any reference to contributory negligence by the plaintiff.

This was not pleaded or taken as a ground of motion in this application. I was not asked at the trial to charge the jury on that point, very little prominence was given to that contention at the trial, and, I think, is not now a reason for setting aside the verdict: *Marvin* v. *Butterwell Trin. T.* 1867, see Stevens Dig. p. 543; *Doe dem. McVey* v. *Danial*, 2 Pug. 372.

In *Wolfe* v. *Ives*, 83 Con. 174:—

> Where, in any action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant, trial Courts instructed the jury that a failure to comply with the requirements of the statute respecting the operation of such vehicles (automobiles) on the highway from which an injury resulted gave the injured person a cause of action, if his own negligence did not materially contribute to the injury, but omitted to say, in so many words, that the burden rested upon the plaintiff to prove the negligence charged, as well as his own exercise of due care, and no request was made to instruct them; it was held that, under these circumstances, the omission to charge more specifically respecting the burden of proof, as to negligence and contributory negligence, was not a sufficient ground for granting a new trial.

After consideration of all the points taken and the authorities bearing on them, I consider the verdict should not be disturbed, and, therefore, dismiss the motion, with costs.

*Motion dismissed.*

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Oct. 17.

## ROSCOE v. McCONNELL.

*Ontario High Court, Riddell, J., in Chambers. October* 17, 1912.

1. JURY (§ I D—31)—MOTION TO STRIKE OUT—QUESTION AS TO EQUITABLE MORTGAGE WHERE DEED ABSOLUTE IN FORM.

Upon a Chambers motion to strike out a jury notice, where the case turns upon whether a conveyance of land absolute in form is so in substance or merely an equitable mortgage, the relief sought comes within sec. 103 of the Ontario Judicature Act, and the case is one for trial without a jury.

[See new Con. Rule (Ont.) 1322; also *Bissett* v. *Knights of the Maccabees*, 3 D.L.R. 714, 3 O.W.N. 1280.]

MOTION by the defendant to strike out the jury notice filed and served by the plaintiff.

The motion was granted.

*Grayson Smith*, for the defendant.
*J. P. MacGregor*, for the plaintiff.

RIDDELL, J.:—The statement of claim sets out that T. McConnell, the father of the parties, was in his lifetime the owner of certain lands in Toronto; that, suffering heavy losses, he was forced to have "the lands he bought and sold in his . . . real estate business, held in the names of various nominees, as trustees for him, pending their resale; that he bought the lands in question and put them in the name of one J. H. S., an employee of his, as trustee for him; that a mortgage was made by J. H. S. to S. C. S., and the proceeds applied in improving the property, building on it, etc. The mortgage was collateral to certain notes made by T. McConnell, upon which his son, the defendant, was also liable; and the defendant persuaded his father, T. McConnell, to have J. H. S. convey to him, the defendant, the said lands as security against his liability on the notes. This was done, S. C. S., who is a solicitor, preparing the conveyance. It is alleged (somewhat loosely) that this was "for the purpose of making the eldest son (the defendant) holding trustee for him (T. McC.), instead of the said J. H. S., until the said houses could be sold and the said advances repaid, when the father expected to be able from the profits to clear off all his old obligations and hold the remainder of the lands himself." The plaintiff claims that this conveyance, though absolute in form, was to have the same effect as that to J. H. S., "with the additional proviso that when the said lands were reconveyed, the defendant . . . was to be released from his liability upon the . . . accommodation endorsements . . . ." T. McConnell went on collecting the rents for a time, when the defendant notified the tenants not to pay him any more, and "from that time forward the . . . defendant . . . has asserted all the rights of a mortgagee (sic) in possession." T. McConnell asked the defendant to convey the property to a purchaser, and he "refused so to convey and alleged that his father must first discharge the said liability of the defendant in respect of the said notes;" but he several times agreed to convey, upon payment of the amount charged upon the lands in favour of himself and S. C. S., amounting to less than $9,000. The plaintiff further alleges that the conveyance was procured by duress and misrepresentation. The defendant sold a part of the land to W. W. P. W. for $12,500; but he holds the rest of the property still. T. McConnell died, leaving a widow and issue,

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the plaintiff, the defendant, and three others. The plaintiff took out letters of administration. She sues on behalf of herself and all other the heirs-at-law of T. McConnell, and claims: (1) "a declaration that the defendant . . . holds the said lands as equitable mortgagee thereof from his father, the said T. McConnell;" (2) an accounting as such mortgagee in possession; (3) sale and division amongst parties entitled; (4) or partition; (5) a declaration as to the rights of all parties; (6) costs; and (7) general relief.

The defendant denies everything, claims estoppel against T. McConnell, etc., by reason of illegality of his alleged scheme, and alleges that the conveyance to him was intended to be an absolute conveyance.

A motion is made by the defendant to strike out the jury notice.

As the defendant has a conveyance of the property in form absolute, it is obvious that to obtain any kind of relief the plaintiff must have a declaration that the defendant is trustee or mortgagee. That kind of declaration never could be had from a common law Court, and it was necessary to apply to the Court of Chancery. The case accordingly comes within sec. 103 of the Ontario Judicature Act; and the jury notice must be set aside; costs to the defendant only in the cause.

The same result would have followed had it been necessary only to apply the new Rule 1322: *Bissett* v. *Knights of the Maccabees*, 3 D.L.R. 714, 3 O.W.N. 1280.

*Application granted.*

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Oct. 21.

## WHITFORD v. BRIMMER.

*Nova Scotia Supreme Court. Trial before Russell, J. October 21, 1912.*

1. FRAUDULENT CONVEYANCES (§ VIII—40)—INSOLVENT DEBTOR—CREDITOR'S ACTION—PROOF REQUIRED.

Upon an application by a creditor, under the Assignments Act, R.S.N.S. ch. 145, to set aside a deed of conveyance of property made by the insolvent debtor in contravention of section 4 with intent to hinder and delay the creditor, the deed may be declared void as against the creditor without a finding of the precise amount of the creditor's claim, provided some amount is found to be due, an accounting to follow if necessary.

Statement

TRIAL of an action brought to set aside a deed from the late Henry Brimmer to his wife shortly before his death which it is alleged was made with intent to defraud his creditors.

Judgment was given for the plaintiff.

*V. J. Paton*, K.C., for plaintiff.

*McLean*, K.C., and *Margeson*, for defendant.

RUSSELL, J.:—The only question in the case is whether the grantor was indebted to the plaintiff who claims to hold his note for $184.92 made on the 4th of January, 1905, but dated December 31st, 1904. The note was made while Brimmer was in his last illness and is signed by his mark, not witnessed. Plaintiff explains that he did not have it witnessed because Brimmer said he would be out in a few days and would then settle the matter. There was a previous note dated June 14th, 1895, also signed by Brimmer by his mark and witnessed for $73.58, on which there were credits made from time to time for work done by Brimmer which plaintiff says were by agreement to be allowed as payments on the note. Plaintiff retained the old note, because, as he says, of the arrangement that the debtor would be out in a few days as already stated. There are some mysterious passages in the evidence, among other things. A witness, Bond, son-in-law of the deceased, says that in August or at least during the haymaking season after the old man's death, plaintiff called him in to see the note and shewed him a note of hand for $184 and some cents with Bond's name on it as a witness. But two other witnesses say that they saw the note in April of the same year and it bore the name of no witness. Were these two notes made by the plaintiff one with the name of a witness forged and the other with no witness? Would plaintiff, after shewing the note to the two persons referred to, a daughter of Brimmer and her friend, and after one of them had called his attention to the fact that there was no witness, concoct a note with the forged mark of the maker and the forged signature of Bond as a witness? I think he would be too shrewd to fall into such a trap even if he were unscrupulous enough to be guilty of such a fraud.

I think the note for $184.92 was made by the deceased Brimmer as plaintiff swears it was and that the existence of the old note furnishes the corroboration required, if corroboration is required in such a case as the present. I do not see how the account grew from $73.58 in 1895 to $184.92 in 1905. There is a sum to be credited of $16.65. If it is necessary to settle the amount due in this action I shall require to be enlightened upon this part of the case. The deed must be set aside as a conveyance that hinders and delays the creditor.

*Judgment for plaintiff.*

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Oct. 16.

William F. W. CARSTAIRS (petitioner) v. Charles W. CROSS (respondent.)

Re Edmonton Election.

(Decision No. 2.)

*Alberta Supreme Court, Scott, J. October 16, 1912.*

1. ELECTIONS (§ IV—90)—PETITION — CUSTODY OF VOTERS' LIST—PROOF THAT PETITIONER'S NAME APPEARS THEREIN.

Under the Alberta Elections Act, 1909, ch. 3, the clerk of the executive council is the proper custodian of the voters' lists for the various divisions, and a document produced from his custody, and purporting to be a voters' list, will be deemed to be such list until the contrary is shewn.

2. EVIDENCE (§ II I—299)—ELECTION PETITION—QUALIFICATION OF PETITIONER.

The onus of proving that the petitioner is not disqualified under the Alberta Elections Act, 1909, ch. 3, is discharged by his statement that he was a qualified elector and, thereupon the burden of proving disqualification is on the respondent raising the preliminary objection; proof that the petitioner was a qualified elector at the time of the election is sufficient.

3. EVIDENCE (§ II M—364c)—PRESUMPTION AS TO RESIDENCE—ELECTION PETITION—STATUTORY PERIOD.

Where it is shewn that the petitioner presenting an election petition and whose status was in question had resided in the electoral district for four years, and preceding the election, for a whole year, and the date of the writ for the election was not shewn, it will be presumed that he had resided in such district for the three months immediately preceding the issue of the writ.

4. EVIDENCE (§ II L—354*a*)—PAYMENT OF FEES BY PETITIONER—CONTROVERTED ELECTIONS ACT (ALTA.).

Payment of the deposit required on filing an election petition, under the Alberta Controverted Elections Act is sufficient, if made by the petitioner's agent on his behalf.

Statement

AN application by the respondent to set aside the petition filed herein under the provision of the Alberta Controverted Elections Act.

The application was refused.

*C. C. McCaul*, K.C., and *C. F. Newell*, for petitioner.

*O. M. Biggar* and *A. G. MacKay*, for respondent.

Scott, J.

SCOTT, J.:—On 13th August, 1912, the respondent obtained a summons under sec. 13 of the Act to set aside the petition filed by the petitioner on the following grounds, viz.:—

(1) That the petitioner is not qualified to file a petition;

(2) That it was not filed within the time prescribed by the Act;

(3) That the deposit was not made in accordance with the requirements of section 5;

(4 That the petition does not on its face disclose sufficient groun ls or facts to have the election set aside or declared void;

(5) That service of a copy of the petition has not been made on the respondent as required by the Act;

(6) That the petitioner was guilty of corrupt practices at and during the said election and is therefore not qualified to file a petition;

(7) That the returning officer has not returned the respondent as being duly elected and therefore no petition lies;

(8) That the notice prescribed by sec. 119 of the Territories Election Ordinance has not been complied with;

(9) That when the petitioner affixed his signature to the petition he was not aware of the contents thereof and is not therefore, in truth and in fact, a petitioner.

On the return of the summons before me on 13th September, the question of the onus of proof of the facts disputed under these objections was raised, I reserved the question until the following day when, for the reasons stated in the judgment I then delivered, I held that the onus of proving those facts disputed under the first, second, third and fifth objections was upon the petitioner and that, as to the seventh, eighth and ninth, the onus was on the respondent. The sixth objection was abandoned by the respondent (*Carstairs* v. *Cross* (No. 1), 6 D.L.R. 59).

On the last mentioned day and on 1st October evidence was adduced by the petitioner and others in support of the matters the onus of proof of which I held was upon him. The effect of this evidence I will deal with in disposing of the objections raised by the respondent as to its sufficiency.

Upon the argument it was contended that the petitioner had not established his status as such.

By sec. 3 of the Act any duly qualified elector of the electoral district in which the election was held may petition under the Act against the undue return or undue election of any candidate.

By sec. 104 of the Alberta Elections Act (ch. 3 of 1909), the persons qualified to vote at the elections in question were all male persons of the full age of twenty-one years who were British subjects by birth or naturalization, who were not Indians, and who had resided in Alberta for at least one year and in the electoral district for at least three months immediately preceding the date of the issue of the writ of election, and who were not disqualified under any of the provisions of the Act.

One objection to the proof of status is that it is not shewn that the name of the petitioner appeared on the voters' list for that polling division.

At the hearing on 14th September the petitioner's counsel applied for and afterwards obtained from me an order requiring the clerk of the Executive Council to produce the enumer-

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ator's list for that polling division. Counsel for the respondent stated that he thought they could arrange with that official to leave it with the clerk of the Court. At the hearing on the following day a document purporting to be the list of voters for that polling division was tendered as evidence by the petitioner. Counsel for the respondent admitted that it was produced by the clerk of the Executive Council but contended that there was nothing in the Alberta Elections Act requiring the deputy returning officer to return the list used in the taking of the vote or constituting the clerk of the Executive Council its custodian, also that it was not shewn that it was the list used at the election and that, if the name W.F.W. Carstairs appeared therein, it was not shewn that he was the petitioner.

Section 91 of the Elections Act prescribes that the polling list, certain other specified documents and all other documents which served at the election, save the disputed ballots and the poll book, shall be placed in the ballot box. Sec. 93 requires the deputy returning officer to lock and seal the ballot box and deliver it to the returning officer and by sec. 234 the latter is required to transmit to the clerk of the Executive Council all documents received by him from the deputy returning officer.

Sections 92 and 135 appear to me to clearly shew that the polling list referred to in sec. 191 is the only list of voters or voters' list used in each polling division and, such being the case, it follows from the sections I have referred to that it should be returned to the clerk of the Executive Council and that he is the proper custodian thereof. The document referred to having been produced from his custody and its purport being as I have stated, I think I am bound to assume that it is what it purports to be. The name "W. F. W. Carstairs" appears therein. It is true that there is no evidence that the person so named is the petitioner but I do not well see how proof could be given of that fact by any means other than by calling the person who prepared the lists and I think it would be unreasonable to hold that the petitioner was bound to procure his evidence. It is, however, unnecessary for me to decide that question as counsel for the respondent stated at the hearing on 14th September that he was satisfied that the petitioner's name was on the list.

A further objection to the proof of status is that it has not been shewn that the petitioners resided in the electoral district for the three months immediately preceding the date of the issue of the writ for the petition.

The evidence of the petitioner in so far as it is material upon the question of his status as such, is that he is over twenty-one years, that he voted at the election in polling division No. 41, that he is a male British subject, that he is not an Indian,

that he has resided in Alberta for seven years and resided therein the year immediately preceding the date of the election, that his rooms are in the Windsor block in Edmonton, that he has been there for the last four years and for all the year immediately preceding the election, that for three months and on the day of the election he was in good faith a resident of and had his residence in the electoral district, and that he was on the date of the election qualified and entitled to vote.

The date of the issue of the writ was not shewn, but as the petitioner stated in his evidence that he has resided in the electoral district for four years, and for all the year next preceding the election, I think the only reasonable deduction is that he must have resided in it for at least the three months next preceding the date of the issue of the writ.

A further objection to the proof of status is that it is not shewn that the petitioner was not disqualified under any of the provisions of the Elections Act.

The petitioner testified that he was qualified and entitled to vote at the election and in view of that statement and, in view of the fact that he has also shewn affirmatively that he was possessed of the qualifications referred to in sec. 104, I am of opinion that it was not incumbent upon him to negative his disqualification under any of the other 299 sections of the Act. His statement that he was qualified in itself negatives any such disqualification and the onus of proving such disqualification was thereby shifted to the respondent.

Another objection to the proof of status is that sec. 3 of the Act requires that the petitioner shall be a duly qualified elector at the time of filing the petition, that the fact that he was such at the time of the election is not sufficient and that the former has not been shewn.

In my view the only reasonable construction to be placed upon sec. 3 is that it merely requires that the petitioner shall be a duly qualified elector at the time of the election. It could not have been the intention to give to a person who was not qualified to vote at an election the right to petition against the return of a candidate elected thereat, and, if this objection were sustained, that would be the effect of the section. The right to petition does not appear to be restricted to those who voted at the election as sec. 2, sub-sec. 9 of the Elections Act provides that the term "elector" shall mean any person entitled to vote at an election.

Further, under sec. 104 of the Elections Act the qualification of an elector can be ascertained and determined only with respect to a pending election for which a writ has been issued. A petitioner cannot be in a position to say that he was a duly qualified elector at the time he filed his petition, his qualification

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as an elector being dependent upon the date of the issue of the writ and, if no writ issued, there is no standard of qualification. At most, he could only say that, if a writ for an election had been issued at the time he filed his petition, he would have been qualified to vote at an election under it.

The form of petition given in the schedule to the Act and which, under sec. 4, is the form which may be used, supports the view I have expressed as it contains an allegation that the petitioner was a duly qualified elector at the election. It may be that the prescribed form cannot have the effect of restricting the scope of sec. 3, but I think that it may be referred to as a guide in ascertaining its meaning and intention.

As to the second objection referred to in the summons, viz., that there is no evidence that the petition was filed within the prescribed time, the grounds relied upon are, that the leaving of the petition with the clerk was not a filing, as it is the clerk who files the petition, that there was no evidence that the document filed was signed by the petitioner and that there is no evidence that the proper fees were paid.

It is open to question whether it is the clerk who files the petition as sec. 5 provides that the petitioner shall, at the time he files the petition, deposit the necessary security. Apart from this, however, the deputy clerk of the Court, who produced the petition filed in the clerk's office, states that itwas filed there on the 22nd July, 1912. It bears the certificate of the clerk that it was filed on that date. The duplicate original which was presented at the clerk's office at the time of filing has attached to it the necessary law stamps to cover the fees for filing, and the petitioner's solicitor in his evidence states that the original filed with the clerk was signed by the petitioner. In view of this evidence I hold that this objection cannot be upheld.

As to the third objection referred to in the summons, viz., that the deposit was not made in accordance with the requirements of the Act, it was contended by counsel for the respondent that the deposit of $500 required by sec. 5 to be made by way of security for costs has not been shewn to have been made by the petitioner.

The evidence is to the effect that the solicitor and duly authorized agent of the petitioner at the time of the filing of the petition deposited with the clerk the $500 by a bank note of the Dominion for that amount. Sec. 5 prescribes that the petitioner shall make the deposit at the time he files his petition and the gist of the objection is that it must be shewn either that the petitioner himself made the deposit or, at least, that it was made with his money.

Upon the cross-examination of the solicitor by counsel for the respondent he questioned the former as to the source from

which he had obtained the money for the deposit. This being objected to, I then ruled that the solicitor was not bound to answer the question, that the deposit having been made by the agent and solicitor of the petitioner and on his behalf it must be taken to have been made by the petitioner. The question was again raised upon the argument of the application and my attention was then called to the difference between the words of sec. 14 of the Dominion Controverted Elections Act and sec. 5 of our Act, the former providing that the deposit shall be made *on behalf of the petitioner* and the latter that it shall be made *by the petitioner*. It was contended by counsel for the respondent that our sec. 5 was taken from sec. 14 and that the change in the wording afforded a strong indication of intention to change the effect.

A comparison of the two sections will shew that there is a wide difference between the two sections not only in the specification of the manner in which the deposit shall be made but also in that of the purpose for which it is to be made. In fact the only point of resemblance is that they both prescribe that a deposit shall be made by way of security at the time of filing the petition. To my mind the dissimilarity is so great that it cannot reasonably be presumed that sec. 14 was taken as a guide in the framing of section 5. In fact comparing the 33 sections of our Act with the 113 sections of the Dominion Act I cannot find a single section of the former which is couched in the same language as that of any section of the latter and, beyond the general scheme of providing for the trial of controverted election petitions, there does not appear to me to be any point of similarity between them. I therefore see no reason for changing the view I expressed at the hearing of the application.

The fourth objection was not referred to by counsel for the respondent upon the argument nor was it stated in what respect the petition did not disclose sufficient grounds to have the election set aside; I therefore treat it as abandoned.

As to the fifth ground of objection, viz., that it has not been shewn that a copy of the petition was served on the respondent, the evidence is to the effect that the original petition was in duplicate, that one of them was filed with the clerk by the petitioner's solicitor, that he had a copy made which he handed with the other original to Mr. Upjohn, a barrister in his office, to deliver to the sheriff for service. Mr. Upjohn states that he handed both in to the sheriff's office and the sheriff states that he compared the original with the copy and that he served the copy on the respondent on 25th July last. I therefore cannot see what doubt there can exist that the document served on the respondent was a copy of the petition filed.

As to the ninth ground of objection the evidence is to my

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mind conclusive that the petitioner at the time he signed the petition was fully aware of its contents.

No evidence was adduced by the respondent in support of the seventh and eighth objections.

For the reasons I have stated I dismiss the application with costs.

*Application dismissed.*

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## HALLIDAY v. CANADIAN PACIFIC R. CO.

*Ontario High Court. Trial before Clute, J. September 30, 1912.*

1. MASTER AND SERVANT (§ I E—25)—TERMINATION OF EMPLOYMENT — LENGTH OF NOTICE.

Where a railway conductor had been employed continuously for twelve years by the same railway company and the practice of the company had been not to dismiss employees of that grade in their service without holding an official inquiry, it may be assumed, in the absence of any contract to the contrary, that he should have a reasonable notice of the termination of his engagement other than for cause, and damages for wrongful dismissal are properly computed on the basis of the conductor being entitled to three months' notice.

Statement

ACTION against the railway company and James H. Hughes for wrongful dismissal of the plaintiff by the railway company from his employment as a conductor and for false imprisonment and malicious prosecution.

Judgment was given for the plaintiff for $480, with costs.

*R. R. McKessock*, K.C., for the plaintiff.
*W. H. Williams*, K.C., for the defendants.

Clute, J.

CLUTE, J.:—I disposed of the action at the trial in so far as the issues arising out of the charge for false imprisonment and malicious prosecution were concerned. I further found that the plaintiff had been wrongfully dismissed. The plaintiff had been in the employment of the defendant company for some twelve years, and during that period had borne a good character. His engagement with the company had been continuous, and, as stated by the superintendent, he was during all that period in the employ of the defendant company. Under the custom and practice of the company with their men, an employee in the grade of the plaintiff was not to be dismissed without inquiry. His dismissal was on account of liquor having been found in the caboose of the train of which he was conductor. This train started from Cartier to White River. There was a collision, and the train was delayed. At the place where the collision occurred, the débris arising therefrom had to be removed, and a number of workmen, twenty or thirty, were engaged in this work. The night was very cold, some fifty degrees,

it was stated, below zero, and the men were constantly going into the caboose to get warmed. The plaintiff, as was his duty, was at the station to be ready to start his train when the road was clear. One of the cars of the train was broken into at this time, and a case of liquor taken therefrom. The plaintiff had been without sleep for over fifty hours. It was discovered that the car had been broken into and some bottles extracted, and the superintendent, searching the plaintiff's caboose, found one bottle and part of another bottle in the caboose. The plaintiff was arrested and charged with stealing liquor, and immediately suspended. The case was tried before Judge Kehoe, and the plaintiff honourably acquitted. He was, however, dismissed the day before the Judge had appointed to give his decision.

Upon the evidence before me, I was satisfied that the plaintiff was not guilty of the theft, and did not know that the liquor had been secreted in his caboose. In my opinion, under the evidence disclosed, he was wrongfully dismissed, under such circumstances, having regard to his hiring, as entitled him to three months' notice: *African Association* v. *Allen*, [1910] 1 K.B. 396; *Harnwell* v. *Parry Sound Lumber Co.*, 24 A.R. 110; *Bain* v. *Anderson*, 27 O.R. 369, 24 A.R. 296, 28 Can. S.C.R. 481; *Gould* v. *McCrae*, 14 O.L.R. 194, and see *Creen* v. *Wright*, L.R. 1 C.P.D. 591; *Speakman* v. *City of Calgary*, 1 Alta. L.R. 454; *Henderson* v. *Canadian Timber and Saw Mills Limited*, 12 B.C. R. 294.

The certificate given by the defendants to the plaintiff shewing the time he had served the company, without which it was difficult to get employment in another company as conductor, was worse than useless, as it contained a statement that he was dismissed on account of liquor having been found in his car.

I suggested on the trial that, the plaintiff having been honourably acquitted by the County Court Judge, the company might so modify the certificate as to shew the facts, and thus enable him to make an engagement with another company.

Upon the whole case, I think the conduct of the company towards the plaintiff was harsh and unfair in dismissing him the day before judgment was to be given. The costs in the case were not appreciably increased by the other issues raised; and, under all the circumstances of the case, I do not think the defendants should have the costs of the issues in which they were successful, viz., those arising out of the charge of false imprisonment and malicious prosecution.

Having regard to the plaintiff's earning power while with the defendant company, I assess the damages at $480, with full costs of action. Any amendments that may be necessary to meet the case as disclosed in the evidence may be made.

*Judgment for plaintiff.*

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## CARLSTADT DEVELOPMENT CO. v. ALBERTA PACIFIC ELEVATOR CO.

*Alberta Supreme Court, Stuart, J. May 27, 1912.*

1. PRINCIPAL AND AGENT (§ II A—12)—AUTHORITY—TRANSACTION IN AGENT'S NAME—NAME OF PRINCIPAL DISCLOSED—SUFFICIENCY.

On a sale of seed flax, where the sale-note contains the name of the buyer's agent instead of the buyer's own name, but the seller when he made the sale knew who the principal was and that the sale was really being made to him and not to his agent, in an action by the principal for breach of contract, the contract will be read as made with the known principal.

2. SALE (§ II C—36)—WARRANTY—BY DESCRIPTION—QUALITY, GENUINENESS OR FITNESS—SEED GRAIN—SALE OF GOODS ORDINANCE (ALTA.).

Where a contract is made for the sale of goods by description there is under sec. 16, sub-sec. 1, of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, an implied condition that the goods were reasonably fit for the purpose intended; and if, by acceptance of the goods, this implied condition were waived, and reduced to a warranty only, such warranty would be covered by sec. 13 of the same Ordinance.

3. SALE (§ II C—36)—WARRANTY—SEED GRAIN—BY SAMPLE—SALE OF GOODS ORDINANCE (ALTA.).

Where a contract is made for the sale of goods by sample there is under sec. 17 (*b*) of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, an implied condition that the bulk should correspond to the sample.

4. PLEADING (§ I N—114)—AMENDMENTS—SCOPE OF AMENDMENTS—CONTRACT LIABILITY—WARRANTY—SALE OF GOODS ORDINANCE (ALTA.).

Where the plaintiff in his statement of claim upon a sale and delivery of seed grain does not allege the exact ground of action, whether misrepresentation and deceit or breach of contract or both, but does bring out all the facts basing his action, thus sufficiently informing the defendant what the real complaint is so that the defendant cannot be prejudiced by a proper amendment, such an amendment may be made during the trial to allege a breach of warranty so that a more satisfactory ground of action may be laid under secs. 13 to 17 inclusive of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, when those sections are applicable.

5. SALE (§ II C—36)—WARRANTY—SEED GRAIN—WILD MUSTARD—FITNESS.

Where grain is sold as "seed flax" and it was at the time of sale contaminated with noxious mustard seed, the seller may be held in damages for a breach of warranty under sec. 16 (1) of the Sale of Goods Ordinance, N.W.T. Ordinances, (Alta.) 1911, ch. 39, on the ground that the seed was not reasonably fit for the purpose for which it was intended.

6. DAMAGES (§ III A 4—82)—QUANTUM—WARRANTY OF—SEED GRAIN.

The damages recoverable for breach of warranty where grain is sold as "seed flax" and it was at the time of sale contaminated with noxious mustard seed, and was in consequence not reasonably fit for the purpose for which it was intended, include deterioration of the lands in which the seed was sown, as well as the wages of the help employed in pulling out the wild mustard.

7. SALE (§ II C—36)—WARRANTY—SAMPLE—SEED GRAIN—EXAMINATION OF SAMPLE—SALE OF GOODS ORDINANCE (ALTA.)—REMEDY.

Where grain is sold as "seed flax" by sample and the seed delivered does not correspond with the sample, the delivery being contaminated with noxious mustard seed, the seller may be held in damages under sec. 17 (2) (c) of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, although the buyer may have omitted to examine the goods delivered but relied upon his warranty and examination of the sample.

8. SALE (§ II E—44)—SEED GRAIN—SAMPLE — WARRANTY — INTRICATE GOVERNMENT TEST—WHEN UNNECESSARY—WILD MUSTARD—INJURY TO SOIL.

Where "seed flax" is sold by sample and the buyer would require an intricate analysis and test by a Government official in order to detect the presence of noxious mustard seed in the sample, the onus is not on the buyer to make a test involving such unreasonable trouble, and upon injury resulting to the buyer's land from "seed flax" contaminated with noxious mustard seed, the seller may be held in damages for same, without the Government test.

9. CONTRACTS (§ II D—163)—CONSTRUCTION—SALE — ENDORSEMENT ON BILL OF LADING, EFFECT OF.

Where seed grain is delivered by rail and the bill of lading is endorsed "for seed purposes free from noxious weeds," if it be shewn that the seller made this endorsement as a representation to the railway company which refuses to carry seed grain containing noxious weeds, the words will not necessarily, upon a legal construction of the contract of sale, be read into it.

10. EVIDENCE (§ XII A—920)—WEIGHT—SEED GRAIN—LACK OF VITALITY —FROSTED CONDITION—GERMINATING TEST—RANDOM TEST OF 100 SEEDS—COMPLETE TEST.

Upon a sale of seed grain, where the buyer pleads that it lacked vitality, and was frosted, a random test of 100 seeds is unsafe upon which to base a conclusion as to the general vitality of 150 bushels of the grain, a more general and complete test being necessary under the circumstances.

[*Lawton* v. *Reid*, 2 W.L.R. 240, applied.]

TRIAL of an action for damages for breach of contract and for deceit. Statement

*W. F. W. Lent*, for the plaintiffs.

*C. C. McCaul*, K.C., and *J. B. Roberts*, for the defendants.

STUART, J.:—In this case I find that the defendant company on the 28th April, 1910, agreed to sell to the plaintiff company 500 bushels of seed flax at $2.25 per bushel. It is true that the sale-note speaks of the sale being to E. E. Floyd; but from all the evidence it is clear that the defendants' agent Dowler knew when he made the sale that it was not really to Floyd, but to the plaintiff company. I also find that the sale was made according to a sample which was produced to Lasher, who negotiated the purchase, and who, as he said, acted under Floyd's instructions, who in turn had, as he said, "advised in directing affairs" for the plaintiffs until one of them could get out to Alberta. Stuart, J.

There is quite sufficient evidence from which to make the inference that the seed delivered did not correspond to the sample. The plaintiffs, however, do not complain directly that

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the bulk did not correspond to the sample. They complain that the defendants represented to them that the seed was free from noxious weeds and of strong vitality; that, relying upon these representations, they sowed the seed delivered; that the seed delivered was in fact of weak vitality and mixed with mustard seeds; and that, as a result, they had a poor crop, and their land was contaminated with mustard, and thereby depreciated in value. They, therefore, claim damages. There was no evidence whatever adduced as to any express representation. The only representation suggested was such as may have been implied in the use of the words "seed flax" in the negotiations for the sale and in the sale-note. The indorsement on the bills of lading of the words, "for seed purposes free from noxious weeds," is not shewn to have been made by the defendants; and, even if so made, it is clear that it was intended as a representation to the railway company, who refuse to carry seed grain containing noxious weeds.

Now, I have much doubt whether there is known to the law any such thing as liability upon an implied misrepresentation. In reality, the indorsements on the bill of lading, to which I have referred, were the only excuse existing for framing the action as an action of deceit. Such a course was, furthermore, entirely unnecessary. A careful reading of the Sale of Goods Ordinance, secs. 13 to 17 inclusive, would have revealed a much more satisfactory ground of action. If the contract was a contract for the sale of goods by description, *i.e.*, under the description of "seed flax," then sec. 16, sub-sec. 1, would suggest an implied condition that the flax was reasonably fit for the purpose intended, which condition would, by acceptance of the goods, be waived and reduced to a warranty under sec. 13; and for this breach of warranty an action would lie. On the other hand, if the contract was a contract of sale by sample, then sec. 17 (*b*) would suggest an implied condition that the bulk should correspond to the sample.

The only suggestion of an action upon a contract is contained in paragraph 9 of the claim; and it is difficult to decide from a perusal of that document what exactly is the ground of action alleged, whether it is for misrepresentation and deceit, which is a tort, or for a breach of contract. However this may be, all the facts were brought out. The defendants were sufficiently informed of what the plaintiffs' real complaint was; and they cannot be prejudiced if I treat the case as if any necessary amendments had been made, and as if the action were one for breach of warranty under the sections to which I have referred. I find as a fact that the seed delivered was contaminated with mustard seed, and that mustard is a noxious weed. The ground upon which the seed was sown was fresh breaking. It was not

an old farming neighbourhood, but a new district. No grain of any kind had ever been sown on the land in question before. The grain was sown with a drill; and all the witnesses say that the mustard which appeared grew along the drills. I think the witnesses were right in saying that the only possible inference to be drawn from these facts is that there was mustard seed in the grain sown which was supplied by the defendants under the contract. This being so, I think the defendants are liable in damages for a breach of warranty either under sec. 16 (1) of the Ordinance, inasmuch as the seed was not reasonably fit for the purpose for which, to their knowledge, it was intended; or under sec. 17 (2) (*c*), inasmuch as the seed supplied did not correspond to the sample.

Mr. McCaul contended that the plaintiffs should have examined the seed when delivered, and that a reasonable examination of it would have revealed the defect, if it in fact existed. But the duty of the purchaser is to examine, not the goods sent, because, though he has a right to do so, he may quite clearly waive that right and rely upon the warranty, but to examine the sample. The evidence shews that Lasher did examine the sample carefully. It also shews that, owing to the exceedingly small size of mustard seeds, it is very difficult to detect their presence among larger seeds. I infer from the evidence, although it is nowhere directly so stated, that there was no mustard seeds found by Lasher in the sample. He says it was an excellent sample of flax. Dowler, when recalled at the close of the case, stated that, to the best of his belief, there was no mustard seed in the sample. I think this is sufficient to shew that the bulk did not correspond to the sample. In any case, even if there had been a defect in the sample, I do not think the presence of the defect could have been detected by any reasonable examination. The defendants produced evidence to shew the possibility of applying to some Government official to make a test of the nature of the seed; but it seems to me that this only goes to shew that there is great difficulty in detecting all the kinds of seed that may be in a sample, and that an examination which would be sure to detect and determine them all, would involve unreasonable trouble.

I think the defendants are, therefore, liable for the damage caused to the plaintiffs by reason of the deterioration in the value of the land in which the seed was sown, owing to its having been contaminated with wild mustard. As all the witnesses state, and as is well known, this is a very noxious weed and exceedingly difficult to eradicate from the soil. Some witnesses swore that the damage to land so contaminated would amount to $10 an acre. The weed inspector, Robinson, stated that the decrease in value would be from $5 to $7 an acre. I think, in view of this evidence, that $6 per acre is the most satisfactory

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figure to adopt. As there were 315 acres sown, this will amount to $1,890. To this might properly have been added, I think, the wages of the men who worked at pulling the mustard; but the amount was not definitely proven; and I cannot find any basis in the evidence upon which to make a calculation.

There were other claims for damages also. The chief one was, that the seed delivered lacked vitality, as a consequence of which the resulting crop was very poor. I cannot give the plaintiffs any damages on this account, because I do not think it was proven with sufficient certainty either that the seed was defective or that the poor crop was a result of such defect. The plaintiffs' foreman, Shields, had a theory that the seed was frosted; but his evidence was largely a matter of theory and nothing more. Speaking of the grain that did not come up, he said, "Most likely it was frosted." And again he said, "I think the flax seed I got was frosted"; again he said, "I think the bad results were due to frosting." It was only under pressure of cross-examination that he at last said, "I know this exhibit 11 is frosted"; but he added, "My belief in frosting is from examining the seed and from the germinating test." I cannot accept such evidence as sufficient to prove that the seed delivered was in fact partially frozen. With regard to the germinating test, I also think it unsafe to base a conclusion as to the general vitality of 150 bushels of seed flax upon one random test of one hundred seeds. I think the test should have been more general and more complete. Besides, many of the witnesses spoke of the crop as not being by any means a poor one for the season. Shewfelt, who cut the crop, said: "It was not a very good season. The flax was looking pretty good." Robinson, the weed inspector, said, "The flax looked all right." Lasher said, "When the flax came up, it was a fair stand of flax." It is true that other witnesses did not speak so favourably of it. But there was evidence that the season was dry. There was some evidence also of frost; and I think it is also clear that the crop was sown late, *i.e.*, only early in June, and that no rain came till July. In such circumstances, I am of opinion that it is impossible to make the findings of fact necessary to establish a liability for damages for the delivery of defective seed grain, a thing always very difficult to do in any case. See *Lawton* v. *Reid*, 2 W.L.R. 240.

The plaintiffs, having accepted 170 bushels of the seed, are bound, I think, to pay the price agreed. The damages allowed above are to be taken as placing the plaintiffs in the same position as if the mustard seed had not been mingled with the seed sold. As I have decided that there can be no damages for lack of vitality in the flax seed itself, there can be no reason for refusing to allow the defendants the price agreed upon for the seed actually delivered. This amounts to 170 bushels at $2.25 per

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bushel, or $382.50 in all, upon which $100 was paid, leaving a balance of $282.50, for which the defendants should have credit. There will, therefore, be judgment for the plaintiffs for $1,607.50 and costs. The plaintiffs were entitled to reject the balance of the seed; and the counterclaim will be dismissed with costs.

*Judgment for plaintiffs.*

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**SAVOIE-GUAY CO. v. DESLAURIERS and DeBRIÉRE, ROSE es qual. (appellant) v. SAVOIE-GUAY CO. (respondent).**

*Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 17, 1912.*

1. LEVY AND SEIZURE (§ III B—49)—NON-OBSERVANCE OF STATUTORY FORMALITIES—ANNULMENT OF SHERIFF'S SALE.

The formalities required by law regarding proceedings at sheriff's sale are of public order and the violation thereof entails the annulling of such sale at the instance of any interested party.

2. LEVY AND SEIZURE (§ III B—49)—RIGHT OF UNPAID VENDOR OF IMMOVEABLES.

An unpaid vendor of immoveables sold at sheriff's sale is an interested party and has the right to have such sale set aside if the due formalities have not been complied with.

3. WRIT AND PROCESS (§ III—58)—SETTING ASIDE SERVICE—ABSENCE OF FRAUD—MODE OF RAISING QUESTION—INTERVENTION.

In the absence of fraud and prejudice mere irregularities in the service of process will not give rise to cancellation, and such irregularities should be raised by intervention or opposition and not by petition to annul.

4. LEVY AND SEIZURE (§ I A—15)—IMMOVEABLES — SEQUESTRATION — "ANIMO DOMINI."

A seizure made on a defendant of immoveables under sequestration is a seizure on the possessor thereof *animo domini* and as such is valid.

5. EXECUTION (§ II—25)—QUEBEC PRACTICE—SEIZURE OF MOVEABLES PRECEDING SEIZURE OF IMMOVEABLES.

In all execution proceedings the moveables of the debtor should be seized and discussed before his immoveables are sold, or at least if should be established by a return of *nulla bona* that there are no moveables to seize; and failure so to do is a fatal irregularity of which any interested party may avail himself to have the sale of the immoveables annulled.

6. LEVY AND SEIZURE (§ I—15)—SALE OF IMMOVEABLE—FAILURE TO PUBLISH STATUTORY NOTICE OF SALE.

Failure to publish in the newspapers of the locality within which the immoveables are situated the legal notices of the sale of such immoveables does not *per se* justify the annulling of the sale but only makes the sheriff responsible for the damages resulting therefrom; nevertheless such omission may be evidence of fraudulent connivance between the parties which the Court will carefully consider on an allegation of fraud.

7. NOTICE (§ I—9)—SALE BY SHERIFF—STATUTORY NOTICE—FAILURE TO POST UP ON DOOR OF PARISH CHURCH.

Legal notices of the sale of immoveables at sheriff's sale should be posted up at the door of the parish church recognized by the civil law for this purpose, and failure so to do is a fatal irregularity.

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8. EXECUTION (§ II—25)—SALE BY SHERIFF OF IMMOVEABLES—QUEBEC PRACTICE.

All immoveables to be sold at sheriff's sale should be described according to the prescriptions of the civil law with indication of their boundaries and of co-terminous lands and of the cadastral name and number. Failure to give these boundaries or the proper cadastral description is a fatal irregularity vitiating the sale.

9. ESTOPPEL (§ III F—80)—ASSENT TO IRREGULAR SALE BY SHERIFF—IMPOSSIBILITY OF RATIFICATION.

There can be no ratification of a sheriff's sale vitiated by reason of grave informalities by the defendant in the case, his consent being absolutely useless for this purpose as against the rights of third parties.

10. EVIDENCE (§ II E 7—189)—PRESUMPTION OF FRAUD—SHERIFF'S SALE—FAILURE TO OBSERVE STATUTORY CONDITIONS.

Every violation of the provisions of the law regarding the procedure to be followed at sheriff's sale raises a presumption of fraud *juris et de jure* which cannot be rebutted.

Statement

AN appeal from the judgment of the Superior Court for the district of Arthabaska, Malouin, J., rendered on September 3, 1910, dismissing with costs the petitioner-appellant's petition to have a sheriff's sale of immoveables annulled.

The appeal was allowed with costs.

*T. Rinfret*, K.C., for appellant.

*J. E. Perrault*, K.C., for respondent.

Gervais, J.

GERVAIS, J. (translated):—The appellant by *reprise d'instance* prays for the quashing of the judgment rendered by the Superior Court for the district of Arthabasca, on September 3rd, 1910, which dismissed with costs the petition of Dame Arthémise Brière to annul the sheriff's sale effected on October 15th, 1907, "*at the registry office of the village of Papineauville*" by the sheriff for the district of Ottawa who then disposed of immoveables described in the Official Gazette of September 14, 1907, as follows:—

1. Partie des lots numéros vingt-trois et vingt-quatre (23 et 24), du village de Rapide de l'Orignal, dans le premier rang du canton de Campbell, dans le district d'Ottawa, appartenant au dit défendeur, et bornés à l'est par le chemin principal, au sud et ouest par partie du dit lot No. 23, appartenant à la fabrique de la paroisse de Rapide de l'Orignal, et au nord par la rivière au Lièvre—avec le moulin à farine et à scie et autres bâtisses sus-érigés, et aussi les machines dans le dit moulin, à l'exception de ce qui appartenait à la dite demanderesse, entre autres les objets suivants:—

(*a*) Une machine raboteuse bouveteuse sur le banc en fonte, avec couteaux pour bouveter 1/2 à 2 épais. par. 12 de large et moins, pesant 4,000 lbs.

(*b*) Une turbine améliorée pouvant donner 18 forces C.V. à 12′ de tête d'eau.

(*c*) Une turbine améliorée pouvant donner 40 forces C.V. à 12′ de tête d'eau.

2. Le pouvoir d'eau situé sur la dite propriété et le long du Rapide de l'Orignal, sur la rivière du Lièvre, le dit pouvoir d'eau étant employé pour mettre en opération le dit moulin à farine et à scie.

Pour être vendus au bureau d'enregistrement du village de Papineauville, le quinzième jour d'octobre prochain, à dix heures de l'avant-midi.

Hull, 30 aout, 1907.

C. W. WRIGHT,
Shérif.

In support of her demand the petitioner alleged divers grounds, amongst others, the following:—

1. Her quality of unpaid vendor of the said immoveables for a price of $6,500, of which $436.25 cash, as appears by deed passed before Lachaine, N.P., at St. Jérôme, on August 14th, 1902, containing a resolutory clause worded as follows:—

"Convenu qu'à défaut par l'acquéreur de faire l'un des dits paiements à échéance, la clause résolutoire aura lieu, c'est-à-dire que la venderesse reprendra ce que dessus vendu, sans rien rembourser à l'acquéreur."

In the same deed the immoveables were described as:—

1. Un morceau de terre à prendre sur les lots numéros vingt-trois et vingt-quatre (23 et 24) du premier rang du canton Campbell, comté Labelle, avec le pouvoir d'eau qui longe le dit terrain, appelé le Rapide de l'Orignal, et contenant le dit morceau de terre environ dix arpents en superficie, tenant d'un côte à Alfred et Louis N. Fortier ou représentants, en suivant une courbe, et de l'autre côte et en arrière aux dits Fortier ou représentants, avec moulins à scie et à farine, leurs tournants et mouvants et autres accessoires.

2. Un autre terrain désigné comme suit: Un morceau de terre à prendre sur le lot numéro vingt-quatre (24), du premier rang du canton Campbell, contenant cinquante arpens en superficie, le dit terrain aura la largeur du dit lot (cinq arpents de largeur) sur dix arpents de profondeur, à partir du ruisseau, tenant d'un côté à Joseph Thibault, et de l'autre côté et en arrière aux dits Fortier.

The waterfall itself or hydraulic power in question, is thus described in the government letters patent confirming the grant and dated the 18th of February, 1907:—

Un pouvoir hydraulique à utiliser sur la rive gauche seulement (côté du canton Campbell) de la rivière du Lièvre, dans le Comté d'Ottawa, étant une partie du pouvoir hydraulique du rapide de l'Orignal, et étant constitué par un débit de cent (100) pieds cubes par seconde, à prendre dans la dite rivière en face des lots numéros vingt-trois et vingt-quatre (23 et 24) du premier rang du canton Campbell, et par la différence de niveau qu'il peut y avoir dans la dite rivière, en face des mêmes lots.

2. The petitioner in nullity of this sheriff's sale further alleges that the suit taken by her on April 4th, 1907, in resolution of the said sale of August 14th, 1902, had not been decided by the Superior Court for the district of Terrebonne before January 22nd, 1908, long after the judicial sale of October 15th, 1907.

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3. The petitioner further contends that the adjudication of these immoveables at a ridiculously low figure (*à vil prix*) has seriously prejudiced her rights inasmuch as she has been deprived thereby of her real rights either as proprietor or as privileged creditor and vendor.

4. The petitioner finally alleges a whole series of informalities in the present personal action instituted on June 29th, 1907, and maintained on July 9th, 1907, on the defendant's confession, and also in the execution of this judgment in virtue of a writ of execution directed against both moveables and immoveables and addressed by the Superior Court of the district of Arthabaska "*to the sheriff of our Superior Court for the Province of Quebec appointed in and for the district of Ottawa.*" Here are the main informalities complained of:—

(*a*) Summoning of Legault, domiciled in Montreal, before the Superior Court sitting at Arthabaskaville, by serving the papers on a stranger living in the house at the l'Orignal rapid;

(*b*) Confession of the latter;

(*c*) Failure to discuss the moveables before the immoveables;

(*d*) Seizure of the immoveables on Legault when he no longer was possessor *animo domini* seeing that the resolutory action against him was pending at that time and that the immoveables in question were under sequestration;

(*e*) Failure in the notices of sale of these immoveables, to describe the parts of lots sold by their cadastral numbers and by their boundaries (*tenants et aboutissants*) as well as to give any indication of the official cadastre affected;

(*f*) Lack of indication of the place at which the sale would be held, in the same notices;

(*g*) Failure to publish these notices at the parish church door;

(*h*) Failure to publish these notices in a French or English newspaper of the locality.

5. The petitioner also alleges subsidiarily fraudulent understanding between the defendant, the purchaser at the sheriff's sale and the plaintiff as evidenced by the fact that the plaintiff re-took moveables sold to the defendant for $1,000.30, represented by notes on which the judgment is based, and then re-sold these moveables to the purchaser at sheriff's sale in settlement of this judgment; as also by the fact that the purchaser at sheriff's sale re-sold part of the lots before they were judicially sold and that the notices of sale never appeared in the local papers as required by article 719*a* C.P.

The contestant denied all these allegations of the petitioner. At the hearing, the following facts were established by the petitioner *en nullité de décret*:—

1. Her interest in the matter, resulting from—

(*a*) Her quality of unpaid vendor under resolutory clause by virtue of her deed of sale of August 14th, 1902, and also by virtue of the judgment rendered in her favour by the Superior Court for the district of Terrebonne, on January 22nd, 1908, copies of which are filed of record.

(*b*) The ridiculously low price (*vilité*) at which the immoveables were adjudicated to Abbé Génier, to wit, $1,801; and yet the abbé admits that "at the time of the sale the property was worth $5,000," and later he says that it is worth even more to-day, by reason of the building of a C.P.R. branch line, of some 60 miles, which branch line was in course of construction at the time of sale.

2. The absence of any civil parish known as "rapide de l'Orignal" is established by the respondent's own admission. In reality this municipality is only a township municipality, of the county of Campbell.

3. By the registrar's certificate, it appears that quite a number of emplacements had been disposed of even before the adjudication of the lots in question, both by the petitioner in nullity, her *auteurs*, and by the purchaser at the sheriff's sale, who admits he gave title after the sheriff's sale to five pieces of land which he had sold, rather curiously, before this judicial sale. To these five sales by the purchaser we must add, therefore, the following which appear on the registrar's certificate:—

Isidore Gauthier to Wilfred Touchette, March 31st 1897. Isidore Gauthier to Jean-Baptiste Fleurant, July 23rd, 1897. Isidore Gauthier to John Baron, July 27th, 1897. Mortgage Alcide Bélec to Joseph D. Fournel, November 18th, 1897. Sale Louis Norbert Fortier to Napoléon Bélanger, January 8th, 1901. Sale Isidore Gauthier to the School Municipality of Campbell county, April 3rd, 1901. Sale Chs. Lalier to the Revd. J. A. Génier, October 16th, 1903. Sale Revd. J. A. Génier to A. Vaillancourt, October 22nd, 1903. Sale J. H. Chasles to A. Dubreuil, June 13th, 1903. Donation Alfred Fortier and Ls. Norbert Fortier to Joseph Limoges of a piece of land of 10 arpents, forming part of lots nos. 23 and 24, June 26th, 1893.

And also, same twenty other sales and deeds of alienation of parts of these two lots.

4. Obscurity, if not ambiguity, in the notices of sale resulting from the absence of any description of the *tenants et aboutissants* of the parts of the lots sold by authority of justice, and from the absence of any mention of the parcels of land sold to third parties under duly registered deeds, without forgetting, of course, the absence of any mention of the official cadastre governing these immoveables:—

Q. M. le Curé, à l'époque de la vente par le shérif, est-ce qu'il y avait quelque chose pour indiquer, une distinction entre le terrain décrit dans l'acte de vente de Mme. Brière à Legault et les cinquante

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arpents auxquels vous avez référé? Y avait-il une marque de division entre les cinquante arpents et la partie des lots vingt-trois et vingt-quatre, à l'époque de la vente? Y avait-il une ligne de division entre ce que le shérif a vendu et ce qu'il a laissé de la propriété de Mme. Brière? R. Lors de la vente du shérif, il y avait le chemin, c'est-à-dire pas exactement; ces cinquante arpents-là dont il est fait mention, c'est une partie du lot qui se trouve au moulin, quatre arpents, de quatre à cinq arpents. La propriété Brière, ce qui composait les deux parties, c'est cinquante acres pris en plein milieu d'un bois et dix arpents autour du moulin, et ces dix arpents-là sont séparés par un chemin. La plus grande partie est à l'est du chemin. Il reste une petite partie à l'ouest, comprenant quelques centaines de pieds, dont un emplacement de village vendu à M. Paré, marchand. Cette partie n'a pas été comprise dans la vente du shérif, parce qu'il dit, la propriété à l'ouest du chemin.

Q. D'après vous, est-ce la propriété à l'ouest du chemin? R. Sans doute, la propriété bornée à l'est par le chemin.

Q. Ca vous satisfait ça vous; mais pensez-vous qu'une personne qui n'aurait pas été au courant des faits comme vous, ça l'aurait bien renseignée, cette description-là? R. Peut-être que c'aurait été difficile. Je ne vois pas comment on aurait pu désigner cela autrement.

Q. S'il avait donné l'étendue, la superficie? R. C'aurait été plus ou moins; il reste encore une petite partie du lot qui n'a pas été vendue, qui se trouve à l'est du chemin et qui fait toujours partie des lots vingt-trois et vingt-quatre.

Q. Comme les cinquante arpents et qui n'a pas été transmise par le shérif? R. Oui.

Q. Pouvez-vous me dire dans le moment, par quelle partie du lot numéro vingt-trois, cette propriété de Mme. Brière se trouve encerclée au sud et à l'ouest? R. Par le terrain de la fabrique.

Q. Dans l'avis, il ne le dit pas, je crois. Est-ce qu'il indique le terrain appartenant à la fabrique. R. Il y avait dans le temps une clôture et la rue de l'Englise.

Q. Ca, c'est à l'ouest? R. Au sud et à l'ouest, c'est-à-dire au sud-ouest et une clôture à l'ouest qui sépare le terrain de la fabrique du terrain de M. Legault.

Q. Il y avait déjà à l'époque de la vente, trois emplacements de concédés? R. Oui.

Q. Il y en a deux autres depuis? R. Oui.

Q. Concédés par vous? R. Oui. J'ai donné un titre à tous.

Q. Est-ce depuis longtemps? R. C'est tout de suite après la vente, après mon achat.

Q. Est-ce que vous n'avez pas dit tout à l'heure, dans votre témoignage en chef, que la description du shérif est plutôt favorable que défavorable à Mme. Brière? R. Oui, parce que d'après la description donnée par le shérif on pourrait croire que c'est tout le pouvoir d'eau qui est vendu, tandis que c'est rien qu'une partie.

Q. Vous interprêtez cette description comme étant tout le pouvoir d'eau? R. Oui.

Q. On dit: "situé sur la dite propriété"; la propriété n'enjambe pas la rivière? R. Elle n'est que d'un côté seulement.

It was under these circumstances that the trial Court dismissed the petition in vacation of this sheriff's sale.

Should this judgment be reversed?

Before this question can be answered, several points have to be decided.

*First question: Has the petitioner an interest in the matter so as to entitle her to move for the vacation of this sheriff's sale?*

She is on the verge of losing almost in its entirety her privileged claim of $6,000, or her immoveables which are worth that sum, as a result of the judicial sale of October 15th, 1907, which, though irregular and *à vil prix*, discharges the property from all her rights.

We find, in the present case, the four conditions required by the authors and by the judgment in *Bérard* v. *Barrette et ux.* 5 R.L. 703, to justify the petition in vacation of this sale.

The petitioner is certainly an "interested party" within the meaning of art. 784 C.P.

*Second question: Can the petitioner invoke the violation of the rules governing competency, ratione personæ, resulting from the summoning to Arthabaskaville of the defendant in Montreal by service of process on a stranger in the township of Campbell? and can she attack the confession of judgment of the defendant?*

In the absence of fraud and prejudice we must answer in the negative. Besides, such grounds should be raised by intervention or *tierce-opposition*.

*Third question: Does the absence of the seizing creditor's claim as a result of the distraction of the machinery from the seizure and the sale thereof posterior thereto, void the sale?*

We do not think so.

This might have given rise to an opposition to annul or to a contestation of the collocation. But, in any case, the decree on the execution for the costs of the seizing creditor's attorneys is valid.

*Fourth question: Was the seizure made super non domino?*

No. Legault was possessing *animo domini* during the seizure. All he had to do to remain proprietor of the immoveables under an unassailable title was to pay the petitioner's claim, and this even up to January 22nd, 1908. This is the teaching of the authors, the jurisprudence, and the law.

It is not so much art. 1065 C.C. as art. 1538 C.C. which was to decide the fate of Legault's ownership in the immoveables in question. The sequestration thereof, according to the order of the Superior Court of the district of Terrebonne (8th August, 1907), did not prevent him from possessing them *animo domini* for the purposes of the seizure.

*Fifth question: Was there any discussion of the moveables of Legault mentioned in the minutes of seizure?*

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No, must we answer. The writ of seizure was not addressed to an official of the Superior Court for the district of Arthabaska, which Court rendered judgment; the inventory of the seizure of the moveables or the return of *nulla bona* should have been served at the office of that Court according to art. 633 C.P., whereas the minutes of seizure of the immovables could be left at the office of the Court of the district within which these were situate according to art. 707 C.P.

No writ was addressed to a bailiff of Montreal. The sheriff for the district of Ottawa, no more than any official, has the right to delegate his powers to Olivier Daoust, bailiff, of Montreal.

The service of a return of *nulla bona* as to moveable property in the district of Ottawa, where the defendant had no longer any domicile even at the time the action was served cannot avail as a proper and regular inventory of seizure or return of *nulla bona*, which could have been drawn up only by the sheriff or a bailiff of the district of Arthabaska or the sheriff or a bailiff of the district of Montreal, in pursuance of a writ duly addressed to one of them; or, finally, as regards the moveable effects of the district of Ottawa, of a writ addressed to Sheriff Wright. All these different addresses might have been included in the same writ *de bonis et terris*.

Such are the teachings of articles 116, 121, 617 C.P. To overlook the discussion of moveables, in other words, failure to seize and sell a debtor's moveables before seizing and selling his immoveables—in the absence of an opposition to withdraw, or, at the very least, of a return of *nulla bona* is a violation of the Ordonnance of Villers-Cotterets, a violation of art. 614 C.P. And the petitioner is justified in complaining of this illegality against art. 784 C.P.

*Sixth question: Failure to publish, in the local newspapers, the notices called for by art. 719a C.P.*

The omission to give such notice does not, according to this article, invalidate the proceedings, but the officer in default is responsible for all damages which may result therefrom.

We shall not go further than art. 719*a*; but we might say *en passant*, that had such notices appeared in the St. Jérôme newspapers then the petitioner's attention might have been drawn thereto.

It is quite evident that the proper formalities have not been complied with in this case. The sheriff fails to produce copies of these notices; he produces no *procès-verbal* of the publication thereof in the newspapers; he is content, in his report, to claim twenty dollars as fees for these notices, not a trace of which can be found in the record.

*Seventh question*: *Failure to publish the notices of sale of immoveables according to articles* 706, 716, *C.P. as regards*:—

(*a*) The proper place.

(*b*) The proper official.

(*c*) The place of sale.

(*d*) The necessary information therein.

(*a*) *The proper place* is the door of the parish church, that is to say, of the church civilly constituted according to the formalities of the canon law confirmed by the formalities of the civil law, as is seen from art. 717 C.P.

Besides, art. 741 C.P., in accord with the practice and jurisprudence, is quite clear on the subject:—

> Si les immeubles peuvent être vendus ailleurs qu'à la porte de l'église paroissiale, les annonces n'en peuvent être faites ailleurs. C'est l'art. 11 de l'ordonnance

"de Henri II., 23 novembre, 1551, qui dit impérativement."

> Et la saisie faite, sera tenu de laisser une attache contenant la déclaration telle que dessus est dite des dites choses criées, laquelle sera mise et attachée à la porte d'entrée de l'église paroissiale des dits lieux criés.

The porch of the church, in those times of great religious preoccupation, was considered the necessary meeting place, more necessary than the *champ de mars* or the market-place. This explains why, in the old French judicial administration and in ours, the door of the church civilly recognized is *par excellence*, and to the exclusion of all others, the place for notices and public sales.

(*b*) Even if we admit that Arthur Trudeau, at the time he posted the notices at the door of the church of the Rapide de l'Orignal, was bailiff in and for the district of Ottawa; he does not say so in his *procès-verbal;* the sheriff could authorize him specially so to do; but no proof of such special authorization can be found of record. (*Vide* art. 702 C.P.)

(*c*) *Faulty indication of the place of sale.* There is no "registry office of the village of Papineauville," but there is an office "for the registration division of the county of Labelle," at the village of Papineauville. Art. 74 R.S.Q. says so.

(*d*) *Insufficiency of description of the immoveables* without indication of boundaries (*tenants et aboutissants*) nor indication of the official plan concerning them.

The deed of August 14th, 1902, and the letters patent are as explicit on this question of *tenants et aboutissants* or *co-terminous lands, i.e.,* the lands and tenements abutting on the land sold—as the notices in question are vague, ambiguous, obscure, and incomprehensible. The purchaser admits this, the defendant likewise. Nobody at reading these could have any idea of the object put up for sale on October 15th, 1907. And

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as to the hydraulic power, the notices are deceiving, as they give no indication of its output nor of its situation: two elements absolutely essential to the estimation of the value thereof.

Now what do we find? If the co-terminous lands abutting on that part of lot 23 which is sold are indicated on three sides it is impossible to know what they are "to the south-east"; as for lot 24, no co-terminous lands in truth are given; and according to the notices that part of lots 23 and 24 which is sold is only bounded "to the south and to the west" by "part of lot 23" without any indication of what that particular part is. It is well to notice that the seizure and sale were not of an *undivided part* of one or two lots, but of a definite part of each of three lots on the cadastre of the township of Campbell. There should have been a clear enunciation of the *tenants et aboutissants* of each of these three lots. The notices of sale do not indicate properly the object of the sale.

Such boundaries may be physical or astronomical, that is to say, either by the indication of latitude and longitude or simply by the mention of the area of the part of the lot sold, or of those parts neither sold nor affected.

Nothing of the kind was done in the present case. Reverend Mr. Génier cannot state how much of lots 23 and 24 was sold him. And if he is unable to say this, who can? In other words, the notices do not state what portions of lots 23 and 24 were sold.

These notices violate articles 2168 C.C. and 706 C.P. which follow the German system of registration introduced into our law in 1860 by means of the cadastre, the official plan and the book of reference to immoveables. Our municipalities as defined and created under the municipal code, have each one of them, an official plan prepared by the provincial land surveyors; the name of the municipality gives its name to the plan and notices of sale, and deeds of sale are to be drawn according to such plan. Now, there is no such village as the Rapide de l'Orignal; there is only a municipality of the township of Campbell, after which the cadastral plan is named. This is another fatal error which increases the vagueness of the description of the immoveables in question. Art. 7486 R.S.Q. enacts that the cadastre shall take its name from that of the municipality.

Once more we must note that our judicial administration recognizes the administrative township divisions.

Our entire hypothecary system rests on the specialization of the immoveable affected and the determination of the claim covering it.

All the dispositions of our law on these subjects are matters of public order.

Cassation, February 6th, 1841;

Troplong, vol. 2, no. 515;
Aubry & Rau, vol. 3, sec. 266;
Beaudry-Lacantinerie, vol. 2, no. 1377.

This last author sums up in happy vein the French law on the subject:—

1377. La sanction de la règle de la spécialité consiste, comme nous l'avons déjà dit, dans la nullité de l'hypothèque qui n'a pas été spécialisée conformément à la loi. Notre code n'admet que des hypothèques conventionnelles spéciales; si cette condition n'est pas remplie, l'hypothèque n'est pas valable suivant les termes mêmes de l'art. 2129.

Cette nullité peut incontestablement être invoquée par les tiers qui ont intérêt à faire écarter l'hypothèque, par exemple par les créanciers hypothécaires de date postérieure. Elle peut également l'être par les tiers détenteurs.

Peut-elle l'être aussi par le débiteur ou ses héritiers? La jurisprudence, par les motifs de ses arrêts et par un arrêt, paraît incliner vers la négative. Elle confond à notre avis, deux idées bien différentes, quoique corrélatives, la spécialité et la publicité. La publicité est ordonnée dans l'intérêt exclusif des tiers; eux seuls ont qualité pour opposer le défaut de publicité; ni le débiteur, ni ses héritiers n'en ont le droit; c'est une formalité que le créancier doit accomplir après la naissance du droit hypothécaire, à laquelle le débiteur demeure étranger. Au contraire, la spécialité de l'hypothèque est une condition requise pour la validité de celle-ci; elle doit être établie par l'acte constitutif ou par un acte authentique postérieur; elle est exigée dans l'intérêt du débiteur et du crédit public; l'intérêt des tiers, s'il a été pris en considération, ce qui est douteux, n'apparait, qu'au second plan. N'est-il pas logique d'appliquer le principe: les nullités sont, en règle générale, absolues, elles peuvent être invoquées par tout intéressé, à moins qu'elles n'aient été édictées dans l'intérêt particulier de certaines personnes? Il ne faut pas non plus oublier que les hypothèques touchent au crédit public et qu'à ce point de vue les règles qui les régissent sont d'ordre public. C'est pourquoi nous reconnaissons au débiteur et à ses héritiers le droit de demander la nullité de l'hypothèque qui n'est pas spéciale.

The entire history of the legislation, jurisprudence and doctrine in France, is summed up in these lines. Nevertheless, in France, the old Roman law general mortgage still subsists in a few cases. Whence it follows that if this nullity is one of public order in France, *a fortiori*, must it be so here in Quebec, where the whole system of hypothecary law rests on the specialization of the immoveable hypothecated and the determination of the claim affecting it, and this in the most rigorous manner. For, as is well known, our law has, as distinguished from the French law, abolished judicial, legal and general hypothecs which in a few cases still obtain in France.

By art. 2042 C.C. "hypothecs are not valid unless the deed specially describes the immoveable hypothecated *with a designa-*

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*tion of the co-terminous lands*"; and art. 2168 C.C. enacts that "no description of an immoveable . . . in the notice of sale by the sheriff . . . will be deemed sufficient unless it is made in conformity with these provisions." And articles 706 and 716 C.P. explain and confirm these prescriptions of the civil law as regards the necessity of describing parts of lots sold judicially by mentioning the *co-terminous lands*. It would almost seem as if they had followed the advice of Beaudry-Lacantinerie.

These principles may be illustrated by the following decisions: *The Montreal Loan and Mortgage Co.* v. *Fauteux*, 3 Can. S.C.R. 411; *Comfort* v. *Roy*, 25 L.C.J. 222; *City of Montreal* v. *Lionais*, 8 L.N. 402; *Barrette* v. *Corporation of the Parish of St. Berthélemi*, Que. 2 Q.B. 585; *The Royal Institute* v. *Guerin*, Que. 15 S.C. 344; *The Corporation of the Township of Sainte Edwige of Clifton* v. *Foy*, Que. 16 S.C. 418; *Therrien* v. *Hénault*, Que. 21 S.C. 452; *Pelletier* v. *Trudeau*, Que. 27 S.C. 196.

All the formalities regarding notices of judicial sale of property are also of public order.

No ratification, no consent can validate a judicial sale made in violation of the law as regards the place where notices are to be given, the place of sale, the time of the sale, the duration of the notices, the designation of the object sold. This sale discharges the immoveable; the legal effects thereof are far too serious to allow of its taking place without the required formalities.

Every violation of these laws carries with it a presumption *juris et de jure* of fraud and prejudice excluding all proof to the contrary; every such violation gives rise to an action to have the sale annulled.

And yet in the present case all the prescriptions of our law have been violated.

We are of opinion to reverse the judgment of the 2nd September, 1910, *a quo*, for the following reasons:—

1. Failure to discuss the moveables of the defendant, or, at least, to have a return of *nulla bona;*

2. Failure to describe the three parcels of land sold with indication of the co-terminous lands, either physical or astronomical, for each one of them, and failure to give the cadastral name;

3. Failure, in the notices, to indicate the seat of the hydraulic power, *i.e.*, the left bank of the Lièvre river, as well as its output, which cannot exceed 100 cubic feet per second;

4. Failure to publish these notices at the parish door of the Catholic church civilly recognized for this purpose;

5. Failure to have these notices published by the sheriff or his nominee;

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6. Failure to indicate in these notices the place of sale;

7. Evidence of fraud or fraudulent agreement between the plaintiff, the defendant and the purchaser, as seen from the following facts:—

(*a*) Sale of parcels of land by the purchaser before the sheriff had sold to him;

(*b*) Distraction from the seizure of the machinery and resale thereof by the seizing creditor to the purchaser;

(*c*) Suppression of the notices in the newspapers of the locality where the petitioner in nullity resided.

The appeal is therefore allowed in part with costs.

The petitioner in vacation or nullity also prays in her conclusions that she be declared proprietor of the said immoveables and that the same be given over to her.

These are conclusions of a petitory action or of an opposition to withdraw.

We cannot grant such conclusions.

The sale is annulled. That is all. The parties are left free to assert their rights over the immoveables which remain in the defendants' estate, subject to the claims of the creditors, owner or third party acquiring, named in the registrar's certificate.

In order to grant the petitory conclusions of the petitioner in nullity of this sale, this Court would have to call in the case all the interested parties who are not parties to the present suit. This would be tantamount to the opening up of a totally new action in the present suit, and this would be contrary to the spirit and letter of our laws.

*Appeal allowed.*

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## Re TOWNSHIP OF ORFORD AND TOWNSHIP OF ALDBOROUGH.

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*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. April 15, 1912.*

1. DRAINS AND SEWERS (§ II—12)—PROCEDURE—WORK FOR IMPROVING AN EXISTING SYSTEM—10 EDW. VII. (ONT.) CH. 90, SEC. 77.

Where what is proposed is not the construction of a new drainage work, but merely the repair and improvement of an existing system, which experience has proved is defective in that it provides no adequate outlet, the work falls within sec. 77 of the Municipal Drainage Act, 10 Edw. VII. (Ont.) ch. 90, and can be performed without a petition.

[*Township of Orford* v. *Township of Howard*, 27 A.R. 223, followed; *Sutherland-Innes Co.* v. *Township of Romney*, 30 Can. S.C.R. 495, discussed and distinguished.]

2. WATERS (§ I C I—18)—MUNICIPAL DRAINAGE DITCHES—USE OF FORMER NATURAL WATERCOURSE—RIGHTS TO USE OF WHOLE SYSTEM.

Where watercourses have lost their natural condition and have become part of an artificial drainage system created under the drainage laws, the part of the system which was once a natural watercourse is entitled to no particular immunity under the law, over the

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parts which are purely artificial, but the whole must operate so as to discharge the waters which it gathers at a proper and sufficient outlet.

[*Re Township of Elma and Township of Wallace*, 2 O.W.R. 198; and *McGillivray* v. *Township of Lochiel*, 8 O.L.R. 446, distinguished.]

3. EMINENT DOMAIN (§ III B 3—126)—TEST OF DETERMINING INJURING LIABILITY BY CONSTRUCTION OF DRAINAGE WORKS—10 EDW. VII. (ONT.) CH. 90.

The test in determining injuring liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.), ch. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of lower land suffering injury from water brought from upper land by artificial means, and, where the drainage work will carry this water to a sufficient outlet, the lands from which the water causing the damage is artificially brought are assessable for injuring liability. (*Per* Henderson, Drainage Referee.)

4. DRAINS AND SEWERS (§ III—16)—RULES FOR MAKING ASSESSMENT—TEST OF DETERMINING OUTLET LIABILITY—10 EDW. VII. (ONT.) CH. 90.

The test in determining outlet liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.) ch. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of the land proposed to be assessed, and where lands can be more effectively drained after the construction of the drainage work than before, because they will then have an outlet which they did not have before, or where they are effectively drained, but their waters are not taken to a sufficient outlet, so that, legally speaking, they have no outlet at all, and the drainage work will give them a sufficient outlet, they are assessable for outlet liability. (*Per* Henderson, Drainage Referee.)

Statement

APPEAL by the Municipal Corporation of the Township of Orford from the report or decision of George F. Henderson, Esquire, K.C., Referee under the Drainage Laws for the Province of Ontario, dismissing with costs the appeal of Orford from the report of G. A. McCubbin, O.L.S., dated the 21st May, 1910, whereby he assessed and charged the sum of $3,225 against lands and roads in Orford in respect of a proposed drainage work in a natural creek or watercourse in Aldborough.

The appeal was dismissed.

The reasons for the decision of the Referee, given on the 8th September, 1911, were as follows:—

The drainage scheme in question on this appeal is one initiated by the Corporation of the Township of Aldborough, without a petition, for the extension of a former drainage work, known as the Pool drain, which had its outlet at a point in Aldborough, a very short distance to the west of the road between lot 3 and lot 2 in that township. The Pool drain was an improvement of a portion of a creek, known as the Kintyre creek, the headwaters of which arise some three or four miles further up in the township of Orford. Some ten miles up, in a more southerly portion of the township of Orford, there is the beginning of another creek, known as the Fleming creek, which has an outlet in the Kintyre creek at a point on lot No. 6 in the 4th concession of Aldborough.

The present intended improvement is the result of a complaint made by one Robert Graham, upon whose lands the Fleming creek joins the Kintyre creek; and the proposition is to take up the improvement of the Kintyre creek at the point to which it had already been made west of the road to which I have referred, and to straighten, widen, and deepen that creek along its course to and beyond the junction of the Fleming creek, as shewn upon the plan of the proposed work which has been filed.

There are a large number of drains in Orford tributary to the Kintyre creek, all of which have been constructed under the provisions of the Municipal Drainage Act or the Ditches and Watercourses Act. Similarly, the usual number of drains have been dug in the upper portion of Orford tributary to the Fleming creek, the improvement of which itself is marked upon the plan as the McKerracher drain. I find as a fact, on the evidence, that the flooding of which Mr. Graham complained to the council, and as the result of which he suffered in common with his more immediate neighbours, was caused by water caused to flow from lands and roads in Orford into Aldborough and brought by the Fleming creek and the Kintyre creek to the lands in Aldborough, to their detriment. I am satisfied, as a matter of law, that, in the result, lands in Orford are assessable because of this condition of things. The improved tributary to Kintyre creek has been altogether artificial down to the point at which the present work is intended to be commenced. It is a matter of particular importance, however, in view of the legal position taken by counsel for the appellant, that the Fleming creek has not been artificially improved throughout its whole length. Its artificial improvement ends at a point on lot B in the 6th concession of Aldborough, where the figures 68 appear on the plan filed as a portion of exhibit 1, that being the terminus of a proposed improvement of the Fleming creek now pending. I inspected such portions of the locality in question as the parties thought proper, yesterday, and think it proper to state that a view of the locality is of very great importance in this action; that it is so is largely because of the fact that the land is not only what is called rolling land, but rolling to a very considerable extent. The highways which we traversed are laid out along the road allowances provided by the surveys, but one goes a very short distance at any time before coming to a steep decline in the road, reaching down to approximately the water level, and then again followed by a steep ascent to higher ground. Generally speaking, the ground surface, except as to these low places, is some fifteen to twenty-five feet higher than the level of the creek. Each of these creeks itself runs along the bed of an unusually wide depression, and care has to be taken in estimating the evidence (if transcribed) to distinguish between the banks of the creek and the edges of

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the waterway itself. There are large stretches of good land on either side of the waterway. The high banks occur at the outer limits of these stretches.

The matter has been argued by counsel for the appellant on the assumption that the creek in its original condition must be taken to be the land level between the high banks, no matter how far apart these may be. I do not understand that it is the intention of the law that riparian proprietors should be entitled to the natural flow of the water at times of high freshets, no matter how far back that flow would extend. If that were the case, there are certain portions of this Province where the rights of people up-stream would be so great as to prevent the cultivation of many miles of very valuable farm property; and, if the argument presented were pushed to its logical conclusion, the result would be to defeat the purposes of the Drainage Act in very many cases. There must, of course, be an application of common sense to each particular case; and, whether I am right or wrong, I always endeavour to administer the law according to the particular case; and in this particular case, throughout almost all the course of the water as I saw it yesterday, I found the high banks to be so far back from the actual waterway and the quantity of land between the high banks and the actual waterway to be so extensive and so valuable that I think the matter must be treated as if the rights of the parties depended upon the flow in the actual waterway; and I so treat it. I elaborate that idea because I think it necessary in order to enable the intention of the engineer to be carried out, that intention being to render fit for cultivation during ordinary seasons all the low-lying lands between these high banks, which are now unfitted for cultivation because of the fact that they are flooded so frequently that it is unsafe to attempt to crop them. I cannot accept the evidence of those who say that the lands are not now flooded as seriously as they were some ten or twelve years ago. I prefer to accept the evidence of the others who say that the flooding has been increasing as the years go by. I note the fact that there has been no real attempt at cultivation of the flats for the last period of ten years or thereabouts, and that apparently there was some attempt at cultivation of portions of the flats before that time. I do not seriously regard the position of the witness who is still cultivating an acre of his flats. That is the witness D. McMillan, if I recollect rightly. His case illustrates the care that has to be taken in considering the situation as it is on the ground. I can quite appreciate that from his point of view there is no particular injury because of water brought down, because his flat land is so irregular in its natural conformation that it would be very difficult to cultivate it even if it had perfect drainage. I can quite appreciate the position of his namesake, higher up, who has 290 acres of land

and does not regard as a matter of consequence the injury to a couple of acres only of that large tract which he has never wanted to cultivate. A portion of it is in rough bush or slash, and it answers for pasture at the upper end of his farm. So, too, with some of the others who were called. They are men who do not want to pay the charges which the engineer has imposed upon them. If they had less land, and required to cultivate the land they had, they would probably feel differently from what they do feel. In estimating the evidence of witnesses of that class, one has to regard their actual condition. The fact remains that damage is occasioned to the lands of Mr. Graham and his neighbours, and that Mr. McCubbin proposes to do away with that damage by the very simple expedient of straightening, widening, and deepening the creek through their lands. Some of these men have already had sufficient enterprise to do that sort of thing on their own lands, although they have not done it to the extent which would be necessary in connection with the larger scheme now under way. For that the engineer gives them credit. The engineers agree, as they must agree, that the fact that there are many windings in the stream is a very important element causing damage.

Coming back to the question of legal liability, I am satisfied that the matter has resolved itself into the application of the judgment of the Court of Appeal in the case of *Township of Orford* v. *Township of Howard* (1900), 27 O.A.R. 223. In fact, I am told by counsel for the respondent that Mr. McCubbin had that decision in view in making the report which he has made, and that he was advised that he could not make the report had it not been for that decision. As I understand it, the Court of Appeal there holds that there may be an assessment for injuring liability, where, as a matter of fact, lands are injured by water brought down artificially from high lands, although not brought down to the actual point where the injury occurred, which is important here in view of the fact, already noted, that there is a considerable portion of the Fleming creek which is yet in a state of nature, and which is located between the now proposed improvement of the Fleming creek and its junction with the Kintyre creek. I find, on the evidence, as I have already stated, that the injury is caused by the waters which come down the Fleming creek, as well as by the waters which come down by the Pool creek. And, if I am right in my understanding of this decision, the result of that finding is, that lands in Orford to which these waters come are assessable, as a consequence. It is contended that, because the proposed improvement of the Fleming creek drain finds an outlet, within the meaning of the Act, at station 68, to which I have referred, there can be no liability attaching to lands in Orford beyond that point. At first blush that would seem to be a very formidable contention, but there again I apply the knowledge gained on the inspection

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and note that the improvement of the Fleming creek drain, for the small section over which it is being improved, is for a strictly localised purpose, which has no effect at all upon the facts which lead to liability in this case. At the point where the Fleming creek is being improved, there is one of the dips of country to which I have referred, and there is a short, comparatively short, space through which the highway is very materially affected by reason of the overflow of that creek. The improvement there will not materially affect the flow of water down Fleming creek. It will result in enabling the township corporation to take proper care of its roads, and will, of course, be of some benefit to or perhaps relieve from injury some of the adjacent lands; but it will not either prevent or to any appreciable extent facilitate the flow of the water from Orford which occasions damage to the lands in Aldborough now in question. It will, of course, bring down more water which would otherwise be evaporated, but the amount will be so small in comparison with the whole volume of water with which we are concerned, that I cannot feel that it should weigh in the determination of this present appeal.

Dealing with the question of whether or not the old outlet of the Pool drain is sufficient, I am satisfied, as the findings I have already made indicate, that it is not and never has been a proper outlet for the waters which are conducted to it. It may be that the assessment as to waters tributary to the Kintyre creek in Orford would be more properly outlet assessment; but, in view of the fact that there is no practical difference in this case in the result between the assessment for outlet liability and assessment for injuring liability, I have not thought it fit to suggest any alteration in the report. Had there been any practical difference so as to necessitate a re-adjustment of the assessment, I might possibly have thought fit to suggest that. But, however one regards it, the result is the same. There are waters brought to the old outlet, and which flow beyond it, causing damage to lands below. These waters occasion injury, and the engineer is justified in relieving them and in assessing the lands which cause the injury accordingly.

It may be convenient shortly to state the practical distinction between injuring and outlet liability, in view of the fact that many lawyers and most engineers complain of difficulty in understanding it. Where lands can be more effectively drained after the construction of the drainage work than before, because they will then have an outlet which they did not have before, they are assessable for outlet liability. Where lands are effectively drained, but where their waters are not taken to a sufficient outlet, so that legally speaking they have no outlet at all, and the drainage work will give them a sufficient outlet, they are again assessable for outlet liability. The test is, that, in order

to enable an assessment for outlet liability, the drainage work must be necessary, in fact or law, to enable or improve the cultivation or drainage of the land assessed.

Where, in the course of his examination, the engineer finds lands suffering injury from water brought from upper lands by artificial means, and his proposed work will pick this water up and carry it to a sufficient outlet, he can assess for injuring liability the lands from which the water causing the damage is so artificially brought. This is usually on pretty much the same state of affairs as the second kind of outlet liability, but from the opposite point of view, the test now being the existence of injured lands seeking relief, not higher lands seeking outlet. It follows that the extent of liability differs in each case, as set out in the respective sections.

An attack is made upon the engineer's principle of assessment, and it is said that he erred in arriving at his assessment for injuring liability, leaving his assessment for outlet liability to follow, and that for benefit to follow again. I do not so understand the evidence of the engineer. That evidence was given when he was under cross-examination, and when he was endeavouring to answer, to the best of his ability, leading questions such as counsel would put to him in cross-examination. It was counsel for the appellant who took up the question of injuring liability first, and I do not understand that the engineer did so. I noticed that he used the phraseology of the statute in answering questions put to him, shewing that he knew what he was talking about, and knew what he was doing when he made the assessment. I am satisfied, as a result of his evidence, that his charge for injuring liability was limited to the extent of the cost of the work necessary for the relief required; but I do not understand that he assessed to that extent. I have no warrant for holding, on the evidence, that there was anything wrong about the engineer's principle of assessment; although, perhaps, it is proper that I should say that I agree with counsel for the appellant that, while the Act says that the assessment may be to the extent of the cost of the work necessary for the relief of the injured lands, it does not at all follow that it should be so. Benefit should first be taken into account, and then outlet liability, and then injuring liability, although probably in many cases, as was the case here, in practical result, outlet liability and injuring liability will run side by side.

Another contention of the appellant is, that the scheme is not continued to a sufficient outlet, within the meaning of the Act. I cannot so find upon the evidence. Mr. Laird and Mr. Manigault compare it with the present Pool outlet, but overlook the all-important distinction that in the one case lands below are injured and in the other no injury is anticipated by either the engineer or the owners of the lands below. Again, the particular facts of the particular locality become important.

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I am also asked to find, on the evidence, that the assessment on lands in Orford is excessive. The total cost of the work, apart from a certain branch which is assessed exclusively upon Aldborough, is $6,645. For injuring liability lands in Aldborough are assessed at $1,094 and lands in Orford at $3,225. There is a small assessment for outlet liability, $126, on lands in Aldborough, and an assessment of $2,200 for benefit on lands in Aldborough. No evidence has been called to criticise the assessment for injuring liability on lands in Orford. The principle, of course, has been attacked. At first blush, again, the amount might seem large; but, when one thinks of the very large area which is very well drained by the two creeks and their tributaries, it is not surprising that the engineer has found it necessary to impose an assessment to the amount of $3,225. I cannot, on the evidence, say that he has in any way erred in that respect.

In the result, therefore, the appeal must be dismissed, with the usual result as to costs, and the costs in this case shall be on the scale of the High Court. The excess costs of the respondents, as between solicitor and client, shall be chargeable against the drainage scheme as a whole. The party and party costs of the respondents shall be chargeable against the lands in Orford. The solicitor and client costs of the appellant shall be chargeable against the lands in Orford.

Argument

*M. Wilson*, K.C., for the appellant. The decision of the learned Drainage Referee was based upon the previous decision of *Township of Orford* v. *Township of Howard*, 27 O.A.R. 223, which, as we contend, was not properly appreciated by him. The lands in Orford could not be assessed for outlet liability, and no such assessment was in issue at the trial, the assessment being for injuring liability alone. Here the burden is on the respondent to shew that the appellant should pay for work done in the respondent township. It is submitted that the work in question could not legally be done without a petition; and that, even if it could lawfully be so done, the facts of the case do not warrant it. As to the necessity for a petition, see the Municipal Drainage Act, sec. 3, sub-secs. 3 and 4, and sec. 77. There must be initiation on the part of the council in order to justify the work. The work in question is not desired by the appellant, and is useless to it, and the scheme should be set aside, as was done in *In re Township of Raleigh and Township of Harwich* (1899), 26 O.A.R. 313. Reference was also made to the following authorities: *Sutherland-Innes Co.* v. *Township of Romney* (1900), 30 Can. S.C.R. 495, at pp. 516-518, which was considered in *In re Township of Rochester and Townships of Mersea* (1901), 2 O.L.R. 435, at p. 439; *In re Townships of Orford and Howard* (1891), 18 O.A.R. 496, which was approved by Osler and Maclennan, JJ.A., in *In re Township of Harwich and Township of Raleigh*

(1894), 21 O.A.R. 677, and followed in *Broughton* v. *Township of Grey and Township of Elma* (1897), 27 Can. S.C.R. 495; Angell on Watercourses, 7th ed., sec. 108 (j), p. 134, also p. 6, and cases there cited. [GARROW, J.A., referred to *Young* v. *Tucker* (1899), 26 O A.R. 162.]

*C. St. Clair Leitch*, for the respondent, referred to secs. 77, 64, and 3 (3) of the Municipal Drainage Act, 1910 (10 Edw. VII. ch. 90), as giving the right to perform the work and make the assessment. Under sec. 77 no petition is required: *Re Township of Dover and Township of Chatham* (1909), 1 O.W.N. 327. [MEREDITH, J.A., referred to *Re Johnston and Township of Tilbury East* (1911), 25 O.L.R. 242.] The question at issue is concluded by the *Orford and Howard* case in 27 O.A.R., *supra*, where the previous cases are discussed: see especially the judgment of Lister, J.A., at p. 230. He also referred to *Young* v. *Tucker*, *supra*, and to *McGillivray* v. *Township of Lochiel* (1904), 8 O.L.R. 446.

*Wilson*, in reply, referred to *Re Township of Elma and Township of Wallace* (1903), 2 O.W.R. 198, and *In re Township of Caradoc and Township of Ekfrid* (1897), 24 O.A.R. 576, 581, and argued that the *Orford and Howard* case was not applicable to the circumstances of the present case.

June 28. GARROW, J.A.:—The facts are very fully set out in the judgment of the learned Referee, in the course of which he says:— GARROW, J.A.

"Dealing with the question of whether or not the old outlet of the Pool drain is sufficient, I am satisfied, as the findings I have already made indicate, that it is not and never has been a proper outlet for the waters which are conducted to it. It may be that the assessment as to waters tributary to the Kintyre creek in Orford would be more properly outlet assessment; but, in view of the fact that there is no practical difference in this case in the result between the assessment for outlet liability and assessment for injuring liability, I have not thought it fit to suggest any alteration in the report. Had there been any practical difference so as to necessitate a re-adjustment of the assessment, I might possibly have thought fit to suggest that. But, however one regards it, the result is the same. There are waters brought to the old outlet, and which flow beyond it, causing damage to lands below. These waters occasion injury, and the engineer is justified in relieving them and in assessing the lands which cause the injury accordingly."

This seems tersely to epitomise the case with which we are called upon to deal.

Counsel for the appellant addressed us very fully and very ably upon certain objections, all of which are in their nature

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objections going to the jurisdiction of the council. These, briefly stated, are: (1) that the proceedings should have been initiated by petition, and not by report without petition; (2) that the work proposed is useless to Orford lands, which already have a sufficient discharge by the works already constructed, and for the construction of which the land-owners in Orford have paid their share; (3) that the Orford lands discharge into natural watercourses, with defined banks, and are for that reason not liable for the proposed work; (4) that the proposed work does not improve the present outlet or furnish a sufficient outlet.

There were also objections as to the details of the assessment and upon the merits generally, all of which were very fully dealt with by the learned Referee, with a knowledge and experience in such matters to which I cannot pretend; and I, therefore, content myself with a general agreement with his conclusions as to them.

Dealing now with the objections to the jurisdiction beforementioned, and taking them in their order, I am quite unable to follow the learned counsel in his contention that a petition was necessary. The contention necessarily implies that, if there had been a petition, the objection would fail. I could more easily understand an argument that, even upon petition, the circumstances are such that the relief could not lawfully be granted; and that, that being so, there could be no relief, either upon petition or report—in view of the fact which we have here of an intervening watercourse. Such an argument would have had some show of virtue, and even of authority (see *In re Township of Rochester and Township of Mersea*, 2 O.L.R. 435), under the old and narrower construction of sub-sec. 3 of sec. 3 of the Municipal Drainage Act, 1910, by reason of the absence from it of the words "either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse," which are in sub-sec. 4. The "any means" in sub-sec. 3 did not, so it was held, include a "swale, ravine, creek or watercourse" —always, it seems to me, an excessively narrow construction. But, if it be granted, as it apparently is, that the relief required could be obtained on petition, the objection seems utterly to vanish. What is proposed is not the construction of a new drainage work, but merely the repair and improvement of an established system which, experience has proved, is defective, in that lands and roads along its course are being flooded from year to year by the overflow of waters for which that system provides no adequate or sufficient escape. Such a case seems to me very clearly to fall within the express provisions of sec. 77 of the Municipal Drainage Act as to "repairing upon report."

In considering such cases as *Sutherland-Innes Co.* v. *Township of Romney*, 30 Can S.C.R. 495, and *Township of Orford* v. *Township of Howard*, 27 O.A.R. 223, both of which were much dis-

cussed before us, it should be remembered that this section, which is the old sec. 75, was very materially amended after both these decisions, by 6 Edw. VII. ch. 37, sec. 9, so as to be made expressly to apply to the case of the better maintenance of a natural stream, creek, or watercourse, which had been artificially improved by local assessment or otherwise in the same manner and to the same extent and by the same proceedings as are applicable to the better maintenance of a work wholly artificial. The effect of this amendment is very wide. It destroys at one blow the value of much that was said in *Sutherland-Innes Co.* v. *Township of Romney*, never in some respects an entirely satisfactory decision: see *per* Armour, C.J.O., in *In re Township of Rochester and Township of Mersea*, before cited, 2 O.L.R.at p. 436; it restores the authority of *Township of Orford* v. *Township of Howard* as an exposition of sub-secs. 3 and 4, which had been shaken by the *Sutherland-Innes* case; and, quite apart from these, and from all the other cases decided before the amendment, it apparently gives a new and substantive right, directly applicable to the facts and circumstances which here appear.

It would, perhaps, have been better if the Legislature had expressly made the words which I have quoted from sub-sec. 4 applicable also to the previous sub-section. To have done so would, at least, have saved some rather hair-splitting arguments upon the subject to which the Courts have had from time to time to listen. There is, upon the face of things, no good reason why injuring liability should stand upon one foundation and outlet liability upon another and a different one. It must surely often happen that certain sections or lots in a drainage scheme are liable for both. In *Township of Orford* v. *Township of Howard*, Lister, J.A., apparently with the concurrence of the other members of the Court, held that the amendment of sub-sec. 4 by the introduction of these words had had the effect of also enlarging the meaning of sub-sec. 3—a conclusion fortified and put beyond question by the subsequent amendment, which, while not primarily directed to sub-sec. 3, is directed to another and a minor phase of the same subject-matter.

The second and third objections, which are somewhat related, may perhaps be conveniently considered together.

It is not, in my opinion, necessary in this case to discuss the general question of the riparian right of drainage into natural watercourses for the purposes of agriculture. The facts in the cases of *Re Township of Elma and Township of Wallace*, 2 O.W.R. 198, and *McGillivray* v. *Township of Lochiel*, 8 O.L.R. 446, to which counsel referred and upon which he relied, were very different. Fleming creek and Kintyre creek, both, although small, entitled in strictness to be called watercourses, long ago lost their natural condition and became part of an artificial drainage system created under the drainage laws of the Province.

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The law permits that to be done. And, when it is done, the part of the system which was once a natural watercourse is entitled to no particular immunity, under the law, over the other parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers, at a proper and sufficient outlet. The law at least aims at affording complete relief from the common enemy, and not merely a nominal or paper relief, or the relief of one section of the locality at the expense of another. And until this main object is secured, I see nothing in the Act pointing to the finality upon which so much of the argument was based. Section 77 provides that "Wherever, for the better maintenance of any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment, *or to prevent drainage to any lands or roads* it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work . . . the council . . . may . . . undertake" the work.

These words are very large, but not too large for the accomplishment of the very desirable purpose aimed at by the Legislature; and they should not, in my opinion, be narrowed by the construction for which the appellant contends.

The remaining objection, of the insufficiency of the proposed outlet, is a question of fact depending upon the evidence, and was determined against the appellant by the learned Referee. The learned Referee, in the course of his judgment, points out the importance in this case of a personal inspection which he had made. Whether or not his conclusion upon this objection was affected by the inspection does not, I think, appear; but, however that may be, while the finding is not in some respects entirely satisfactory, I am not convinced that it is erroneous. And I reach this conclusion with the less regret because the objection does not appear in the written notice of objections served by the appellant, which contains some thirteen other objections. If it had, it is quite possible that further and more satisfactory explanations would have been forthcoming.

Upon the whole, the appeal, in my opinion, fails, and should be dismissed with costs.

Meredith, J.A.

MEREDITH, J.A.:—I desire to say that, as they appear to me, all the points raised, and argued at such length, on this appeal, involve, when properly looked at, questions of fact only.

The question whether the scheme was properly launched without a petition, is simply a question whether, on its facts, that scheme came within the provisions of sec. 77 of the drainage enactment.

Upon such a question, the finding of the Drainage Referee, who had all the ordinary advantages of a trial Judge, as well

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as the advantage of a personal inspection of the locality and of the work—especially when that finding is in accord with the drainage engineer's judgment—is not lightly to be reversed in any Court of Appeal, even if otherwise one might be inclined to reach a different conclusion, which I am not: and so the appeal fails upon that branch of it.

So, too, as to the sufficiency of the outlet, and also as to the method of assessment, and the amount of the several assessments.

The provisions of the drainage enactment ought not to be employed to such an extent as to be oppressive or unreasonably burdensome; the duty of municipal councils is, or ought to be, a safeguard against that; nor should unauthorised methods be taken to effect that which cannot be effected by authorised methods; the Courts should prevent that; but there is, as far as the evidence shews, nothing objectionable in this case in these respects.

I concur in dismissing the appeal.

Moss, C.J.O., Maclaren and Magee, JJ.A., also concurred in dismissing the appeal.

Moss, C.J.O.
Maclaren, J.A.
Magee, J.A.

*Appeal dismissed.*

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## REID v. TABER TRADING COMPANY.

ALTA.

D. C.

1912

Oct. 23.

*District Court of the District of Calgary, Alberta, Walsh, J. October 23, 1912.*

1. Courts (§ II A 1—150)—Alberta District Courts—Jurisdiction.

The jurisdiction of a District Court is not ousted merely by reason of the fact that defendant resides, and the cause of action arose, without the limits of the judicial district in which the action is brought.

Statement

Motion to set aside the writ of summons on the ground of want of jurisdiction.

The motion was refused.

*Fenerty*, for the motion.

*McDonald*, for plaintiff, *contra*.

Walsh, J.

Walsh, J.:—The defendant applies to me sitting as a District Court Judge in Chambers for an order setting aside the writ of summons issued out of the District Court of the district of Calgary on the ground that "this honourable Court has no jurisdiction to adjudicate on this claim." The defendant does not reside nor did the cause of action arise in this judicial district and it is upon these facts that the defendant's argument as to want of jurisdiction rests; the contention being that a District Court action can only be brought in the Court in which either the defendant lives or the cause of action arose.

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The application should, I think, have been made to the Supreme Court for prohibition but in view of the disposition which I am making of it I am disregarding its form.

The Legislature had the undoubted power to establish the District Courts and to confer upon them the jurisdiction which it has given to them. It also had the power either to extend the jurisdiction of each Court over men living or causes of action arising in any part of the province or to limit it to men living or causes of action arising within its own territorial area. There is nothing in the Act which says in so many words what the jurisdiction of each Court shall be in this respect and it is therefore only by a scrutiny of the various sections which bear upon the question that the intention of the Legislature can be ascertained. The Courts are created by section 3 which says that "there shall be in every judicial district a Court of Record to be styled the District Court of the district of (as the case may be)." These words import nothing more than this that in each judicial district a new tribunal is brought into existence whose functions must be discharged within the territorial limits of the district.

The jurisdiction of the Courts is conferred by the group of sections numbered from 23 to 27, both inclusive, of which 23 is the pivotal section. Under it the Courts have jurisdiction in *all* causes of the various characters enumerated in it up to the amount thereby limited. The language of this section is broad and simple. There is nothing whatever in it suggestive of a limitation of the jurisdiction to men who live, or events which occur within its geographical area. Giving to its words their ordinary meaning they seem to me to mean nothing less than this, that given a cause of action of one of the kinds named in the section and involving no greater amount than that which is thereby fixed as the pecuniary limit of the Court's jurisdiction, any District Court in the Province can entertain it, unless it is an action to which under section 32 a local venue is given. I think it a fair inference that when the Legislature says, as it does in sec. 32, that some actions must be brought and tried in a certain district its intention was that no other action should be under any such limitation and therefore that any other action can be brought and tried in any district.

The new sub-sec. enacted by sub-sec. 2 of sec. 13 of ch. 4 of the statutes of 1909 which enables a Judge to transfer an action to another Court where the preponderance of convenience is against the trial in the Court in which the action was commenced, affords some evidence of the fact that the jurisdiction is not fixed by such considerations as the defendants' residence or the place where the cause of action arose.

Section 40 gives validity to process of the Court which is to

be served or executed in another district which is a plain stretching of the arm of the Court beyond the confines of the district. Section 41 limits the jurisdiction in probate to the estates of persons dying within the territorial limits of the Court which is so far as I can ascertain the only residential test applied to the Court's jurisdiction.

The provisions to which I have referred, in the entire absence of anything in the Act to shew a contrary intention on the part of the Legislature, satisfy me that there is no such limitation upon the jurisdiction of a District Court as the defendant here contends for, but the strongest argument against the defendant's contention is, I think, to be found in the sections to which I will now refer.

Section 35 brings the Judicature Ordinance into force in all the District Courts. Section 4 of that Ordinance provided that suits should be entered and tried in the district where the cause of action arose or in which a defendant resided or carried on business at the time of action brought. This section would therefore have applied to the District Courts if it had remained in force, but it was repealed by an Act that received the Royal assent on the same day that the District Courts Act was assented to, the repeal being accomplished by sub-sec. (1) of sec. 7 of ch. 5 of the statutes of 1907. By section 52 of the District Courts Act the small debt procedure set out in Part III. of the Judicature Ordinance is made to apply to claims under $100 in the District Courts. By sub-sec. 7 of sec. 7 of ch. 5 of the statutes of 1907 it is enacted that

> in small debt cases suit shall be entered and unless otherwise ordered tried in the judicial district where the cause of action arose or in which the defendant or one of several defendants resides or carries on business at the time the action is brought.

The result therefore of these enactments all passed at the same time is that the section of the Judicature Ordinance which would have made it impossible to bring or to carry on this action in the Calgary District Court was repealed and the provisions of that section were in effect transferred and made applicable only to small debt suits. The mere mention of this limitation in the case of a small debt action would, under the well-known maxim, exclude its application to other actions, but when, in addition, there is at the same time the removal of the limitation from other actions by the repeal of a section which would have imposed it, there seems to me to be no room for further argument about it.

The only section to which the defendant's solicitor referred me in support of his contention is section 33 which provides that an action by or against a District Court Judge may be brought in the Court of an adjoining district, the argument, of

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course, being that the reason for this section lies in the fact that without it the Judge must sue or be sued in his own Court. I think that the only Court in which such an action could be brought is that of an adjoining district, the word "may" in the section meaning "must" or "shall." The object of the section is not to give the plaintiff in such an action a choice between the two Courts but to take away from him the right which he otherwise would have to sue in the Court presided over by one of the parties to the litigation.

The opinion which I expressed on the argument against the defendant's contention was based largely upon my familiarity with the County Courts Act of Ontario and the practice under it. County Court actions are commenced there without the slightest reference to the defendant's residence or the county in which the cause of action arose. Our Act is modelled very closely upon the Ontario Act. The Courts are created and the jurisdiction conferred in almost identical language. There is there, as here, the element of local venue in certain cases and the practice of moving to change the venue when inconveniently laid by the plaintiff. In fact, in all things essential for consideration on this application, our Act is practically a reproduction of the Ontario Act, except that the latter contains no small debt provisions, those being found in Ontario in the Division Courts Act. I have been unable after a careful search through the Ontario Digests to find any case reported in which the contention here made was even suggested in that Province. On the other hand, reports of motion to change the venue are innumerable and in many of them the residence of the defendant and the place in which the cause of action arose form an important element as justifying a change. In some of the other Provinces the Act creating the inferior Court limits its jurisdiction as the defendant here contends that ours should be, and in those Provinces such a motion as I am now disposing of would of course succeed. The question of jurisdiction turns in each Province upon the wording of the statute under which the Court is created.

For the reasons which I have attempted to give, the motion must be dismissed. As the point involved is of considerable importance and it comes up now for decision for the first time so far as I know, I direct that the costs of it shall be in the cause.

*Motion dismissed.*

## JOHNSON v. CITY OF MONTREAL and THE MERCHANTS' TELEPHONE COMPANY of Montreal.

QUE.
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Oct. 12.

*Quebec Superior Court. Trial before Saint-Pierre, J. October 12, 1912.*

1. PROXIMATE CAUSE (§ I—8)—INDEPENDENT NEGLIGENT ACTS OF TWO PERSONS CAUSING INJURY TO A THIRD PERSON.

Where one person is negligent, and, by the negligence or wilful act of another, his negligent act causes injury to a third person, if the first negligent act be not in its nature such that the second might be looked for as a natural and probable consequence, then the first negligent person is not responsible, but, if it be so, then he is liable.

[See 1 Beven on Negligence, 3rd ed., 76.]

2. DEATH (§ III—20)—FALL OF TELEPHONE POLE IN PUBLIC STREET—ACT OF COMPANION OF DECEASED.

Where a pole erected by a telephone company upon a street of a municipality has decayed to some extent, but would nevertheless have stood for some time without falling by its own weight, and was still fit to be used for the purpose for which it was erected, and one passing along the street, in a frolic, jumps up and catches a guy wire attached to the pole, and pulls the pole down upon his companion and injures him, neither the telephone company nor the municipality is responsible for such injuries.

[*Nordheimer* v. *Alexander*, 19 Can. S.C.R. 248; and *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240, discussed and distinguished.]

Statement

AN action for damages for the death of the plaintiff's husband caused by the fall of a telephone pole erected by the defendants the Merchants' Telephone Company of Montreal on St. Dominique street in the city of Montreal.

The action was dismissed.

*A. Chase Casgrain*, for the plaintiff.

*R. C. Smith*, K.C., and *G. Gordon Hyde*, for the Merchants' Telephone Co.

*J. A. Jarvy*, for the city of Montreal.

Montreal, October 12, 1912.

St. Pierre, J.

SAINT-PIERRE, J.:—The question submitted for the decision of the Court is one of responsibility resulting from an accident wherein Bruce Currie, the husband of the plaintiff, lost his life.

By her present action, Elizabeth Johnson sues the Merchants' Telephone Company and the city of Montreal, both of which she holds responsible for said accident, and claims from them jointly and severally the sum of $75,000, said sum representing, as she alleges, the loss she has sustained in consequence of the death of her husband.

The facts are but few and quite simple:—

In the year 1910, the Merchants' Telephone Company of Montreal had one of their large wires running along Dorchester street from the west as far as St. Dominique street in the east, where it had been made to turn at a square angle so as to

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follow the western side of this last-mentioned street going up north.

In order to ease off the strain produced at the angle upon the pole put up there, another pole had been planted on St. Dominique street some distance south of Dorchester street on the western side of the street, which pole was connected by a strong wire with that at the corner of Dorchester and St. Dominique streets. At the time of the accident, however, this connecting wire had been temporarily removed. In order to give more strength to the counter traction intended to be obtained by the use of this auxiliary pole, it had been planted so as to incline southward, and had been anchored in the ground by means of a guy wire running from its head to a considerable distance towards Lagauchetiere street, with its other end securely fastened in the ground underneath the edge of the sidewalk, thereby forming a line descending gradually and running in a slanting direction from the pole's top to the ground.

On Saturday, the 12th November, 1910, about midnight, five young men, named respectively David Mendelshon, Bruce Currie, the deceased husband of plaintiff, Honoré Fréchette, Pierre Chouinard and Charles Hansher, who had spent the evening together, were going up St. Dominique street walking in Indian file on the western side of the street, when, on nearing Dorchester street, where the guy rope of the slanting post I have just described was at their side, Mendelsohn, who was leading and who is a strong and comparatively heavy man, was seized with the mad freak of playing acrobat. He suddenly jumped up, and, clutching the guy wire with both hands, suspended himself from it. At the same moment a creaking noise as of wood breaking was heard and the pole fell down, injuring Currie, who was walking next to Mendelsohn, so seriously that he died at the hospital in the same night. Hence the present action of damages by his widow, both against the Merchants' Telephone Company of Montreal and against the city.

Her contention is that so far as the Merchants' Telephone Company is concerned, it should be held responsible for the reason that the pole in question which had been planted by them and was their property was rotten at the level of the ground, and as to the city, that it also should be held responsible for the reason that it had failed in its duty by allowing to stand in one of its streets a rotten pole which was a constant menace to the lives of the passers-by. As the broken ends of the pole were produced before the Court, it became easy to ascertain the real condition in which the wood was. It was then seen that said pole was far from being in as bad a condition as had first been represented. Those pieces of stumps have a diameter of about eighteen inches, out of which more than six

inches in the centre appeared to be perfectly sound. The surrounding parts were what the witnesses call "hazy," a word which I would take to correspond to the French word "eotti," used by the common people in this country. Now it is clear that this pole in the condition in which it was could have lasted for a considerable time without falling under its own weight, and that it was still fit to be used for the purpose originally intended it should serve.

A number of authorities have been cited on behalf of the plaintiff in order to shew that the owner of a building which has tumbled or crumbled down, or of a tree which has fallen under its own weight, are responsible for the damages caused by such accidents.

I quite agree with the principle thus laid down by the text writers, but our case differs essentially from those upon which such a legal conclusion has been made to rest.

I find in Beven on Negligence (Canadian edition, vol. 1, p. 76), a distinction in cases of responsibility resulting from negligence, which may assist us in arriving at a proper solution of the one now under consideration. It reads as follows:—

> Again, one person may be negligent, and by the negligent or wilful act of another the negligent act of the first may cause injury to a third; then, says Beven, "a distinction is to be taken: If the first negligent act is not in its nature such that the second might be looked for as a natural and probable sequence, then the first negligent person is not responsible. If the subsequent negligence is likely to follow from the antecedent negligence, then the first negligent person is liable."

Among the cases which were brought under my notice on behalf of the plaintiff, two may be here referred to as illustrations of the above distinction. One is the case of *Nordheimer* v. *Alexander*, M.L.R. 6 Q.B. 402, decided by our own Courts, and the other the English case of *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240.

In the case of *Nordheimer* v. *Alexander*, M.L.R. 6 Q.B. 402, and *Nordheimer* v. *Alexander*, 19 Can. S.C.R. 248, the evidence shewed that a high wall which had been left standing for several days after a fire had destroyed Nordheimer's store, and which, owing to the effect of a strong wind, had fallen upon Alexander's house, constituted a succession of facts which rendered Nordheimer responsible for the damage caused to Alexander's property. Nordheimer was clearly at fault in leaving this high wall standing, and the various Courts which were called upon to adjudicate upon his case readily came to the conclusion that he should naturally have anticipated that precisely such an accident as actually did occur would be quite likely to take place under the action of a strong wind. The

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consequence was that Nordheimer was held liable and condemned to pay damages.

In the case of *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240, the English Judges came to a similar conclusion.

The facts were those: The driver of a horse and cart left it for a temporary purpose, and a lad in the cart, while wrongfully and against orders, attempting to drive, ran into the plaintiff's carriage, which was upset, the occupants sustaining serious injury. The Judges held that the driver of the horse and cart should have anticipated, or at least suspected, that the lad might start the horse and as a consequence that some accident would happen.

Turning now to our case, I must say that I find nothing that would justify any anticipation that some foolish young man might act as Mendelsohn did act on the occasion I have mentioned. The pole was good enough for the purpose for which it had been put up and nothing short of the tremendous weight which was made to bear upon the guy wire could have caused it to break and fall down as it did. In addition to the shock produced by Mendelsohn suddenly clutching at the wire, the weight of his body must have acted in the same manner as the moveable weight upon the beam of a steel-yard, thereby creating a pressure which only a body several times the size of his own could otherwise have produced. It is doubtful that a pole more than half the size of the one which was broken, assuming it to be perfectly sound, could have resisted such a pressure.

Let us suppose by way of illustration that the shutters of one of the houses along the street had been hung upon weak hinges, and that Mendelsohn had by a sudden pull jerked off one of those shutters, which in its fall had injured his friend, Currie, could it be reasonably contended that the owner of the house might be held liable in damages owing to the fact that the hinges of his shutter were weak, and by pretending that if they had been stronger the accident might not have happened? Such an action would simply be preposterous; shutters no more than guy ropes used for telephone poles, are not expected to become objects of sport for young men who happen to be passers-by.

My conclusions, therefore, are that no fault can be attributed either to the Merchants' Telephone Company of Montreal nor to the city, and that the sole recourse of the plaintiff is against the young man whose foolish act was the cause of the accident and as a consequence of the death of the plaintiff's husband.

The action is, therefore, dismissed with costs.

*Action dismissed.*

## Re COUTTS and LEBOEUF.

ONT.

H. C. J. 1912

*Ontario High Court, Kelly, J. June 7, 1912.*

1. WILLS (§ III E—108)—CONSTRUCTION—DESCRIPTION OF LANDS—TOWNSHIP LOTS—NORTH HALF FOR SOUTH HALF—MISTAKE IN DESCRIPTION.

Where a testator, at the time of his will, and at his death owns the north half and no part of the south half of a certain township lot, and in his will devises to his son the south half of the north half and to his wife the "north half of the south half," the devise to the wife will be read as the "north half of the north half," where the will shews an intention to dispose of all his lands, and such a reformation of the will fits the testator's exact ownership.

[*Re Clement*, 22 O.L.R. 121; *Smith* v. *Smith*, 22 O.L.R. 127; *Re Harkin*, 7 O.W.R. 840, 841, referred to.]

Statement

AN application under the Vendors and Purchasers Act.

*J. A. Walker*, K.C., for the vendor.

*A. Clark*, for the purchaser.

Kelly, J.

KELLY, J.:—Jane Coutts, claiming to be devisee under the will of her husband, Alexander Coutts, of the north half of the north half of lot 11 in the 5th concession of the township of Tilbury East, in the county of Kent, agreed, in February, 1910, to sell these lands to Eugene Lebœuf. The purchaser objected to the title, on the ground that the property was not devised or disposed of by Alexander Coutts, and did not pass by his will, and that he died intestate as to it; and that, therefore, the vendor has no power to sell it.

Alexander Coutts made his will on the 17th April, 1875, and died on the 14th August, 1881. His wife, Jane Coutts, was appointed his executrix, and probate of the will was issued to her.

The first paragraph of the will is: "I give devise and bequeath all my lands and tenements goods and chattels as follows." Then, after devising to his son the south half of the north half of lot 11 in the 5th concession of Tilbury East, containing 50 acres more or less, and other lands, he devised to his wife, Jane Coutts, the vendor, for the benefit of his family, several parcels, including "the north half of the south half of lot number 11 in the 5th concession, containing 50 acres more or less;" and he did "also enjoin her to sell any portion or parcel of the lands willed to her at any time she may see fit or judicious."

At the time the will was made, and also at the time of his death, the testator was the owner of the north half of lot 11 in the 5th concession of Tilbury East, but was not then and never was the owner of or interested in the south half of that lot.

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The will shews an intention on the part of the testator to dispose of all his lands and tenements, etc. Not owning the south half of the lot, but owning the north half of it, and having devised the south half of the north half to his son, if in the devise to Jane Coutts he had used the word "north," instead of "south," the description in the will would then, as stated in *Re Harkin*, 7 O.W.R. 840, at p. 841, "fit his exact ownership, and all his lands will pass by his will as the intention is therein expressed."

I am of opinion that the will operated so as to pass to the vendor, Jane Coutts (for the benefit of the testator's family, and subject to the power of sale as therein expressed), the north half of the north half of lot 11 in the 5th concession of the township of Tilbury East. I refer to *Re Harkin*, 7 O.W.R. 840; *Re Clement*, 22 O.L.R. 121; and *Smith* v. *Smith*, 22 O.L.R. 127, where many of the earlier cases are considered.

*Judgment for vendor.*

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Oct. 16.

## ERNST v. SLAWENWHITE.

(Decision No. 1.)

*Nova Scotia Supreme Court, Russell, J. October 16, 1912.*

1. LEVY AND SEIZURE (§ III B—46)—ABSCONDING DEBTOR — PROCESS — MOTION TO SET ASIDE—SUMMARY RELIEF, WHEN REFUSED.

Where the defendant, an alleged absconding debtor moves summarily under the Supreme Court Rules (N.S.), to set aside a process issued against him, if originally the circumstances of the case at the time the process was issued were such as to warrant the *bonâ fide* belief that the defendant was absconding from the province, the process will not, under the summary jurisdiction of the court, be set aside even though the defendant has returned to the province and shews that he had had no intention of remaining out of it, but if the defendant's property has been attached unwarrantably he will be left to his action therefor.

[*Hunt* v. *Soule*, 1 N.S.R. 206 (ed. 2), followed; *Starr* v. *Muncey*, 3 N.S.R. 244, referred to.]

Statement

MOTION to set aside process against an alleged absconding debtor.

*V. J. Paton*, K.C., for plaintiff.

*McLean*, K.C., and *Margeson*, for defendant.

Russell, J.

RUSSELL, J.:—In *Hunt* v. *Soule*, 1 N.S.R. 206 (ed. 2), Halliburton, C.J., referring to the case of *Starr* v. *Muncey*, 3 N.S.R. 244, cited by both parties in the present contest, said that the Court had decided in this case that the mere return of the defendant into the province would not authorize the Court to set aside the process if circumstances authorized the issue of it at the time, *i.e.*,

if those circumstances authorized the plaintiff to deem the defendant an absent or absconding debtor when he sued out the process. I understand this to mean that if the circumstances were such as to warrant the *bonâ fide* belief that the defendant was absconding the process would not be set aside even though the defendant should return to the province, and even if he could shew that he had no intention of remaining out of the province. The learned Chief Justice in the same case said that "if the circumstances leave any doubt upon the minds of the Court the summary jurisdiction to set the process aside ought not to exercise, but if the defendant thinks his property has been attached unwarrantably he should be left to his action."

The circumstances of this case seem to me to have fully warranted the belief that the defendant was an absent or absconding debtor, and I must, therefore, decline to set aside the process. I reserve the costs of opposing the motion, which should probably be made plaintiff's costs in the cause to be set off in the possible event of his ultimate failure in the action.

*Motion refused.*

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## ERNST v. SLAWENWHITE et al.
### (Decision No. 2.)



*Nova Scotia Supreme Court. Trial before Russell, J. October* 23, 1912.

1. EVIDENCE (§ II L—345)—PRESUMPTION AS TO PAYMENT OF ACCOUNT—PARTNER OF CREDITOR AS WELL AS OF DEBTOR—STATUS.

Where a claimant is a partner in a firm of ship-supply merchants and is also the owner of a one-third interest in a certain vessel, and where the claimant sells out his one-third interest in the vessel to the owners of the remaining two-third interest, and it appears that at the time of this sale there was a current account for ship supplies outstanding against the vessel in question and in favour of the firm of merchants of which the claimant was a partner; there is from these circumstances of themselves no presumption that the claimant by virtue of selling his interest in the vessel intended thereby to waive his claim as a merchant for the ship supplies, and this especially since none of the parties to the sale of the interest in the vessel appears to have so treated the supply account.

Statement

TRIAL of an action on an acceptance.

*V. J. Paton*, K.C., for plaintiff.

*McLean*, K.C., and *Margeson*, for defendant Slawenwhite.

Russell, J.

RUSSELL, J.:—The making of the acceptance was disputed in the first instance and a comparison of handwriting shewed some peculiarities that warranted a doubt as to the genuineness of the signature. But the defendant abandoned that part of his defence and the sole contention now made is that the deceased Ernst was only entitled to two-thirds of the amount that the acceptance represents and that the present plaintiffs suing as his executors, can only recover that amount.

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The transaction arises out of, or rather is connected with, the ownership of a vessel in which Abraham Ernst and the two defendants Slawenwhite and Rudderham were interested in substantially equal shares (the 64 shares were not exactly divisible and the odd share was held by one of the three). After the running of the vessel for some time Ernst sold out to the other owners at their desire and request. His firm had been supplying the vessel and rendering accounts from time to time and notes were running for such supplies both before and after the sale from Ernst to the other owners, which took place in 1908. Ernst died in September, 1911. In July of that year there was an acceptance for upwards of $2,000 which was a consolidation of two previous or current obligations, with some charges added, for interest certainly, and I suppose for supplies, although of this I am not certain and need not pause to make myself certain. It is sufficient to say that this acceptance was made by Slawenwhite in such form that it might be contended that it was in a representative capacity as made on behalf of the owners of the vessel, of whom, however, Slawenwhite was one and Slawenwhite and Rudderham were the only two. When this acceptance came due the firm of J. Ernst & Son drew on Slawenwhite for the amount required to retire it, and this was duly indorsed by Slawenwhite, but has not been paid.

I can see no defence to the action. Abraham Ernst sold out his shares in the vessel to his co-owners for $500. It would be absurd to suppose that he meant to forego his claim as a member of the firm for the supplies furnished to the vessel or that he was to continue liable for the debts of the vessel to his own firm or to anybody else. The common sense of the matter as well as the conclusion to be drawn from the conduct of the parties is that he merely parted with all his interest in the vessel for $500. He did not part with his claim as a merchant for supplies to the vessel. If this had been the understanding the account would have been so adjusted when the current acceptance or acceptances or note or notes came due after the sale. The continuing owners instead of accepting for the whole amount of the current obligations to Ernst & Co. would have struck off one-third of the amount and accepted for the balance. Indeed, it would be a singular thing that they did not have the matter so adjusted at the time of the sale. If the proposition had been made to Ernst that although he was to receive $500 for his shares in the vessel he must lose one-third of his claim for supplies, I think the proposition would have been rejected. If he or his estate is to lose that claim because he was a part owner when the goods were supplied, there is no reason why he should not have continued liable on all the other existing obligations, if any. The parties themselves have not so dealt with the matter. The

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subsequent acceptances for supplies which were running for three years or thereabouts after Ernst had sold out were treated as obligations of the continuing owners to the firm of J. Ernst & Son. Whatever question there may have been in connection with the previous notes or acceptances I do not see how any question can be made with respect to the draft sued on which is made by the firm of J. Ernst & Son, after the death of Abraham Ernst and accepted without qualifications by Slawenwhite. The other part-owner Rudderham does not defend the action. He is, of course, not liable on the acceptance. The claim against him as against Slawenwhite is not directly on the acceptance, but for money paid to retire the acceptance which it is alleged was drawn for the accommodation of the two defendants to renew a note endorsed by J. Ernst & Son for the accommodation of the defendants, that is the July note already mentioned. The defence on the part of Rudderham being withdrawn, I see no reason why there should not be judgment for the plaintiff as claimed.

*Judgment for plaintiff.*

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## TOWN OF WATERLOO v. CITY OF BERLIN.

ONT.
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*Ontario High Court. Trial before Boyd, C. November 8, 1912.*

1. COURTS (§ I D—124*b*)—JURISDICTION — MATTERS UNDER CONTROL OF THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

A formal agreement between municipalities which is not of a voluntary character but which is executed in conformity with a direction of the Ontario Railway and Municipal Board as to the operation of a municipal railway is within the exclusive jurisdiction of the Board as to adjustment of differences arising thereunder between the municipalities in the accounting for the profits of the operation of the road, and an action in the High Court will be dismissed.

Statement

ACTION to enforce a proper accounting for profits under an agreement between the parties for the operation of a street railway.

The action was dismissed.

*A. B. McBride*, for the plaintiffs.

*A. Millar*, K.C., for the defendants.

Boyd, C.

BOYD, C.:—Action by the town of Waterloo against the city of Berlin to enforce proper accounting under clause 20 of an agreement between these parties dated 18th January, 1910. The agreement, as a whole, makes provisions for the operation of the street railway between these municipalities; the railway itself being owned and operated by the defendants.

Clause 20 provides that Berlin shall pay to Waterloo one-quarter of the annual net profits earned by the railway on the

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1st January of each year. The complaint is that Berlin has wrongly assumed to make deductions from the total profits "under the guise of taxes," and has so reduced the amount properly payable to the plaintiffs: and also with like effect the defendant has charged to maintenance account several sums which should have been properly charged to the capital account; and otherwise has failed fully to account for other profits. A general account is asked with special declarations of liability. The defendant pleads as a matter of law that the Court has no jurisdiction.

It was admitted that the agreement sued on was not of a voluntary character between the signatories, but was the outcome and the effective expression of terms and regulations imposed by the Ontario Board of Railway Commissioners by its order duly made on the application of Waterloo. The agreement itself was after execution submitted to and approved of by the same Board as appears by its order dated 2nd September, 1910. The objection having regard to these conditions is well taken. The policy of the legislature is that questions such as these between municipalities and street railways as to their operation and mutual relations, financial or otherwise, should be exclusively dealt with by the Railway Board specially constituted for that purpose. Once having laid hold of a matter within its jurisdiction, that Board is seized of it for all purposes of working out details of any directions given by the Board. It is for the Board to interpret and give effect to its own orders and to deal with differences arising out of these orders, and this the legislature intends for the very purpose of expeditious and appropriate adjustment without having recourse to the intervention of the Courts. Ample machinery is provided by the statute for dealing with the adjustment of the accounts and the ascertainment of the net profits on a right footing satisfactory to the Board—which gave the direction. Reference *passim* to the statute of 1906, 6 Edw. VII. ch. 31, will shew how abundant are the powers and methods entrusted to the Board, for administrative and supervisory purposes. Thus sec. 16 gives power to the Board to dispose of any complaint that there has been a failure to do the thing called for by the agreement in question, viz., to pay a full and proper one-quarter of the net profits. And again more particularly as applicable to the present situation, the group of sections headed "Enforcement of Municipal Agreements," e.g., sec. 63. The Board has power to enforce municipal agreements such as this and the power to construe and determine the proper meaning of the clause in question (sec. 64). The Board may take such steps as are necessary to enforce payment of the one-quarter net profits and to solve the difficulties raised in the pleadings, sec. 63(2). The Board has

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full jurisdiction to hear and determine all matters of law or fact and have such powers in connection with the exercise of its jurisdiction as are possessed by the High Court, sec. 17(1): and having become properly seized of a case the Board has exclusive jurisdiction therein (sec. 17(3)).

Appellate jurisdiction is given to the Board in questions of amount, taxation and exemption therefrom (sec. 51), and these are also within the purview of its primary powers in a dispute such as the present. Of cases cited, *Re Sandwich*, 2 O.W.N. 93, where the question arose chiefly under a private agreement made between the litigants as to which it was said that the Board was not a Court and had no general power of adjudicating upon questions of construction in the abstract: a proposition not pertinent to the present agreement. On the other hand the large jurisdiction conferred by the Act of 1906 is commented on and recognized in *Re Port Arthur*, 18 O.L.R. 376, 382.

The objection is well taken and the action should stand dismissed with costs: this is, of course, without prejudice to any further application being made to the Railway Board.

*Action dismissed.*

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## CANADIAN NORTHERN QUEBEC R. CO. v. JOHNSTON.

QUE.

K. B. 1912

Oct. 31.

*Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. October 31, 1912.*

1. DAMAGES (§ III S—357)—FATAL ACCIDENT — DEDUCTING ACCIDENT INSURANCE.

Where the widow or heirs of a person killed as the result of an accident sue the person responsible for such death in damages the defendant is entitled to have the amount of damages suffered diminished by whatever sums the heirs may have received under the terms of accident policies carried by the deceased.

Statement

THIS was an action in damages brought by the widow of the late Wilfrid Heather, who died as a result of injuries suffered in a collision in June, 1907. The trial Judge awarded $4,500 to the widow plaintiff, $3,000 to the widow, and $1,500 to the minor children, and held that the company alone was at fault.

*W. S. Johnson*, for appellant.

*E. Languedoc*, K.C., for respondent.

Lavergne, J.

LAVERGNE, J., rendering judgment for the Court, said that in their opinion on the facts disclosed by the record there was evidence of contributory negligence. Had there not been such common fault the Court thought that damages of $6,950 should have been awarded. As there was contributory negligence, however, the award of $4,500 was a proper one and should be

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maintained. The deceased, however, had an accident insurance policy and his widow had been paid the amount thereof, to wit, $1,000, in her quality of tutrix. Their Lordships were of the opinion that this amount should be deducted from the amount of the condemnation awarded in favour of the children. Consequently the judgment would have to be modified; $3,000 should be granted to the widow and $500 for the children. And as to the costs, seeing that the widow was to receive herself the full amount allowed her by the Superior Court, she should not be called upon to pay costs.

*Judgment modified, without costs.*

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**LEONARD & SON** (respondents) v. **KREMER** (appellant).

*Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.*
*February 3, 1912.*

1. DAMAGES (§ III P 2—342)—BREACH OF CONTRACT—SALE OF GOODS—DELAY IN DELIVERY—PURPOSE OF PURCHASE KNOWN.

Where the seller of a boiler and attachments agrees to deliver at a certain time, and at the time of the agreement of sale knows the purpose for which the buyer is purchasing and that prompt delivery is essential and subsequently before the date for delivery is warned by the buyer of the necessity for prompt delivery, and where the goods are shipped twenty days later than the date agreed upon and there is additional delay because one of the essential attachments had not been shipped at all and another of them was a misfit, the seller is liable in damages for each of these failures to deliver promptly in violation of his contract.

2. DAMAGES (§ III P 2—342)—SALE OF GOODS—QUALITY—SELLER'S BREACH —BUYER'S MINIMISING DAMAGE.

Where, upon an agreement of sale of a boiler and its attachments, with stipulation for delivery on a fixed date, the seller violated the contract by being late with the delivery and when delivered one of the essential attachments was a misfit, the buyer is bound to be reasonably prompt in minimising, so far as in his own power lies, the damage resulting from such violation of the contract by the seller, and this especially where the buyer is claiming a very large daily loss therefor.

3. DAMAGES (§ III P 2—342)—SALE — DILATORY DELIVERY — NOTICE FIXING DAILY LOSS, WHEN BINDING UPON CLAIMANT HIMSELF.

In an action by the buyer of goods for damages for breach of contract in failure to deliver goods promptly, where the buyer gives the seller written notice prior to the dilatory delivery that his loss by the delay will be $40 per day and afterwards introduces evidence of a greater daily loss, the notice prevails and limits the damages to the $40 per day.

4. CONTRACTS (§ II C—140)—CONSTRUCTION — TIME — "ON OR ABOUT"—INTERPRETATION.

Where a contract to sell goods stipulates for delivery "on or about the 28th April," the variance from the exact date "28th April" must be only slight if at all, where the seller, at the time of the contract knew the purpose of the purchase and that the buyer needed and expected prompt delivery not later than the day specified, and this, es-

pecially where between the date of execution of the agreement and the date for delivery, the buyer further gave special written notice that failure to deliver promptly would involve him in a loss of $40 per day.

[*Cross* v. *Elgin*, 2 B. & Ad. 106, applied.]

5. CONTRACTS (§ IV F—370)—WRITTEN AGREEMENT—SALE OF GOODS—SEPARATE LETTER—EFFECT AS TO VARYING CONTRACT.

Where a written order for the purchase of goods fixes a date for delivery, and the buyer having duly signed the order in transmitting same to the seller writes and mails concurrently a separate letter to accelerate the delivery, such letter has not the legal effect of varying the contract but the date of delivery is determined from the written order without reference to the letter.

6. EVIDENCE (§ II K—311)—ONUS — SALE OF GOODS — SAVING PROVISO "IF UNABLE TO DELIVER PROMPTLY."

Where a written contract for the sale of goods contains a clause for delivery on a certain date with a proviso that "if for any reason the seller may be unable to fill the order or deliver the goods at the time stated, the buyer will not in any way hold the seller responsible for damages," the onus is upon the seller, in case of failure to deliver promptly to establish his inability to deliver at the stated time.

[*Attwood* v. *Emery*, 1 C.B.N.S. 108, specially referred to, and distinguished.]

7. EVIDENCE (§ II E 5—166)—PRESUMPTIONS — WHOLESALE MANUFACTURER AND DEALER—MACHINERY—MISFITS—SELLER PRESUMED TO KNOW REQUIREMENTS.

Where the seller of a boiler and its attachments is a wholesale dealer and manufacturer of such machinery, and where the attachments sent under the contract of sale are misfits and not workable, the seller will be held strictly to knowledge of their requirements in an action by the buyer for damages for delay in returning the attachments for readjustment and alterations.

Statement

APPEAL by defendant from judgment of Harvey, C.J., dismissing defendant's counterclaim for damages for the delay of the plaintiffs in delivering a boiler and certain attachments, and awarding plaintiffs judgment for the balance due them.

The appeal was allowed, SIMMONS, J., dissenting.

*C. F. Adams*, for plaintiffs, respondents.
*John Barnett*, for defendant, appellant.

Scott, J.

SCOTT, J.:—I concur in judgment of Beck, J.

Stuart, J.

STUART, J.:—The order which the plaintiffs accepted, and which therefore contained the contract between the parties, stated that the goods were to be delivered "on cars at Calgary, Alta., on or about the 28th April, 1910." It also stated that "all piping, valves and fittings, etc., are covered by this lien"—that is, the lien given in the contract.

The bulk of the goods were placed on the cars in Calgary on May 18th, i.e., twenty days later than the date agreed upon. When they arrived at Innisfail on May 23rd a steam flange, which was an essential part of the boiler, was found not to be there at all. The defendant had to make a paper template of

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it, and, at the request of the plaintiffs' Calgary agent, sent this to Calgary, so that one might be made there. This was not received at Innisfail till June 2nd. There is no question here of any change in the size of anything. The steam flange simply was not there at all and had to be manufactured. This, however, did not cause a further delay of 10 days, as would at first appear, because the flange was not needed at once. The boiler had to be set up and some work done on it before the defendant was ready to put the flange on. According to his letter of May 27th, in which he says, "The boiler will be finished to-morrow and ready for action," I gather that he had up to that time suffered no real delay merely by the absence of this flange. I think as he got the flange on June 2nd only three days should be added, which makes 24 in all.

Then, on June 2nd, he, for the first time, discovered that the safety valve flange did not fit the corresponding flange on the boiler, to which it was to be attached. I do not think he was to blame for not discovering this sooner, because I gather that he needed the steam flange before he could go on to adjust the safety valve flange. I can see no reason for blaming the defendant for this mistake. It is true that the steam connection on his engine was only two inches in diameter, and that he points this out in his letter of April 9th, where he enquires as to the diameter of the steam connection of the boiler. The answer given by Stewart, in his letter of April 12th, was that the boiler outlet was 3½ inches. "But this can be reduced to 2½ inches if required." It is clear, however, that there was no change made in the boiler outlet on this account, because when it came it was neither 3½ nor 2½ inches, but 3 inches, as set forth in the affidavit forwarded to be filed with the Government. What Stewart was referring to when he spoke of reducing the size was a device by which by means of a joint the size of a pipe may be reduced on its way from one outlet to another. All this, however, is no reason why the one flange should not correspond with the other to which it was to be bolted. These, at any rate, should have fitted each other. The plaintiffs knew that one should fit the other and that they were intended to be bolted together. Yet when the defendant proceeded to do it on June 2nd it could not be done, and he expresses his reasonable astonishment in his letter of June 2nd, wherein he asks in popular language, "What do you know about that?" He sent the flange at once to Head and Company, of Calgary, and also wrote to Stewart that he had done so. That may have been a foolish thing to do, but Stewart was informed as to where it had been sent, which, in my opinion, covers up any fault. Stewart contented himself with merely enquiring for it at Head's, and then writes back that it had not arrived. His company was in de-

fault, and in my opinion he could have undertaken to locate the flange, just as he should have done if it had been expressed to himself and had not arrived. Yet so far as the evidence goes he made no attempt to do so.

In such circumstances the plaintiffs are not entitled to criticize with too much strictness the defendant's method of repairing a default which was theirs and not his. The defendant got to work on June 18th, which was sixteen days' further delay. In all it would appear to me that the total delay is made up as follows: 28th April to 18th May, twenty days; 30th May to June 2nd, three days; June 2nd to June 18th, sixteen days; or thirty-nine days in all. From this, however, should be deducted some time which must have been spent in any case in fixing the boiler and making connections over and above the period between May 23rd, when the boiler arrived, and May 30th, when the defendant was ready to put on the two flanges, one of which was missing and the other a misfit, which I have already allowed. From the evidence I should infer that four or five additional days should be allowed, which would reduce the delay to thirty-four days, the number finally claimed by Mr. Barnett in the argument before us.

I think, however, it is fair that a further allowance should also be made. Between June 5th, the date of the defendant's last communication with Stewart about the misfitting flange, and the time he took the train to go and see about it in Calgary, he seems to have waited around doing practically nothing. For a man who seeks damages at $40 a day for delay, I think he should have been somewhat more prompt in minimizing the damage and I would deduct, say, six days further. This leaves twenty-eight days, which, I think, is the right period, unless the plaintiffs are entitled to a reasonably further time after April 28th in view of the use of the expression "on or about" in the order. I have been unable to discover any case in which an interpretation is put upon the word "about" when it refers to time. But there is a case of *Cross* v. *Elgin*, 2 B. & Ad. 106, where the contract was for the sale of "about 300 quarters" of rye, "more or less." Delivery of 350 quarters was tendered. Parke, J., and Patterson, J., held that it lay upon the vendors to shew that such an excess above the quantity named was in the contemplation of the parties.

In the present case the plaintiffs' agent knew, when he took the order, that the boiler was needed for the opening of the brick-making season. He was also afterwards warned by the defendant that prompt delivery for the opening of the season was required. I am unable to conclude that the letter accompanying the order is sufficient to constitute a variation of the contract or of its real meaning. The defendant signed the order as

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drawn by Stewart, and must, I think, abide by the true interpretation of it. The defendant says he would not have been able to start in any case till May 8th, but, even if there had been prompt delivery on the day named, the defendant would have needed a good deal, the intervening time to set up his machinery. For myself, I do not think the plaintiffs ought to expect in the circumstances to be allowed more than ten days at the outside after the date named. They have given no evidence to justify any larger allowance. I therefore think only eighteen days' delay should be charged against them.

The order contained a clause reading as follows:—

> If for any reason you may be unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages.

The learned Chief Justice who tried the case thought that this clause, even in the absence of any evidence shewing inability on the part of the plaintiffs, was sufficient to defeat the defendant's counterclaim for damages. With great respect I am unable to view the matter in that light. One does not need to assume wilful delay on the part of the plaintiffs in depriving them of the benefit of this clause in the absence of evidence. They may have been merely careless and dilatory. I do not think the clause is sufficient to throw the *onus probandi* on the defendant. The facts were not within his knowledge. If it were open to us to interpret the real meaning of the contract to be that the plaintiffs were merely to deliver "as soon as possible," which was the expression used in *Attwood* v. *Emery*, 1 C.B. N.S. 108, something might be said in favour of the view that the burden of proving that the goods were not delivered "as soon as possible" lay upon the purchaser; but in the form in which the present contract stands and in all the circumstances of this case, I have no doubt that the burden of proving inability lay upon the plaintiffs, and, as they offered no evidence, they cannot rely upon the clause.

I make no reference to the question of the governor, because I concur in the observations made in that regard by the judgment of Mr. Justice Beck, which I have read, and with which, upon that point, I entirely concur.

I also agree that $40 a day is the measure of damages that should be allowed, which will amount to $720. The plaintiffs' claim is $565.30. Deducting $100 from this for parts not supplied, as allowed by the trial Judge, and deducting the balance from the above sum of $720, we have the sum of $254.70, for which, I think, judgment for the defendant should be entered, together with costs of the appeal and of the trial.

Beck, J.

BECK, J.:—This is an appeal from the Honourable the Chief Justice giving judgment for the plaintiffs for the balance of

their claim after deducting $100 for certain attachments not supplied with the boiler and certain other machinery the price of which forms the subject matter of the action, and dismissing the defendant's counterclaim for damages for delay in delivery.

There seems to be no ground for disturbing the learned Judge's decision upon the plaintiffs' claim. I think, however, the defendant is entitled to judgment for some damages on his counterclaim. The reasons stated by the learned Judge for dismissing the counterclaim are first, that the terms of the contract exclude the defendant's right, and secondly that the delay was occasioned by reason of the defendant not having a governor which was not included in the contract in question.

As to the first ground, the contract which was created by the plaintiffs' acceptance of an order given by the defendant contains the following provision:—

> If for any reason you are unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages.

This is the provision to which the learned Judge referred to as excluding the plaintiffs' liability. He seems, however, to have overlooked the fact that there is no evidence whatever of the plaintiffs' inability to deliver at the time stated. Counsel for the plaintiffs contended that no such evidence was necessary; that either "unable" means nothing more than "fail" or non-delivery at the time is *primâ facie* evidence of inability. I think this contention is not sound, that inability means more than failure, and that mere failure is no evidence of inability; that under the terms of the clause the onus lay upon the plaintiffs to shew that they were unable to deliver at the time stated which they might have done by shewing, for instance, a strike of their own or the railway company's employees, inability to obtain railway cars, an accident in their works, etc. See *Elkin* v. *Janson*, 13 M. & W. 655, 14 L.J. Ex. 201.

As to the second ground:—It is true that the defendant during his cross-examination, in reply to a question from the trial Judge, made the bald answer "No" to the question, "Could you have gone ahead without a governor?" but while he was in the witness-box on this occasion the point was not again referred to. Later Watson, the Government Inspector of Boilers, was called and with regard to a governor gave evidence as follows:—

> Q. What would you say as to the necessity of a governor for running an engine?
>
> A. It would depend on what kind of work you were putting the engine to. Certain kinds of work you are compelled to have a governor.
>
> Q. For example?
>
> A. You could not do electric lighting without a governor.
>
> Q. Could you run a brick plant without a governor?

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A. Yes, I think so.

Q. What has been your experience with governors? You have had a fairly wide experience.

A. I have run them for weeks and weeks without a governor.

Q. What is the purpose of a governor?

A. It is to have the engine running at a uniform speed regardless of the lead.

Q. And there is no way of accomplishing that without a governor?

A. Throttling.

Q. What do you mean by throttling?

A. Your valve, shut-off valve at the engine. You can regulate the speed by that, if your load were varying. You would need a man to attend to that though.

Q. You say you have run an engine for weeks without a governor?

A. Yes, there are all kinds of engines. A locomotive never has a governor. An American engine has not. There is any amount of times the bolt of the governor may break and you don't stop to fix it.

Later he said, "It is not necessary to have a governor to operate the engine."

The defendant was recalled and gave evidence as follows:—

Q. Concerning that boiler, was it in the same condition at the time of Mr. Watson's inspection as when you set it up?

A. Yes, the boiler, exactly the same.

Q. Had there been any changes?

A. No changes whatever.

Q. Did you know an engine could be run without a governor?

A. Yes.

Q. Had you ever done so?

A. Yes.

He was not cross-examined at all, nor was any reference made to his earlier contradictory answer to the trial Judge. The defendant's answer to the learned Judge, that he could not go ahead without a governor, was, it seems clear, not true; but from a perusal of the whole evidence I fancy what he meant was that he did not intend to operate his plant without a governor. I think it must be taken as established that a governor was not essential for the operation of the plant for the purpose of the defendant's business of brickmaker, which was the business he was carrying on to the knowledge of the plaintiffs, though I am inclined to believe that the defendant did not intend to use any other available expedient in lieu of a governor from these same plaintiffs, he got another elsewhere on account of their delay in filling his order for it. I therefore think that the absence of the governor was not the real cause whereby the defendant was prevented from getting his plant into operation. In any case the delay in the delivery of the governor was the delay of the plaintiffs.

A part of the correspondence about the governor was as follows: On the 9th April the defendant writes saying:—

> Give me your best price on governor with 2½ steam connection.

Plaintiffs on 12th April write:—

> Re governor. We could supply you with one 2½-inch Evans patent noiseless governor for the sum of $30. This is the engine we use on our Leonard and Clipper engines. We would be pleased to supply you with one of these governors.

The defendant on the 19th April writes ordering the governor. On the 26th the plaintiffs' agent replies saying he has sent in the order for the governor, "which will come up with the boiler." This last statement no doubt was relied upon by the defendant and when the boiler came without some of the admittedly necessary attachments comprised in the order for the boiler, the absence of which, admittedly delayed its being put into operation, no occasion arose until or at any rate until shortly before these other attachments had arrived or other expedients had been adopted for the defendant to decide what course he would take on account of the absence of the governor—whether he could do without it, adopting some other expedient, or as he eventually did, procure one elsewhere.

As to the damages:—The plaintiffs at the time the order for the boiler was given were notified by the defendant that he had contracted for a sale of all the brick he could manufacture during the season of 1910. He proves a contract at $8.75 a thousand, a price less than the market price. I think he has established a loss of profits for 18 days.

On the argument his counsel finally stated his claim to be for 34 days from the 10th May to the 18th June at $52.88 per day; but on the 9th May the defendant wrote to the plaintiffs, saying:—

> I am and will be losing $40 per day until that boiler is in steaming shape.

I think that in consequence of this notice $40 per day is the rate which should be charged against the plaintiffs; that makes $720. The plaintiffs' claim is $565.30, from which $100 allowed by the trial Judge for parts not supplied should be deducted, leaving $465.30. This deducted from $720 leaves $254.70. In my opinion the defendant is entitled to judgment for this amount, with the general costs in the Court below and costs of the appeal.

SIMMONS, J. (dissenting):—This is an appeal from the judgment of the Chief Justice dismissing defendant's counterclaim for damages for the delay of the plaintiffs in supplying to the defendant a boiler and attachments. Simmons, J.

The judgment in favour of the plaintiffs in regard to defendant's claim for damages is upon the finding of fact that an attachment called a governor (which was not included in plaintiffs' contract with the defendant, and which was not got from

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plaintiffs) was "approximately the last thing that was done to enable him to start work." There is also an intimation in the judgment appealed from that even aside from this that the defendant might not succeed on the ground of remoteness of the damages.

The plaintiffs carry on at London, Ontario, the business of manufacturers of boilers and engines, and Geo. Stewart, their agent at Calgary, visited the defendant at Innisfail and discussed with the defendant the kind of boiler the defendant required for his brick plant at Innisfail, and after some correspondence between them the defendant executed and delivered to Stewart the order, which is as follows:—

To E. LEONARD & SONS,
Manufacturers of Engines and Boilers,
London, Canada.

Dated at Calgary, Alberta, the 28th day of February, 1910.

SIRS,—You will please manufacture for the undersigned and deliver on cars at Calgary, Alta., on or about the 28th day of April, 1910, one 54 in. x 12 in. return tubular boiler complete with all fittings, built for 125 lbs. steam pressure; 50 feet of 24 in. smoke stack and wire; one C. C. Penberthy injector, and one 3 in. by 2 in. by 3 in. steam pump and piping to connect same, and suspension for rear end of boiler, which the undersigned agree to receive, and to pay you therefor the sum of seven hundred and forty-four dollars, in the following manner: $744.00.

| | |
|---|---|
| Cash in hand when ready to ship | $300.00 |
| My or our approved joint note, due 6 months after shipment | 222.00 |
| My or our approved joint note, due 9 months after shipment | 222.00 |
| | $744.00 |

with interest at the rate of 8 per cent. per annum on said purchase money from the date of delivery of said goods. The above goods to be shipped via C. P. R. Railway to Innisfail, Alberta, or by such other route as you may direct at the risk of the undersigned, on or about the time above mentioned, but if for any reason you may be unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages.

And the undersigned agree not to countermand this order, and if the above machinery is not settled for by cash or notes within 20 days after shipment, according to "terms of sale," then the account shall become due, and the undersigned hereby agree to accept and pay draft for the amount mentioned above.

It is distinctly understood and agreed that the property and title to the goods, so to be furnished by you to the undersigned, is not to pass to the undersigned until you are fully paid the price therefor, and it is also distinctly understood and agreed that all piping, valves and fittings, etc., are covered by this lien and for all repairs in connection therewith, and that the notes so to be given are to be held by you as collateral security in respect of such purchase money. If default be made in payment of the said note or notes or any of them, or of any renewal or renewals thereof, including all accounts for repairs in re-

spect of said goods, or if the said goods be disposed of, or attempted to be disposed of, by the undersigned, or are seized in execution in respect of any debt due by the undersigned, or if the undersigned make an assignment for the benefit of creditors or abscond or leave the said goods unprotected, or sell or attempt to sell the real estate of the undersigned or any of them, or of any part or parts thereof, then you are at liberty to take possession of the said goods and re-sell the same by public auction or private sale, crediting the undersigned with the proceeds only less all expenses connected with such retaking and all repairs in respect thereof, including repairs for refitting said goods for the purpose of such resale, which you are hereby authorized to make for the purpose of such resale and the residue of the price of such goods and said repairs, if any, shall at once become due and payable, and the undersigned in such case hereby agree to pay the same, and such notes shall continue to be collateral security for the payment thereof.

And the undersigned and each of them hereby declare that the provisions of the Statutes of Ontario, 51 Vict. ch. 19, now ch. 149, Revised Statutes of Ontario, entitled an Act respecting Conditional Sales, shall not apply to this agreement, and you shall be at liberty to resell the said goods without any notice to me.

And the undersigned hereby acknowledge having received a copy of this agreement.

If an engineer is required, the charge to be $5 per day, and the railroad fare and board at cost.

Remarks ....

Witness: D. H. KREMER,
Innisfail, Alta.

As the landlord of the said.....I we hereby release the above mentioned machinery from any and all claims for rent I we have or may hereafter have, against the said.....
.....until the above claims of.....
are fully paid and satisfied, and I we as far as the said machinery is concerned.

The order is dated the 28th of February, 1910, and on February 24th, 1910, the defendant advised the plaintiffs by letter that:—

I signed a contract yesterday to supply all the brick I can make in the season of 1910.

And on February 28th, 1910, the defendant wrote Stewart enclosing the order, exhibit 1, and stating:—

Now about delivery, I would like to get this boiler sooner than stated in the order.

In reply Stewart on February 28th, 1910, said:—

We will get this boiler put in hand for you at once and will try and have it brought up a little sooner than stated.

On April 9th defendant wrote plaintiffs at Calgary as follows:—

Innisfail, Alta., April 9th, 1910.

LEONARD & SONS,
Calgary, Alta.

Dear Sirs,—I would be much obliged if you could tell me what size steam connection will be on boiler. My engine is 2 inch and I would

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rather have it two and a half (2½) inch if it is possible to change. Give me your best price on governor with 2½ steam connection.

I am ready any time now for that boiler. I am setting engine now.

A reply by return of mail will oblige,

Yours truly,

D. H. KREMER.

In this letter defendant for the first time intimates to the plaintiffs that his engine is 2 inch and he would rather have steam connection 2½ inch if it is possible to change, and asks for price on governor and 2½ inch steam connection. Plaintiffs replied by letter as follows:—

E. LEONARD & SONS,
Manufacturers of Engines and Boilers,
London, Canada.

Geo. Stewart, P.O. Box 1315, Calgary, Alta.,
April 12th, 1911.

D. H. Kremer, Esq.,
Innisfail, Alta.

Dear Sir,—Your favour received and in reply beg to say that the outlet on the boiler is 3½ inches, but this can be reduced to 2½ inches if required.

Please let us hear from you by return mail as to this.

Re governor, we could supply you with one 2½ inch Evans patent noiseless governor for the sum of $30; this is the governor we use on our Leonard and Clipper engines. We would be pleased to supply you with one of these governors.

Kindly let us hear from you and oblige.

We beg to remain,

Yours respectfully,

H. LEONARD & SONS.
*Per* Geo. Stewart.

Defendant replied by letter as follows:—

Innisfail, Alta., April 19th, 1910.

LEONARD & SONS,
Calgary, Alta.

Dear Sirs,—Re governor for engine, would say that I will take a 2½ inch Evans for $30.

The boiler outlet would have to be reduced to 2½ inches. I may want a short time to pay for this governor, which I hope would be satisfactory. You will find enclosed a pattern for governor to fit.

Could you give me some idea about when the boiler would arrive? What would you advise (for use on engine) to shut engine down, say with a small rope 25 or 30 feet away, which would only be used in case of accident at brick machine. Some tell me the governor could be used and others say a throttle valve.

Would like to hear from you regarding this, I remain,

Yours truly,

D. H. KREMER.

On April 26th, 1910, plaintiffs replied by letter (ex. 13, p. 112):—

> Your favour of the 19th inst. received, for which kindly accept our thanks; this would have been answered sooner, but the writer has been out of the city.
>
> Have sent your order in for the 2½ inch governor, which will come up with the boiler, and we expect the boiler to arrive here in about two weeks, as it will be shipped now in a day or so. We will try and navigate a little time for you on this governor.
>
> We note that you want the outlet made to 2½ inches on the boiler; this can be done by using a reducer.
>
> Re shutting down engine, we think you should have what is called a quick shut-off throttle, or valve, for this purpose, as the governor will hardly do this.

Defendant made no complaint and no reference to plaintiffs' notice in this letter that the boiler was expected in two weeks, although this was April 26th and the contract named April 28th for the delivery of boiler at Calgary, and on May 9th, in reply to another letter of plaintiffs of May 4th, stating boiler would be at Calgary in ten days, the defendant says:—

> Yours of the 6th inst. received, enclosing sworn to affidavit. I am pleased to hear that boiler has been shipped. Boiler not being here sooner has put me to considerable trouble.
>
> I am and will be losing $40 per day until that boiler is in steaming shape. I contracted for all my brick to be shipped to Calgary and will not be able to fill contract. I hope you will rush boiler and help me get it as quick as possible.
>
> Be sure that everything is correct and all on board before it leaves Calgary, so that I will have no delay when it arrives.

On May 18th the boiler was shipped from Calgary to Innisfail and the pump shipped by local freight. The claim for damages seems to rest practically upon two grounds: (*a*) the delay from April 28th to May 17th in the arrival of the boiler at Calgary, and (*b*) the absence of one of the parts of the boiler called a steam flange. This steam flange fits on to a nozzle flange on the boiler, and in the top of the steam flange is an opening, in which is inserted the steam pipe by means of which the steam is conducted from the boiler to the engine. On May 23rd defendant wrote plaintiffs at Calgary calling attention to absence of steam flange, and the plaintiffs had one made in Calgary and shipped to defendant about May 28th. On June 2nd the defendant discovered the safety pop flange or safety valve did not fit the corresponding part of the boiler, and he sent it to William Head Co. at Calgary for alterations. Through some mistake at the express office apparently it remained at the express office for some days and finally defendant went to Calgary on the 12th or 13th of June and got this pop flange at the express office and took it to Sutor's foundry, and Sutor said he could not do anything with it, and defendant then took it home and fitted it on to the boiler by doing some chiselling. In defendant's letter of June 2nd to the plaintiffs at Calgary, advising them that he had sent the safety pop flange to William Head & Co., he says:—

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I am delayed any way on account of the governors so long as I get it as soon as they arrive.

And on page 57 of the case, in answer to a question by the Court, the defendant says he could not have gone ahead without a governor. A governor was ordered on April 19th from plaintiffs, but the defendant, not being able to get it from plaintiffs, got one from another dealer on June 14th. The defendant commenced operations on June 18th.

In regard to defendant's claim under (*a*) namely, delay in shipment of twenty days, I am of the opinion that the clause of the contract

> If for any reason you may be unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages,

fully protects the plaintiffs in the absence of negligence or *mala fides* upon their part. It would clearly be upon the defendant, in the face of this exemption clause, to assert and prove negligence on the part of the plaintiffs as the cause of delay, and there is not the slightest indication in the evidence of either *mala fides* or negligence.

In Smith's Mercantile Law the effect of exemption provisions which are inserted in charters and bills of lading is somewhat fully discussed, and it is intimated that the Court will give full effect to them even to the extent of giving relief by way of exemption from damages where these clauses include exemption as to negligence of the carrier. See also *Westport Coal Co.* v. *McPhail*, [1898] 2 Q.B. 130; also in *B. C. Saw Mills Co.* v. *Nettleship*, L.R. 3 C.P. 499, 37 L.J.C.P. 235. Willes, J., says at page 508:—

> If this matter had been brought to the ship owner's knowledge not as mere information, but as the basis of liability, he would have rejected the contract, and it is absurd to contend that mere knowledge that the chattel is to be used in a specific manner is to fix the carrier when if it had been suggested that he was to be responsible he would have rejected the liability if he had a chance.

See also the remarks of Lord Esher in *Hammond* v. *Bussy*, 20 Q.B.D. 79, as to the application of the dictum in *Hadley* v. *Baxendale*, 9 Ex. 341:—

> Such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

It seems to me that in the clause of the contract above quoted we have a clear, unequivocal declaration of both parties that the plaintiffs are not to be liable for damages even though they know the defendant wants his machinery for a certain purpose at a named date. The same principles seem to me also to apply to the matters raised under (*b*), namely, the absence of the steam

flange and the subsequent misfit of the safety pop flange. Even if it were negligence of the plaintiffs in shipping the boiler without this part, it would seem they had no difficulty in having one made in Calgary and shipped to the defendant in a few days. In regard to the misfit of the safety pop flange, I am not satisfied that the defendant was not the direct cause of this. On April 9th he wrote plaintiffs (ex. 10) and they replied by letter (ex. 11), and defendant replied to them on April 19th (ex. 12, *supra*). This correspondence seems to clearly indicate that the defendant wished some modifications in regard to the size of the outlet on the boiler in order to accommodate it to the engine to which the defendant intended attaching the boiler. The evidence of Watson, boiler inspector, is to the effect that the governor was not necessary to operate the boiler in connection with a brick-making machine. The defendant thought it was. On May 27th defendant wrote plaintiffs:—

> The boiler will be finished to-morrow and ready for action,

and on June 2nd he said to plaintiffs that

> he was delayed any way on account of the governors.

At the trial he said he could not operate without the governors. It seems to me the defendant must fail as to both grounds raised under (*a*) and (*b*). He has not brought home to the plaintiffs their assent to assume any liability for delays or defects such as occurred, and secondly, he has not shewn that these were the natural proximate causes of the delay in commencing the operation of the machine.

I would therefore dismiss the appeal with costs.

*Appeal allowed*, SIMMONS, J., *dissenting*.

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## Re BAYNES CARRIAGE CO.



*Ontario High Court, Boyd, C., in Chambers. September* 20, 1912.

1. CORPORATIONS AND COMPANIES (§ VI E—344*a*)—WINDING-UP ACT (CAN.)—EXAMINATION OF DIRECTORS—PROCEDURE—RULES, REGULATIONS, PRACTICE.

Upon an application to examine certain directors of a corporation, the provisions of sec. 135 of the Winding-up Act, R.S.C. 1906, ch. 144, control, and as read with sec. 2 (*c*) and sec. 134, render applicable, in the Province of Ontario, the procedure, including rules and regulations and methods of practice, current in the High Court of Justice (Ont.), adapted as nearly as may be as laid down in the Con. Rules (Ont.), it appearing that no other rules have yet been made under sec. 134 of R.S.C. ch. 144.

[*Re Belding Lumber Co., Ltd.* (1911), 23 O.L.R. 255, specially referred to.]

2. CORPORATIONS AND COMPANIES (§ VI E—344*a*)—WINDING-UP ACT (CAN.)—DIRECTORS COMPETENT AND COMPELLABLE WITNESSES—CON. RULES.

Upon an application by a corporation for a winding-up order under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144, the

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directors of the corporation are compellable witnesses for examination under sec. 135 of the Act supplemented by Con. Rules (Ont.) 489, 491, 492.

3. COURTS (§ V E—315)—FOLLOWING DECISIONS OF ENGLISH COURTS — WINDING-UP ACT (CAN.)—PROCEDURE.

Upon a question of practice under the Winding-up Act R.S.C. 1906, ch. 144, English cases decided upon different conditions of practice may not be applied to frustrate the clear intent of the Act itself.

Statement

MOTION on behalf of the company and certain of the directors to set aside an appointment to examine the directors, and the subpœna to testify, therewith served, on the ground that it was not competent for the petitioners to use such evidence on an application for a winding-up order under the Dominion Act.

The motion was dismissed.

*H. A. Burbidge*, for the applicants.
*Grayson Smith*, for the petitioners.

Boyd, C.

September 20. BOYD, C.:—The petitioners are shareholders to the extent of $50,000 paid-up shares, the total capital being $375,000. The broad position taken is, that the procedure under the Consolidated Rules is not available under the Act. It is also urged that directors as officers cannot be so examined. As I read the Act (R.S.C. 1906, ch. 144), it makes no express provision as to this preliminary procedure except what is found in sec. 13, *i.e.*, the application is to be by petition, of which four days' notice is to be given to the company before the application is made. No provision appears as to how the petition is to be supported or verified. It seems to be that it is only by reference to secs. 134 and 135 that the *modus operandi* can be ascertained.

Sections 107 to 133 are headed "Procedure," but they apply generally to proceedings under a winding-up order, that is, after it has been made, and not to this preliminary application for such an order. Section 116 is the only one which relates in terms to a step before the winding-up order is made, and that is of a conservatory character. Sections 134 and 135 relate to "Rules, Regulations, and Forms." Section 134 provides for the Judges making "forms, rules, and regulations," to be followed and observed in proceedings under the Act, but no action has been taken in this direction; so that sec. 135 now controls the situation applicable to the present motion. It reads: "Until such forms, rules, and regulations are made, the various forms and procedures . . . shall, unless otherwise specifically provided, be the same as nearly as may be as those of the Court in other cases." No other special provision has been pointed out to me, nor do I know of any, which derogates from this sweeping direction as to the method of procedure. I read the word used, "procedures," as including rules and regulations and methods of practice current in the High Court of Justice (sec. 2 (e)), which are to be

adapted as nearly as may be to the uses of the profession under the Winding-up Act. The marginal gloss is not of authority, but it is correct as found opposite sec. 135, to wit, "Until rules are made, procedure of Court to apply." The practice of the Court is to support petitions by affidavits or by *viva voce* evidence of witnesses under the Consolidated Rules in that behalf, 489, 491, 492. Substantially the very matter now in dispute was decided as I now decide in earlier cases; see *Re Belding Lumber Co. Limited* (1911), 23 O.L.R. 255.

I see no reason why the directors should not be examined as witnesses. They know more about the internal affairs of the concern than any other, or should have such knowledge, and the shareholders should not be deprived of this source of information when no imputation of *mala fides* exists. The policy of our legal methods is to facilitate and to simplify proceedings, and English cases in other conditions cannot control what is the manifest intention of the law-makers as set forth in the Winding-up Act.

All I now decide is, that it is competent for the petitioners to examine the directors, and the procedure taken is right.

The application must be dismissed with costs.

*Motion dismissed.*

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## GERBRACHT v. BINGHAM.



*Ontario High Court, Riddell, J., in Chambers. October* 14, 1912.

1. JURY (§ I D—31)—INTERLOCUTORY MOTION TO STRIKE OUT JURY NOTICE.

Upon a Chambers motion to strike out a jury notice, the judge should proceed under Con. Rule (Ont.) 1322 (passed 23rd December, 1911), to determine the question whether the case is proper for trial with a jury or not, and should not merely direct that the question be left over to be determined by the judge at the trial.

[*Bissett* v. *Knights of the Maccabees* (1912), 3 D.L.R. 714, 3 O.W.N. 1280, followed.]

2. TRIAL (§ II C 8—164)—DAMAGES—MALPRACTICE CASE AGAINST PHYSICIAN.

An action for malpractice against a surgeon or physician should be tried without a jury.

[*Town* v. *Archer* (1902), 4 O.L.R. 383; *Kempffer* v. *Conerty* (1901), 2 O.L.R. 658*n*; *McNulty* v. *Morris* (1901), 2 O.L.R. 656, referred to.]

Statement

MOTION by the defendant Bingham for an order striking out the jury notice.

*E. F. Ritchie*, for the applicant.

*J. H. Spence*, for the plaintiff.

*S. G. Crowell*, for the defendant Easton.

Riddell, J.

RIDDELL, J.:—The action is for malpractice against two surgeons. The plaintiff by the statement of claim alleges that the defendants left certain gauze within the plaintiff's body after an

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operation, which had to be subsequently removed; and he charges negligence and want of skill. Dr. Easton, one of the defendants, says that Dr. Bingham had sole charge of the operation, and that he (Easton) was not negligent; Dr. Bingham says that he performed the operation with skill and in the proper manner.

In *Bissett* v. *Knights of the Maccabees* (1912), 3 D.L.R. 714, 3 O.W.N. 1280, I pointed out that, since the change in the Rule,* "the Judge in Chambers is called upon to exercise his judgment as to how the case ought to be tried; he cannot pass that responsibility over to any one else—and, if it appears to him that the case should be tried without a jury, he must—he 'shall'—direct accordingly."

I have no kind of doubt that an action of malpractice against a surgeon or physician should be tried without a jury—and I am strengthened in that opinion by the almost if not quite universal practice for twenty years.

At the bar, I had very many cases of this kind; and I never saw one tried with a jury since about 1887.

*Town* v. *Archer* (1902), 4 O.L.R. 383, *Kempffer* v. *Conerty* (1901), 2 O.L.R. 658 (*n.*), and *McNulty* v. *Morris* (1901), 2 O. L.R. 656, may be looked at.

It is said, however, that this case will or may turn upon one simple question of fact, "Did the operating surgeon leave a piece of gauze in the body of the patient?" But, while that may be so as regards one surgeon, it is not so as regards the other—and in any case it may have been good surgery to leave the gauze as it is alleged to have been left.

Even if it were the case that there would be but the one question, and that a question of fact, to try, in addition to the damages, I should still be of the opinion that such a fact should be passed upon by a Judge.

Shortly before leaving the Bar, a case of malpractice, in which I was of counsel, came on for trial before Mr. Justice Meredith at Brampton. The sole question (outside of damages) was one of fact—Did the operating surgeon direct the nurse to fill the rubber bag (upon which the patient was to lie during the operation) with boiling water? Mr. Justice Meredith, the trial Judge, nevertheless, dismissed the jury, and tried the case himself.

The present is by no means so simple a case; and I think the jury notice should be struck out.

Costs in the cause.

*Order made.*

*See Con. Rule 1322, passed on the 23rd December, 1911.

## MONTREAL STREET R. CO. v. CONANT.

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*Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.*

1. TRIAL (§ III E 4—253)—CORRECTNESS OF INSTRUCTION—NEGLIGENCE OF STREET RAILWAY—MODIFICATION OF INSTRUCTIONS — DESISTING AGAINST ONE OF DEFENDANTS.

Where, in a jury trial of an action for negligence against a street railway company and a municipal corporation, the plaintiff desists from his action as against one of two defendants jointly sued in damages and the trial Judge thereupon modifies the assignment of facts to be submitted to the jury, no prejudice is suffered by the remaining defendant if the assignment of facts as modified allows the jury to find the accident was due either to the negligence of the plaintiff, or to that of the defendant or to that of neither of them.

2. STREET RAILWAYS (§ III B—28)—OPERATION—RATE OF SPEED—MUNICIPAL BY-LAW—DUTY TO USE CARE EVEN WHEN RUNNING WITHIN PRESCRIBED LIMIT OF SPEED.

Where a municipal by-law fixes a limit of speed, *e.g.*, eight miles an hour for the street cars of a company, such company is not thereby authorized to run its cars at such maximum speed regardless of conditions and circumstances; hence a speed of not more than five or six miles an hour may be imprudence on a dark, rainy night on slippery rails and on a dimly lighted street, and if such car causes injury to a person crossing at the intersection of streets the company will be liable in damages.

Statement

THIS was an appeal by the defendant company from the judgment of the Superior Court, Demers, J., assisted by a jury, rendered at Montreal, on March 8, 1912, condemning it to pay to the plaintiff the sum of $3,000 damages.

*T. Rinfret*, K.C., for the appellant.

*P. Beullac*, K.C., and *H. J. Elliott*, K.C., for the respondent.

Archambeault, C.J.

October 31, 1912, Montreal. ARCHAMBEAULT, C.J. (translated):—This is an action in damages where judgment was rendered according to the verdict of the jury. The respondent's wife, Lydia Charland, was struck by one of the company's cars on May 21st, 1910, about ten o'clock at night, as she was crossing Papineau avenue, from Lalonde avenue. The left limb had to be amputated above the knee. The respondent and his wife are common as to property and the husband is the plaintiff in the present case. He claims $10,400 from the appellant. The jury rendered their verdict and found the accident was due to the common fault of the company and of the victim, and awarded the plaintiff $3,000. Judgment was rendered according to the verdict.

The appellant complains of this judgment and prays for its reversal on three grounds:—

1. Because the trial Judge during the suit, modified the assignment of facts and thereby injustice was done to the appellant;

2. The verdict is not based on the plaintiff's declaration but on a fault not therein alleged;

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3. The verdict is contrary to the weight of the evidence, such that no jury could reasonably find otherwise than in favour of the appellant.

As to the first point. The action was at first directed against the appellant and against the city of Montreal. The declaration alleges that the accident was caused through the fault and negligence of the appellant and of the city of Montreal; that of the city being the fact that the street was insufficiently lighted, and was full of stones, obstructing it; that of the appellant being the failure to have a proper headlight on the car, the excessive speed of the car, the insufficiency of the brakes and the inexperience and incompetency of the employees of the company. The assignment of facts was drawn according to this declaration. The minutes of the trial shew that after the enquete had been declared closed by both parties, the plaintiff declared that he desisted from his demand as regards the city of Montreal. The Judge then ordered that the assignment of facts be modified accordingly, and he struck out all questions tending to have the city of Montreal declared responsible either for its sole fault or for its fault and that of the appellant.

The appellant contends that this modification in the questions submitted to the jury caused it prejudice in that the jury were no longer called upon to answer whether the accident had been caused by the exclusive fault of the city of Montreal, an answer which might have relieved the company of all responsibility. The jury, says the appellant, then found themselves face to face with an assignment of facts which necessarily presupposed that the accident had been caused either by the fault of the victim or by that of the company, without being given an opportunity to pass on the fault of the city of Montreal or of a third person.

I am of opinion that this first ground of the appellant is ill-founded. The assignment, as modified by the trial Judge, allowed the jury to weigh the case as a whole and to declare whether the accident was due to the sole fault of the appellant, to the sole fault of the victim, to the common fault of these two parties, or without the fault of either of them . . . Had the jury been of the opinion that the accident was due to insufficient lighting, or to the presence of obstructing stones in the street, or to any other fault not imputable to the appellant it would have answered negatively to the three questions. The changes brought by the trial Judge, therefore, caused no prejudice to the appellant.

The second reason urged by the appellant is to the effect that the verdict is not based on the declaration. Paragraph 4 of the plaintiff's declaration which charges fault against the appellant reads as follows:—

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The negligence of the defendant, the Montreal Street Railway Company, consisted in the absence of proper and sufficient light, in front of the car, as required by the by-laws of the city of Montreal, and by the said defendant's own regulations and usage, also in the fact that the car was driving too fast, viz., faster than provided by the by-laws of the city of Montreal; that said car was provided with an improper, insufficient and dangerous fender or guard, and that said car was equipped with improper and insufficient brakes and appliances, which had long been condemned by the officers of the said defendant, and furthermore, said car was in charge of inexperienced and incompetent employees.

As already stated, the jury found that the accident was due to the common fault of the victim and of the appellant and this is how it defined the fault of each. I quote textually:—

Madame Charland aurait dû exercer plus de prudence, attendu qu'elle est sourde, et attendre avant de s'engager sur la traverse; quant à la compagnie, son employé aurait dû aller plus tranquillement ou arrêter, sachant qu'il faisait si noir qu'il ne pouvait voir.

The appellant contends that in order to conform to the declaration the verdict should have found that the speed of the car was greater than that allowed by the by-laws of the city of Montreal, and that by simply declaring that the defendant's employee should have gone more slowly or should have stopped on account of darkness, the jury based their verdict on a fault not alleged against the appellant. In returning this verdict, says appellant, the jury went outside of the question as raised by the parties and placed the controversy on totally new ground.

There is no doubt of course that a plaintiff can only succeed at law "*secundum allegata et probata.*" But I do not think that, in the present case, it can be said that the verdict is contrary to this legal maxim. The declaration alleges that the street where the accident occurred was not sufficiently lighted, that the light in front of the car was insufficient, and that the car was driven faster than allowed by the city by-laws. The jury returned that the company was at fault in that its employee should have driven more slowly or should have stopped knowing that it was so dark he could not see.

This verdict seems to me perfectly based on the allegations of the declaration. The appellant claims that the by-laws of the city of Montreal authorize the company to drive its cars at a speed of eight miles per hour, that the car in question was only going at five or six miles per hour, and that, consequently, the verdict is not founded on the declaration which charges that the car's speed was greater than that allowed by the by-law. By-law No. 210, on the point at issue, indicates and fixes the extreme of speed allowed for cars. They must not go faster than eight miles an hour. But if that be the maximum speed allowed under the most favourable circumstances possible—in broad day-

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light, fine weather, between crossings—should it not be inferred that, if the conditions are unfavourable, then the same speed is no longer allowable; and if this speed is kept up, notwithstanding, can it not be said that the car is being driven at a greater speed than that allowed by the by-law? It seems to me that the jury could perfectly well interpret the by-law in this sense, and render a verdict accordingly.

In the present case the motorman should certainly have been more prudent. It was 10 o'clock in the evening; it was a very dark night; the street was scarcely lighted; it had rained and the rails were more slippery than usual; several witnesses swear positively the car had no head light. All these circumstances obliged the motorman to drive his car at a very moderate speed and even to stop, as the jury said, before crossing streets. Now the motorman himself admits he was running his car at a speed of five or six miles per hour. If a speed of eight miles an hour is the maximum speed allowed by the by-laws, then surely speed of five or six miles under the conditions just mentioned is not in accord with the spirit of the by-law. For these reasons I cannot admit that the verdict is not founded on the allegations of the declaration.

In the third place the appellant contends that the verdict is contrary to the weight of the evidence. From the foregoing remarks it is evident that I do not agree with the company's pretensions. I find the verdict well founded, and the judgment is affirmed purely and simply.

*Appeal dismissed.*

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## LAMBERT v. MUNNS.

*Alberta Supreme Court, Stuart, J. February 8, 1912.*

1. RECORDS AND REGISTRY LAWS (§ III C—20)—DEALER IN REAL ESTATE—SOLE PROPRIETOR USING A COMPANY NAME.

The business of buying and selling real estate on his own account may be carried on by a sole proprietor, without incorporation, using as his business style, a company name or designation without registering a declaration of such company name under the Partnership Act (Alta.) 1908, ch. 5.

2. RECORDS AND REGISTRY LAWS (§ III C—20)—REAL ESTATE AGENT—SOLE PROPRIETOR OPERATING UNDER A COMPANY NAME.

The business of a real estate agent may be carried on by a sole proprietor, without incorporation, using as his business style a company name or designation without registering a declaration of such company name under the Partnership Act (Alta.) 1908, ch. 5.

2. PARTNERSHIP (§ I—3)—REGISTRATION OF FIRM NAMES—"TRADING, MANUFACTURING OR CONTRACTING."

The word "contracting," as used in the phrase "trading, manufacturing, contracting or mining," contained in the Partnership Act (Alta.) 1908, ch. 5, as to registration of firm and company names, is to be interpreted in its popular sense as referring to what is usually

known as a contracting business, *ex. gr.*, building or railway contracting work, and does not include the making of contracts for the sale or purchase of real estate either on one's own account or as a broker or agent.

Statement

HEARING of motion for judgment made by plaintiff on the admissions made in the examination of defendant Munns for discovery.

The motion was refused.

*Charles F. Adams*, for plaintiff.

*Albert E. Millican*, for defendant.

Stuart, J.

STUART, J.:—This is a motion for judgment upon admissions made by the defendant Munns in the examination for discovery under rule 229.

The plaintiff sues on behalf of himself and the King for a penalty under the Partnership Act, which is ch. 5 of the Alberta statutes of 1908. Sec. 4 of this Act says:—

> Every person engaged in business for trading, manufacturing, contracting, or mining purposes and who is not associated in partnership with any other person or persons, but who uses as his business style some name or designation other than his own, or who, in such business uses his own name with the addition of "and company" or some other word or phrase, indicating a plurality of members in the firm, shall cause to be filed as aforesaid a declaration of the fact in writing signed by such person.

The defendant, in his examination for discovery, admits that he began in the month of January, 1911, to do business under "The Calgary Loan & Investment Company"; that he had no other person in the said business, but that the company consisted of himself alone and that he had not registered a declaration of this fact until August 25, 1911; that is, some time after the period of six months allowed by the Act had elapsed. This would, of course, make the defendant liable to the penalty imposed by sec. 9 of the Act, provided the business which he carried on could be held to come within the meaning of the terms above quoted, namely: "trading, manufacturing, contracting or mining." The defendant said that the business he carried on was that of buying and selling real estate. I gather from his evidence that he not only bought and sold on his own account, but acted as agent for intending vendors, because he says that people came in and listed their property with him. There was really no other business carried on by the defendant, although he states he did negotiate a loan for some third parties on behalf of a client or two, and also that on one or two occasions he introduced a friend to a life insurance agent, as a result of which some life insurance business was done.

This motion is made really for the purpose of testing the question whether or not such a business as this is one which

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comes within the meaning of the Partnership Act, which I have just quoted. I am of the opinion that it does not. It is neither trading nor manufacturing nor mining. The only mentioned word that could possibly cover such a business is the word "contracting," but, in my view, this word refers to what is popularly known as a contracting business, that is, taking contracts for various kinds of work, building or railway contracts and things of that kind.

The motion for judgment, therefore, upon the admissions will be dismissed with costs.

*Motion refused.*

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## SERLING v. LEVINE.

*Supreme Court of Canada, Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. October 7, 1912.*

1. WRIT AND PROCESS (§ II A—18)—SERVICE OF PROCESS ON INFANTS—APPOINTMENT OF TUTOR.

The summoning of a minor under Quebec law in an action in damages brought by a plaintiff who had been decoyed from the United States to the Province of Quebec, by fraudulent representations in order that he might be arrested on *capias* is not null merely from the fact that the defendant is a minor, such incapacity as that of minority being removable on application to the court for the appointment of a tutor to represent and assist the minor.

2. INFANTS (§ III—41)—SERVICE OF PROCESS—IRREGULARITY—PROOF OF PREJUDICE.

The incapacity of a minor to be sued is only relative, it is not an absolute nullity and may be denounced by an exception to the form revealing the fact of minority; but such exception will only be maintained if the defendant can prove prejudice from the method whereby the summons was served.

3. INFANTS (§ III—41)—DEFENCE BY INFANT—ACT OF MINOR HINDERING APPOINTMENT OF TUTOR—FAILURE TO PLEAD.

Where on an exception to the form the court orders the summoning of a family council to appoint a tutor to represent and assist him and the defendant hinders and prevents the family council from meeting and the minor becomes of age, the exception falls to the ground and the court may then declare the minor to be properly in the record and he must plead personally to the action as brought, and if he fails to do so judgment may be rendered against him *ex parte*.

[*Garceau* v. *Denis*, 2 Que. P.R. 389, approved.]

4. APPEAL (§ VII I 2—352)—DISCRETION OF COURT OF ORIGINAL JURISDICTION—MATTERS OF PROCEDURE.

The discretion used by the court of original jurisdiction as to incidents of procedure and informalities therein should not be interfered with by appellate courts unless substantial injustice has been done.

5. ESTOPPEL (§ III F—82)—PARTICIPATION IN LEGAL PROCEEDINGS—SUBSEQUENT OBJECTION TO THEIR REGULARITY—WAIVER.

A defendant who appears as a witness to answer interrogatories on articuled facts and who objects to the relevancy of questions put to him, and who objects to questions put to other witnesses, by such proceeding acquiesces in his being summoned as a defendant and cannot raise later the question of his incapacity.

6. DISMISSAL AND DISCONTINUANCE (§ I—2)—QUEBEC PRACTICE—INSCRIPTION FOR JUDGMENT.

Irregularity in inscription for judgment *ex parte* is not a reason for the dismissal of the action.

THE facts involved in this case are shortly as follows:—

The appellant, a resident of Syracuse, where he was carrying on business as a metal dealer, was decoyed to Montreal by means of two letters, written to him by the respondent. These letters stated that a large whiskey distillery at Ste. Anne de Bellevue had recently been burned down, and that the receiver was ready to dispose of the metals, and suggesting that the appellant should come on to Ste. Anne's to purchase these materials, and giving particulars as to how he should reach his destination, most of which statements were, to the knowledge of the respondent, false.

On his arrival at Ste. Anne's, the appellant was met by the respondent, who represented that the letters had been written by his father, and requested the appellant to wait at Ste. Anne's until he, the appellant, could communicate with his father in Montreal. The same afternoon, while the appellant was waiting for his interview with the respondent's father, he was arrested on a *capias* issued by Miss Christine Olsen, a stenographer in the employ of Mr. Henry Weinfield, a brother-in-law of the respondent, who was at that time also living at Ste. Anne's with the respondent's parents. After his arrest, the appellant was taken by the bailiffs charged with the writ of *capias* to Mr. Weinfield's office, where the following conversation was held:—

> Mr. Weinfield asked me, "What will you offer?" I told him I was selling—what do you want? He said: "What are you offering me?" So I asked him if I owed him anything. He said: "On that *capias*." I told him I did not know anything about that *capias* and did not know who he was.

The appellant was taken to the Montreal jail and instructed his attorneys to contest the *capias*, and the *capias* issued by Miss Olsen was quashed on the 8th of September, and she desisted from her action on the 6th of October following. While the respondent was still in jail and before he could be liberated following the judgment on the first *capias*, a second *capias* was issued by Louis and Hyman Sapery, the former being also a brother-in-law of the respondent, and, with Mr. Weinfield, living with the respondent's parents at Ste. Anne's. This *capias* was likewise quashed on the 23rd of September, and a desistment from the action was filed on the 26th of September.

After the conclusion of these proceedings, the appellant took action against the respondent, against Miss Christine Olsen, who made the affidavit for the issue of the first *capias*, and against Louis and Hyman Sapery who took the second *capias*, alleging

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a conspiracy on the part of these four defendants to decoy the appellant to the city of Montreal in order to extort money from him by the illegal and malicious proceedings which they adopted. Judgment was rendered against Miss Olsen and the Saperys, after contestation, on the 30th day of June, 1911, by the Honourable Mr. Justice Guerin. The present respondent did not plead to the merits, but filed an exception to the form, on the ground that, at the time of the institution of the action, he was a minor.

In the Superior Court, district of Montreal, the defendant was condemned *ex parte* in damages; the Court of King's Bench, appeal side, reversed this judgment and dismissed the action.

The judgment of the Court of King's Bench was reversed and the judgment of the Superior Court was restored.

*A. Geoffrion*, K.C., and *A. Rives Hall*, K.C., for appellant.
*E. F. Surveyer*, K.C., and *P. Ledieu*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—I am obliged, with great reluctance, to differ from the conclusion reached by the majority of this Court to reverse the unanimous judgment of the Quebec Court of Appeal.

The question at issue is of first importance, affecting, as it does, not merely the practice and procedure of the Quebec Courts, but the broad question of the rights of minors in that province. The judgment in the Court below, which is reversed here, conforms with what I have always understood to be the settled jurisprudence of Quebec.

This is an action of damages brought by the appellant against the respondent to recover the sum of $2,500 damages. It is unnecessary to state in greater detail the cause of action. Nothing turns upon the merits of the claim. The respondent was a minor when served with the writ, but he attained his majority during the course of the proceedings in the Superior Court after the issue of minority had been raised.

The question is: In these circumstances, could the plaintiff, now appellant, ignore the plea of minority and proceed to judgment without a tutor being appointed to the defendant minor and without issuing a new writ of summons?

The *ex parte* judgment of the Superior Court proceeds on the assumption that the plaintiff may obtain a condemnation against the minor although not represented by his tutor. The defendant was not represented by counsel at the hearing, and the attention of the trial Judge does not appear to have been specially drawn to the plea of minority. In the Court of King's Bench, after very full argument, it was held that the fact of minority was an absolute bar to the action, and the judgment

of the Superior Court was reversed. I concur in the judgment in appeal.

Minority is an absolute bar to an action, and, even when not set up, may be invoked after judgment rendered, on a petition in revocation, C.P.Q., art 1177, par. 9. The general effect of articles 246, 304, 320, 323, 324, 987, 1039, and 1263 of the Quebec Code, is that, except in special circumstances, and for very limited purposes, a minor is not capable of performing any civil act, or of assuming an enforceable civil obligation. On the other hand articles of the Code of Procedure (arts. 78 and 174), when read as they must be with the provisions of the Civil Code, make it quite clear that no person can be a party to an action either as plaintiff or defendant or in any form whatever unless he has the free exercise of his rights; those who have not the free exercise of their rights must be assisted, authorized or represented in the manner prescribed by law. Since this case was decided in the Superior Court, the question came up again for consideration in *Paquette* v. *Auclair*, 12 Que. Prac. Rep. 402, and, in a footnote to the report of that case, will be found a long series of decisions, dating from 1819, in all of which the law is laid down as decided by the Court of Appeal. I see no reason to innovate.

I do not, of course, dispute the right of the plaintiff, in a suit like this, upon the production of the plea of minority, to take such steps as are necessary to have a tutor appointed who could be brought into the case by a new writ when the proceedings are continued as if the tutor had been a defendant *ab initio*. Such is the practice in Quebec. But nothing of that sort was done here, and I hold that the service of the writ of summons on the minor was a nullity which could not be cured except, if at all, in the way that I have just indicated. At the time the minor became of age he was not properly before the Court and he was careful not to acquiesce in any of the subsequent proceedings.

Demolombe's dictum *"on ne confirme pas le néant"* (vol. 24, par. 382, page 367), will, I am convinced, continue to be acted upon by the Quebec Courts even after this judgment is rendered and until this important point is settled by the Privy Council.

I refer to the following French and Canadian text writers: Roy, Droit de Plaider, No. 89; 2 Mignault 215; Sirois, Tutelles et Curatelles, No. 242; 1 Langelier 403; 4 Laurent No. 365; 1 Boitard, Procédure Civile, No. 215.

In answer to the argument that the respondent was not prejudiced, I refer to the following cases in all of which it was held that whenever there is a nullity there is a prejudice: *Larue*

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v. *Poulin*, (K.B.) 9 Que. P.R. 157; *Fairbanks* v. *Howley*, 10 Que. P.R. 72, 73; *Roberts* v. *Dufresne*, 7 Que. P.R. 226.

I would dismiss the appeal with costs.

IDINGTON, and DUFF, JJ., concurred with BRODEUR, J.

ANGLIN, J. (dissenting), concurred with the Chief Justice.

Brodeur, J.

BRODEUR, J. (translated):—The defendant, respondent, was sued in damages as a result of his inducing the plaintiff, appellant, under fraudulent representations, to come to the province of Quebec, in order that he might be arrested there on a *capias*.

The defendant filed an exception to the form, pleading minority. He never filed any plea to the merits, although he was ordered so to do after he had attained the age of majority. His exception to the form having been dismissed, judgment *ex parte* was rendered against him, condemning him to pay to the plaintiff $2,000.00 damages. He appealed from this judgment as well as from that rendered on his exception to the form, and was sustained by the Court of Appeal which decided that seeing his minority, he had been illegally summoned, and that, as a result, the action taken against him should have been dismissed. The plaintiff appealed from this judgment of the Court of Appeal.

The question which we are called upon to decide is as to whether this exception to the form should have been maintained. It seems to me at the very outset, that the conduct of the procedure in a case should be left to the Court of original jurisdiction. Now, no less than five Judges of the Superior Court, to wit, Davidson, Fortin, Martineau, Lafontaine and Charbonneau, JJ., were called upon to render interlocutory judgments in this case, where this question of summons arose, but every one of them was of the opinion that the ends of justice were absolutely safeguarded, not by having the action dismissed, but by causing a tutor to be appointed to the defendant, whilst he was a minor or by compelling him to plead to the merits when he became of age. These interlocutory judgments were, moreover, in line with the decision of Pagnuelo, J., in the case of *Garcau* v. *Denis*, 2 Que. P.R. 389.

It must not be forgotten that the respondent had been summoned in the name of His Majesty, and in obedience to this writ, he had appeared, and, first of all, filed a dilatory exception praying that security for costs be furnished. But when afterwards he disclosed the fact of his minority by his exception to the form, the Court decided that a tutor should be appointed, in order that he might be properly represented and assisted, and for this purpose, ordered the summoning of a family council.

With the obvious object of preventing the arm of the law

from striking and punishing him as he deserved, for his most reprehensible offence, his parents refused to accede to the orders of the Court. When he became of age ten months later, the proceedings for the summoning of the family council, were discontinued, and the defendant was ordered to plead to the merits.

In order that his exception to the form might succeed, the respondent was bound to establish that he had suffered prejudice. Art. 174 C.P. says:—

> The defendant may invoke any of the following grounds by exception to the form *whenever they cause a prejudice*; . . . 2. the incapacity of the plaintiff or of the defendant.

What is the prejudice suffered by the defendant in the present case?

He alleged that he was incapable of defending himself because he was a minor. The Court answered, stating that he would be given a tutor, and when he became of age, it ordered him to defend himself personally.

The incapacity of minors is relative, it is not absolute. They are answerable for their offences, says art. 1053 of the Civil Code. They may demand of the Courts that a tutor be appointed to them, and they may in certain cases appear before the Courts (C.C. 250, 323). They may also sue for wages and bring all actions arising from the contract for the hire of their personal services (art. 304 C.C.).

If they are reputed as of the age of majority in the case of an offence committed by them, can they not, just like minors engaged in commerce, be brought before the Courts? The question may arise, but it is not necessary to decide it in this case.

Art. 174 of the Code of Civil Procedure, is new law; Art. 116, formerly ruled in this matter, and read as follows:—

> Sont invoqués par exception à la forme les moyens résultant 1°. des informalités dans l'assignation; 2. des informalités de la demande lorsqu'elle est en contravention avec les dispositions contenues dans les articles 14, 19, 50, 52 et 53.

It is, therefore, necessary to suffer prejudice before an exception to the form can succeed. This is a question of fact which should be left to the discretion of the Judges of the Court of original jurisdiction, and if, as in the present case, the necessary precautions have been taken to obviate to this prejudice, then appellate Courts should not intervene. Even under the old Code, the summoning of a minor was not radically null.

Pigeau, vol. 1, p. 79, says:—

> Deux choses sont nécessaires pour qu'on puisse intenter une action contre une personne; la première qu'elle soit soumise au droit d'où procède l'action; la seconde, qu'elle ait le discernement nécessaire pour se défendre.

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Guyot, Vo. "Mineurs," is no less explicit. "Minors," says he:—

> ne peuvent ester en jugement sans l'assistance d'un curateur; mais comment doit-on entendre cette maxime générale? La demande formée par le mineur seul sera-t-elle nulle? Donnera-t-elle seulement lieu à une exception de la part du défendeur, qu'il n'est pas tenu de répondre à l'assignation jusqu'à se que le mineur ait été pourvu d'un curateur?
>
> Il semble donc qu'une demande formée en justice par un mineur au-dessous de l'âge de puberté ne devrait pas être déclarée nulle, sur le fondement qu'elle aurait été formée par lui seul sans être assisté de son curateur parce que cette nullité n'a été établie qu'en sa faveur.
>
> L'incapacité des mineurs n'est donc que relative à eux afin qu'ils ne puissent se préjudicier.
>
> The respondent alleges the nullity of the summons. Solon says in his "Traité des Nullités," page 6: En général les nullités sont odieuses. Que signifie en effet dans le for intérieur l'irrégularité d'une demande dans sa forme si cette demande est juste . . . elle doit être repoussée dans tous les cas où le législateur ne s'y oppose pas formellement.

Where then can be found the text of law whereby the legislator declared the nullity of a proceeding such as the one in issue?

Article 304 C.C. says, it is true, that actions belonging to a minor are brought in the name of his tutor and nevertheless, this article gives instances in which the minor can act alone with the authority of a Judge. The Civil Code has no provisions regarding actions brought against a minor. The Code of Civil Procedure deals with this question at art. 78 which reads as follows:—

> No person can be a party to an action, either as claimant or defendant, in any form whatever, unless he has the free exercise of his rights, saving where special provisions apply.
>
> Those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity.

Nowhere does the Code declare that the summoning of a minor is null; it therefore, belongs to the Judge to decide. Merlin, Répertoire, Vo. "Mineur," par. 8, says:—

> Il suit donc qu'une demande formée en justice par un mineur au-dessus de l'age de puberté ne devrait pas être déclarée nulle sur le fondement qu'elle, aurait été formée par lui seul sans être assisté de son curateur, parce que cette nullité n'a été établie qu'en sa faveur; le défendeur pourrait simplement proposer une exception dilatoire et soutenir qu'il n'est pas obligé de défendre la demande contre lui jusqu'à ce que le mineur ait été fourni d'un curateur.

If, as is stated by Merlin, the minor may bring an action, and if the adverse party has only the right to ask that he be assisted by his tutor, it seems to me that this right also exists in the case of actions brought against the minor.

In neither case should the action be dismissed, but the Court may order the tutor, who is to assist and represent the minor, to be called into the suit.

Solon, "De la Nullité," at page 14 says:—

> Il résulte de ce que nous venons de dire qu'il dépend le plus ordinairement du juge d'accepter ou de refuser une nullité qui n'est point prononcée de plein droit. Au lieu que si elle a ce caractère il ne peut se dispenser de la prononcer car elle repose sur les présomptions légales contre lesquelles aucune preuve n'est admise. (Articles 1350 et 1352.)

These articles 1350 and 1352 of the Code Napoléon, correspond to articles 1239 and 1240 of our Civil Code.

Far from declaring the nullity of the summons of a minor, art. 174 of our Code of Civil Procedure states that it may only be invoked when it causes a prejudice, and this is a fact which I have already stated, should be left to the absolute discretion and appreciation of the trial Judge. Appellate Courts should not overlook the discretion which he has exercised.

It is well to add that the defendant was summoned to answer interrogatories on articulated facts according to the dispositions of article 359, and following of the Code of Civil Procedure. He was then of age, and he was summoned as a defendant to answer the questions served upon him. The objections which he raised against this last summons are such as to constitute on his part an acquiescence to his treatment as the party defending the case.

The Court of Appeal has also held that the inscription for judgment was irregular, but this informality is not such as would justify the dismissal of the action. The defendant when summoned as a witness and on *faits et articles*, never complained of this irregularity in the inscription. It is evident that the defendant in this cause, hoped he could avoid the consequences of his offence and of his most reprehensible conduct, by invoking informalities of procedure. He will have to be convinced that the rules of procedure have not been instituted to hinder the course of justice.

The appeal is maintained with costs, both in this Court and in the Court of Appeal, and the judgments of the Superior Court are confirmed.

*Appeal allowed;* FITZPATRICK, C.J., *and* ANGLIN, J., *dissenting.*

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Oct. 22.

## WIGGIN and ELWELL v. BROWNING.

*Ontario High Court. Trial before Middleton, J. October 22, 1912.*

1. ESTOPPEL (§ III D—63)—AGENCY—EQUIVOCAL REPLY AFTER LOSS SUSTAINED.

Estoppel does not arise to prevent a denial of agency in respect of a purchase made by one in the name of another from whom in fact he had no authority, where the latter is first notified of the transaction after the pretended agency has been acted upon and after the consequent loss had been sustained, although, instead of directly repudiating any liability, the pretended principal answers a demand for settlement in terms which imported a doubt on his part as to the evidence of his legal position when he had no doubt, *ex gr.*, by writing to the deceived party that while not admitting that the pretended agent is correct in asserting that he was authorized, the writer does not wish for the present to take the stand that he had absolutely no authority.

[*Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, and [1904] A.C. 806, considered.]

2. ESTOPPEL (§ III D—63)—PRETENDED AGENCY—REPUDIATION.

Where one learns that another had been without authority purporting to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority as regards obligations afterwards entered into by such third person on the faith of the pretended agency.

[*Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, and *Ewing* v. *Dominion Bank*, [1904] A.C. 806, discussed.]

Statement

ACTION to recover $5,538.75, being a balance of the price of stock alleged to have been purchased by the plaintiffs for the defendant.

The stock was purchased by one Mills, now deceased, purporting to act on behalf of the defendant, and a part of it was paid for by Mills; but he had in reality no authority to use the defendant's name. When the defendant first heard of it, in October, 1911, and was pressed by the plaintiffs' solicitors to admit or assume liability, he declined to do so; but on the 14th November he wrote to one of the plaintiffs as follows: "Mills claims that he had authority to purchase this stock; and, while I am not admitting this, I do not wish for the present to take the stand that he had absolutely no authority to do what he did. At the same time, I do not feel like guaranteeing the amount." On the 22nd November, the plaintiffs wrote to the defendant that they were "carrying the account in its present position as a personal indulgence and to enable you to avoid a loss, if possible. In view of the fact that you have not repudiated liability, we are willing to give you a further opportunity of working out the account." On the 24th November, the defendant wrote to the plaintiff, "I am not admitting liability." On the 1st December, the plaintiffs wrote: "If we are to understand it," i.e., the letter of the 24th, "as a repudi-

ation of your liability . . . we fancy that we cannot allow the matter to stand. We are satisfied that we have sufficient evidence to establish your responsibility, and we do not feel justified in postponing action." On the 4th December, the defendant replied: "It may be that you are right in thinking that I am personally responsible, and as to this I am not expressing an opinion.

*H. H. Dewart*, K.C., for the plaintiffs.
*R. McKay*, K.C., for the defendant.

Middleton, J.

MIDDLETON, J.:—The plaintiffs are stock brokers, carrying on business at Boston, Mass. The defendant is a barrister, practising at North Bay and at Toronto. At the time of the occurrences hereinafter related he was absent from Canada. J. F. Mills, now deceased, was a broker, carrying on business in Toronto. Browning had had business transactions with Mills, but Mills had no general authority to act for him in any way.

In July, 1911, Mills was interested in the flotation of a mining company known as the Porcupine Coronation. He had asked Browning to assist him in this. Browning had absolutely refused to have anything to do with it. During Browning's absence, and for the purpose of forwarding his own schemes in connection with this company, Mills conceived the idea of purchasing stock in the company, from the plaintiffs, in Browning's name, and he accordingly telegraphed the plaintiffs, instructing purchase of the stock.

Some correspondence ensued; all the communications from Toronto being telegrams sent by Mills in Browning's name, and the answers, both by telegram and letter, being intercepted by Mills in some way not explained.

In the result, several parcels of stock were purchased and drafts were made by the plaintiffs upon Browning, in pursuance of instructions given by Mills in his name. One of these drafts were paid by Mills, but at the end of July 25,000 shares had been purchased and there was some $8,500 due to the plaintiffs. On the 2nd of August, Mills cabled to the defendants at London for authority to purchase for him 25,000 shares of Coronation. This cable message reached the defendant at Belfast. He wrote, refusing:—

> I would not give an order for 25,000 if I were on the ground. The mine may be all right, but I have too many irons in the fire to go as far as you in your gambling transactions.

On the drafts being unpaid, a member of the plaintiffs' firm came to Toronto and saw Mills. The matter was placed in the hands of solicitors, and it then became quite apparent that Mills had no authority to use Browning's name. This is

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clear from the letter written by the plaintiffs' solicitors to Mills on August 2nd.

It is true that a letter of August 14th was tendered in evidence for the purpose of getting over the statements contained in the earlier letter; but no evidence was adduced in support of the statements contained in that letter, and I think I should disregard it. Mr. Browning returned to Toronto in October, 1911, and was advised by the solicitors of what had taken place in his absence. He saw Mills. He says:—

> I asked Mills for an explanation of what he had done . . . He admitted that he had acted without authority . . . that he knew he was liable criminally, and had done what he did thinking that the stock market would act differently from the way it had gone.

(Examinations for discovery.) The solicitors at this time pressed Browning to admit or assume liability. This he declined to do, and up to this point, no possible fault can be found with his conduct.

On the 14th of November he wrote a letter to Mr. Elwell, one of the members of the plaintiffs' firm, stating that since his return he had been interviewed both by Mills and Hodgson (the solicitor) with regard to the purchase of stock made by Mills in his name, and he adds:—

> Mills claims that he had authority to purchase this stock; and while I am not admitting this, I do not wish for the present to take the stand that he had absolutely no right to do what he did. At the same time, I do not feel like guaranteeing the amount.

On the evidence of the defendant, which I accept, Mills not only had no authority but did not claim that he had any authority; and this letter is most disingenuous. It was well calculated to lead the plaintiffs to suppose that the question of Mills' authority was one of doubt, upon which different views might be taken. The plaintiffs did not at once respond on receipt of this letter; but on the 22nd November they wrote a letter which might also be the subject of criticism, stating that they were "carrying the account in its present position as a personal indulgence and to enable you to avoid a loss if possible. In view of the fact that you have not repudiated liability, we are willing to give you a further opportunity of working out the account."

This was immediately replied to by a letter of the 24th, in which Mr. Browning said: "I am not admitting liability." On December 1st the plaintiffs wrote:—

> If we are to understand it (the letter of the 24th) as a repudiation of your liability for our account, we fancy that we cannot allow the matter to stand. We are satisfied that we have sufficient evidence to establish your responsibility, and we do not feel justified in postponing action. On the 4th of December, Mr. Browning replied: "It may be that you are right in thinking that I am personally responsible, and as to this I am not expressing an opinion."

It is sought to treat the letter of the 24th November as bringing the case within the decision of *Dominion Bank* v. *Ewing*, 7 O.L.R. 90, *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, and [1904] A.C. 806.

To understand the precise effect of that decision is not easy. In the Supreme Court, no doubt, the majority of the Judges thought that, where one learns that another had been without authority purporting to act in his name, he owes a duty to the person with whom the transaction has taken place, to inform him that the transaction was without authority, and that by failing in this duty he is estopped from thereafter asserting the absence of authority.

In the Privy Council no such wide proposition is assented to. Their Lordships regard the matter as a pure question of fact, and treat the principle of *Mackenzie* v. *British Linen Co.*, 6 App. Cas. 82, as governing the case. There the principle invoked was not estoppel, but rather ratification. The silence of the defendant was treated as "very strong evidence indeed that Mackenzie, for Fraser's sake, thus ratified Fraser's act for a time; and a ratification for a time would, I think, in point of law operate as a ratification altogether."

In *British Linen Company* v. *Cowan* (1906), 8 F. 704, the Court of Session, while accepting to the full the decision in *Mackenzie* v. *British Linen*, 6 A.C. 82, also adopts the statement of the Lord Ordinary when he says:—

> Upon general principles I cannot too strongly repudiate the idea that one person can fasten liability upon another, with regard to a matter with which that other has no previous concern, by writing him letters or handing him documents which *ex facie* demand an answer, and afterwards founding upon the fact of no answer being received to them is inferring liability of some sort on the part of the person to whom they were sent. I consider it to be the right of every person who receives a letter or other document regarding a matter with which he is not concerned, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might, I think, be productive of most mischievous results and put honest people to a vast amount of annoyance, trouble, and expense.

It is, however, I think, my duty to accept the law, as I understand it, laid down by the majority of the Supreme Court: and I do so with the less hesitation because I think that, even if there is no obligation on the part of the recipient of the letter to answer, there is, I think, an obligation upon him, if he undertakes the burden of answering, to state the truth with absolute candour.

But I do not think that this helps the plaintiffs. At the time the letter was written, the loss had been sustained. The plaintiffs knew that Mills had no authority. If they had learned anything between the 2nd and 14th August to justify a change

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of opinion, they had the facts before them. The solicitors' interviews with Browning were not for the purpose of seeking information upon which the plaintiffs intended to act in their dealings with Mills. It is not shewn that they in any way acted upon or relied upon the letter. What was sought was an admission by Browning of his own liability. What was given was a denial of liability, or, at any rate, a refusal to admit liability, unsatisfactory because made in terms which import doubt on Browning's part as to the evidence of his legal position, when he had no doubt.

I think I should be extending the Supreme Court's decision unwarrantably if I were to treat it as applying to the circumstances of this case as warranting either a finding of assumption of liability or as creating an estoppel.

The action fails, and must be dismissed; but, as it has been provoked by the letter under discussion, without costs.

*Action dismissed.*

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SASK.

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Oct. 24.

## MORRISON et al. v. BERNHART et al.

*Saskatchewan Supreme Court. Trial before Newlands, J. October 24, 1912.*

1. SPECIFIC PERFORMANCE (§ I E—30)—RIGHT OF ONE PARTNER TO BIND THE OTHER TO OPTION FOR PURCHASE OF REAL PROPERTY.

One of two owners of partnership real property, holding a power of attorney from the other partner authorizing him to lease the property and to consent to the assignment of an existing lease upon said property, which lease contained an option to purchase exercisable at any time during the term of the lease, may bind the other partner to an agreement consenting to the assignment of that lease and giving a new option for the same amount and with a like limitation as to time as was contained in the original lease, especially where the agreement made by the one partner was shewn to the other and no objection was interposed for several months.

Statement

THIS is an action for specific performance of an agreement in writing whereby the defendants agreed to give the plaintiffs an option to purchase lots 37 to 40 in block 123, Moose Jaw, for the sum of $36,000, payable as therein mentioned.

Judgment was given for specific performance.

*G. E. Taylor*, for plaintiff.

*C. E. D. Wood*, for defendants.

Newlands, J.

NEWLANDS, J.:—The facts as proved at the trial are that the defendants are the owners of said land, and on the 4th day of February, 1909, they leased the same to one William Percival Curran for the term of five years, and said lease contained a provision allowing Curran to purchase the premises during said term for the sum of $36,000. This lease was signed by the defendant Joseph Bernhart for himself and as attorney for the defendant Antoine Bernhart.

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On the 5th May, 1909, Curran assigned the said lease from Bernhart to himself to Robert A. Machan, and transferred the option to purchase said premises to him, the same being put at $35,000. On the 7th May, 1909, Robert A. Machan transferred the said lease and option to the plaintiffs.

There was a provision in the lease from the defendants to Curran that he was not to assign the lease without their consent, so on the 15th of January, 1910, the defendants entered into an agreement with the plaintiffs, in which Machan joined, agreeing to the assignment of the above-mentioned lease. The plaintiffs by the same agreement released the Curran option assigned to them by Machan, and which was for the sum of $35,000 and took a new option from the defendants for the sum of $36,000, which was the amount of the original option to Curran.

I might point out here that Curran was a son-in-law of the defendant Joseph Bernhart, which was, in my opinion, one of the reasons for the defendants giving a new option to the plaintiffs, Curran having given an option to Machan for $35,000, which he assigned to the plaintiffs, when his option from the defendants was for $36,000.

The agreement sued on was executed by the defendant Joseph Bernhart for himself and as attorney for his brother Antoine Bernhart, and the real question in issue is, whether Joseph had authority to bind his brother Antoine by executing said agreement as his attorney.

It is true that Joseph disputes his liability also on the ground that he did not know he was giving a binding option, but the evidence was entirely against him on this contention, he having been advised by counsel before executing it, and it having been read over to him, and I am of the opinion that he not only knew what he was signing, but that the agreement carried out his intention.

Antoine's liability is placed on two grounds, 1st, that Joseph was authorized to sign for him, and, 2nd, that he acquiesced in it. It is not disputed that Joseph signed the lease to Curran as Antoine's authority and that he had authority to do so. He had also, by virtue of a power of attorney dated 13th January, 1910, authority from Antoine to lease said premises and to consent to an assignment of the existing lease upon said property. The option to purchase was a part of this lease which Joseph had authority from Antoine to consent to being assigned, and as the agreement which he did execute amounts to no more than an assignment of the lease, I have come to the conclusion that he had express authority from Antoine to execute it on his behalf. In addition to this, he and his brother were in partnership, and the premises in question were partnership property, and Joseph was the partner who conducted the business of the firm, and the

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transaction in question was a partnership one. Then the document in question was shewn to Antoine immediately after its execution, and remained in his possession for some months before he made any objection to it. For these reasons I am of the opinion that Antoine is bound by the execution of the agreement in question by his brother Joseph, both because Joseph had authority to execute it on his behalf and because, by not objecting to what was done, he acquiesced in it.

It is admitted that the plaintiffs made a tender of the amount due under the agreement, and they are, therefore, entitled to specific performance as prayed for, with costs.

*Judgment for specific performance.*

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ONT.

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Oct. 30.

## HOODLESS v. SMITH.

*Ontario High Court, Riddell, J., in Chambers. October 30, 1912.*

1. PARTIES (§ I—55)—NON-JOINDER OF JOINT OWNER WITH PLAINTIFF.

While the non-joinder of parties having a joint interest as co-owner with the plaintiff, is, under Ont. C.R. 206 (1897), no longer a ground for the absolute dismissal of the action, the court will direct, on the defendant's exception raised on an interlocutory motion, that the action do not come on for trial unless and until the other person interested has been joined as a party.

[*Lydall* v. *Martineau*, 5 Ch.D. 780, specially referred to.]

Statement

APPEAL by the plaintiff from an order of one of the Local Judges at Hamilton requiring the plaintiff to add his wife as a co-plaintiff, within one week, and, in default, that the action be dismissed with costs.

*J. G. O'Donoghue*, for the plaintiff.
*E. D. Armour*, K.C., for the defendants.

Riddell, J.

RIDDELL, J.:—The pleadings set up that one C.B. was the owner of a certain park lot, which he laid out in 54 lots, registering the plan; that he sold 35 of these to the C.L. company, the company in the deed covenanting, for themselves, their successors and assigns, not to erect any building with the front wall within less than 6 ft. from the line of Sophia street. The C.L. company sold certain lots to A.M., who entered into similar covenants; A.M. sold to "the plaintiff and his wife, K.H., as joint tenants, and not as tenants in common," part of this property; and the plaintiff and his wife entered into similar covenants. A.M. sold thereafter to the defendants (husband and wife) other parts and adjoining the property of the plaintiff and his wife; and they entered into similar covenants.

The defendants in April, 1912, commenced to excavate a cellar, and this to a depth below the plaintiff's brick house—

and also out to the margin of Sophia street, and have erected a store there. The plaintiff claims a mandatory injunction, etc.

The defendant M.D.S. denies the allegations, and submits that the plaintiff is not the sole owner, denies any covenant but one he did not break, etc.; his wife's defence is the same.

Notice of trial was served for the assizes at Hamilton beginning on the 7th October, 1912, and the case was postponed by Mr. Justice Kelly, to the non-jury sittings beginning on the 18th November.

The defendants moved on the 24th October for an order dismissing the action, on the ground that the plaintiff is suing for damages to land of which he and his wife are joint tenants, without joining her as a party; the motion was heard by Judge Monck, Local Judge in Chambers, and an order made that the plaintiff's wife be joined within one week, and, if this were not done, that the action be dismissed with costs.

The plaintiff now appeals.

There can, I think, be no doubt that this is a case of non-joinder which is most objectionable: Daniell's Chancery Practice, 7th ed., vol. 1, p. 182; *Stafford* v. *London*, 1 P. Wms. 428. But it is argued that the application should be made at the earliest possible moment: and that is true: *Sheehan* v. *Great Eastern R. Co.*, 16 Ch. D. 59; *Scane* v. *Duckett*, 3 O.R. 370.

Nevertheless, I cannot see how the plaintiff is hurt: and all rules of practice must, of course, be elastic.

The defendants raise in their defence that the plaintiff is not the sole owner of the land. This is probably a sufficient objection—and the plaintiff would proceed at his peril: *Nobels* v. *Jones*, 28 W.R. 726; *Lydall* v. *Martineau*, 5 Ch.D. 780. And the Court, while it would not perhaps dismiss the action (Con. Rule 206 (1)), would certainly not proceed in the absence of the co-tenant—but would order that the wife be made a party (Con. Rule 206 (2)).

I think that the order was properly made now that she be made a party; but the penalty should not be (on default) that the action be dismissed; it will be sufficient that the order be made that the action do not come on for trial unless and until the amendment be made.

I think, too, that the costs both here and below may be in the cause, in view of the delay in moving.

*Judgment accordingly.*

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## HARQUAIL COMPANY v. ROY.

*New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry and McKeown, JJ. April 19, 1912.*

1. SALE (§ III A—55)—RIGHTS AND REMEDIES OF PARTIES—LIABILITY OF VENDEE ON QUANTUM VALEBANT—WHEN IT ACCRUES.

Where a vendee becomes liable on *quantum valebant* for goods sold and delivered, the liability accrues as soon as the goods are retained by him, notwithstanding that the period of credit under the original agreement had not expired.

2. SALE (§ III A—55)—RIGHTS AND REMEDIES OF PARTIES—RECOVERY ON "QUANTUM VALEBANT" WHERE CONTRACT NOT PERFORMED.

Notwithstanding a special contract for the sale of a quantity of goods at a specified price, where the vendee accepts a certain number of the goods, he is liable for their value on *quantum valebant*, though the goods accepted were not up to the contract.

[*Cutter* v. *Powell*, 6 Term R. 320, 2 Smith's L.C., 9th ed., 1212 (and similarly 11th ed., 1903, vol. 2, p. 24), followed; *Read* v. *Rann*, 10 B. & C. 438, referred to.]

Statement

AN appeal by the defendant from the judgment of McLATCHEY, J., refusing to set aside a verdict, and to enter judgment for the defendant or for a new trial, a verdict having been given and judgment for $100 entered in favour of the plaintiff on the trial with a jury. The action was brought for goods sold and delivered under the following circumstances:—

In March, 1911, the plaintiff agreed to manufacture and deliver to the defendant 2,000 crates at 35 cents per crate. All the crates were delivered on or before April 25, 1911, but did not prove up to sample. Some of them were used by the defendant and the remainder, about three-quarters of the whole quantity, were taken back by the plaintiffs and altered and delivered again to the defendant some time after May 2, 1911. The defendant rejected some of the altered crates. It was agreed when the order was given that the defendant might pay cash or in sixty days. About the first day of May, the defendant accepted a draft at thirty days for $500 and paid the same at maturity, but refused to pay any more. This action was brought on June 30 for the recovery of the balance of the contract price, viz., $200. The only count in the declaration was for goods sold and delivered.

Argument

*A. T. LeBlanc*, for the defendant (appellant), moved to set aside the verdict and enter judgment for the defendant or for a nonsuit or for a new trial. The plaintiff could not recover on a *quantum meruit*, because the contract was entire: *Heney* v. *Bostwick*, 24 N.B.R. 414.

McLEOD, J.:—Should you not have immediately returned all the boxes when you found part were not up to the contract?

*A. T. LeBlanc*:—We used part of the crates and paid $500 for them, but we did not accept all of them after they were

altered. The jury gave a verdict for only $100, virtually finding that the plaintiff did not complete his contract. The plaintiff cannot recover unless he has completely fulfilled his part and yet the Judge charged that we were liable to pay for the crates we kept: *Frye* v. *Frye*, 34 N.B.R. 569; *Cutter* v. *Powell*, 6 Term R. 320, 2 Smith's L.C., 9th ed., 1212.

WHITE, J.:—You would be liable for the boxes you accepted on a *quantum meruit*.

*A. T. LeBlanc*:—Yes, but the plaintiff must shew that he could not take back the unused ones. There is no finding that they were up to quality.

BARRY, J.:—If the verdict had been for the balance on the boxes used you could not have complained.

*A. T. LeBlanc*:—I would not have appealed, although none of the boxes were up to sample. The period of credit had not expired, because the altered crates were delivered between May 2 and May 6, 1911, and the action was begun on June 30, 1911. We are entitled to a nonsuit.

*W. A. Trueman*, for the plaintiffs (respondents):—This was one order. The defendant could not use part and then say I will refuse part. The evidence shews that after he did receive the goods and before he complained, he had used the crates and had ample opportunity to know that they were not up to contract. The crates were accepted subject to an agreement to make them right, and the defendant could not restore the crates to Mr. Harquail and put matters as they were. The question as to the period of credit was expressly left to the jury and they found it had expired. While a special contract remains unperformed, there is no recovery on an *indebitatus assumpsit*, but, if one party has received some benefit which cannot be returned, he must pay a reasonable amount for it: *Waterous* v. *Morrow*, 18 N.B.R. 11.

*A. T. LeBlanc*, in reply.

The appeal was dismissed with costs, BARRY, J., dissenting.

Barker, C.J.

BARKER, C.J.:—This is an appeal from the County Court of Restigouche. The action is for the recovery of $200, a balance alleged to be due for goods sold and delivered. The particulars are for the price of 2,000 crates at 35c. each on which $500 had been paid on account. It seems that there was a contract made by the defendant with the plaintiff for the manufacture and delivery of 2,000 crates for holding bottles. The agreement was a verbal one and it provided that the crates were to be in various specified sizes, according to sample, and at an all-round price of 35 cents each. When the goods came to be delivered,

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the appellant objected that they were difficult to put together and not as they should be. This resulted in all or some of them being returned to the plaintiffs' shop, where they were made all right, as he says, and sent back. The Judge told the jury that notwithstanding there was a contract for the delivery of the 2,000 boxes at a specified price, if the defendant took and received and used a certain number, he was liable for their value notwithstanding they were not up to the contract. The jury found a verdict for the plaintiff for $100.

Two questions were raised by the appellant. The first is as to the correctness of the Judge's charge to which I have just referred. I think the Judge's charge in this particular was right. In the notes to *Cutter* v. *Powell*, 6 Term R. 320, 2 Smith's L.C., 9th ed. 1212 [and similarly 11th ed., 1903, vol. 2, p. 24], the rule in such cases is stated thus:—

> The general rule being thus established, viz.: that while the special contract remains unperformed, no action of *indebitatus assumpsit* can be brought for anything done under it, we now come to the exceptions from that rule, and the first of them is that adverted to by Mr. J. Parke in *Read* v. *Rann*, 10 B. & C. 438, in the passage just cited. It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party has derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration, as the benefit conferred upon him is reasonably worth, and to recover that *quantum* of remuneration an action of *indebitatus assumpsit* is maintainable. This is conceived to be a just expression of the rule of law as it at present prevails.

The passage from the judgment of Parke, J., *Read* v. *Rann*, 10 B. & C. 438, at p. 441, referred to, is as follows:—

> In some cases, a special contract, not executed, may give rise to a claim in the nature of a *quantum meruit*, *ex gr.* When a special contract has been made for goods, and goods sent, not according to the contract, have been retained by the party, then a claim for the value on a *quantum valebant* may be supported; but then from the circumstances a new contract may be implied.

And Smith's continuing says:—

> But no claim in the nature of a *quantum meruit* can be founded upon a special contract which has not been performed, unless the person who has a right to insist on the performance of the special contract has accepted some benefit resulting from its partial performance or the circumstances are such as to shew, in any other way, that a new contract has arisen between the parties.

This seems to be ample authority for the maintenance of the action. And see *Waterous* v. *Morrow*, 18 N.B.R. 11; Cassels' S.C. Digest 138.

The other question was, that the period of credit had not expired. The evidence was that the defendant said he might pay cash or he might want sixty days' credit and it was said that that period had not elapsed when this action was commenced. As to this question the Judge left it to the jury to say whether or not the period of credit had expired, and they seem to have found that it had, and there is evidence to sustain that view.

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This does not seem to me to be a material question. When once you have got rid of the special contract a part of which was this provision as to payment, you are rid of that question. This action and the recovery are based not on a special contract, but on implied liability to pay on request for the goods received and used. By agreement, goods delivered according to contract were to be paid for in 60 days at the contract price. By law the value of the goods retained though not up to contract was to be paid for on request.

Landry, J.

LANDRY, J.:—The facts shew that boxes were delivered to the defendant under the contract; some of which were accepted and some rejected. The rejected ones went back to the manufacturer; the accepted ones were used. When the rejected ones came back altered, some of such altered ones were used and others were rejected. The action is for goods sold and delivered. Had the contract been filled by the plaintiff, the suit could only have been brought on the contract. The contract was not filled, but the defendant, with the knowledge that all the goods delivered were not up to contract, accepted some of them and used the same. For such as he used, I take it, that he became liable outside of the original contract, to pay for goods sold and delivered as soon as he used them irrespective of any time given in the original contract as to payment.

The appeal should be dismissed.

McLeod, J.

MCLEOD, J. (oral):—I agree in this case that the appeal must be dismissed. The action is brought for the value of a quantity of boxes that were delivered by the plaintiff to the defendant, under a contract. They were all delivered to the defendant some time in April. Some of them were not according to contract; but the defendant, with that knowledge, took and used some of them. The defendant complained to the plaintiff about some of them not being according to contract, and the plaintiff took them back and practically repaired them and returned them to the defendant in May. Notwithstanding that, a number of the boxes were still not according to the contract, but the defendant did not return them. One of the defences is that the action was brought too soon; that is, that he had a credit of 60 days, and the 60 days had not expired. I think the delivery took place when the boxes were delivered

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first in April, and the fact that the plaintiff took some of them back to make certain changes, and returned them, did not make a new delivery, and the term of credit had expired. The plaintiff is clearly entitled to recover on the *quantum meruit* for those that were kept, although they were not up to the contract.

WHITE, J.:—I agree with my brother McLeod.

BARRY, J. (dissenting):—In March, 1911, the plaintiffs, (respondents) carrying on a wood-working and manufacturing business at Campbellton, contracted with the defendant (appellant) a manufacturer of non-intoxicating beverages, also carrying on business at Campbellton, for the manufacture and delivery of sufficient material properly cut and sized, called shooks, to make, when put together, 2,000 crates, such as the defendant required in shipping his product, at thirty-five cents per crate. There was no particular time specified for the delivery of the crates, although it seems to have been understood in a general way by both parties that the goods were to be delivered in the following April.

The plaintiffs commenced to deliver crates on April 15, and on the 25th of that month, the delivery of the whole quantity contracted for had been completed. Samples, according to which the crates were to be manufactured, had been furnished by the defendant to the plaintiffs at the time of the making of the contract. After the delivery of the material at the defendant's warehouse, it was found when his workmen began to put the crates together, that the different parts would not fit satisfactorily, so as to make a complete whole. It sufficiently appears from the evidence of the plaintiffs' principal witness, Mr. John Harquail, president and manager of the company, that the shooks were not satisfactory, and that the company, recognizing the defects in them, at its own suggestion, took them back to the factory for the purpose of having the necessary alterations and corrections made. Mr. Harquail says:—

> The defendant claimed that the ends were a little narrow and the centre division required too much force to put them together. Those reasons were the complaints made. I ordered those parts complained of to be brought back to the factory, that is the parts he had not used. We took back nearly all the centre divisions that had not been used and had them put together. We widened the ends to what we thought would be satisfactory. The ends were made to sample in the first instance. The ends shrunk because of atmospheric changes in the first instance and we corrected this. We put together I should say fully three-quarters of the centre parts of the 2,000 crates.

And again, he says:—

> My foreman told me crates were not satisfactory. Did not fit well in centre pieces . . . They were ordered back because my foreman told me crates went together bad and the ends a little narrow.

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And the foreman of the plaintiffs' factory says:—

> We acknowledge that the boxes were not fit for market before change, but that is why the changes were made.

About three-quarters of the whole quantity of crates ordered had to be and were taken back to the plaintiffs' factory for the purpose of having the necessary alterations made in them. It is important to bear in mind that, according to the plaintiffs' evidence, this was done after the second and before the sixth day of May. The exact date upon which the second delivery, i.e., the delivery of the shooks as altered and corrected, was made, does not appear to be at all clear, although I should rather infer from the plaintiffs' evidence that it was after the sixth of May. It is clear, however, that this delivery took place after the second of May.

There is very little difference between the plaintiffs and the defendant in regard to the terms of payment agreed upon. Mr. Harquail says:—

> Mr. Roy said when order was given, he might want sixty days or he might pay cash. . . . He said he might pay in sixty days or might pay cash. I understood sixty days was after delivery of goods.

That would mean, I take it, after the delivery of the goods satisfactorily manufactured and in a condition fit for use in the manner in which they were required and intended to be used. The defendant, speaking of the terms of payment, says:—

> Everything else all right, and asked him to give me to the last of June to pay. He said it was all right.

And again:—

> I asked Mr. Harquail if he would give me until the end of June to pay for cases; he said "yes." I will not say that I did not say I might pay cash or might want sixty days, to Mr. Harquail. If I did use the foregoing words, that is the way I put it, instead of saying I wanted to the end of June.

The defendant about the first of May, although there was no obligation upon him to do so, accepted a draft at thirty days for $500 on account of the price of the crates; this draft he paid at maturity. This action was brought for the recovery of the balance of the contract price. The declaration contains but one count, the common *indebitatus* count for goods sold and delivered, and the particulars indorsed upon the writ of summons exhibit a claim for the price of 2,000 crates, at 35 cents each, $700; upon which the payment of $500 is credited, leaving the amount sought to be recovered, $200, i.e., the balance of the contract price.

One of the defences raised by the defendant is that the goods were sold on credit, and that the period of credit had not expired at the time of the commencement of the suit. The writ

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was issued on June 30, 1911. That the goods were sold on credit cannot be disputed, the only question being the time at which the period of credit expired. According to the plaintiffs' own evidence, a credit of sixty days after the second of May—accepting that date as the date of the ultimate delivery from which the credit was to run—and would not expire until the first of July; or, on the other hand, accepting the defendant's statement, that he was to have until the end of June in which to pay the price, he would have the whole of the day on which the writ was issued in which to discharge the balance of his obligation. There is no conflict or balancing of evidence here: take the statement of either party and you arrive at the same result—a writ issued before the period of credit had expired. In the judgment which he delivered upon the motion for a new trial, the Judge of the County Court says:—

> This question (*i.e.*, whether or not the period of credit had expired) was left squarely to the jury by me in my charge, and they have found against the defendant's contention. I must say there was ample evidence for a finding in defendant's favour, but that evidence is not clear, and I am not prepared to say the jury erred in their finding.

For my part I am disposed to go very much further than the learned Judge goes in the quoted passage from his judgment, and to say that there is not a particle of evidence to warrant the jury in coming to any other conclusion than that, at the time of the commencement of the suit, the period of credit had not expired.

The interval between the date when the writ issued and the date when, according to my view, it might have been safely issued, is, it is true, short—one, or at most two days—an interval that might be regarded as trifling and of little moment to the defendant, were it not that in this case the interval, short though it may have been, is the measure of the difference between an unaccrued right of action, and a right of action accrued.

It is a well established principle that wherever the terms of any special agreement, not under seal, have been performed and satisfied, so as to leave a mere debt due to the plaintiff, he may sue in an *indebitatus* count, reserving the contract and the performance of it on his part to be proved in evidence. He is not limited to a special count upon the special contract, although he may if he likes, adopt that course. And it is equally well established that where a special contract has been rescinded either by mutual consent, or by such a breach on one side as entitles the other to rescind, and goods, labour, etc., which have been provided by one party under the special contract, and retained by the other party after the rescission, the value may

be recovered in this form of count, provided a new contract can be implied to pay the value of the consideration actually received. So that with this choice of procedure open to the plaintiffs, the form of action which they have selected furnishes no guide, but on the contrary leaves the Court in uncertainty as to whether they are seeking to recover upon a fully executed and completed special contract, or upon an implied promise to pay for the value of the goods furnished in part performance of a special contract which has been rescinded. But when one looks at the course of the proceedings at the trial, there can be no doubt or uncertainty. According to the record the plaintiffs opened their case and adduced evidence with the avowed object of proving a fully executed special contract, and being fully executed, entitling them to the balance of the entire consideration. That this was the course of the trial seems clear, not only from the evidence, but also from the remarks of the trial Judge in the judgment before alluded to, in which he says:—

> The plaintiff in his case proved a contract with the defendant to make and deliver 2,000 crates at 35 cents each, the contract price being $700. The defendant paid $500 and refused to pay any more, which was the cause of the suit.

In the whole of the case there is nothing said about rescinding the contract; neither is there anything said about repudiation by the defendant; the defendant never had any idea of repudiating the contract, for the very good reason that he wanted the crates, he says, because he needed them in his business and could not get them elsewhere. The attitude of the defendant at the trial was nothing more than that of a purchaser who denied having received the full quantity of crates contracted for, of the stipulated specifications, and quoad those that had been delivered, the time of payment under the contract had not arrived at the time the plaintiffs issued their writ.

If goods are sold on credit, the vendor cannot, as a general rule, sue for the price until the period of credit has expired: *Paul* v. *Dod*, 2 C.B. 800; *Price* v. *Nixon*, 5 Taunt. 338. It is said by Allen, C.J., in *Waterous* v. *Morrow*, 18 N.B.R. 11 at p. 13:—

> The general rule, no doubt, is, that while a special contract remains unperformed, no action of *indebitatus assumpsit* can be brought for anything done under it; but there are exceptions to that rule, and one of them is, that where something has been done under a special contract, but not in accordance with the terms of the contract, if the other party has derived any benefit from it, it would be unjust to allow him to retain that benefit without paying anything. The law, therefore, implies a promise on his part to pay such remuneration as the benefit conferred upon him is reasonably worth.

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*Foshay* v. *Baxter*, 6 N.B.R. 335, is to the same effect. In *Read* v. *Rann*, 10 B. & C. 438, it was said by Parke, J.:—

> In some cases a special contract, not executed, may give rise to a claim in the nature of a *quantum meruit, ex gr.*, where a special contract has been made for goods, and goods sent, not according to the contract, are retained by the party, there a claim for the value on a *quantum valebant* may be supported, but then, from the circumstances, a new contract may be implied.

See also *Bartholemew* v. *Markwick*, 15 C.B.N.S. 711; *Lee* v. *Risdon*, 7 Taunt. 188.

Accepting as correct the statement of the law as laid down in the authorities which I have alluded to, the question is, can the plaintiffs here in the absence of any repudiation or rescission of the contract by the defendant recover for the balance of the price of the crates before the time for payment as stipulated in the special contract has arrived? If the plaintiffs had manufactured and delivered all the crates strictly in accordance with the terms of the contract, they could not have recovered the price until the arrival of the time agreed upon; and I cannot well see why they should now be permitted to call to their assistance a breach of the contract committed by themselves, that is the delivery of a quantity of inferior goods or goods not according to the sample furnished them—for there must have been a deficiency in either the quantity or the quality of the goods to justify the verdict—and recover the value of those accepted and used by the defendant before the time when, had they fully carried out their part of the contract, they might properly have demanded payment. That the plaintiffs could ultimately recover the value of the goods accepted and used by the defendant, is not disputed, but I do think they were premature in bringing the present action.

*Wayne's Merthyr Coal Co.* v. *Morewood*, 46 L.J.Q.B. 746 is, I think, a direct authority in support of these views. The reasoning in the case is not easy to follow in the report, but this statement of the case which is taken from Benjamin on Sales, 5th ed., 814, appears to be generally accepted as correct. The plaintiffs had contracted to supply the defendants with coke bars of iron of a particular quality by successive deliveries, payment for each delivery to be made in cash for discount within a month, or by bills at four months, at the defendant's option. The plaintiffs delivered coke bars which were inferior to sample; but it was only after the defendants had worked all the bars delivered up into plates that they discovered their inferior quality, and they then refused to accept the residue. Before the discovery, the defendants had elected to pay for the bars by bill. The plaintiffs thereupon and before the expiration of the period of credit brought an action for the price of goods sold

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and delivered. It was contended on the authority of *Bartholemew* v. *Markwick*, 15 C.B.N.S. 710, that they were entitled to treat the original contract as rescinded, but it was held that as, distinguishing that case, the defendants had elected to take credit, and it was owing solely to the plaintiffs' fault in delivering inferior goods that the defendants had withheld the bill for the price, the contract was not wholly rescinded, and the plaintiffs were not entitled before the expiration of the credit to sue on a *quantum valebant* for the value of the goods delivered, but that they were entitled to damages for the defendants' refusal to accept the residue of the goods. The defendants had either not repudiated the contract at all, or at most had repudiated only the latter part of it, which had become severable from the rest; at any rate, the plaintiffs, being in fault could not be allowed to contend that the defendants had repudiated the contract *in toto*, so as to deprive the defendants of their right to credit for the goods already delivered. The contract therefore, so far as concerned the goods delivered, being either in fact open, or the plaintiffs not being allowed to say that it was not, no immediate right of action on a *quantum meruit* was competent to them; but the defendants were liable for their breach of contract in refusing to accept the residue of the goods. See *Fee* v. *Whyte*, 13 U.C.C.P. 83.

Several other questions, some of them of more or less importance, were raised on the appeal, but having come to the conclusion indicated, upon the question of the terms of credit,—and it is upon that question alone that I base my judgment,—it is unnecessary to refer to those other matters. I would allow the appeal with costs, and send directions to the Court below to enter a judgment of nonsuit against the plaintiffs, with costs, together with the costs of the motion for a new trial.

McKEOWN, J.

McKEOWN, J.:—I agree with the judgment of the learned Chief Justice.

*Appeal dismissed*, BARRY, J., *dissenting*.

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Oct. 29.

## KENNEDY v. HARRIS.

*Ontario High Court. Trial before Riddell, J. October 29, 1912.*

1. DAMAGES (§ III A 7—75)—CONSTRUCTION—PENALTY OR LIQUIDATED DAMAGES—TEST—OPTION.

Whether a stipulated liability for default in keeping alive an option is a penalty or liquidated damages may depend upon whether the damages though inevitable (1) are an enigma and incapable of exact calculation, or (2) are such that proof of them is extremely complex, difficult, and expensive, or (3) are such that the very thing intended to be provided against by the stipulation is to preclude the necessity of the minute, difficult, and complex proof.

[*McManus* v. *Rothschild* (1911), 25 O.L.R. 138, applied.]

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2. CONTRACTS (§ II C—140)—CONSTRUCTION—OPTION—DEFAULT IN KEEPING ALIVE THE OPTION—DATE, HOW DETERMINED.

Where a written mining contract prescribes a fixed liability if one of the contracting parties "fails in carrying out" a certain option with a third party, such is in effect an agreement to keep the option alive; and the date of the default may be fixed by reference to the date of the cancellation of the option by the third party.

3. CONTRACTS (§ II A—133)—OPTION—RECITAL—LATER CLAUSE, CONTROLLING EFFECT BY SPECIFIC PROVISIONS.

In an action by the plaintiff for a stipulated sum as liquidated damages under the defendant's written agreement to carry out and complete an option with a third party for the purchase of a certain interest in a mine, where the recital provides that in case the option is not carried out and completed the defendant will "on or before" June 1st pay the sum so fixed, and where a later clause stipulates that in case of the defendant's failure to carry out the option and complete the purchase he shall "within one month after such default, on or before June 1st," pay the stipulated sum, the specific provisions of the later clause prevail, and the liability will arise at the expiry of one month after the default, although such construction of the contract may mature the obligation prior to June 1st.

Statement

ACTION by a mining prospector to recover $5,000 under an agreement with the defendant.

Judgment was given for the plaintiff.

*W. N. Tilley*, for the plaintiff.
*J. E. Day*, for the defendant.

Riddell, J.

RIDDELL, J.:—The plaintiff had set up a claim in good faith to a certain mining property, and had commenced and was prosecuting an action to enforce it. The land was also claimed by a company. On the 30th March, 1911, the company and the defendant entered into an agreement which provided for the defendant obtaining a release of the plaintiff's claim and a discharge of his action—and the company, in consideration thereof, gave the defendant an option for $14,000 worth of work to be done on the property and $50,000 cash, as well as paid-up stock to the amount of $300,000 in a company to be formed by the defendant, with a capitalisation of not more than $2,000,000. The defendant was to spend $2,000 on development work, etc., before the 30th June, and $2,000 in each of the months of July, August, September, October, November, and December—or he might pay in cash to the company $500 for each of the months of June and July. The cash, $50,000, was to be paid on or before the 1st January, 1912, and the stock to be delivered not later than the 1st February. Time was made of the essence of the contract—and the defendant was given also an option to purchase, for money payable in stated instalments.

On the same day, the plaintiff and defendant entered into a contract which contained recitals of the plaintiff's claim, the agreement with the company, and continued:—

"And whereas one of the considerations of the said option is

that the said Kennedy shall release his caution and all his claims on the said lands, it being agreed that he shall be a partner with Harris in obtaining the said option and entitled to a one-half of all the profits, benefits, and advantages derived or to be derived by the said Harris under and by reason of the said option or by reason of acquiring selling or dealing with the said lands.

"And as a further consideration for the said Kennedy this day releasing the said lands from his caution and his other rights in an action now pending . . . which action shall be dismissed without costs, Harris is to agree with Kennedy that he shall, in case the annexed option is not carried out and completed, that he will on or before the 1st day of June, 1912, pay to Kennedy the sum of five thousand dollars."

The contract then provides that (1) the parties shall be partners, (2) the defendant shall be the selling agent while not in default; "but no sale . . . is to be had or made by Harris without Kennedy's written consent unless Kennedy's share of the profits shall equal $7,500, which shall be guaranteed by Harris in the ultimate result of the transaction."

"3. Harris is to furnish all the moneys required for the purpose of carrying out the said option, and, in case he fails to carry out the said option and complete the purchase, he is then, within one month after default, on or before the 1st day of June, 1912, to pay to Kennedy the sum of five thousand dollars.

"4. Harris shall make the election and make each of the payments called for by the annexed option at least one month prior to the date named for such payment, work, or notice or election, and shall at once notify Kennedy in writing where and when such payment was made. If Harris fails in carrying out the said option, or in doing the work or making the election or in making the payments called for thereby or thereunder, as herein set out, Kennedy shall thereupon be entitled to exercise the said option for his own benefit, as to him seems best, and Harris shall have no rights or interest in said option or thereunder."

"5. Kennedy agreed to release his caution and dismiss his action.

"6. If it becomes necessary in carrying out this proposed purchase, and the parties shall mutually consent to any changes, or if they cannot agree in the changes, the dispute between them shall be settled by W. N. Ferguson, and his decision shall be final as to what changes shall be made."

There are other provisions not material to be mentioned.

The plaintiff discharged his caution and action; the defendant went on with his option. In July, he asked the plaintiff to permit a change in the work, which, by the contract between them, was to be done in July, but by the "option" could be

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done in August. The plaintiff refused unless $2,000 were paid into the bank as security that the work would be done. The defendant refused this. Mr. W. N. Ferguson, being spoken to, said that he thought the plaintiff's condition perfectly fair. Mr. Ferguson was never applied to, to make or decide any changes in the contract under clause 6 above quoted. It would have been difficult, but not at all impossible, for the defendant to have done the work in July as agreed. The evidence of the plaintiff is to be fully accepted.

All parties knew that the company rued their bargain, and would get out of it if they could. Accordingly, when the defendant failed to do the work in July, the plaintiff made up his mind to do it, and took tools on the ground for that purpose—this, of course, under clause 4. He also tried to sell, but failed—and he did not in fact do the work required or any of it.

The company cancelled their option, and the plaintiff sues for $5,000 and interest from the 20th October, 1911. The writ was issued on the 29th March, 1912.

The statement of defence sets up that it became necessary to make changes in the contract, but the plaintiff refused to submit the matter to Mr. W. N. Ferguson; that the defendant was prevented from doing the work by a conflagration; that the $5,000 is a penalty; that the plaintiff suffered no damage; and that, in any case, there is nothing payable till June, 1912; and, therefore, the action is premature.

The plaintiff joins issue.

I find, upon the evidence, that there was no refusal or request to submit to Mr. W. N. Ferguson; no prevention of the work by the conflagration; and the questions of law now remain.

In addition to the defences set up in the pleading, another was raised at the trial, viz., that the provisions of clauses 3 and 4 are alternative—and the plaintiff has taken that relief given by clause 4.

An examination of the contract shews its purpose. The defendant was to do the work, etc., a month before the time that his option with the company called for; so that, in case he failed, the plaintiff might do it and keep the option alive. In that case, however, he would keep it alive for his own advantage only; and, while the language is used in clause 4, "If Harris fails in carrying out the said option," etc., it is obvious that what is meant is the acts necessary to keep the option alive during its contemplated currency up to the end of December—otherwise the provision that, on such default, Kennedy was to exercise the option for his own benefit would be wholly nugatory. But clause 3 contemplates something quite different. In the recital it is provided that the defendant is to agree with the plaintiff that "he shall, in case the annexed option is not carried out and com-

pleted, . . . pay to Kennedy the sum of $5,000." There is in clause 3 an agreement which is inserted to implement this. But the express agreement goes further, and provides that the defendant shall, "in case he fails to carry out the said option and complete the purchase . . . within one month after default, on or before the 1st day of June, 1912, pay to Kennedy the sum of five thousand dollars." I think this contemplates the final failure of the defendant to complete the purchase: and that it is quite independent of the provisions of clause 4. Whether, had the plaintiff succeeded in selling, the defendant would still have been liable, is a curious question, but we need not consider it here.

I do not think that the liability of the defendant to pay the $5,000 arose so long as the option was in existence, but that the right of action accrued one month after the company cancelled their option—which was well before this action began.

Nor do I think that this sum is due only on the 1st June, 1912; clause 3 is perfectly specific.

Nor is it a penalty. The Divisional Court has so recently dealt with the question of penalty aut non, that I need not further discuss it: *McManus* v. *Rothschild* (1911), 25 O.L.R. 138.

The plaintiff will have judgment for the sum of $5,000 (without interest) and costs.

In case of conflict, the evidence of the plaintiff and of Ferguson is to be given full credit.

*Judgment for plaintiff.*

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## Re BRENNAN and WALDMAN.



*Ontario High Court, Britton, J. October 25, 1912.*

1. DESCENT AND DISTRIBUTION (§ II A—1)—REALTY IN ONTARIO—STATUTES IN FORCE AT TIME OF DEATH.

The real estate in Ontario of an infant who died in the year 1882, leaving no brother or sister, devolves in accordance with the statute then in force in regard to real property (R.S.O. 1877, ch. 105, sec. 22), and goes altogether to the father surviving to the exclusion of the mother.

Statement

APPLICATION by the vendors, under the Vendors and Purchasers Act, for an order declaring that Matilda Agnes Hay, wife of Robert John Hay, the grantor in a deed to John and Margaret Brennan (the vendors) dated the 22nd May, 1903, had no right to dower and no other interest in the land therein described.

*W. J. Clark*, for the vendors.
*J. T. Richardson*, for the purchaser.

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Britton, J.

BRITTON, J.:—Robert John Hay and his wife lived together until about the 1st January, 1880, and the only child born to them was one son, named William John Hay.

The land mentioned was purchased by Robert John Hay and conveyed to him by deed dated the 23rd December, 1881, and in the conveyance the words describing Robert Hay are "as trustee for William John Hay"—his son. It is said that the age of the son was then about two years.

Matilda Agnes Hay deserted her husband about the 1st January, 1880. The infant son died on or about the 30th June, 1882.

Robert John Hay did not sign the deed, and he never signed any deed of trust. It was argued that he never was trustee in fact. Certain it is that the land was purchased by Robert John with his own money. He remained in possession until the 22nd May, 1903, when he sold to John and Margaret Brennan, the present vendors.

It is now suggested that Matilda Agnes, if living, may be entitled to an interest, by reason of her husband taking the land in trust for the son.

The facts are sufficient to warrant an order declaring that the wife is not, if living, entitled to dower.

It seems to me unnecessary formally to decide the question of trusteeship. The son died on the 20th June, 1882, leaving no brother or sister, but only his father and mother. The law then in force in regard to descent of real property in Ontario was R.S.O. 1877 ch. 105, sec. 22. Robert John Hay was the sole heir-at-law of his son William John. The mother of the infant took no interest in the land other than an inchoate right of dower.

An order should go declaring that Matilda Agnes Hay is not entitled to any interest in the land. No order as to costs.

*Order accordingly.*

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Oct. 7.

**Douglas C. CAMERON (defendant, appellant) v. Thomas Alfred CUDDY and John Franklin Boyd (plaintiffs, respondents).**

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. October 7, 1912.*

1. ARBITRATION (§ I—2)—SALE OF TIMBER LIMIT—FIXING DEFICIENCY BY ARBITRATION.

Where the vendor of a timber limit guarantees the existence of a specified amount of timber, and agrees to make good any deficiency by deduction from the purchase price, the amount of such deduction to be ascertained by arbitration, in an action for the purchase price the purchaser may counterclaim for damages for the breach of the vendor's guarantee, notwithstanding that there has been no arbitration, but he cannot set up as a defence that the timber described in the

agreement has not been delivered, and that the vendor is not entitled to recover the purchase price until the value of any deficiency has been ascertained by arbitration, and deducted therefrom.

[*David* v. *Swift*, 44 Can. S.C.R. 179, referred to.]

2. COURTS (§ III—195)—JURISDICTION OF SUPREME COURT OF CANADA—QUESTION OF PROCEDURE.

The Supreme Court of Canada will not entertain an appeal in which a mere question of procedure is involved.

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Statement

AN appeal by the defendant from the judgment of the Supreme Court of British Columbia affirming the judgment at trial in favour of the plaintiffs, in an action brought to recover the purchase-price of shares sold by the plaintiffs to the defendant under a written contract.

The appeal was dismissed with costs.

*Ewart*, K.C., for the appellant.

*Nesbitt*, K.C., for the respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree in the opinion stated by Mr. Justice Anglin.

Idington, J.

IDINGTON, J.:—This case is presented in a most unsatisfactory shape. The respondents sold the appellant fifteen hundred shares in a company, and had them delivered according to the terms of the contract, for which he agreed to pay one hundred and fifty thousand dollars. The time for payment had long elapsed when this action was brought.

The respondents had guaranteed that certain specified assets of the company existed, and were in its possession, and if found deficient to make good such deficiency by deducting same from said price, on a basis furnished by the agreement in question.

At the trial the respondents proved their case by reading the appellant's answers to interrogatories herein and were entitled thereupon to judgment.

At the close of the plaintiffs' case in that way the only record we have of what counsel for the appellant said or did is this:—

Our defence rests, my Lord, under paragraph six followed by the single word "argument."

Exactly what it was about we can only gather from the learned trial Judge's judgment and what appears in the judgments of the learned Judges in appeal.

In the agreement of sale between the parties there was a method by way of arbitration provided for determining the deductions agreed to be made from the price.

It is said by the learned trial Judge and the learned Chief Justice that there had been an award made by arbitrators and, on the application of the appellant, set aside on the ground that the arbitrators had no power to decide upon the extent of the deficiency, but only to the value thereof after the extent had been otherwise ascertained.

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The award is not before us and whether anything is *res judicata* as the result of that proceeding, as the learned Chief Justice intimates, I am unable to say.

Nor am I quite sure that I would take the ground that the learned trial Judge takes of the scope of such a submission as appears herein to have been, probably, what the arbitration proceeded on, or might have proceeded on.

The learned Chief Justice holds, and with him the majority of the Court of Appeal, that upon the pleading set up in paragraph six of the defence there was not such a pleading as entitled the appellant to make a case by way of defence, but that he ought to have counterclaimed.

And I infer, from what the learned trial Judge says, not only did he take that view, but that, on some application made relative to striking out and amending the defence, views had been put forward by the learned Judge before whom the application had been heard that the solicitor for the defendant was determined to ignore, and that he was determined to have his own method of pleading approved.

This Court has almost uniformly declined to entertain appeals in which only mere questions of procedure are involved.

If that is what this appeal is about, and it certainly seems so, I think it should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I am of opinion that under the clause of the agreement between the parties to this action, numbered two, it was open to the defendant, notwithstanding the provision for arbitration made by the clause numbered six, to have counterclaimed in this action for such damages as he sustained by reason of the breach of the plaintiffs' guarantee,

> that the assets of the said company with their approximate values consist of the lands and tenements and goods and chattels set forth in the schedule hereunto annexed (clause 2):

*David* v. *Swift*, 44 Can. S.C.R. 179.

The defendant, however, did not so counterclaim. On the contrary, he contented himself with pleading by way of defence an allegation that the goods set out in the memorandum of agreement had not been delivered and that, under the sixth clause of the agreement, the plaintiffs were not entitled to recover the purchase-price of the property sold until the value of any deficiency in it had been ascertained by arbitration and the amount thereof deducted from the sale price.

The learned trial Judge held that, although there were a deficiency, this fact was not available to the defendant as a defence in this action for the price of shares, unless he was in a position to shew that the extent and value of the shortage had been ascertained as provided for by the sixth clause of the agree-

ment. This judgment was confirmed by the Court of Appeal; and, as a matter of strict legal right, it seems unimpeachable.

It would, in my opinion, have been more satisfactory and more in accord with the true rights of the parties if, without setting aside the judgment of the trial Judge, the Court of Appeal had, on proper terms, so modified it that the defendant would not be compelled to pay to the plaintiffs the entire price of the shares purchased, although entitled in a proper proceeding, to recover from them a substantial sum in respect of the deficiency in the timber on the limits sold. That there is such a deficiency is admitted. The guaranteed quantity was 526,890,000 feet. The defendant in his factum states that the plaintiffs have admitted a shortage amounting in value to $10,126.13. He alleges a deficiency of 222,477,103 feet, worth, at fifteen cents per thousand, $33,361.56. There is no evidence in the record of the alleged admission or of the extent of the deficiency; but, in their factum, the respondents say that "it has always been common ground that a deficiency exists."

In these circumstances, I should have thought it reasonable and legitimate to modify the judgment so that the defendant should now pay the plaintiffs the amount ordered less the $33,361.56 in dispute: and that he should either pay this latter sum into the Supreme Court of British Columbia to the credit of this cause to abide further order, or should, in lieu of payment into Court, give security to the satisfaction of the registrar of the Supreme Court of British Columbia for the payment of it, or so much of it as he might ultimately be found to owe to the plaintiffs. Proper directions for the ascertainment of the correct balance might have been given and due provision also made to protect the interests of the plaintiffs. Had that course been taken I should certainly have been better satisfied. But the Court of Appeal has not seen fit to so deal with this case. It was entirely discretionary with it to do so or not. The defendant was not then and is not now as of right entitled to any such relief. My learned brothers think he should not have it. Under these circumstances I cannot do otherwise than concur in the dismissal of this appeal.

BRODEUR, J.:—I agree that the appeal should be dismissed with costs. Brodeur, J.

*Appeal dismissed.*

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Oct. 16.

## GUNDY v. JOHNSTON.

*Ontario High Court. Trial before Lennox, J. October 16, 1912.*

1. COSTS (§ II—35)—FIXING BY STATUTE—RIGHT OF SOLICITOR TO MAINTAIN ACTION FOR ADDITIONAL CHARGES.

Where, by private Act of Parliament (2 Geo. V. ch. 125, sec. 6) the costs of the plaintiff in an action against a township, were fixed "as between solicitor and client" at $1,800, which was to be paid by the township, a statutory contract was thereby created between the plaintiff and the township only, and the plaintiff's solicitor acquired from the Act no right against his client as to compensation, and he cannot maintain an action against the latter until after the delivery of a detailed bill of costs as required by the Solicitors Act, R.S.O. 1897, ch. 174.

[*Re Solicitor*, 22 O.L.R. 30, specially referred to; *Belcourt* v. *Crain*, 22 O.L.R. 591, considered.]

2. STATUTES (§ II A—96)—LEGISLATIVE INTENT—AMBIGUITY—ENCROACHMENT ON PREVIOUS RIGHT.

It is not to be presumed that the legislature intended to encroach on the rights of any one; and to justify such an interpretation of a statute there must be either express words to that effect or such an interpretation must be implied beyond a reasonable doubt.

[*Western Counties R. Co.* v. *Windsor and Annapolis R. Co.*, 7 A.C. 178, applied.]

Statement

ACTION by a firm of solicitors for the recovery of solicitor and counsel fees.

The action will be dismissed.

*M. Wilson*, K.C., for the plaintiffs.
*M. Houston*, and *A. Clark*, for the defendant.

Lennox, J.

LENNOX, J.:—The plaintiffs sue for the recovery of solicitor and counsel fees. They delivered a signed bill of costs on the 8th May last, the principal item of which was set out as follows:—

1912. April 15. Solicitor and client costs in litigation over by-law No. 17 of 1910 of the Township of Tilbury East, concerning the Forbes Drainage Works, both in the High Court and in the Court of Appeal, as settled by agreement between the parties, and fixed by statute of the Province of Ontario passed on or about April 15, 1912, which costs as settled and fixed as aforesaid were by the said statute directed to be paid by the Township of Tilbury East to you.....$1,800.00

There were other items amounting to ..... 84.68

1,884.68

Payments on account are admitted, amounting to ... 575.00

**The plaintiffs claim to recover a balance of.....$1,309.68**

with interest from the time the Act was assented to, the 16th April, 1912.

The retainer of the plaintiffs is not disputed, nor their right of lien upon the money payable by the Township of Tilbury East; but, as far back as May last, at all events, the defendant demanded and insisted upon the delivery of an itemised bill. A letter of the 8th May to the plaintiffs, from the solicitors then acting for the defendant, defined the attitude of the defendant in this way: "The bill that you gave us this morning is not a detailed bill, and we require a detailed bill from beginning to end so that we can have them (it) taxed. If you refuse to deliver your bill, we shall be obliged to make an application for an order in the usual way under the Rules. If you will read the statute, you will see that Mr. Johnston gets the $1,800, and not you. We again say that we do not deny your lien, and our client is ready and willing to pay you whatever you are entitled to, so soon as the bill is taxed."

There are some minor matters; but, as indicated in the letter quoted from, the substantial question is this: Is the defendant concluded by the provisions of the private Act referred to, or is he entitled to the delivery of a bill of costs shewing how the $1,800 is made up, and to an opportunity for taxation, before being called upon for payment?

Section 34 of the Solicitors Act, R.S.O. 1897 ch. 174, provides that no action shall be brought until one month has elapsed after delivery of a bill. The section of the statute referred to in the plaintiffs' bill of costs—2 Geo. V. ch. 125—is sec. 6: "The Township shall pay to the plaintiff James Johnston, his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and in the Court of Appeal, and such costs are hereby fixed at eighteen hundred dollars."

The plaintiffs submit that this private Act supersedes the ordinary right of the client to have a bill delivered, and an opportunity for taxation, before being called upon to pay; and that it finally fixes the costs in this case at $1,800, not only as between the Township of Tilbury East and the defendant, but between the defendant and the plaintiffs as well.

I am unable to accede to this proposition. It is true that "a statute is the will of the Legislature," and that the will of the Legislature, acting intra vires, whether reasonable or unreasonable, just or unjust, is supreme. If this enactment is to shut out all right of information and inquiry, it is glaringly unjust to the defendant; but, if it is clearly the legislative will, there is no redress except by its repeal: Maxwell on Statutes, 4th ed., p. 5. But the presumption is, that the Legislature intended what is fair, reasonable, convenient, and just; and, if the language is capable of two interpretations, that which avoids

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an injustice is to be adopted: Maxwell, pp. 285, 299, 300. It is not to be presumed that the Legislature intended to confiscate the property or encroach upon the rights of any one; and, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt: *Western Counties R. Co.* v. *Windsor and Annapolis R. Co.*, 7 App. Cas. 178, 188; *Commissioners of Public Works* v. *Logan*, [1903] A.C. 355.

In construing a statute and ascertaining the intention of the Legislature, the preamble, context, history, and object of the enactment is to be taken into account: Maxwell, pp. 37 and 78. It is to be presumed that the Legislature did not intend to interfere with the existing law beyond what it declares or beyond the immediate scope and object of the statute: Maxwell, p. 152.

The services in respect to which the $1,800 is claimed were rendered in connection with the defendant's opposition to a drainage by-law of the Township of Tilbury East, No. 17. The judgment of the Drainage Referee was against the defendant, with costs, and against all the other appellants. The defendant alone appealed, and he succeeded in quashing the by-law in the Court of Appeal, with costs against the township. This relieved him of assessment in respect of the drainage works.

What, then, was the object of the private Act? The object was the relief of the Township of Tilbury. The municipal council had diverted the general funds of the township, to provide moneys for which only the ratepayers of the drainage area should be liable; and the object was to enable the council to recoup the township.

The defendant occupied a position of exceptional advantage. He was free from the by-law, free from taxation, and the township was liable for his costs. He was not seeking legislation; he was opposed to legislation. He engaged the plaintiffs, and specifically he engaged Mr. Gundy, of the plaintiffs' firm, to prevent legislation, or, failing in this, to see to it that the relief granted to the township did not invade or impair the defendant's rights.

There was no suggestion of interference in any way whatever with the contractual or statutory relations existing between the plaintiffs and the defendant. Such a thing was not contemplated by the parties to this action, was not within the purview of the relief sought by the municipality, and could not be in the contemplation of the Legislature.

The defendant was physically unable to come to Toronto. He sent his son Thomas to supplement the efforts of his lawyers or to assist them. The son was a special agent, with powers limited within the scope of his instructions. He had no power

whatever to vary in any way the relations between the parties to this suit, much less to sweep away this beneficent statutory condition precedent to the recovery of costs; and he did not profess and was not asked to do so.

It was the manifest and absolutely imperative duty of Mr. Gundy, acting there in the absence of the defendant, not only to safeguard his client's interest against the municipality, but sedulously to guard him against any collateral embarrassment, inconvenience, or loss arising from careless or slovenly drafting; and, a fortiori, of course, absolutely to refuse an advantage to himself or his partners at the expense of his client. It would indeed be an extraordinary thing, if, while representing the defendant as solicitors and counsel, and bound to protect him, the plaintiffs could by a side-wind and by doubtful implication legislate themselves out of a long-established legislative disability—the inability to sue until a signed bill had been delivered; and I would certainly think it unfortunate if, notwithstanding the limited scope and object of the Act, the clearness of the language employed compelled me to give effect to the plaintiffs' contention. But it does not. On the contrary, I am clearly of the opinion that the Legislature never intended to do more, and upon a proper construction of the language does not do more, than: (a) provide for the payment *to the defendant* of the defendant's costs as between solicitor and client; (b) determine that as between these parties, and only as between these parties, the sum which the Legislature will compel the municipality to pay and the defendant to accept is to be $1,800.

A statutory contract, in fact, between these parties; the only parties before the Legislature. The solicitors were not acting for themselves; they were there to represent the defendant, and the defendant alone. They had no personal interest in the matter whatever. The money, when paid, is the money of the client; and, if paid to the solicitors, they receive it as trustees and agents of the client: *Re Solicitor*, 21 O.L.R. 255, affirmed in appeal, 22 O.L.R. 30.

But there was no agreement at all between the plaintiffs and defendant for the Legislature to confirm; and in fact there could be no binding executory agreement between them before delivery of a bill in conformity with the statute: *In re Baylis*, [1896] 2 Ch. 107; and with this decision *Belcourt* v. *Crain*, 22 O.L.R. 591, and the English cases there referred to, do not conflict; nor do any of them relax the vigilance with which the Courts have been accustomed to guard the client's rights concerning taxation. On this latter head, *Re Solicitor*, 14 O.L.R. 464, and *Re Mowat*, 17 P.R. 180, may also be referred to.

It is perhaps right to add that my reference to the duty of a solicitor is not to be taken as an indirect reflection upon the con-

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duct of Mr. Gundy, but merely for the purpose of defining how I should approach the interpretation of the private Act in question. On the contrary, I formed the opinion that Mr. Gundy acted throughout the legislative proceedings with the utmost good faith, and with skill and judgment.

In my opinion, the action cannot be maintained. I have not referred to the other items of the bill; but, with the exception of "costs re Hickey," $5, all the charges relate to this drainage matter, and are all included in the same bill. In any event, they constitute one cause of action; and the plaintiffs could only have judgment upon them separately if they were prepared to abandon their other claim. I may say, too, in view of the possibility of an appeal, that, if I were giving judgment upon these items alone, it would be without costs, as the litigation arose in reference to the $1,800 item alone.

The action, then, will be dismissed; and, the parties each standing upon what they assumed to be their legal rights, it will be dismissed with costs. The plaintiffs will have the right reserved to them of suing again. I trust, however, that further litigation may be avoided.

*Action dismissed.*

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## Re CANADIAN SHIPBUILDING CO.
**(Decision No. 2.)**

*Ontario High Court, Riddell, J., in Chambers. October 24, 1912.*

1. APPEAL (§ XI—720)—GRANTING LEAVE TO APPEAL—MATTER OF PUBLIC IMPORTANCE.

Leave to appeal to the Court of Appeal on the ground that the question raised by the judgment of the trial court is of great public importance, will not be granted the liquidator of a company under secs. 101 (*c*) and 104 of the Winding-up Act, R.S.C. 1906, ch. 144, where the question involved is not of a common law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

2. APPEAL (§ XI—720)—LEAVE TO APPEAL—LIQUIDATOR OF COMPANY—INABILITY TO SUCCEED IF JUDGMENT REVERSED.

Leave to appeal to the Court of Appeal will not be granted the liquidator of a company under secs. 101 (*c*) and 104 of the Winding-up Act, from the decision of the trial court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the judgment should be reversed, he could not prevail in the action unless he could successfully contend, as he must, in order to succeed, that the bills of sale under which the opposing party claimed, did not satisfy the requirements of such Act, and no case for leave to appeal on that branch of the case was made out.

Statement

MOTION by the liquidator of the company, under secs. 101 (*c*) and 104 of the Winding-up Act, for leave to appeal to the Court of Appeal from the judgment of Riddell, J., *Re Canadian Ship-*

*build'ng Co.* (Decision No. 1), 6 D.L.R. 174, 26 O.L.R. 564, and also for an extension of the time for giving security.

The liquidator attempted to appeal, without leave, to a Divisional Court, but the case was struck off the list for want of jurisdiction.

*J. A. Paterson*, K.C., for the liquidator.

*H. E. Rose*, K.C., for the Hamilton and Fort William Navigation Company Limited.

RIDDELL, J.:—It is contended that the question raised by my judgment is of great public importance, and that the Court of Appeal did not decide it, though raised, in *Re Rainy Lake Lumber Co.* (1888), 15 A.R. (Ont.) 749. There are several answers to this argument. Riddell, J.

In the first place, the question is not of a common law or equitable right but as to the interpretation of a statute. If my interpretation be not that intended by the Legislature, the matter can be set right by a simple amendment, retroactive or otherwise, a mere drop in the bucket of annual legislation.

Again, the matter cannot be very important, in the sense of frequently recurring, as, raised a quarter of a century ago, no case seems to have occurred again till the present.

Then, too, as there are two grounds upon which the judgment may be supported, either of which is sufficient, it might happen, as in the Rainy River case, that the Court of Appeal would proceed on the ground taken by the learned Referee, and leave this point undecided.

But the objection to granting leave goes much deeper.

It would not profit the applicant at all to have a judgment in his favour reversing my decision and holding that he is entitled to take advantage as a "creditor" of the Bills of Sale and Chattel Mortgage Act, unless he could go further and succeed in convincing the Court of Appeal that the learned Referee was wrong in holding that the bills of sale in the present case satisfy the statute.

The main fact is, that the liquidator is saying: "The navigation company are not entitled to hold the property because their solicitors made a mistake in drawing up the documents. My solicitors made a mistake in not going to the Court of Appeal. Help me by enabling my solicitors to take advantage of the mistake of the other solicitors, by nullifying theirs."

It is the proverbial rule of fair play—"If you can't help the man, don't help the bear." And it would, in my view, be monstrous for the Court to assist one litigant to take advantage of a slip of his opponent by lifting him over a slip of his own.

Whatever advantage any litigant can derive from a statute,

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he must have—the Court cannot mitigate the rigour of a statute, however great injustice it may work in the particular instance. "The words of the Legislature are the text of the law, and must be obeyed:" *per* Hamilton, J., in *Attorney-General* v. *Exeter Corporation*, [1911] 1 K.B., at p. 1101. The Legislature can legislate only in general terms, and every general rule will work hardship in particular cases—but with that the Court has nothing to do. "The statute is like a tyrant: where he comes, he makes all void," said Hobart, C.J., according to Twisden, C. J., in *Maleverer* v. *Redshaw* (1670), 1 Mod. 36, and Wilmot, C.J., in *Collins* v. *Blantern* (1767), 2 Wils. 351: No one can withstand that tyrant when he attacks; but, when all danger of an attack is over, it is a matter for the sound discretion of the Court whether the tyrant is to be called back and empowered to make an attack.

In the present case, the navigation company made a perfectly legitimate, honest, and usual agreement; they spent money on the strength of it; they are guilty of no fraud or impropriety; they are unquestionably entitled to the property, unless their solicitors have made a slip in preparing documents. I think they would have every reason to complain if a slip of the solicitors of their opponent were healed by the Court to take advantage of a slip of their own solicitors which the Court cannot heal.

Of course, I could not limit the appeal to the one ground which would not dispose of the case: the Court of Appeal has quite enough to do to give actual litigants their rights in actions properly before it, without taking up academical questions. At all events, if that be desired, the initiative must come from another source.

The motion will be dismissed with costs.

*Motion dismissed.*

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## AURIOL v. ALBERTA LAND AND INVESTMENT CO.

*Alberta Supreme Court, Simmons, J. February 14, 1912.*

1. VENDOR AND PURCHASER (§ I C—13)—TRANSFER OF TITLE—RIGHT OF PURCHASER TO DEMAND UNINCUMBERED TITLE.

Under an agreement for the sale of land wherein the vendor covenants to transfer the fee simple upon payment of the purchase price, the purchaser is justified in refusing to pay the balance until the vendor can give satisfactory assurance as to title and as to arrears of taxes.

2. VENDOR AND PURCHASER (§ I C—13)—TRANSFER OF TITLE—RIGHTS OF PURCHASER WHERE TRANSACTION IS TO BE COMPLETED AT DISTANCE FROM REGISTRAR'S OFFICE.

Where the parties are dealing at a distance from the registrar's office, the mere tender on the part of the vendor of an abstract from the land titles office, shewing him to be the registered owner, free

from incumbrances, of the lots in question, is not sufficient. The purchaser is entitled to be protected against the risk of having to deal with incumbrances of any nature that might be recorded against the title between the time of delivery of the transfer to him and its recording at the registry office. He has the right to notify the vendor that he will appear at the registry office on the date of payment and will there tender the vendor the price on the vendor depositing with the registrar a proper transfer and the vendor's duplicate certificate of title under the Land Titles Act and on ascertaining from the records that the title is free of all incumbrances.

[*Mayberry* v. *Williams*, 3 S.L.R. 350, referred to.]

Statement

TRIAL of an action for the balance of the purchase-price of land.

Judgment was given directing a reference to title and reserving further directions.

*E. H. Nichols*, for the plaintiff.

*G. H. Ross*, for the defendants.

Simmons, J.

SIMMONS, J.:—The defendants bought from the plaintiff four lots in the town of Camrose for $1,661, paying cash $553, and the balance payable in two equal instalments, of $553.70 each, in three and six months respectively, with interest at 6 per cent. per annum. An agreement for sale was executed by the parties, setting out these terms of payment. The agreement contained the following clauses: "In consideration whereof and on payment of the said sums of money with interest thereon as aforesaid, the vendor will immediately thereupon transfer to the purchasers in fee simple the said tract of land with the appurtenances, but subject to the conditions and reservations expressed in the original grant thereof from the Crown; and such transfer shall be prepared by the vendor at the expense of the purchasers." "Time is to be considered the essence of the agreement." On the 2nd or 3rd October, 1911, a clerk in the office of the plaintiff's solicitors attended on Mr. Bryan, manager of the defendant company, and tendered a transfer, properly executed, to Mr. Bryan, coupled with a demand for the final instalment of principal and interest and $3 for drawing the transfer. Mr. Bryan says that the letter (exhibit 5) was handed to him with the transfer, and the letter is as follows:—

Calgary, Oct. 9th, 1911.

The Alberta Land & Investment Co., Calgary.

Dear Sirs,—Re Auriol. We beg to tender you herewith transfer of lots 5 and 6 in block "E.," 1 and 2 in block "D.," and 5 and 6 in block "D.," according to a plan of sub-division of block 7, known as Fairview Addition, registered as plan 1,700-U., which plan of sub-division is registered as 5,262-A.B., and to inform you that the balance due under this contract is $571. We are sending duplicate certificate of title to the registrar, and the lands are registered in the name of André Auriol, grantor of the within transfer. In other respects the title is clear. You may receive this transfer on payment of $571.

Yours truly,

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Mr. Bryan says he was unwilling to part with his money till he was absolutely assured that the property was not incumbered; that the vendor did not give an assurance satisfactory to him. Mr. Bryan says he did not know that there were no arrears of taxes or no execution against the vendor, and did not know who was the registered owner of the land when the transfer was tendered to him. The defendants had, prior to this, received from the plaintiff's solicitors the following letter:—

Calgary, Oct. 4, 1911.

The Alberta Land & Investment Co., Ltd., Calgary.

Dear Sirs,—Re Auriol. Under agreement dated 8th March last you purchased lots 5 and 6, block "E.," 1 and 2 in block "B.," and 5 and 6 in block "B.," sub-division of Fairview Addition, Camrose, registered as plan 5,262-A.B. Final payment of $553.70 is in arrear under the terms of the contract. You were tendered transfer and neglected to pay the amount, which as of to-morrow is $571 as follows:—

| | |
|---|---|
| Final instalment | $553 70 |
| Interest to October 5th | 14 30 |
| Fee drawing transfer | 3 00 |
| | $571 00 |

The charge for the transfer is provided for in the agreement. Of course the principal sum will carry interest until payment. We take this opportunity of notifying you that the taxes are paid on this property, and the title is in the name of André Auriol, transfer from whom was tendered you to-day. Let us have cheque for this sum of $571, and receive the transfer. Your attention will oblige.

Yours truly,

NICHOLS & SAVARY.

And in reply to the defendants' letter of the 5th October, which was not produced at the trial, the plaintiff's solicitors wrote to the defendant as follows:—

Calgary, Oct. 6th, 1911.

Alberta Loan & Investment Co., Calgary, Alta.

Dear Sirs,—Re Auriol. Replying to yours of the 5th inst., we beg to say that, unless the money was formally tendered, we shall have to insist on the interest being paid. As for the title, we are glad to inform you that it is clear of incumbrance and taxes paid. We shall expect to receive your cheque to-morrow for the amount stated in our previous letter and will deliver you transfer and deposit title in the lands titles office.

Yours truly,

NICHOLS & SAVARY.

The defendants refused to pay the balance until the plaintiff gave them assurances satisfactory to them as to title and as to arrears of taxes. The plaintiff produced at the trial an abstract from the land titles office at Edmonton, shewing the plaintiff to be the registered owner, free from incumbrances, of the lots in question, and also that the certificate of title covering these lots included other lots in the same sub-division.

North Alberta Land Registration District,
Edmonton, Alta.

Messrs. Nichols & Savary, Barristers, etc., Calgary, Alta.

Sirs,—Replying to your favour of the 10th instant, asking for information in regard to duplicate certificate of title No. 234-F. 16, in the name of André Auriol, covering property in Camrose, I beg to advise you that this certificate is on file in this office.

Your obedient servant,

A. Y. BLAIN, *Registrar.*

As to the production of the plaintiff's certificate of title, he did all he was required to do under the circumstances. The certificate covered other lots, and depositing it with the registrar for the purpose of registration of the transfer to the defendants was quite justified.

I am of the opinion, however, that the defendants were quite within their rights in demanding an abstract of title and a certificate from the registrar that there were no executions registered against the vendor.

> The vendor is bound to shew and make good title in accordance with the contract: Encyc. of Laws of England, 2nd ed., vol. 14, p. 452.
>
> The terms conferring on the purchaser a right to a good title are conditions for the benefit of the purchaser: Fry, 4th ed., p. 160.
>
> In every contract for sale of land a condition is implied for a good title: Fry, 4th ed., p. 159.

And Williams on Vendors and Purchasers, vol. 1, p. 555, enunciates the general rule "that the vendor must shew a good title, that is, he must prove his right to convey what he has sold"; and on p. 53 of the same text: "If the vendor delay in sending the abstract of title, the purchaser should ask for it."

It seems quite clear that the law in England and also in Ontario requires the vendor to produce at his own expense an abstract of title. In delivering the judgment of the Court *en banc* of Saskatchewan, in *Mayberry* v. *Williams*, 3 S.L.R. 350, 15 W.L.R. 553, Wetmore, C.J., deals with the relative rights of vendor and purchaser when the vendor sues for the purchase-price.

There it was held that the vendor was not bound to produce and shew to the defendant an abstract of title before suing for the balance of the purchase-price where the defendant purchaser pays no attention to the contract and does not demand any evidence of title, if at the trial it was found the plaintiff had a good title when he made the demand for payment. The learned Chief Justice, however, quotes, with approval, Boyd, C., in *Cameron* v. *Carter*, 9 O.R. 426:—

> When an estate is offered generally for sale, the purchaser has a right to assume that the title is good and that it is free from incumbrance, and he has a right to require this to be shewn before he can be compelled to pay any part of the purchase-money.

And the inference to be drawn from the judgment in *Mayberry* v. *Williams*, is, that, when the purchaser is ready to pay

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his purchase-money and demands an abstract or other evidence of title, the vendor must comply with the demand. The remarks of Wetmore, C.J., in *Mayberry* v. *Williams*, 3 S.L.R. 350, as to the relative importance of an abstract under our system of registration and the English and Ontario systems, are very apt in the case before me. Under the latter systems an abstract was a necessity to shew the chain of title. Under our system, it shews at a particular moment the registered owner in fee simple, subject to the incumbrances, if any.

In the case before me, the defendants were content with something less than they were entitled to. The registry office was in Edmonton, and the parties were dealing with each other at Calgary. The defendants were content to accept an abstract of title shewing the plaintiff the registered owner free from incumbrances, including arrears of taxes. If they had paid over the purchase-price and received the transfer with the assurance as to title demanded, the defendant would inevitably take the risk of having to deal with executions, caveats, or mechanics' liens that might be recorded against the title in the registry office at Edmonton, between the delivery of the transfer at Calgary and its arrival at the registry office in Edmonton.

If the parties stand at arms' length on their absolute rights, it would appear that the purchaser has the undoubted right to notify the vendor that he will appear at the registry office on the date of payment, and will there and then tender the vendor the price, on receiving the assurances that the vendor has deposited with the registrar a proper transfer and the vendor's duplicate certificate, and that the title is free of all incumbrances. The covenant of the vendor in the agreement for sale: "will immediately thereupon transfer to the purchaser in fee simple the said tract of land" fully bears out this view. The vendor covenants to do all he is able to do to give the purchaser "a title in fee simple free from all incumbrances," that is, to procure the purchaser to become the registered owner of the said land free from incumbrances. These acts of the purchaser and vendor, namely, the payment by the purchaser and the transfer in fee simple by the vendor, are consecutive acts, which are in so close proximity as to be in the practical working out thereof simultaneous.

The covenant of the vendor is, "And on payment of the said sum of money . . . the vendor will immediately thereupon transfer to the purchaser the," etc. The purchaser is entitled at that moment to be satisfied of the vendor's ability as well as his intention to transfer the fee simple.

The only remaining question to consider is the request of the defendants to be furnished with a tax certificate shewing no arrears of taxes prior to the 1st January, 1911. It is to be

noted that the agreement for sale is dated the 8th March, 1911. The defendants plead, in par. 10 of their defence,

> that it was a condition precedent to the right of the plaintiff to recover the sum demanded that he should deliver to the defendants an abstract of title and tax certificate and prove and shew his title to the lands in question, etc.

Section 43 of the Real Property Act provides

> that the land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention therein, unless the contrary is expressly declared, be subject to all unpaid taxes.

The effect of this section is to make unpaid taxes a charge upon the lands. The Municipal Ordinance gives the municipality of Camrose the right to take proceedings by way of sale when the taxes upon the lands are in arrears for two years.

Surely the purchaser is entitled to have an assurance from the vendor that there was no charge upon the lands in the way of arrears of taxes. This is an essential part of the vendor's proof of ability to transfer in fee simple, and should be produced when the purchaser demands it. I am of the opinion that he is clearly within his rights. The purchase-money and the transfer are in Court, and there will be a reference to the clerk as to the amount due on the day of trial; and, on payment into Court by the defendants of the balance, if any, found due on account of purchase-price and interest and $3 for transfer under the agreement, the clerk will investigate the title, and if found by him that there are no arrears of taxes and that he can register the transfer now in Court so as to pass title to the defendants in fee simple, subject to the conditions and reservations expressed in the original grant from the Crown, the amount of purchase-price will be by him paid out to the plaintiff, or his solicitor, and he will deliver to the defendants, or their solicitor, the transfer for the purpose of registration.

Leave to each party to apply to a Judge in Chambers for further directions. The defendants to have the costs of the action.

*Reference directed as to title; further directions reserved.*

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## Re LANE and BEACHAM.



*Ontario High Court. Trial before Britton, J. November 8, 1912.*

1. WILLS (§ III G 4—139*a*)—CONSTRUCTION OF DEVISE—RESTRAINT UPON ALIENATION.

Where a testator's lands are to be equally divided amongst his children after the death or re-marriage of his widow but the lands are not to be sold "only to the testator's own heirs—they may buy or sell to each other," the restraint does not apply where all the parties entitled are desirous of selling to a stranger.

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2. WILLS (§ III B—81)—DESCRIPTION OF BENEFICIARIES—WHO MAY TAKE—MEANING OF "HEIRS."

Where land is devised to sons of the testator after a prior life estate, with the provision that "should any of the boys marry and have heirs, and should die before this property is divided"—*i.e.*, at the determination of the life estate—the word "heirs" means "children."

3. VENDOR AND PURCHASER (§ I C—10)—TITLE TO LAND—RESTRAINT UPON ALIENATION.

Where land is devised to the testator's widow for life, and then to the testator's sons living at the date of the death of the widow, but if during her life any sons shall die leaving children, the children are to take the share their parent would have taken if he had lived, the interest of such of the sons as may be alive at the death of their mother does not vest until such death, and the executors, widow and sons of the testator cannot make title to a purchaser during the life time of the widow.

Statement

APPLICATION by the vendors, under the Vendors and Purchasers Act, for a declaration that the vendors can make a good title to the lands in question.

*J. C. Hegler*, K.C., for the vendors.
*M. D. Fraser*, for the purchaser.

Britton, J.

BRITTON, J.:—This property was owned by the late Henry Johnston, who died on the 1st day of December, 1886, and whose will was made on the 21st June of that year.

The executors and beneficiaries under the will have entered into an agreement with John Beacham for the sale to him of the land in question.

There was personal property sufficient for payment of all debts of the deceased, and all such debts have been paid. An only daughter was left a legacy of $1,500, payment of which by the sons was directed by testator, although the testator did not in terms leave to the sons property out of which payment was to be made. This legacy has been paid. The widow and all the children of the testator are living. The widow has not married—the children are all of age, and all are anxious that the sale be carried out, as none of the family now reside upon the property.

The purchaser objects that, under the will, the vendors are not able to make a good title. One specific objection is, that by clause 5 a valid restraint on alienation is created. I will deal with that objection, as if no other, and as if the three sons of the testator took an estate, a vested remainder, the widow having an estate for her life.

Clause 5 is as follows: "Furthermore, I do not allow my executors hereinafter mentioned to let any of my lands be sold only to my own heirs—they may buy or sell to each other." It seems to me clear, from reading the whole will, that the attempted restraint aimed at was to meet a situation that the testator in 1886 thought might exist in the, then, near future. He attempted

to provide for the case of his children having the farm divided by the assessor as he mentioned or in some other way, and each one of his sons living upon his part. In that case, if one should desire to sell, he should sell to a brother, or a member of his family, and not to a stranger. It was not intended to apply, and, in my opinion, does not apply, to the case of all those interested selling. No possible objection could come from any one now living.

The clause attempting restraint on alienation may well be interpreted as meaning that any of the testator's sons holding under the division any part of this land, shall not sell that part to one not an "heir." This objection by the purchaser is not valid.

A further objection is raised under clause 6 of the will.

The testator disposed of all his property by clause 2. The widow took it all for her life unless she should marry again. Should the widow marry, two-thirds of all the property should go to the testator's sons living at the time of the marriage of their mother.

In the event of the widow not marrying, she holds the property for her life, and then the property will go to the testator's sons living at the time of the death of their mother. Then the testator desired to provide for the case of his widow marrying before the youngest son, Fred Meredith Johnston, became of age —that is not material now, as the widow did not marry and Fred attained his majority many years ago. Then the testator added, as part of clause 6, the following: "And should any of the boys marry and have heirs, and should die before this property is divided, the heirs shall claim their parents' share." My interpretation of this clause is that the word "heirs" means children; that the division of the property means the division provided for by the will, viz., division upon marriage of their mother, should she marry, or upon her death, when that takes place.

The effect of this clause last mentioned is to add to clause 2, from the end of it, these words: "And should any of the boys die leaving children, before the property is divided, the children shall claim their parents' share:" and to add to clause 3, after the words, "my boys that may be alive at my wife's death," the words: "And should any of my boys die leaving children before this property is divided, the children shall claim their parents' share."

Under this will I am of opinion that the sons do not take any present interest in the estate of the testator. The interest of such of the sons as may be alive at the marriage or death of their mother, does not vest until such marriage or death. If any one of the testator's sons dies before division, and leaves children, then these children will take under this will the share their father

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would have taken were he alive. I must hold the latter objection of the purchaser valid.

Were it not for the clause bringing in the children, if any, of any deceased son of the testator, there would be no difficulty in making a perfect title, the executors, the widow, and all the children of the testator joining in the conveyance.

As all the parties are anxious to have the sale carried out, such a sale apparently being in the interest of all, it would seem to be a proper case for sale under the Settled Estates Act.

No costs.

*Judgment accordingly.*

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Oct. 10.

## McGUIRE v. TOWNSHIP OF BRIGHTON.

*Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. October 10, 1912.*

1. MUNICIPAL CORPORATIONS (§ II G 3—241)—LIABILITY—DAMAGES — INJUNCTION — DRAINAGE DITCH—OVERFLOW OF NATURAL WATER COURSE.

Where a drainage ditch is constructed by a defendant municipal corporation opposite the plaintiff's farm so as to drain surface water into a natural watercourse, it may not, apart from statutory authority, bring into it a larger volume of water than can be carried at its natural capacity, and if it does so, the injured party has a remedy in damages or by injunction.

[See also *Kenny* v. *Rural Municipality of St. Clements*, 4 D.L.R. 304.]

2. MUNICIPAL CORPORATIONS (§ II G 3—241)—DAMAGES FOR DRAINAGE OVERFLOW—SLIGHTLY EXCESSIVE ASSESSMENT NOT HYPERCRITICALLY SCRUTINIZED IF MUNICIPALITY A WILFUL WRONGDOER.

If a municipal corporation, about to drain into a natural watercourse, proceeds, without due regard to the rights of an adjoining property owner and without any attempt at preliminary amicable negotiations with a view to obviating or lessening the damage to adjoining lands, to overflow the course and damage neighbouring lands, the municipality which committed the wrong cannot complain if the damages awarded against it for both past and future injury in lieu of an injunction, should slightly exceed a sum which would compensate the land owner, the situation having been brought about by its own wrongdoing.

Statement

APPEAL by the defendants, the Corporation of the Township of Brighton, from the judgment of the Junior Judge of the County Court of the United Counties of Northumberland and Durham, awarding the plaintiffs, Archibald McGuire, Frank McGuire, and Patrick McGuire, the sum of $350 damages in perpetuity, in lieu of an injunction, in an action to restrain the defendants from bringing on the plaintiffs' land a greater volume of water than naturally came thereon, which, as the plaintiffs alleged, had been done by a drain or ditch constructed by the defendants and a double culvert crossing the road opposite the plaintiffs' farm.

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The appeal was dismissed.

*E. G. Porter*, K.C., for the defendants.
*W. F. Kerr*, for the plaintiffs.

At the conclusion of the argument, the judgment of the Court was delivered by Mulock, C.J.:—Mr. Porter relies on what is, we think a correct statement of the law, the proposition of law that the defendants have the right to drain surface-water into the creek in question, it being a natural watercourse, provided that no greater volume of water is turned into the creek than, according to its natural capacity, it can take care of. He did not elaborate the proposition thus fully, but what I have said is a fair paraphrase of the proposition.

According to Mr. Porter, the evidence shews that, before the defendants drained any surface-water into the watercourse, it periodically overflowed its banks. It is still in its normal condition, having never been deepened or had its capacity increased. It, therefore, must follow that, when the defendants brought into it a larger volume of water, they increased the overflow; and, thus increasing the overflow, they are liable for doing what they have no right to do, namely, turning into this watercourse a volume of water in excess of its natural capacity—thus having committed a wrong for which they must answer in damages or by injunction.

As to the amount of damages, the learned trial Judge has named a very moderate sum. In actions for damages arising out of the doing of violence to another man's rights, the amount is not to be weighed, as my brother Riddell correctly observes, in scales of gold. A man who commits a wrong against the property of another must take the consequences, and cannot complain if the damages awarded should slightly exceed the actual damage sustained. The situation is brought about by his wrong-doing.

If the defendants here had been influenced by a due regard for the plaintiffs' rights, they might have negotiated with them for the deepening of the watercourse and put it into such condition that it would have taken care of the drainage, whereby all this litigation would have been avoided. Instead of so acting, they proceed in a lawless way to act without reference to the plaintiffs' rights. There is no evidence controverting the estimate made by the plaintiffs as to the damages; and the amount awarded is a moderate capital sum for the probable annual damage. Mr. Porter prefers damages to an injunction. Therefore, we will not disturb the finding of the learned trial Judge as to the amount awarded; and dismiss this appeal with costs.

*Appeal dismissed.*

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Nov. 7.

## WILSON v. TAYLOR.

*Ontario High Court. Trial before Boyd, C. November 7, 1912.*

1. MORTGAGE (§ VI G—100)—ENFORCEMENT — SALE — STATUS OF MORTGAGEE.

A mortgagee selling under the power of sale in the mortgage is not a trustee for the mortgagor, and is not liable for any loss by reason of the sale unless guilty of wilful negligence and default, and when such wilful negligence and default occurs, and the land is sold at an undervalue, the mortgagee is chargeable with the full value of the land.

2. MORTGAGE (§ VI G—100)—SALE EN BLOC LESS ADVANTAGEOUS THAN SALE BY PARCEL.

If in the *bonâ fide* exercise of his discretion where there is a doubt as to whether the land would sell more advantageously *en bloc* or in parcels a mortgagee prefers one way and sells accordingly, he is not to be charged on the ground of wilful default if it is made to appear after the sale that the other way might have been more advantageous.

[*Haddington Island Quarry Co.* v. *Huson*, [1911] A.C. 722, followed.]

Statement

ACTION for damages for sale of the plaintiff's property by the defendant, a mortgagee, under the power of sale in a mortgage.

The action was dismissed.

*J. E. Hutcheson*, K.C., for the plaintiff.

*J. L. Whiting*, K.C., for the defendant.

Boyd, C.

BOYD, C.:—It has been said that in exercising the power of sale in a mortgage, the mortgagee is acting as a trustee, and in explanation of that relation it has been further said that he should act in the same way as a prudent man would act in the disposal of his own land. The highest Courts, however, have held that the mortgagee is not acting as a trustee, but only in pursuance of the powers conferred by the mortgage, and that he may first consult his own interest before that of the mortgagor, especially I would think in a case where the security, though adequate, may be difficult of realization. The effect of this state of the law is to displace the test of the prudent man dealing with his own property, in favour of a somewhat lesser degree of responsibility. The point is adverted to by Mr. Justice Duff in *British Columbia Land & Investment Agency* v. *Ishitaka*, 45 Can. S.C.R., at 302, 317, and has a bearing on the present case.

A valuable rule as to the obligations of the mortgagee is to be found in an appeal from Victoria to the Privy Council; viz., that a mortgagee may be chargeable with the full value of the mortgaged property sold if from want of due care and diligence it has been sold at an undervalue, and the reference in such an event would be to charge the mortgagee with what, but for his wilful negligence and default, might have been received: *National Bank of Australasia* v. *United Hand-in-Hand* (1879), 4 App. Cas., at 391, 411. In other words: the inquiry is, has

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the mortgagee been culpable to the extent of wilful default in exercising his power of sale?

My attention was called to the terms of the power of sale; in this case, the statutory form which was used in the mortgage of 20th November, 1908, made by the plaintiff to the defendant to secure $4,000, R.S.O. ch. 126, covenant 14, p. 1186. Power is given "to sell the lands or any part or parts thereof by public auction . . . as to him shall seem meet . . . and the mortgagee shall not be responsible for any loss which may arise by reason of any such . . . sale . . . unless the same shall happen by reason of his wilful default or neglect." The responsibility arising from the exercise of the power of sale is thus exactly defined in the terms used by the Privy Council and is to be measured by the usual tests applied in cases of wilful blame. In conveying the land to be held as security the mortgagor has given a large discretion to be *bonâ fide* exercised by the mortgagee. If default is made in payment and due notice given of the intention to sell by proper and adequate advertisements, the manner of selling whether *en bloc* or in parcels is left in the hands of the mortgagee. For a disadvantageous sale or for an inadequate price he is not responsible when he acts *bonâ fide*, unless the amount is so disproportionate to the value as to induce the conclusion that the property has been recklessly sacrificed. One is wise after the event, and after a sale one may be able to say that had the property been put up otherwise a better result would have been obtained. But in considering the method of advertising and the best way of putting up the property for sale it may be a matter of doubt as to what course is most advisable, for example, as to selling *en bloc* or in parcels. If in this dilemma the mortgagee prefers one way to the other he cannot be charged on the ground of wilful default. Acting according to the best light reasonably attainable he may err and yet be absolved from making good any loss to the mortgagor.

In the latest decision on the point in the Privy Council the language of Kay, J., in *Warner* v. *Jacobs*, 20 Ch.D. 220, is approved, who says the power is given to enable the mortgagee the better to realize his mortgage debt. "If he exercises it *bonâ fide* for that purpose without corruption or collusion with the purchaser the Court will not interfere even though the sale be very disadvantageous unless indeed the price is so low as in itself to be evidence of fraud:" *Haddington Island Quarry Co.* v. *Huson*, [1911] A.C. 722, 729. In *Kennedy* v. *De Trafford*, [1897] A.C. 180, the law lords agree in holding that if a mortgagee takes pains to comply with the provisions of the power and acts in good faith his conduct as to the sale cannot be impeached.

At the close of the evidence I thought that the mortgagor had been damaged to the extent at least of $1,800 as an effect of

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the sale conducted as it was; the evidence as applied to the plan of the place indicated that the better way would have been to have sold in parcels and that four parcels could readily be adjusted (1) of the house and barn, (2) of the brickyard, and 7 acres of clay, (3) of three lots to the north of the house and (4) of the grazing land, about 13 acres, separated by a stream from the brickyard. There was evidence that the owner himself, to the knowledge of the mortgagee, had offered the place for public sale about a year before in parcels, and other evidence shewed that persons would have competed for the lots and the grazing land had they been put up in parcels. Some attempt was made to have the land parcelled out before the sale on behalf of the mortgagor, but nothing very definite as to the manner of subdivision was suggested.

I think, on the evidence, that the land should have been advertised in parcels and that a better attendance would have been the result at the place of auction.

On the other hand local conditions existed—that the property was a difficult one to dispose of in any way, and that in Gananoque, where it was situate, there was little or no market for land or for such a sized house as was on this land. The property was all in one place and fenced around, with some intermediate fencing, and though the mortgagee, from age and infirmity, was not able to give much assistance, he referred the applicants and the arrangement of the whole sale to a solicitor of long standing and experience resident in the place, who weighed the pros and cons of the situation. I might almost say that the mortgagee did not act as if he had been disposing of his own property, yet this would not be a decisive test in view of the latter authorities, for he employed a competent person who endeavoured to "take some pains" to carry out rightly the provisions of the mortgage both as to advertising and conducting the sale. The mortgagor had himself made use of all the various parts of the mortgaged property in connection with the brickyard, and the solicitor thought that the best way to get the whole sold was to make no separation of the parts. The proposal to separate was not urged in any explicit or defined way: only a claim was expressed by the creditors that it should be sold in parcels, and what the mortgagor himself asked was that the brickyard might be sold separately and the rest to the best advantage.

The complaint in the pleadings is that the defendant sold the whole property *en bloc*; that he neglected to divide into separate parcels prior to the sale, though requested by the mortgagor, and that he omitted ten lots in the description given in the advertisement. No harm resulted from the omission of the numbers of these lots—it was a printer's error, and as

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the lots formed part of the brickyard, this enumeration was merely following the minutiæ of the description in the mortgage. No one clear method of division was suggested by the mortgagor or anybody else. When the mortgagor himself advertised for sale, he made three parcels: (1) the house and barn, (2) the brickyard, and (3) the grazing land, but his sale was abortive and none of the parcels were bid up to the reserved bid.

No doubt it was decided in *Aldrich* v. *Canada Permanent Loan Co.*, 24 A.R. 193 (*dissentiente* Burton, J.A.), that the duty of the mortgagee was to sell in parcels and not *en bloc*. But that duty depends upon a variety of circumstances which do not here exist. In that case the mortgage covered a farm, and two shops in a village nearly three-quarters a mile away, and no justification for a joint sale existed. Whatever loss has resulted to the mortgagor from the sale of the property, conducted as it was, I do not think judgment should be given in his favour, having regard to the trend of judicial opinion.

I dismiss the action without costs.

*Action dismissed.*

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## TOFFEY v. SUTHERLAND.

ALTA.

S. C. 1912

*Alberta Supreme Court. Trial before Beck, J. February 9, 1912.*

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF TRANSFER OF LAND FOR FRAUD—MISREPRESENTATION OF VALUE, AND DECEPTIVE MAPS.

A formal transfer of lands will be set aside where the transferee relied upon false representations of value of the transferor's property, made by the latter and his agents, and where deceptive maps and plans were shewn to the transferee, misrepresenting that the transferor's land was on a certain avenue, the transferee never having seen the land in question.

Statement

TRIAL of action to set aside a formal transfer of lands made upon an exchange of property on the ground of fraud.

Judgment was given for the plaintiff.

*F. D. Byers*, for plaintiff.

*L. W. Brown*, for defendant.

Beck, J.

BECK, J.:—My judgment is in favour of the plaintiff. I am going to declare the transaction shall be set aside. I do it on this ground. I am satisfied that the plaintiff bought this land relying upon representations of its value and a further representation which affected him to some extent that it was on Jasper avenue and that he was deceived to some extent by that name and by the appearance of the property upon the maps and plans which were shewn to him. He never saw the property and he depended upon what was made to appear at the meeting at which the transaction was, as the defendants say, closed.

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Now, the maps and the plans are all deceptive. They are deceptive in more ways than one. There are marks on this plan of the city—this plan of the city shews, in more prominent lines the proposed extension of the boundaries of the city than the actual boundaries of it; it shews a straight line as Jasper avenue right out to this property. As a matter of fact there is no straight line as a continuation of Jasper avenue to that property, there is a considerable detour; and I have got to say here that I think it is a thing which is misrepresented, probably by many people without thinking it would have the effect of a misrepresentation, but it, to my mind, is a gross misrepresentation to file a plan shewing a property eight miles from the centre of this city and five or six miles from the boundary as on Jasper avenue. It is not on Jasper avenue. These plans, I am inclined to think, have to get the approval of the Minister or Deputy Minister of Public Works. I am not sure about that, but if he gives his approval to plans with these names on them, I think it is time to stop. Not only that, but I think the Legislature, in connection with the bill before it now, in dealing with these sub-divisions might very well put in a provision to prevent the naming of a road away out in the country like this by the name of a street in town.

Now I am satisfied that at that conversation, beside this misleading of the plaintiff by the appearance of these plans as to the distance and the continuation of Jasper avenue, he was misled also as to the value. I believe him when he states that before the transaction was closed in the manner in which they say it was closed, that Sutherland spoke of the value and that the plaintiff depended upon Sutherland's statement and I am satisfied that there is not the value to-day in these lots that is placed upon them by the prices which these men are trying to get for them. The best price that anybody has spoken of for lots there is that spoken of by Mr. Mills, and he would be willing to sell lots that he got there at $200 a lot and his lots are some considerable distance nearer to Edmonton and they are on what is called Jasper avenue.

Of these lots which are in question here, four are on Jasper avenue, so called, and the rest on a side street which is called 7th street. Now, when Mr. Mills got these lots he didn't pay cash for them; he got them in an exchange for property which he had great difficulty in getting a sale for down in Millet. I have not a great deal of confidence in his appreciation of the values of them; he is not a real estate man; I am not sure that I would have much more confidence in the opinion of a good many of the real estate men, than I would in his, but he is the man who gives the highest price which has been given for these lots, of those who have spoken about them outside of the parties

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interested. Mr. Hart comes next and his value would be as I estimated from his figures for such lots as these about $150 so that I find as a fact that these lots at the time this conversation took place were not worth the price which was placed upon them I don't think they were worth more than $150 apiece. I would not give that for them myself. I find as a fact that Sutherland, in the presence of his co-defendant, so acted and so spoke as to lead the plaintiff to believe that the lots were worth approximately the prices the plaintiff was asked to pay for them.

Now, I am not quite satisfied that I have got the full truth or the exact truth of either side of the case. I have some little doubt about the plaintiff's evidence as to whether he intended to conclude the transaction that evening, but I do believe his evidence in the other respects that he depended entirely for his information as to the value of the lots and the location and so on upon the defendants and their agent, Magee, and as he relied upon their information, and I hold he so relied, it is not necessary for me to find anything more—it is not necessary for me to find that there was fraud on the part of the defendants and I do not find it. It is sufficient for the purposes of my decision that I find there was, in fact, a misrepresentation and I do find that. A good deal of conversation took place there and as I say I believe the plaintiff's account of it. I can quite well understand that a good deal may have been said which was of interest to him which the other people thought of no particular interest—of no particular importance to them and consequently that they don't remember it now. They made, as I find, by reason of the conversation that went on in their presence, conversation in which they took part, such statements as amount to direct statements of the location, position and value of this property which were not true. On that ground I direct judgment to be entered rescinding the transaction and I think I should make it with costs.

*Judgment for plaintiff.*

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## CAMPBELL v. VERRAL.

**(Decision No. 2.)**

ONT.

H. C. J.
1912

Oct. 29.

*Ontario High Court, Middleton, J., in Chambers. October 29, 1912.*

1. WITNESSES (§ V—69—WITNESS FEE—SOLICITOR—PROFESSIONAL WITNESS FEE—CROSS-EXAMINATION ON PROFESSIONAL AFFIDAVIT.

Under a subpœna requiring a solicitor to attend before a special examiner for cross-examination upon an affidavit made as solicitor, where the knowledge basing the affidavit was acquired by the deponent in the course of the rendering of professional services, the witness is entitled to a professional witness fee per diem of $4 in advance, pursuant to Con. Rules 492, 443, and disbursements tariff item 119.

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MOTION by the plaintiff for an order for the committal of Mr. Phelan, a solicitor, for his failure to submit himself for cross-examination upon an affidavit made by him in this action, which was brought subsequently to the action of *Campbell* v. *Taxicabs Verrals Limited*, 4 O.W.N. 28.

The motion was dismissed.

*J. MacGregor*, for the plaintiff.
*J. M. Godfrey*, for Mr. Phelan.

Middleton, J.

MIDDLETON, J.:—The real question is the right of Phelan to demand payment of a professional witness-fee, and I propose to deal with the motion upon that basis.

Mr. MacGregor argued that the objection was taken prematurely, and that Mr. Phelan ought to have been sworn before demanding the fee in question. I do not agree with this; but, even if Mr. MacGregor be right, this defect in Mr. Phelan's conduct is more than offset by the fact that the subpœna served was not in any authorised form, and merely commanded attendance before "John Bruce, special examiner, on Friday the 4th October, 1912, at half past nine o'clock in the forenoon," without specifying, as it should, the purpose for which attendance was to be made. The subpœna did not require more than "attendance."

The right to a professional fee seems clear. Evidence upon a motion may be given by affidavit (Con. Rule 489); but the deponent may be cross-examined (Con. Rule 490); the witness being "required to attend in the same manner as, and his examination shall be subject to the same rules as apply to, the examination of a party for discovery" (Con. Rule 492.) The examination may, therefore, take place when the witness is "served with a copy of the appointment and a subpœna, and upon payment of the proper fee" (Con. Rule 443.) The proper fee is indicated by the disbursements tariff item 119: "Barristers and solicitors . . . other than parties to the cause, when called upon to give evidence, in consequence of any professional service rendered by them . . ., per diem $4."

The affidavit upon which cross-examination is sought is an affidavit made by a solicitor as solicitor, relating entirely to the proceedings in this cause and another cause in which the plaintiff herein was plaintiff and the defendants were "Taxicabs Verrals Limited." All the solicitor's knowledge was acquired by him in the course of the rendering of professional services; and, manifestly, his evidence is given by reason of professional service rendered by him.

Before the examiner, the position taken was that when a solicitor makes an affidavit "he is entitled only to the ordinary fee of $1." This is clearly untenable.

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The motion must be dismissed with costs, which I fix at $15. If the applicant desires, she may have an order directing that, upon payment of the costs and the proper witness-fee, $4, Mr. Phelan do attend and submit to examination at a time to be appointed.

*Motion dismissed.*

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## Re SOLICITORS.

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C. A.
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Sept. 27.

*Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. September 27, 1912.*

1. SOLICITORS (§ II A—24)—RIGHT TO PAYMENT FOR SERVICES RENDERED BY DIRECTOR—ABSENCE OF EXPRESS AGREEMENT.

In the absence of an express promise by the client to pay for services rendered by a solicitor as a director of a company incorporated by the client, no remuneration for such services will be allowed.

2. EVIDENCE (§ II F—217)—PRESUMPTION AS TO GRATUITOUS SERVICE OF DIRECTORS.

The presumption in the case of a director of a company is that his services as such are to be gratuitous.

3. EVIDENCE (§ IV J—437—CONCLUSIVENESS OF ENTRIES IN SOLICITOR'S DOCKET.

Entries in a solicitor's docket, while not conclusive, are *primâ facie* evidence of the proper remuneration for his services.

4. COSTS (§ I—10)—DISCRETION OF TAXING OFFICER—INTERFERENCE WITH —ABSENCE OF ANY GOVERNING PRINCIPLE—RIGHT TO REVIEW.

The rule that, where a taxing officer has not made any mistake in principle, and the amount allowed by him as remuneration for a solicitor's services is not so grossly large or so extremely small as to be beyond all question improper, the court should not interfere with his discretion, is not applicable to services not governed by any authorized tariff, but in such cases the principle is that the solicitor is to be allowed the value of his services, and such value is a question of fact to be determined by proper evidence, and, while the taxing officer is at liberty freely to apply his own special knowledge and experience, his conclusion is just as much open to review as that of any other judicial officer dealing with a question of fact, *e.g.*, the assessment of damages by a judge at a trial without a jury.

[*Re Solicitor*, 12 O.W.R. 1074, distinguished.]

Statement

APPEAL and cross-appeal from the order of the Divisional Court on an appeal and cross-appeal from the order of Britton, J.

The clients, B. C. Beach, C. A. Beach, Beach Brothers, and the Cobalt Power Company Limited, had appealed and the solicitors had cross-appealed, from the certificate of Mr. J. H. Thom, Senior Taxing Officer of the Supreme Court of Judicature for Ontario, upon the taxation of bills of costs of the solicitors rendered to the clients.

May 1, 1911. The appeals and cross-appeals were heard by BRITTON, J., in the Weekly Court at Toronto.

*R. A. Pringle*, K.C., for the clients.

*F. E. Hodgins*, K.C., for the solicitors.

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June 29, 1911. BRITTON, J.:—The history of the proceedings for which the bills of costs in question were rendered is fully given in the statements and papers filed. I have had the benefit practically of an argument in writing, part of it being the statements at length and in full detail of Mr. Kilmer and of Mr. McAndrew (two members of the solicitors' firm). Mr. Pringle, also, for the clients, has submitted in writing his view of the facts and of the law applicable.

The bills were rendered as separate bills against Beach *et al.* and against the company. The proceedings necessarily ran into each other or overlapped. Much of the time of the solicitors was occupied for both Beach *et al.* and for the Cobalt Power Company. The work was important and difficult, and required a great deal of care and attention and professional skill of a high order; but the bills must necessarily be considered as a whole, and as growing out of work done practically in the same matter. The solicitors were employed as such. They were not employed as brokers or promoters. They were employed generally by Beach *et al.*, and the interests of Beach *et al.* and the Cobalt Power Company were not conflicting but identical; and whatever changes were necessary in the capitalisation or organisation of the company were those required by the solicitors, who were the solicitors for Beach *et al.*

Mr. McAndrew mentions the date of the first work of his firm in this matter as about the 18th February, 1909. Mr. Pringle states that the entire time taken in the work, other than that of a trifling character, was about one hundred and fifty days. That would not necessarily prevent the solicitors from getting a larger amount than that allowed; but time occupied is one of the factors necessary to know in determining the proper amount to allow. The work was confined to comparatively narrow limits as to time, and the clients had the benefit of the work being done expeditiously. In looking at the matter as a whole, as a matter in which Beach and the company were at one as a client of the solicitors, the amount of fees as taxed seems large and would be so considered by the majority of clients, even of the wealthy class, and in these days of large transactions.

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| The bill against Beach *et al.* as individuals was rendered at | $15,907.07 |
| And there was disallowed | 9,234.12 |
| Leaving it taxed at | $ 6,672.95 |
| The bill against the Cobalt Power Company was rendered at | $ 9,193.67 |
| There was disallowed | 3,126.70 |
| And allowed at | $ 6,066.97 |

So that the entire amount of the solicitors' costs as allowed is $12,739.92. This amount the clients think unreasonably large. The solicitors say the amount is unreasonably small, and that certain items, struck off by the Taxing Officer, should not have been disallowed—hence these appeals.

These bills are not "solicitors' bills," within the ordinary meaning of these words; nor are they "solicitors' bills" within the meaning of the statute. The clients appreciated that, and so on this appeal argued that the solicitors should be compelled to furnish further particulars, details, and items, shewing the work for which large sums were charged. It is not in accordance with the practice, if in my power, at this stage and as to this kind of bills, to order further particulars, or to order new bills to be delivered.

The order for taxation was made on the 17th November, 1910, by the Master in Chambers, upon the application of the individual clients; and the clients submitted to pay what, if anything, should be found due to the solicitors, upon the taxation of these bills. These bills, which had then been delivered, were referred to the Taxing Officer; and the bill which the solicitors had delivered to the Cobalt Power Company should also be taxed by the Taxing Officer, but the latter without prejudice to any rights which the solicitors may have against the said Cobalt Power Company. The Taxing Officer, however, refers to a præcipe order dated the 21st September, 1910, as his authority for taxing the bill against the Cobalt Power Company, and rendered to that company. Both bills were in fact taxed, and all parties were represented. It is not now a case of new bills—it is simply taxation of present bills rendered.

I have looked at every item in these bills, and have considered the evidence and arguments in support of and in objection to the items under review. There has been no error in principle on the part of the taxing officer. It is in every case only a question of amount.

*Re Solicitor* (1908), 12 O.W.R. 1074, is binding upon me. In that case the authorities are cited, and the conclusion reached that "where the Taxing Officer has not made any mistake in principle, and where the amount is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court" ought not to "interfere with the discretion of the Taxing Officer." That case, unless and until reversed, is binding upon me.

In *Murphy* v. *Corry* (1906), 7 O.W.R. 363, cited upon the argument, Mr. Scott, then Master at Ottawa, discusses the whole question of such bills as these are, and of the rules and principles to govern on such taxation.

For the above reasons, and without referring to any other of the many cases cited, I must dismiss the clients' appeals. I

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do not interfere with the discretion of the Taxing Officer in dealing with costs of taxation, and I do not allow any costs of these appeals. They will be dismissed without costs.

The appeal by the solicitors is: (1) against the disallowance by the Taxing Officer of a commission by way of remuneration for services in negotiating and completing a sale of stock and bonds of the Cobalt Power Company for $180,000; and (2) in not allowing to the solicitors, as against Beach Brothers, remuneration for the services of the solicitors as directors and officers of the said company. What I have said in regard to the whole matter seems to me a sufficient answer to both grounds of this appeal. The Taxing Officer acted upon a proper principle in dealing with the solicitors and the costs as upon *quantum meruit*.

If the solicitors intended to make a charge of five per cent. or any other large sum by way of commission, the clients were entitled to know of it, so that they could at least have endeavoured to separate what may be called the financial part of the business from that which is generally understood to be the work of solicitor and counsel—the difficult work of organisation and steering corporations away from the troubles into which so many fall. It may be accepted, as the solicitors allege, that solicitors are entitled to receive the same remuneration as could be recovered by any person not a solicitor for the same services. It is not the case, however, that a solicitor, employed as such, and doing special work in connection with a company or undertaking and charging for that work, can, at the end, when the undertaking is to be sold, or when bonds are issued and sold, as the result of all the work of solicitor and client and for which the client has paid the solicitor, charge a commission, adding it as "rounding out" the bill of costs. The evidence taken as a whole does not establish that in this case five per cent. was only reasonable.

The claim for remuneration for the services as directors and officers of the company by members of the firm of solicitors should not be allowed. If such services should be paid for at all, payment should be by the company, and only with the consent of the shareholders. When these services as directors, etc., were rendered, they were rendered as part of the whole work being carried on by Beach Brothers and the solicitors, and it was not in contemplation of Beach Brothers that any special and separate charge for these services by solicitors, *quâ* directors and officers, should be made, over and above the day-by-day work being charged, as shewn by the bills.

The entries in the solicitors' dockets do not estop the solicitors from claiming larger amounts than those mentioned, but they confirm my opinion that the bills should not be increased beyond what the Taxing Officer has allowed.

The appeal of the solicitors should be dismissed—but, as in the other cases, without costs.

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The clients and the solicitors both appealed from the order of BRITTON, J.

October 31, 1911. The appeals were heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

*R. A. Pringle*, K.C., for the clients.

*F. E. Hodgins*, K.C., for the solicitors.

RIDDELL, J.

November 3, 1911. RIDDELL, J.:—Messrs. Beach Brothers were lessees from the Crown of a water power at Hound Chutes, and had entered into an arrangement with the firm of Baillie & Co., looking to the development of this water power.

The Cobalt Electric Power Company Limited had been chartered to carry out this arrangement, Beach Brothers being the owners of the stock in fact, and the incorporation of the company being for technical reasons. On the 18th February, 1909, the solicitors were retained by B. C. Beach, for Beach Brothers; and they subsequently, at the request of their clients, became directors of the company.

The arrangement with Baillie & Co. fell through, and the bonds of the company, to the amount of $180,000, were sold to Mr. D. Fasken.

The clients, Beach Brothers, procured an order, on the 26th October, 1910, for the delivery of bills of costs, charges, and disbursements, and bills were rendered accordingly against Beach Brothers and the company separately. An order was obtained for taxation on the 17th November, 1910, and the taxation proceeded before Mr. J. H. Thom, Taxing Officer, on the 6th December, 1910. The result was:—

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| Against Beach Brothers, rendered at | $15,907.07 |
| Taxed off | 9,234.12 |
| Allowed at | $ 6,673.95 |
| Against the company, rendered at | $ 9,193.67 |
| Taxed off | 3,126.70 |
| Allowed at | $ 6,066.97 |

Upon the taxation it was agreed that the whole be dealt with as a bill against Beach Brothers, as the amount would come out of their pocket in any case.

An appeal and cross-appeal were dismissed by my brother Britton.

Both parties now appeal to this Court, the clients having failed to obtain an order allowing an appeal direct to the Court of Appeal (2 O.W.N. 1495), although the solicitors did not object to such order.

The appeal, as argued before us, covers six points:—

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(1) A charge is made of $2,000 for the preparation of a trust mortgage, etc., to secure bonds to the amount of $300,000 and the mortgage bonds—this is allowed by Mr. Thom at $1,500, but the clients contend that $700 to $750 is ample.

(2) A similar charge of $4,000 in respect of $600,000 and afterwards $800,000 bonds; allowed at $2,000; the clients contend that $1,250 is ample.

(3) Items 1 to 27 charged at $500, allowed at $350; the clients are willing to allow only $235.25.

(4) Items 28 to 62 charged at $9,000; allowed at $2,700; the clients would allow $965.

This is also to be considered as No. 7, being the first point of the cross-appeal.

(5) A charge of $600, which the clients say should only be $358.12.

(6) A charge of $5,000, allowed at $2,549.98, which the clients do not admit.

Nos. 3, 5, and 6 are really pressed because the dockets of the solicitors are said to contain entries with amounts to the sum the clients desire the costs should be reduced to; but this is not exactly the case, and many entries are not full. I can find nothing in the way of an estoppel, even if the contention of the clients as to the dockets were well founded—the solicitors are entitled to a reasonable sum for their services, no matter what their dockets do or do not shew.

As to Nos. 1, 2, and 4, while the Taxing Officer might have been justified in reducing the amounts allowed, I can see nothing in which he has erred in principle.

It cannot be necessary to elaborate authorities for the rule to be followed on an appeal from the Taxing Officer. I adhere to the opinion expressed in *Re Solicitor*, 12 O.W.R. 1074: "The Court must necessarily possess a general jurisdiction over the Taxing Officer on all matters to prevent any positive wrong to parties or suitors;" but we can give "no countenance to the proposition that where the Taxing Officer has not made any mistake in principle, and the sum awarded is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court can interfere with the discretion of the Taxing Officer." It is much the same case as when a motion is made to the Court against a finding at the trial—the Court, no doubt, has the power to set aside the finding, but it will not do so unless the finding is "beyond all question improper."

I may add that I can see no excess in the amounts allowed on any of the items. They should as to Nos. 1, 2, and 4 be increased, if anything. It cannot be unknown to any one that the value of money had decreased and is decreasing—the same amount of money cannot command the same amount of services or of goods as formerly.

The appeal should be dismissed. In the cross-appeal are two matters for consideration:—

(7) The solicitors were instructed to sell $180,000 worth of bonds, which they did; they claim five per cent., *i.e.*, $9,000, and have been allowed $2,700. The argument is, substantially, that they were employed by Beach Brothers as brokers, and should be paid the same amount as brokers would charge as brokerage or commission. Now, it is undoubtedly true that a person who happens to be a solicitor may be employed as a broker, just as he may be employed as an auctioneer or a gardener; but it is equally true that what these solicitors were employed to do is what is done by solicitors every day for their clients. The present case on the facts comes within Lord Langdale's test in *Allen* v. *Aldridge*, *In re Ward* (1844), 5 Beav. 401, and the business was "business in which the . . . solicitor was employed, because he was a . . . solicitor, or in which he would not have been employed, if . . . the relation of . . . solicitor and client had not subsisted between him and his employer:" see p. 405.

*In re Baker Lees & Co.*, [1903] 1 K.B. 189, is a late instance of the application of the principle that in such cases the fees to be paid are solicitors' fees, and so are taxable.

The solicitors in the present case are not to be paid as brokers, but as solicitors.

There is no hard and fast rule as to the remuneration to be allowed for such services—it may be on a percentage basis, as was the case in *In re Richardson* (1870), 3 Ch. Ch. R. 144, or a lump sum, as in *Re Solicitor*, 12 O.W.R. 1074. I adhere to the view expressed in the latter case that "in . . . proceedings taken by persons who indeed are solicitors, but who do not act differently or with any different right from those not solicitors, I cannot see why they should not be paid the same as any other person." But all that is for the Taxing Officer; so long as he does not err in principle, speaking generally, the Court on appeal will not interfere. It cannot be said that there is any error in the principles upon which the Taxing Officer proceeded in this item; he is an officer of very great and varied experience, and we should not interfere. This the more that the learned Judge appealed from has affirmed the Taxing Officer.

(8) The solicitors, at the instance and in the interests of Beach Brothers, became and acted as directors, etc., of the company. There is and can be no pretence that there was any impropriety in this, or that there was any conflict of duty to client and company—the client "owned" the company, which, indeed, as has been said, was formed for technical reasons.

This was work done for the client; and, while there would be difficulty in the solicitors compelling the company to pay them, I can see none in the way of charging the clients Beach

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Brothers. The Taxing Officer thus reports: "The said solicitors claimed an allowance for services performed by them and members of their office staff in acting as directors and officers of the Cobalt Power Company Limited, at the request of and in the interests of the said Beach Brothers; but that I did not consider the said claim, and made no allowance therefor." In this I think he was wrong. I am unable to follow my brother Britton when he says: "If such services should be paid for at all, payment should be made by the company." The services, while they were in form rendered for the company, were in fact rendered for Beach Brothers, and as part of the whole work carried on for Beach Brothers. The appeal should be allowed on this ground.

If both parties agree, we may fix a reasonable sum to allow; but, if they cannot agree (say, within ten days), the matter should be referred back upon this point—costs of the new reference to be in the discretion of the Taxing Officer. The costs of this appeal should substantially follow the event—the clients should pay three-fourths of the costs before us; and we should not interfere with the costs before Mr. Justice Britton.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree.

Latchford, J.

LATCHFORD, J.:—I agree in the result.

The clients appealed to the Court of Appeal from the order of the Divisional Court, and the solicitors cross-appealed.

May 9 and 10, 1912. The appeals were heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

Argument

*R. A. Pringle*, K.C., for the clients. The bills of costs, as thus far allowed, are grossly excessive, even if much has been taxed off the original amounts. There is nothing like this in Scott's Bills of Costs, 10th ed. The responsibility of the solicitors in respect of the two mortgages, for which such a large fee was allowed, was not great, as they were acting only for the mortgagors. Their charges in many instances exceed the amounts which their dockets shew; this, though not conclusive, is *prima facie* evidence of what they should receive unless satisfactory explanation were given that the docket entries were undercharges. This was not shewn here. On the main question, this is not a case of a mere mistake in *quantum* by the Taxing Officer, but a mistake in principle. This case does not come under the regular tariff, and so the rule against interfering with the Taxing Officer's discretion does not apply. Where the matter is outside the tariff, as here, the solicitor should get the value of his services, which should be determined by the Taxing Officer on evidence, not on his own knowledge. Therefore, the taxation should be re-opened for the admission of evidence of the value

of the services. I do not find any case just like this, but refer to the following: *Re R. L. Johnston, a Solicitor* (1901), 3 O.L.R. 1; *Re McBrady and O'Connor, Solicitors* (1899), 19 P.R. 37; *Murphy* v. *Corry*, 7 O.W.R. 363; Am. & Eng. Encyc. of Law, 2nd ed., vol. 3, p. 420; *Re Tilleard* (1863), 32 Beav. 476; *In re A. B., a Solicitor* (1871), 8 U.C.L.J.N.S. 21. The solicitors should not have been allowed a fee for their services as directors. There was no express contract to pay them as such, and none should be implied: *Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case* (1895), 26 O.R. 289; Scott's Bills of Costs, 10th ed., pp. 509 to 584. No claim for commission should be allowed, as it was never contemplated by the parties, and at any rate was not a proper charge in the circumstances.

*F. E. Hodgins*, K.C., for the solicitors. The bills, as so far allowed, are fair and reasonable. In the taxation of these bills, the Taxing Officer did not err in principle, and the question of *quantum* alone arises on this appeal, and on that question the Taxing Officer's discretion should govern: *In the Estate of Ogilvie, Ogilvie* v. *Massey*, [1910] P. 243. The clients chose the Taxing Officer for their tribunal; they did not call as witnesses the experts who, they say, would have agreed with their contentions. The case of *Re Russell Son and Scott* (1886), 55 L.T.R. 71, explains *Re Tilleard, supra*, cited on behalf of the appellants. The solicitors are not bound by the entries in their dockets: *In re Hellard & Bewes*, [1896] 2 Ch. 229. There was a great deal of responsibility assumed by the solicitors. The clients would have lost all they had but for the loan of $180,000 from Fasken, which was obtained through the influence of the solicitors: *Re Solicitors* (1907), 10 O.W.R. 951; *Re Solicitor*, 12 O.W.R. 1074. The solicitors are entitled to a commission: *In re Baker Lees & Co.*, [1903] 1 K.B. 189; *Gradwell* v. *Aitchison* (1893), 10 Times L.R. 20; *In re Richardson*, 3 Ch. Ch. R. 144; *In re Attorneys, etc.* (1876), 26 C.P. 495; *O'Connor* v. *Gemmill* (1899), 26 A.R. 27; *Paradis* v. *Bossé* (1892), 21 S.C.R. 419; *In re Harrison* (1886), 33 Ch.D. 52; *In re Macgowan, Macgowan* v. *Murray*, [1891] 1 Ch. 105, at p. 114; *Rice* v. *Galbraith* (1912), 26 O.L.R. 43. The solicitors are entitled to remuneration for services as directors, under an implied contract: *In re Dover Coalfield Extension Limited*, [1908] 1 Ch. 65; *Greenwell* v. *Porter*, [1902] 1 Ch. 530; *In re South Western of Venezuela (Barqui-simeto) R.W. Co.*, [1902] 1 Ch. 701.

*Pringle*, in reply. In regard to commission, the solicitors should have employed a broker to do a broker's business. As to the clients seeking the tribunal, they had to go to Mr. Thom. The clients should have got the costs of the taxation, as they taxed off three-fifths of the whole.

September 27. GARROW, J. A.:—As will be seen, the Divisional Court reversed the judgment of Britton, J., in part, upon the

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cross-appeal, and allowed the items charged by the solicitors for attendance as directors and officers of the Cobalt Power Company Limited. Riddell, J., in his judgment, says of this item: "This was work done for the client; and, while there would be difficulty in the solicitors compelling the company to pay them, I can see none in the way of charging the clients Beach Brothers."

The view of Britton, J., is thus expressed: "When these services as directors, etc., were rendered, they were rendered as part of the whole work being carried on by Beach Brothers and the solicitors, and it was not in contemplation of Beach Brothers that any special and separate charge for these services by solicitors, *quâ* directors and officers, should be made, over and above the day-by-day work being charged as shewn by the bills."

It would, I think, be dangerous to encourage the idea that, under any circumstances, a solicitor acting for a client may as such become a director upon the board, or act as an officer of, a joint stock company, and be at the same time in the pay of the client for the services so rendered to the company.

Whether or not the company is what is called a one-man company can make no difference in the principle. Such a company is an entity, and is subject to the general law respecting joint stock companies, the policy of which seems to be entirely against such a practice. The rule, or, as it might perhaps better be called, the presumption, in the case of directors, is, that the services as director are to be gratuitous. See *per* Bowen, L.J., in *Hutton* v. *West Cork R.W. Co.* (1883), 23 Ch.D. 654, at p. 672. Although, of course, by observing the formalities prescribed by the statute, provision may lawfully be made for payment. See the Ontario Companies Act, 1912, secs. 89, 90.

There is certainly no evidence of an express promise to pay for these services; and I agree with Britton, J., in thinking that the circumstances do not justify the necessary inference of an implied promise by the clients; for which reason I agree with Britton, J., that the item should not be allowed, and that the judgment of the Divisional Court should, to that extent at least, be reversed.

Then as to the main question. The clients contend that, notwithstanding the large amount already taxed off, the bills are still grossly excessive in several particulars—a contention so far not acceded to either by Britton, J., or in the Divisional Court. The contention is, therefore, one, under the circumstances, not easy to maintain in this Court. None of the members of this Court nor of any of the Courts who have passed upon the matter can or will pretend to either the knowledge or experience of the learned Senior Taxing Officer, universally acknowledged to be an exceptionally capable and competent official. And, if the matter could properly be regarded, as it evidently was, both by Britton, J., and in the Divisional Court, as not involving any principle, but merely a question of amount—

in other words, of "more or less" under some stated or acknowledged principle—I for one would not think of interfering. Britton, J., in his judgment, said: "*Re Solicitor*, 12 O.W.R. 1074, is binding upon me. In that case the authorities are cited, and the conclusion reached that 'where the Taxing Officer has not made any mistake in principle, and where the amount is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court' ought not to 'interfere with the discretion of the Taxing Officer.' " Riddell, J., in delivering the judgment of the Divisional Court, refers to the same case, which was a judgment of his own, and used practically the same language. And the language itself correctly expresses what, after looking at a number of cases upon the subject, seems to me to be the law in such cases. But what I cannot understand is the "principle" which both the learned Judges seem so satisfied is not being violated, and that, therefore, the whole question is one of amount. I could understand the use of the term as applied to items governed by an authorised tariff; but it is conceded that the items complained of are not tariff items; and the only principle applicable to them, so far as I am aware, is, that the solicitor shall recover the value of his services—in other words, he shall recover as upon a *quantum meruit*. What the value of the services is, is a question of fact, to be determined, as in other cases, by proper evidence, which means, of course, here, the evidence of experts of experience, the Taxing Officer being, of course, at liberty freely to apply his own special knowledge and experience in addition. And his result or conclusion in such a case must, on principle, be just as open to review as that of any other judicial officer dealing with a question of fact, just as, for instance, an assessment of damages by a Judge at a trial without a jury; for it would certainly be odd and not reassuring to the public that, while this Court may, as it constantly is called upon to do, review the findings of a trial Judge, or even of a Divisional Court, upon a question of the *quantum* of damages, it is powerless to act in such a case as this.

There does not appear to have been a large amount of evidence given before the learned Taxing Officer, and what was given does not seem to me to be very definite or conclusive. In the argument before us reference was made to other experienced gentlemen familiar with the class of work in question who might have been, but were not, called. And there must, we would think, be no dearth of such evidence.

Upon the whole, I have come to the conclusion, reluctantly I admit, that the clients are entitled to have the taxation at least partially re-opened, for the purpose of shewing, if they can, that the bills in question should be still further reduced. The amounts, even as allowed, are certainly very large. They greatly exceed the amounts as entered in the solicitors' dockets,

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which, while not conclusive, ought to be at least *primâ facie* evidence of what the correct charges should be. The whole account need not, of course, be gone into, but only those items of which the clients still complain, which are all, I think, set out in the judgment of Riddell, J. Both parties as to these will be at liberty to call further evidence, and the clients will take the risk in costs, if in the end they fail to obtain a further reduction.

It is a pity that there is no proper tariff for such charges. It places all parties in a very awkward position. That there is power to fix such a tariff, see the Solicitors Act, 1912, secs. 46, 47. And it may be worth while to note the various clauses (*a*) to (*e*) of the latter section, as to what should guide in framing such a tariff, these being indirectly some guide, even in the absence of a tariff or until one is provided.

We were asked to interfere with the order heretofore made as to costs by the Taxing Officer. The clients might very well, under the circumstances, have been given their costs, considering the very large amount struck off the bills; but it was, I think, a matter within the discretion of the Taxing Officer, with which we ought not to interfere.

As to the other costs, if the parties had produced before the Taxing Officer the evidence which, I think, might have been obtained, we should have been able to deal with the whole matter here. For that omission both parties are, it seems to me, somewhat to blame. We are reversing the result in the Divisional Court, in so far as concerns the solicitors' cross-appeal; but, on the other hand, are not allowing the clients' appeal otherwise than by a reference back to the Taxing Officer—in other words, giving them another opportunity on further evidence still further to reduce the bills, if they can; so that the final result is still uncertain.

Conditions such as these lead me to think that a fair order as to costs is to direct that the order of Britton, J., as to the costs of the proceedings before him, should stand, and that there should be no costs to either party of the appeal or cross-appeal to the Divisional Court or to this Court. The costs upon the reference back will, of course, be in the discretion of the Taxing Officer.

Lennox, J.

LENNOX, J., agreed with GARROW, J.A.

Meredith, J.A.

MEREDITH, J.A.:—The rule that an appeal does not generally lie from a Taxing Officer to a Judge as to the amount of a taxable item comprised in a bill of costs, has no application to such a case as this: the rule deals with ordinary matters of taxation, with which the Taxing Officer, from experience, ought to be better able to deal than a Judge; if he be not, the remedy should be in a better Taxing Officer; because, but for the rule, a Judge would, by appeals, be made really a Taxing Officer. The items

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involved in this case are of a very extraordinary amount—a $25,000 bill in a single matter; the character of the work has not been of ordinary occurrence in the past, and it seems to me to be quite time that the views of the highest Court of the Province should be expressed so as to be, to some extent, a guide in a new but apparently growing class of work.

The starting points in considering the case now may very well be these three: the amount of the solicitors' claim against the clients, (1) as particularly set out by them, both as to services rendered and charges made for them, at their own instance; (2) as greatly increased in these demands for the purposes of the taxation; and (3) as taxed by the Taxing Officer.

The amounts charged by the solicitors in their books, from time to time as the services charged for were performed, are not, of course, necessarily binding upon them; though, as against them, they are entitled to great weight, needing satisfactory explanation before treating them as mistakes in the way of undercharge; and no such explanation was given; indeed, there seems to me to have been no reason for the increase except that the solicitors wanted more when the clients wanted explanation. To the contrary, after a careful examination of the original entries, I have no hesitation in saying that the charges made in them are, to say the least of it, very liberal, and such as any solicitor might well be satisfied with; and the increases made for the purpose of the taxation extravagant.

Two of the main items upon which the solicitors' extremely large ultimate demand was made, consist of the two mortgages prepared for the purpose of securing bonds to be issued, and much was attempted to be made of them, especially on account of the responsibility the solicitors, it was said, incurred in respect of them; but, under any circumstances, as the solicitors were acting for the mortgagors only, what great responsibility could they be incurring? It would be very different with solicitors who were acting for the bondholders. And, beside this, the first mortgage was not finally used; the second one was substituted for it; and the second one was prepared in accordance with a form provided by a solicitor, who was acting for the proposed bondholders, and who required that it be in that form. I can find no good reason for allowing any great amounts in connection with either of these mortgages.

Nor can I find any good reason for allowing the solicitors anything by way of a "commission." Such a charge is entirely an aftersight; it was not thought of when the work was undertaken, when it was done, or when it was charged for; it is not ordinarily, if at all—except under Rules of Court made for the purpose of curtailing solicitors' charges—a proper solicitors' charge. One going to a broker and retaining his services in matters pertaining to his business, impliedly, if not expressly,

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undertakes to pay the usual brokerage charges, because that is the usual, if not the invariable, mode of dealing; but in this case neither solicitor or client had any thought of any such method of payment; it was not the usual manner of charging, or paying, in that profession: the usual and proper method of charging was that adopted by the solicitors, evidenced by the entries in their dockets. If in the conduct of a client's business a broker's services are needed, I desire to say that it is the solicitor's duty, with the client's assent, to have the work done by a competent broker. To do the work himself and charge for it four or five times as much as the experienced man—the broker—would charge, would be inexcusable. I can find no justification for imputing to the clients a promise to pay, in any respect, by way of commission; and, short of a contract to pay, no such charge can lawfully be sustained. Nor, if charges by way of commission were incidents of a solicitor's business, can I find evidence enough in this case to warrant any such charge: the loan or advance by the witness Fasken was not obtained by the solicitors independently of the clients, nor was that moneyed man first introduced to the clients by the solicitors, nor can I believe that the solicitors' "personality," and not the security of the clients' property and the money to be made out of the transaction, opened the purse-strings, or, indeed, had anything substantial to do with that profitable operation.

In dealing with bills of costs for services such as those in question here, the allowances to be made must be reasonable; and, in determining what is reasonable, the Taxing Officers have a safe guide in the authorised tariff of fees under which bills of costs are daily taxed; it affords evidence of reasonableness in so many things that I cannot but think it should afford a reasonable guide in most, if not in all, things.

I would allow the appeal and do not oppose a retaxation —if the solicitors are yet unwilling to accept the charges made by them in their own books, which the applicants are willing to pay, and which appear to me to be quite large enough.

The question of costs of this appeal and of former appeals has now been raised, and I have been asked to express my opinion upon it. When writing the foregoing opinion nothing was expressed upon the subject, because I saw no reason to depart from the just rule that a successful party should have his costs of an appeal. Here the clients' appeal is allowed and the solicitors' cross-appeal is dismissed. What possible reason can there then be for making an exception of, and a special order as to, costs in this case? Because the unsuccessful parties happen to be solicitors is no kind of reasonable or just reason. The clients were obliged to come to this Court to get relief from the judgment of a Divisional Court, and they have got it; the solicitors were not obliged to appeal from that judgment, which gave

them too much; but they did, and failed. Why not pay costs of such an appeal? My conclusions upon the merits of the appeal do not necessitate a reference back of the bills; I would prefer dealing with them finally now; but see no serious objection to such a reference. It is, however, in my opinion, no ground whatever for depriving the clients of their costs in this Court. If this appeal were allowed and the cross-appeal dismissed and the judgment of the single Judge restored merely, no one would gainsay the clients' right to such costs; why, then, should they fare worse when getting greater relief than that; and in any case why be deprived of them merely because this Court may deem it better to refer the matter back to the Taxing Officer than finally dispose of the case on its merits on this appeal? The costs of the appeals to the single Judge and of the appeals to the Divisional Court stand upon a different footing: the former appeal and cross-appeal failed, and the Judge exercised his discretion over the costs of them: there was also failure to a considerable extent on each side ultimately as to the things sought in the appeals to the Divisional Court. So that a fair disposition of the costs of the appeals in each of those Courts would be made in leaving the parties respectively to pay their own costs; and that disposition of such costs I would now make. The costs of the new taxation should be dealt with by the Taxing Officer.

MACLAREN and MAGEE, JJ.A., agreed in the result.

Maclaren, J.A.
Magee, J.A.

*Appeal allowed and cross-appeal dismissed.*

The order of the Court was as follows: Appeal allowed with costs and cross-appeal dismissed with costs; no costs to either party of the appeals to BRITTON, J., and the Divisional Court; reference back to the Taxing Officer.

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## DOOL v. ROBINSON.

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*Manitoba King's Bench. Trial before Macdonald, J. October 22, 1912.*

1. VENDOR AND PURCHASER (§ I E—28)—PURCHASER'S DEFAULT—CROP PAYMENT PLAN—SALE BY MORTGAGEE ON DEFAULT OF VENDOR.

Where the purchaser of land under a crop payment plan himself makes default in carrying out his agreement and such default is found to have been the cause of the vendor's default to a mortgagee of the property by reason whereof the property was sold under the mortgage, the original purchaser first mentioned has no right of action in damages against his vendor for allowing the property to be sold.

Statement

THE plaintiff brings this action claiming damages against the defendant for the latter allowing the property hereinafter referred to being sold under a mortgage given by the defendant on the said property.

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The action was dismissed.

*A. Eakins*, for plaintiff.
*H. F. Maulson*, for defendant.

MACDONALD, J.:—The defendant, on the 16th November, 1908, entered into an agreement with one Still for the sale to the latter of the south-east quarter of section ten (10) and south-west quarter of section eleven (11) in township fourteen (14) and range seventeen (17) west of the principal meridian in Manitoba, and Still, with the consent of the defendant, assigned the said agreement and all his interest therein and in the said lands to the plaintiff.

The land was at the time under mortgage by the defendant to the Canada Permanent Mortgage Corporation, but the agreement is silent as to this mortgage, and no reference was made to it at the time of the sale to Still. The latter was, however, aware of the mortgage at the time of the assignment to the plaintiff, and the plaintiff was advised of it.

The agreement provides for the payment of the purchase-price without fixing any day for its payment, the purchaser agreeing to buy for the sum of $5,700 with interest at the rate of seven per cent. per annum on the sum of $2,500, being the amount of the mortgage against the property, and six per cent. per annum on the balance of the purchase money. And the purchaser further covenants and agrees

> to break and backset twenty acres of the said land during the season of 1909 and a further quantity of the uncultivated arable land upon said premises to be broken and backset in the same manner during the proper seasons as follows: 20 acres in 1909; 20 acres in 1909.

This last twenty acres, it is evident, was intended for 1910.

The agreement further provides that the purchaser will seed to wheat or such other grain as the vendor may consent to in writing all the land that may be broken previously to the year 1909 unless the vendor consent in writing that some part may be left over to summer-fallow.

The purchaser agrees to pay and discharge all taxes, rates and assessments wherewith the land may be rated or charged from and after the date of the agreement.

Notwithstanding the slovenly and careless manner in which this agreement was made out it is plain that the intention of the parties was that the purchase-price was to be paid on what is known as the crop payment plan, upon the purchaser complying with the terms and conditions of the agreement and upon the purchase-price being paid the vendor agreed to convey to the purchaser by good and sufficient deed of conveyance.

In default in any of the payments or in the performance of any of the covenants the vendor shall be at liberty at any time after such default with or without notice to the purchaser, either

to cancel the contract and declare the same void and forfeit any payments that may have been made on account thereof or proceed to another sale of the said lands either by public auction, tender or private contract.

The purchaser made default in almost all (if not all) the conditions and provisions of the agreement, entitling the vendor to cancellation of the agreement on the happening of any default.

In 1909 he failed to break the twenty acres called for by the agreement; in that year he put into crop but sixty acres instead of one hundred and ten as demanded by the agreement, and without advising the vendor or obtaining his consent to the lesser quantity; he did not give the notice required by the agreement, although this requirement may have been waived; he did not pay the taxes, although he says he took care that the lands were not sold for arrears of taxes, but this was not a compliance with the terms of the agreement; he saw the clerk of the municipality several times about the taxes, and on the last occasion, after at least the second default, he was advised that the taxes had been paid by the company holding the mortgage against the property. This satisfied the plaintiff and he paid no further attention to this matter, knowing as he must, that this default on his part would make his vendor in default under his mortgage.

In the year 1909 he failed to deliver to the vendor his share of the oats as called for by the agreement, appropriating to his own use at his own estimate oats to the value of sixty dollars. He claims, however, that he had the permission of the vendor's agent to do this, and although the agent does not remember any such permission, he thinks it improbable, and it seems unreasonable that he would consider his authority extended thus far. Although the plaintiff sets out this permission, he admits that he was to make good this shortage, which, however, he never did.

It seems to me the vendor could very well say that the purchaser, through his neglect and many defaults, was the cause of his default under the mortgage through which the property was sold.

The expectation no doubt was that the returns from the farm would protect this mortgage and failure to extend the cultivation and to account for one-half of the crop might make the payments under the mortgage difficult for the vendor.

The purchaser was just as much in default as if the purchase-price was payable in money instalments and he had failed in meeting them.

In my opinion the plaintiff, by reason of his failure to comply with the terms of the agreement of sale is without redress for the defendant allowing the property to be sold under his mortgage, and I dismiss the action with costs. I also dismiss the counterclaim with costs.

*Action dismissed.*

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Annotation

Refusal of specific performance

**Annotation — Specific performance (§ I A—8) — Grounds for refusing the remedy.**

Upon the well-known principle that the purchaser must have been ever ready to perform, it is clear that where he sues for specific performance, the crucial question commonly is whether he himself has ever been ready, desirous, prompt and eager to carry out his part of the contract, and, if not, an otherwise evenly-poised scales is by defendant's laches turned against him, and specific performance refused: *Milward* v. *Earl of Thanet*, 5 Ves. 720*n*; *Dunlop* v. *Bolster*, 6 D.L.R. 468, 21 W.L.R. 695; *Edgar* v. *Caskey*, 7 D.L.R. 45.

A party cannot call upon a Court of equity for specific performance unless he has shewn himself ready, desirous, prompt and eager, to perform his own part of the contract: *Edgar* v. *Caskey*, 7 D.L.R. 45, *per* Simmons and Stuart, JJ., following the principle as laid down in *Milward* v. *Earl of Thanet*, 5 Ves. 720*n*; *Eads* v. *Williams*, 4 DeG. M. & G. 674, 691.

A plaintiff purchaser seeking specific performance must meet the question whether he himself has temporized on a speculative purchase, so that by his own conduct he allowed the vendor to take a position by re-sale whereby specific performance would work a hardship; and the plaintiff failing to meet such a defence cannot succeed: *Edgar* v. *Caskey*, 7 D.L.R. 45.

In a purchaser's suit for specific performance the onus is on him to shew reasonable diligence in setting up his claim, and where, either in speculation, or in bad faith, or even through inadvertence, he moved so slowly that the vendor, relying upon appearances from the purchaser's default, bargained to re-sell and therefore cannot retract without liability for damages, the original purchaser will be denied the relief: *Dunlop* v. *Bolster*, 6 D.L.R. 468, 21 W.L.R. 695; *Edgar* v. *Caskey*, 7 D.L.R. 45,

Under an agreement to sell lands, where the purchaser, by his continued default on an instalment of the purchase price, placed upon the contract the earmarks of abandonment, and thereby entitled the vendor to cancel the contract, but, instead of cancelling, the vendor brought action to compel payment of the purchase-price under the terms of the agreement, this election by the vendor entitled the purchaser (had he acted promptly) to have the sale carried out.

Under an agreement to sell lands, where the vendor after default on an instalment of the purchase-price brought action demanding, under an acceleration clause, payment of the full balance of purchase-money, and the purchaser tenders only the amount of the defaulted instalment when the vendor was entitled to the full balance, this shews on the purchaser's part a want of readiness and eagerness to carry out the contract and is in effect an abandonment of it, and when followed up by notice of rescission from the vendor, a subsequent action by the purchaser for specific performance must fail: *Dunlop* v. *Bolster*, 6 D.L.R. 468, 21 W.L.R. 695, reversing, on appeal, *Dunlop* v. *Bolster*, 4 D.L.R. 451; *Harris* v. *Robinson*, 21 Can. S.C.R. 404, applied.

The principal case holds that where the purchaser of land, under a crop payment plan, himself makes default in carrying out his agreement, and such default is found to have been the cause of the vendor's default to a mortgagee of the property by reason whereof the property was sold under the mortgage, the original purchaser first mentioned has no right of

**Annotation** (*continued*)—Specific performance (§ I A—8)—Grounds for refusing the remedy.

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Annotation.

Refusal of specific performance

action in damages against his vendor for allowing the property to be sold: *Dool* v *Robinson*, 7 D.L.R. *ante*. The purchaser, in that case, sought specific performance, under an agreement of sale of lands, in which he had covenanted to break and crop certain acreages, and to pay the purchase money on the crop payment plan, and to pay the taxes; it appeared that substantially all of those covenants were broken; and, partly because of the default on the taxes, the lands were sold under a mortgage which the vendor had covenanted to pay; the purchaser had stood by and watched the mortgage sale; it was held that such default and laches by the purchaser himself had been shewn that specific performance should be refused: *Dool* v. *Robinson*, 7 D.L.R. *ante*.

So also where a purchaser of a farm, seeking specific performance of an agreement of sale, had, under that agreement, covenanted (*a*) to break 20 acres; (*b*) to crop 110 acres; (*c*) to turn over to the vendor his stipulated share of all the crops; (*d*) to pay all taxes; and where he has done practically none of those things; and where, as a result of his default, the farm went to sale under an outstanding mortgage the instalments on which the vendor had covenanted to pay, the purchaser by his persistent defaults was held disentitled to any relief by way of specific performance: *Dool* v. *Robinson*, 7 D.L.R. *ante*.

Where an agreement for the sale of land expressly stipulates for a down payment of $10,000 on a $33,750 purchase, and there is outstanding a mortgage (of which the purchaser had notice prior to the agreement) which amounts to less than the balance of the purchase price, if the purchaser refuses on an objection to title based upon the outstanding mortgage to make the down payment, the vendor is entitled upon reasonable notice to cancel the contract, and where such notice is given and the purchaser still refuses to comply he cannot afterwards enforce specific performance: *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, reversing, on appeal, *Knight* v. *Cushing*, 1 D.L.R. 331, 20 W.L.R. 28.

Where a purchaser, under an agreement to purchase lands, insists upon something unprovided for in the agreement as a *sine qua non* of his performing his own express obligations under the contract, he thereby raises an impassable barrier to his own action for specific performance: *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, *per* Idington, J.

Where a purchaser under an agreement of sale of lands refused to comply with an express provision for payment of a substantial down payment on the purchase price of lands of speculative value of which he does not receive possession, and after a long interval without taking any action until the property had greatly increased in value offers such down payment to the vendor, the latter will not be compelled to accept the same for the reason that it would, in effect, be constituting a fresh contract: *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, *per* Duff, J.

Under an agreement for the sale of land, where the property is of a speculative character and time therefore of the essence of the agreement, where the purchaser has refused to comply with an express requirement of the contract for a large down payment on the purchase price, a four day notice by the vendor for payment, or, in the alternative, for cancellation is reasonable, and, on the purchaser continuing in default beyond the

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Annotation

Refusal of specific performance

**Annotation** (*continued*)—Specific performance (§ I A—8)—Grounds for refusing the remedy.

period so fixed by the notice, the vendor is entitled to treat the agreement as cancelled: *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, *per* Anglin, J.

Where both the parties are at fault, and the contract is therefore ended, the general rule is a return to the purchaser of his payments less damages to the vendor for the purchaser's default: 39 Cyc. 2029; compare *Campbell* v. *Grier*, 10 U.C.C.P. 295.

In an action for specific performance, if literal enforcement would be unduly harsh, the relief will be modified: 36 Cyc. 726, 731, 755.

The rule which governs the Courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must shew that he has been always ready and eager to carry out the contract on his part: *Harris* v. *Robinson*, 21 Can. S.C.R. 390, 404; *Dunlop* v. *Bolster*, 6 D.L.R. 468; *Edgar* v. *Caskey*, 7 D.L.R. 45.

The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies, and in the exercise of the remedy much regard is shewn to the conduct of the person seeking relief: *Harris* v. *Robinson*, 21 Can. S.C.R. 390, 397; *Lamare* v. *Dixon*, L.R. 6 H.L. 423; Fry on Specific Performance, 2nd ed., sec. 25; *Fuller* v. *Maynard*, 5 D.L.R. 520.

The jurisdiction, which Courts of equity formerly exercised by way of specific performance, is, since the Judicature Act, administered by all Courts in Ontario, but upon the old established principles and subject to the old limitations; and, in a case where a Court would be compelled to set at defiance the wholesome rule which requires *promptitude and diligence* on the part of one who seeks this extraordinary relief in order to grant specific performance, the relief must be refused: *Harris* v. *Robinson*, 21 Can. S.C.R. 390, 397, 404; *Fuller* v. *Maynard*, 5 D.L.R. 520.

The granting of relief, in a proceeding for the specific performance of a contract, lies in the discretion of the Court, and will not be exercised arbitrarily or capriciously, but only where it would be inequitable to deny such relief: *Fuller* v. *Maynard*, 5 D.L.R. 520; see also *Clowes* v. *Higginson* (1813), 1 V. & B. 524; *Harris* v. *Robinson* (1892), 21 Can. S.C.R. 390; *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414; *Coventry* v. *McLean* (1892), 22 O.R. 1.

Where time was not expressly or impliedly the essence of a contract for the sale of real estate, and the vendor failed afterwards to give the purchaser such reasonable notice to complete the contract within a definite and specified period as would make time the essence thereof, and the delay in completing the contract on the part of the purchaser was due to his waiting to hear as to an application he had made (with the knowledge of the vendor) for a loan on the property for the purpose of completing payment therefor; a determination of the contract by the vendor was unjustifiable, and the purchaser would be entitled to recover any special damage he had suffered, by reason of having entered into possession and made extensive and costly improvements, with the knowledge and approval of the vendor: *Mitchell* v. *Wilson*, 2 D.L.R. 714; see also *Parkin* v. *Thorold*, 16 Beav. 59.

**Annotation** (*continued*)—Specific performance (§ I A—8)—Grounds for refusing the remedy.

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Annotation

Refusal of specific performance

16 Jur. 959, 22 L.J. Ch. 174; 7 Halsbury's Laws of England 413; *Forfar* v. *Sage*, 5 Terr. L.R. 255; *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171, 174; *Bunny* v. *Hopkinson*, 27 Beav. 565, 29 L.J. Ch. 93, 6 Jur. (N.S.) 187, 1 L.T. 53; *Rolph* v. *Crouch*, L.R. 3 Ex. 44; Mayne on Damages, 7th ed., 229.

Facts known to the vendor (at the time the contract was made) as having influenced the purchaser to agree to the time fixed for completion, in a contract for sale of land, will be considered in determining what is a reasonable notice, where the contract does not provide that time shall be of the essence of the contract: *Mitchell* v. *Wilson*, 2 D.L.R. 714; see also *Parkin* v. *Thorold*, 16 Beav. 59, 22 L.J. Ch. 174; *Forfar* v. *Sage*, 5 Terr. L.R. 255; *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171.

A memorandum of sale of land, which recites a consideration of $2,700, and provides for six yearly payments aggregating $2,400 only, does not contain all of the terms of the contract between the parties so as to satisfy the requirements of sec. 4 of the Statute of Frauds, when the document is silent as to the manner of paying the remaining $300, whether in cash or otherwise, nor can it be presumed, even as against the vendor, that such balance was to be paid in cash, although the purchaser assents thereto by his pleading: *Fenske* v. *Farbacher*, 2 D.L.R. 634, and its annotation; see also *Hussey* v. *Horne-Payne*, 4 A.C. 311, 316; *Chinnock* v. *The Marchioness of Ely*, 4 DeG. J. & S. 638, 646; *Munday* v. *Asprey*, 13 Ch.D. 855; *Fowler* v. *Freeman*, 9 Ves. 351.

If one of two parties to a contract for a sale of land gives to the other notice that he will not perform the contract, and the person receiving the notice does not, within reasonable time after the receipt of such notice, take steps to enforce the contract; equity will consider him to have acquiesced in the abandonment of the contract, and will leave the parties to it to their remedies at law: *Parkin* v. *Thorold*, 16 Beav. 71.

When it is a condition of a contract for the sale of land that time is to be considered as of the essence of the agreement, a mere extension of the time is a waiver of such condition, only to the extent of *substituting* the extended time for the original time, and the condition remains effective so as to make time of the essence of the agreement as to the *substituted* date: *Hicks* v. *Laidlaw*, 2 D.L.R. 460, following *Barclay* v. *Messenger*, 43 L.J. Ch. 449; see also Annotation to *Hicks* v. *Laidlaw*.

A Court of equity may either relieve against, or enforce, specific performance (notwithstanding failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion) if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, or in the nature of the property or circumstances, which would make it inequitable to interfere with, and to modify, the legal right: *Hicks* v. *Laidlaw*, 2 D.L.R. 460; *Tilly* v. *Thomas*, L.R. 3 Ch. 61.

The exercise of the jurisdiction of equity, as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court, not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles: *Lamare* v *Dixon*, L.R. 6 H.L. 414, 423; see also *Knight* v. *Cushing*, 1 D.L.R. 354*n*, and the same case in appeal *sub nom. Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555.

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## McLARTY v. TODD.

*Ontario High Court. Trial before Riddell, J. October 26, 1912.*

1. ASSIGNMENT FOR CREDITORS (§ VIII—74*a*)—WAGES — PREFERENTIAL CLAIM — MEANING OF "WAGES NOT EXCEEDING THREE MONTHS' WAGES"—WAGES ACT (ONT.) 10 EDW. VII. CH. 72.

Where an assignment is made for the general benefit of creditors, the wages "not exceeding three months' wages" for which (under the wages Act (Ont.) 10 Edw. VII. ch. 72, sec. 3), a person in the employment of the assignor within a month of the assignment has a preferential claim, means, not necessarily the wages for the three months immediately preceding the assignment, but the balance of wages due him not exceeding any three months' wages.

Statement

AN action brought by the assignee of a claim for wages against two companies and their assignee for the benefit of creditors.

Judgment was given for the plaintiff.

*L. F. Heyd*, K.C., for the plaintiff.

*J. P. MacGregor*, for the defendants.

Riddell, J.

RIDDELL, J.:—I held that the plaintiff had established by evidence that his assignor had been duly employed by the companies, and I gave judgment for the amount of the balance of the claim.

As against the assignee of the companies, the question arose as to the amount for which the said claim is a preferential claim under R.S.O. 1897 ch. 156, sec. 2, now 10 Edw. VII. ch. 72, sec. 3. I should not have thought it necessary to write a judgment, had I not been informed by counsel that it has been, by Referees, etc., more than once ruled that the amount of the preference is to be found by taking the amount of the last three months' wages and deducting therefrom the amount of wages paid during the same time. This I think an error: the assignee is to pay "the wages of all persons in the employment of the assignor . . . not exceeding three months' wages . . ." It is not the balance of the last three months' wages, but "the wages . . . not exceeding three months' wages." In other words, the servant may venture to leave in the master's hands a balance of his wages, so long as that balance does not exceed three months' wages.

The wages were $35 per week—3 months=13 weeks at $35 per week—$455.

Accordingly, of the amount of $873.77 found due at the trial, the plaintiff will have a preference to the amount of $455 and a claim for the remainder.

The plaintiff is also entitled to his costs as against the defendant assignee, although the assignee on the facts before him was justified in disputing the claim: *Zimmerman* v. *Sproat*, 5 D.L.R. 452, 26 O.L.R. 448.

*Judgment for plaintiff.*

## MAPLE CITY OIL AND GAS CO. v. CHARLTON.

ONT.

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1912

*Ontario High Court. Trial before Kelly, J. July 29, 1912.*

1. ESTOPPEL (§ III B—54)—"OIL LEASE" OF WIFE'S LANDS EXECUTED BY HUSBAND IN PRESENCE OF WIFE.

Where a husband, who had been in the habit of conducting his wife's business, executes an "oil lease" of lands belonging to her, in which lease she does not join, but stands by at the execution thereof, reads the instrument, knows its contents and expresses her approval, and the husband accepts rent under the lease, and later the wife herself actually subscribes her name to the instrument in order to confirm it, she is estopped as against assignees of the lease from claiming that there was no valid execution of the lease.

[*Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827, referred to.]

2. MINES AND MINERALS (§ II B 4—53)—RIGHTS OF PRIOR LESSEES OF "OIL LEASE."

Subsequent lessees of an "oil lease" where there is already on record an outstanding valid "oil lease" on the same property will be restrained from entering upon or prospecting for oil or gas on the lands in question during the period that the prior lessees are so entitled.

3. IMPROVEMENTS (§ I—4)—COMPENSATION FOR IMPROVEMENTS MADE BY SUBSEQUENT LESSEES UNDER "OIL LEASE."

Where plaintiffs are entitled by reason of a prior "oil lease" to enter upon and prospect for oil and gas upon land subsequently leased to defendants and upon which defendants have already done work and made improvements, if the plaintiffs wish to take the benefit of this work done and improvements made, defendant is entitled to compensation therefor.

[*McIntosh* v. *Leckie*, 13 O.L.R. 54, followed.]

Statement

ACTION by the assignees of an oil lease for possession of the lands leased and to restrain the defendants from entering upon or prospecting for oil or gas thereon during the currency of the lease.

There was judgment for the plaintiffs with costs.

*W. N. Tilley*, for the plaintiffs.

*O. L. Lewis*, K.C., and *W. G. Richards*, for the defendants the Ridgetown Fuel Supply Company, Limited.

*R. L. Gosnell*, for the defendants John Charlton and Agnes Charlton.

Kelly, J.

KELLY, J.:—The defendant Agnes Charlton, wife of her co-defendant John Charlton, is the owner of part of lot 177 on the north side of Talbot road (on the town line) in the township of Tilbury, containing 90 acres more or less.

On the 12th October, 1905, W. E. Keve, accompanied by George A. Jackson, a farmer residing in the township of Romney, went to the residence of the defendants, the Charltons, and negotiated with the defendant John Charlton for what is known as an "oil lease" of the property. The negotiations were carried on in the presence of the defendant Agnes Charlton, and resulted in a lease being made by John Charlton to Keve of all the oil

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and gas in and under the premises, with the exclusive right to enter thereon for the purpose of drilling and operating for oil, gas, or water . . . for the term of ten years, "and as much longer as oil or gas are produced therefrom," etc.

The lease was made on certain conditions, one of which was that, if operations for drilling a well for oil or gas were not commenced within four months from the date of the lease, and in case a well were not so commenced, the lease should become null and void, unless the lessee should pay to the lessor 25 cents per acre annually thereafter until a well should be commenced, and that such payments might be made "in hand by cheque or post office order mailed to the first party's (lessor's) credit in the Bank of Commerce of Blenheim, Ontario." Jackson, who completed the drawing of the lease, says he assumed that John Charlton was the owner of the property.

On the 20th July, 1906, Keve assigned this lease to H. E. Graham, and both the lease and the assignment were registered in the registry office on the 9th August, 1906.

Drilling for oil or gas did not commence within the four months; and on the 6th February, 1907, $22.50 (being 25 cents per acre for the 90 acres) was paid to John Charlton, who gave to the New York and Western Consolidated Oil Company (a company apparently owned by Graham, or with which he was associated) a written receipt therefor, which was expressed to be "in full for one year's rent from February 12th, 1906, to February 12th, 1907, on lease made by me to W. E. Keve, of Lima, Ohio, on the 12th day of October, 1905, for oil and gas purposes, on my land . . . and this payment is received by me in full satisfaction of all present claim or claims due me on said lease, which is hereby confirmed."

It having come to the knowledge of Graham that these lands stood in the name of the defendant Agnes Charlton, and not in that of John Charlton, early in September, 1907, Graham and A. D. Chaplin, who was the secretary-treasurer of the plaintiff company, went to Charlton's house, with the evident intention of having Mrs. Charlton confirm the lease made by her husband, or of having her sign a new lease to take the place of the former one. There was then produced to her what purported to be a copy of the original lease signed by her husband and Keve, and after the names "John Charlton" and "W. E. Keve" had been struck out, and the names "Agnes Charlton" and "H. C. Graham" substituted therefor, the document was signed and sealed by Agnes Charlton and by Graham.

Later on, the lease was assigned by Graham to A. D. Chaplin, who in turn assigned it to the plaintiff company.

The lessee, or those who subsequently became entitled to the benefit of the document, not having commenced to drill, they continued to make the annual payments of $22.50, and sub-

sequent to the above-mentioned payments, for which the defendant, John Charlton, gave his receipt, the following payments were made: Cheque of Graham to the order of The Canadian Bank of Commerce at Blenheim, dated February 7th, 1908, for $22.50. The only evidence of the date on which this was paid to the bank, is from a statement of the bank, produced since the trial, shewing its receipt on February 15th, 1908.

Prior to February 12th in each of the years, 1909, 1910, and 1911, there was paid into the same bank by plaintiffs by cheques payable to the order of John Charlton, the sum of $22.50, each cheque on its face indicating that it was rent for the property in question.

All of these sums were by the bank placed to the credit of John Charlton.

It appears, too, from the bank's statement that a further sum was paid in to the bank for the credit of John Charlton on January 6th, 1912.

On April 11th, 1908, John Charlton by cheque signed by him drew from the bank the $22.50 paid in the previous February.

On the 6th January, 1911, the defendants, Agnes Charlton and John Charlton, made an "oil lease" of these same premises to John W. Smith, who, on the 9th January of that same year, assigned it to the defendants the Ridgetown Fuel Supply Company, Limited.

Prior to the making of the latter lease and subsequent to the making of the document under which plaintiffs claim, another lease was made by the Charltons, or one of them, to other parties, but it was afterwards abandoned.

The defendant company proceeded to drill a well on the premises, and have incurred considerable expense thereby.

Jasperson & McKay, the contractors, who did the work of drilling the well, were made parties defendants, but before the trial the action was discontinued against them.

In answer to the plaintiffs' claim to be entitled under the documents executed in favour of Keve and Graham, the defendants have set up that the plaintiffs are not, under these documents, entitled to the property or the use thereof or to the gas or oil which may be taken therefrom, on the ground that John Charlton had not the right to make the lease; that the document signed by Agnes Charlton was not a confirmation of the lease; and, if the latter document should be taken to be a lease from her to Graham, that the lessees have forfeited their rights by reason of payment of the 25 cents per acre annually having been made to John Charlton and not to her. They also contend that there have been such material alterations in the documents as render them inoperative.

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The further defence is put forward that the lands are not described with such accuracy as to satisfy the Statute of Frauds. The defendants, however, are not entitled to succeed on this last ground; in my opinion, the documents sufficiently describe the property.

As to any alterations made, they were immaterial and not such as to affect the validity of the documents or to vary their legal effect; they merely expressed more fully the intention of the parties, already apparent on the face of the documents, and do not prejudice any of the parties thereunder: Norton on Deeds, 2nd ed., p. 39.

Moreover, the evidence of Chaplin is, that no alterations or additions were made to the documents signed by Mrs. Charlton, after she had signed it, except this addition at the end, "22nd October, 1907;" but there is no evidence to shew by whom this addition was made.

The defendants laid stress upon two letters from Graham to Mrs. Charlton, in December, 1907, in which she was told that the plaintiffs would not drill on the property until they had got a lease properly signed. This was not in repudiation of what had been already signed, but it shews a desire on the lessees' part to have a more formal document from the owner before they commenced to drill.

A ground of defence urged in the argument was as to the manner of making the annual payments of $22.50, and the consequence of their having been made to the credit of John Charlton, instead of to Agnes Charlton. On this ground, I think they must fail.

From the depositions of the Charltons, on their examination for discovery, it is quite apparent that both fully understood the nature, objects, and meaning of the original lease and the document later on signed by Agnes Charlton; that the husband had been in the habit of conducting business for his wife; that she, when the original document was drawn, knew of its contents, read it over, and expressed her approval of it; and that, when she signed the document in September, 1907, she intended it to be a confirmation of the lease signed by her husband on the 12th October, 1905.

I cannot treat the dealings of the husband and wife in this transaction as separate; and, taking into consideration all the circumstances, I think it would be most unfair and inequitable to allow them to evade the consequences of what may be taken to have been their joint act, and thus relieve them from the obligation to carry out the bargain which they made with the plaintiffs' predecessors in title. The propriety of this conclusion is to be seen from their evidence.

Mrs. Charlton, in her examination for discovery, says:—

Q. And you were there on that day? (referring to the making of the lease of 12th October, 1905). A. Yes.

Q. After that Mr. Chaplin and Mr. Graham came out to see you? A. Yes.

Q. And they told you that they had discovered somehow that Mr. Charlton was not the owner of the lot and that you were? A. Yes.

Q. And they had a lease, a copy of the lease that he had signed there, signed by Keve and Chaplin? A. Yes.

. . . . .

Q. Now what you thought you were doing was that you were confirming your husband's action in leasing this property; you were correcting what was an irregularity, as far as you knew? A. Yes.

Q. And that was your intention? A. Yes.

Q. I suppose it is the same in your family as others, the husband does the business and the wife lets him? A. Yes, generally.

Q. And you were approving of what he had done? A. I guess I must have been or I would not have signed that paper.

. . . . .

And referring to her husband signing the lease to Keve, she says:—

Q. You were quite willing he should do what he was doing, and considered that whatever he was doing he was doing for you, as usual? A. Yes.

The evidence of John Charlton shews that the lease was recognized as existing and in force, when, in April, 1908, he drew from the bank the $22.50 paid in by the lessees; this money was not returned to the plaintiffs or their predecessors in title.

On the argument the question was not raised as to the effect of the payment for the year ending the 12th February, 1908, being made after that date. There is some doubt about the date the bank received it. But, assuming that it was made after the end of that year, I think the Charltons waived any forfeiture that might have resulted from failure to make payment within the proper time, when the husband drew that payment from the bank in April, 1908. The acceptance of this payment, and what took place in November or December, 1909, when John Charlton spoke to the plaintiff's secretary about giving up the lease, and to which I refer later on, is evidence that the Charltons treated the lease as being in effect at that time.

John Charlton admits, too, that he had notice from the bank in each year, except the present year, that the annual payment had been paid into the bank.

Neither of the Charltons did anything to repudiate the lease, until about November or December, 1909, when an opportunity presented itself of leasing the property on terms more favourable to them than those contained in the document under which the plaintiffs claim; and, desiring to be freed from their dealings with the plaintiffs and their predecessors, the defendant John Charlton approached the secretary of the plaintiff company, and

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asked, as the secretary says, for a surrender of the lease held by the plaintiffs. John Charlton himself admits that he did go to the secretary, "to see what he was going to do about the lease, whether he was going to go on and drill, or give it up," and he admits that he told the secretary that he was going to lease it to other parties; in reply to which the secretary said that, if he did so, he would get into trouble. On his return home, he told his wife of this interview.

In the face of this warning, the Charltons did lease to Smith; and the more favourable terms they were able to make with him may have helped to induce them to disregard whatever obligations they may have been under towards the plaintiffs.

In answer to an objection by the defendants, it is contended on behalf of the plaintiffs that Agnes Charlton is estopped from denying the right of her husband to bind her to the transaction of the 12th October, 1905.

Jackson, who completed the drawing of the lease, and whose evidence was given with frankness and apparent honesty, shews the interest she took in the negotiations when, as he says, she read over the lease of October 12th, 1905, before it was signed and expressed her approval of it. It is true that the husband in his examination for discovery denies that his wife read this document. I prefer, however, to accept Jackson's testimony on that point. She knew or should have known that the title was in her, and I cannot see how she can escape from being held to be estopped, especially when it is so clearly shewn that she and her husband were acting together.

In *Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827, it is stated that

> the doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

And again,

> I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.

Counsel for the Charltons contended that the registered deed to Agnes Charlton was notice to the plaintiffs of her title,

and should be presumed against them; and, therefore, her "standing by" had not the effect of estopping her or giving the plaintiffs any right by estoppel.

It must not be overlooked that there was more than a mere "standing by" on her part, when she read over and expressly approved of the making of the original document. In *Gregg* v. *Wells*, 10 A. & E. 90, it is laid down that "a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

As to the defendant company, they cannot claim to have been ignorant of the true condition of affairs. The original lease to Keve and the assignment thereof by Keve to Graham had both been registered before they negotiated with the Charltons. Charlton swears that Smith was told of the existence of the lease set up by the plaintiffs and of the documents under which they claimed; and, as he puts it, "I told him all about it."

The evidence of Agnes Charlton on the same point is as follows:—

26. Q. After that Macdonald comes along for Smith? A. Yes.

27. Q. And you gave him a lease? A. Yes.

28. Q. Now when you gave Macdonald a lease for Smith, you told all about these leases? A. Yes.

29. Q. You had signed and your husband had signed? A. Yes.

30. Q. That you had received money. Who from? A. The company. They knew all that, they knew everything.

31. Q. And they knew also, Mrs. Charlton, that your husband and Chaplin had some words about it, and that the Maple City Oil Company were claiming that the leases were good, and they were going to enforce them. You told them all that? A. They knew all that—yes.

The defendant company, though put upon inquiry, both by the registered documents and by the knowledge which they obtained from the Charltons, took no steps to clear off the title or to put themselves in a position where they could safely deal with or obtain a lease of the property; they took the risk of entering upon the property and expending a very considerable sum of money in drilling operations.

On the whole evidence, and without expressly referring to many objections taken by counsel for the defendants in their lengthy and able arguments, I cannot do otherwise than hold that the effect of the lease of the 12th October, 1905, and of the document subsequently signed by Agnes Charlton in favour of Graham, taken together, as I think they should be, is to constitute a lease by the husband and wife. It is beyond doubt that both intended that the lease should be given, and they thought they were making such a lease; they acted upon it to the extent of accepting payment of the first year's rental, as well as the

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rent for the year ending the 12th February, 1908, which was drawn from the bank by John Charlton (for I must hold that the receipt of these moneys by the husband was for the wife), and they had notice that the other payments were being made from time to time to the bank as rental for the subsequent years.

If any part of the evidence adduced by the plaintiffs was capable of being contradicted or explained by the defendants, they did not avail themselves of the opportunity of doing so, as they refrained from going into the witness-box at the trial.

I declare, therefore, that the document of the 12th October, 1905, taken with that signed by Agnes Charlton in December, 1907, constitutes a lease for the purpose therein set forth of the part of lot 177 on the Talbot road, township of Tilbury East, owned by Agnes Charlton, and that the plaintiffs are entitled to possession for the purposes set forth in these documents.

The defendant company are restrained from entering upon or prospecting for oil or gas on these lands during the time that the plaintiffs are so entitled.

Following what was directed by his Lordship the Chancellor in *McIntosh* v. *Leckie*, 13 O.L.R. 54—a case in many respects not unlike the present one—if the plaintiffs take the benefit of the work done and improvements made by the defendant company on the lands, it must be on terms of compensating that company therefor; and there will be a reference to the Master at Chatham to ascertain the amount of such compensation, if the parties fail to agree.

The plaintiffs are entitled to their costs of the action.

*Judgment for the plaintiffs.*

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Oct. 29.

## TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

*Ontario High Court. Trial before Kelly, J. October 29, 1912.*

1. COURTS (§ I C 2—80)—DECLARATION OF LIEN FOR MUNICIPAL TAXES.

The provision of the Assessment Act (Ont.), 4 Edw. VII. ch. 23, sec. 89, whereby a municipal corporation is declared to have a special lien on lands for tax arrears confers no jurisdiction upon the court to pronounce a decree declaratory of such lien unless consequential relief can be given in the case.

[*Mutrie* v. *Alexander*, 23 O.L.R. 396, followed.]

2. EVIDENCE (§ VI J—571)—REGISTERED SUBDIVISION OF LANDS.

The production, for reference at the trial of what purports to be a copy of a registered plan the correctness of which alleged copy was neither admitted nor proved, is insufficient in an action for taxes, to prove that lots and subdivisions referred to in assessment rolls are identical with those shewn on the registered plans, so as to prove compliance with sec. 22 of the Assessment Act (Ont.), 4 Edw. VII. ch. 23, sec. 22.

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3. TAXES (§ III B—110—VALIDITY OF ASSESSMENT.

In order to shew that taxes are due, it must appear that the imperative requirements of the statute as to assessment have been complied with and that the rate of taxation has been fixed.

4. TAXES (§ IV—175)—SPECIAL LIEN FOR ARREARS.

The Assessment Act, 4 Edw. VII. (Ont.) ch. 23, sec. 89 in making land taxes due to the municipality a "special lien" on the lands confers no new right of realization by action at law which would accelerate the time for selling or shorten the time for redemption under the statutory mode of realizing under tax sale proceedings; the effect of the statute is to give to the municipality a security by way of lien for such taxes in priority to other claims and incumbrances, until payment is enforced.

5. STATUTES (§ II B—116)—INTERPRETATION OF TAXATION LAW.

A taxation statute is to be construed strictly.

[*Cox* v. *Roberts*, 3 App. Cas. 473, applied.]

6. TAXES (§ III B—116)—SUBDIVISION ASSESSMENTS.

Under the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, sec. 22, whereby land "subdivisions" are to be assessed separately two or more lots or parcels on a plan should not be included in one assessment. (Dictum *per* Kelly, J.)

7. TAXES (§ III B—116)—ASSESSMENT OF PART OF SUBDIVISION LOT.

Upon the separate assessment of a part of a lot in a land subdivision such part should be designated in the assessment roll by its boundaries or other definite description, so as to indicate what part is intended (Dictum *per* Kelly, J.)

[Assessment Act (Ont.), 4 Edw. VII. ch. 23, sec. 22, considered.]

8. ESTOPPEL (§ I A—8)—JUDGMENT FOR TAX ARREARS—CONCURRENT REMEDIES.

Where a municipal corporation accepted the promissory notes of a taxpayer for his tax arrears and by reason thereof had the taxes marked paid in the collector's tax roll and thereafter upon default in payment of some of the notes, took judgment thereon, the municipality is thereby estopped from afterwards seeking any other remedy for the taxes than what is available upon or incident to the notes and the judgment obtained. (Dictum *per* Kelly, J.)

Statement

ACTION for a declaration that taxes to the amount of $9,531.30, for the years 1906 to 1910, both inclusive, on a very large number of parcels of land, were charged by special lien on those parcels in priority to every other claim, privilege, or incumbrance of every person (including the defendants) except the Crown; and for payment by the defendant or some of them of that sum and interest and the costs ($32.50) of an order permitting the action to be brought; and, in default of payment, to enforce the lien by sale; and also for payment by the defendants the Trusts and Guarantee Company Limited and the liquidator of the defendants the Imperial Land Company Limited of all sums received by them for rents and profits, insurance, or purchase-money, on any of the lands in question.

The action was dismissed.

*G. H. Kilmer*, K.C., and *J. M. MacNamara*, K.C., for the plaintiffs.

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*S. H. Bradford*, K.C., and *J. Bradford*, for the defendants the Imperial Land Company Limited and E. R. C. Clarkson.

*H. W. Mickle* and *A. D. Armour*, for the defendants the Trusts and Guarantee Company Limited.

KELLY, J.:—On the 25th June, 1909, on petition of the plaintiffs, an order was made for the winding-up of the defendants the Imperial Land Company Limited, and the defendant Clarkson was appointed liquidator of that company.

The defendants the Trusts and Guarantee Company Limited are trustees under a mortgage deed of trust to secure bonds issued by the defendants the Imperial Land Company Limited.

Amongst the defences set up are: that no taxes are due as claimed by the plaintiffs; that the assessments for the various years for which the claim is made were not valid; and that the imperative requirements of the Assessment Act and Municipal Act have not been complied with.

On the 1st September, 1908, the plaintiffs accepted from the defendants the Imperial Land Company Limited their promissory notes of that date, as follows: $500 at 3 months; $500 at 6 months; $500 at 9 months; $500 at 12 months; and $957.93 at 12 months; all of which notes bore interest at six per cent. per annum. These notes were given and accepted for the taxes on the lands in question for the years 1906 and 1907.

On the 1st February, 1909, the plaintiffs obtained judgment against the defendants the Imperial Land Company Limited for the amount of the first note; and on the 30th March, 1909, judgment for the amount of the second note.

The defendants contend that, even if the plaintiffs became entitled to a lien in respect of the taxes, they have lost their right thereto for the years 1906 and 1907, by accepting the notes.

On the 5th October, 1908, the plaintiffs passed a resolution instructing the tax collector to mark as paid all taxes owing by the defendants the Imperial Land Company Limited, on the collector's rolls for 1906 and 1907, as the same had been settled by notes; and entries were made in the collector's roll for 1907 accordingly. The collector's roll for 1908 does not shew any arrears for these properties.

The defendants set up, too, that such other persons as may be owners of or interested in any of the lands in question should be added as parties to these proceedings.

On the opening of the trial, counsel for the plaintiffs agreed that, if it should be found that any of the lands in respect of which the plaintiffs claimed a lien were owned by any other person or persons not parties to these proceedings, the plaintiffs' claim for a lien on the lands so owned by others should be abandoned in this action, the plaintiffs reserving their rights to proceed against such other person or persons and the lands owned by them by separate actions or proceedings.

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In the first place, is this a case where the Court should be asked to make a declaratory order in respect of the special lien claimed by the plaintiffs?

The plaintiffs not only ask a declaration as to a lien, but also that, in default of payment of the amount claimed, the lien should be enforced by sale of the lands. They rely for relief on sec. 89 of the Assessment Act, 4 Edw. VII. ch. 23, which is as follows:—

> 89. The taxes due upon any land with costs may be recovered from the owner or tenant originally assessed therefor, and from any subsequent owner of the whole or any part thereof, saving his recourse against any other person, and shall be a special lien on the land, enforceable by action, in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority shall not be lost or impaired by any neglect, omission or error of the municipality, or of any agent or officer, or by want of registration.

This cannot be taken to mean that the municipality having such lien has the right to enforce it by sale in such manner as to interfere with or deprive the owner of the right of redemption given by the Act, in the event of a sale for taxes.

The Assessment Act has provided a means of realising taxes which are three years in arrear, and has also given the owner the right to redeem within a year after such sale.

The intention of the Legislature in making the "taxes due" a special lien on the lands was not to give a new or additional means of realising, which might have the effect of accelerating the time for selling, shortening the time for redemption, or otherwise interfering with such right, if not altogether depriving the owner of it, but rather to give the municipality security for such taxes in priority to other claims and incumbrances as mentioned in the Act, until a tax sale or until payment before such sale.

This is not a case where, if a declaratory order were made, consequential relief could be given. Following what was laid down in *Mutrie* v. *Alexander* (1911), 23 O.L.R. 396, and for the reasons given at p. 401 and in the authorities there cited, I refuse the declaration asked by the plaintiffs.

As to the claim for payment by the defendants of the taxes said to be due and the costs of the order: on the evidence submitted, I think the plaintiffs must fail.

So far as the years 1906 and 1907 are concerned, the plaintiffs accepted the company's promissory notes and relied upon that form of payment; and whatever remedy they have against the defendants for the taxes for these years is upon the notes and the judgments obtained thereon.

The defendants, too, deny that any taxes are due for any of the years for which the plaintiffs make claim, on the ground,

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amongst others, that the description of the lands contained in the various assessment rolls and collectors' rolls "are ambiguous, indefinite, and incapable of being identified upon the ground."

Apart from other objections and apart also from any other errors or irregularities which may have occurred in making the assessments for these years (the effect of which I am not now taking into consideration), the evidence submitted by the plaintiffs does not shew that there was a compliance with the provisions of sec. 22 of the Assessment Act.

> (c) Land known to be subdivided shall be designed in the roll by the numbers or other designation of the subdivisions, with reference where necessary to the plan or survey thereof; land not subdivided into lots shall be designated by its boundaries or other intelligible description.
>
> (d) Each subdivision shall be assessed separately, and every parcel of land (whether a whole subdivision or a portion thereof, or the whole or a portion of any building thereon) in the separate occupation of any person, shall be separately assessed.

The registered plans shewing the subdivisions of the property were not produced at the trial. The only guide before the Court as to these subdivisions is what was said to be a copy of the registered plans or subdivisions, but this copy was not proven or admitted to be correct, nor is it shewn that the lots or subdivisions mentioned in the assessment rolls are those shewn on the registered plans.

In the absence of some positive evidence that the lots and subdivisions referred to in the assessment rolls are according to the registered plans, I am unable to say that the assessment comply with the requirements of clauses (c) and (d) of sub-sec. 1 of sec. 22 of the Act.

After the trial, opportunity was given counsel to produce the original plans, or, in some satisfactory way, to prove the correctness of the copy produced at the trial. This, however, was not taken advantage of; and I have been left to deal with that part of the evidence in its unsatisfactory and incomplete form.

Even assuming that the copy of the plan produced at the trial shews correctly the subdivision into lots and blocks, there is clearly, in many instances, a want of compliance with the requirements of sec. 22, as, for example, where two or more lots or parcels were included in one assessment, or where the lands intended to be assessed were not designated with such certainty as to enable them to be readily defined or identified, or where the assessment refers to a part of a lot or parcel without designating that part by its boundaries or other intelligent description.

The effect of this non-compliance, or the failure or neglect to prove that there was a compliance, is to render invalid the

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assessments on the properties intended to be assessed: *Blakey* v. *Smith* (1909), 20 O.L.R. 279. Failure or neglect to shew a compliance with the Act in this respect makes it impossible to hold that there are "taxes due" upon these lands which "may be recovered" from the defendants.

What the plaintiffs are seeking to collect from the defendants is taxes for the years mentioned. To impose a tax legally, there must have been a valid assessment. A taxing Act must be construed strictly: *Cox* v. *Roberts* (1878), 3 App. Cas. 473. The making of a valid assessment is an imperative requirement.

In *Love* v. *Webster* (1895), 26 O.L.R. 453, Armour, C.J., held a tax sale to be invalid when an imperative requirement of the Act had not been complied with; and the decision of a Divisional Court in *Waechter* v. *Pinkerton* (1903), 6 O.L.R. 241, is to the same effect.

Section 89 of the Assessment Act presupposes that taxes exist and are due upon the lands; and, in order to shew that taxes have been properly imposed and do exist and are due, there must have been a valid assessment and the fixing of a tax. It cannot be said that a tax exists or is due unless it is shewn that in making the assessment the imperative requirements of the Act have been complied with.

I, therefore, dismiss the action with costs. This, however, is not to be taken as affecting whatever rights the plaintiffs may have to recover upon the notes given for the taxes of 1906 and 1907 or the judgments which they have obtained on any of these notes.

The defendants the Trusts and Guarantee Company Limited claim payment to them of such rents as the plaintiffs may have received from tenants of any of the properties under the order of Mr. Justice Middleton of the 17th May, 1911. If any such rents have been received, they will be paid over to such of the defendants as the Official Referee before whom the proceedings for liquidation of the defendants the Imperial Land Company Limited are pending, finds entitled thereto. He will also ascertain the amount to be so paid, if the parties fail to agree.

*Action dismissed.*

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## BURNEY v. MOORE.

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Oct. 26.

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. October 26, 1912.*

1. VENDOR AND PURCHASER (§ I A—4)—SALE — LAND — DEED — TENDER, WHEN WAIVED.

A tender for execution of a deed of conveyance will be deemed to have been waived where it is clear from the circumstances existing at the date of the writ that the tender must have been refused if it had been made and for that reason would have been a mere useless

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formality, *ex. gr.*, where the grantor had already sold to another person.

[*McDougall* v. *Hall* (1887), 13 O.R. 166, followed; *Knight* v. *Crockford* (1794), 1 Esp. 190; *Lovelock* v. *Franklyn* (1864), 8 Q.B. 371, referred to.]

2. VENDOR AND PURCHASER (§ I A—4)—SALE — LANDS — RIGHT-OF-WAY —DEED—SURVEY BY GRANTOR CONDITION PRECEDENT TO TENDER OF CONVEYANCE.

Where an agreement for the sale of land includes a right-of-way over other lands of the grantor, and contains a provision that he shall give a deed of the right-of-way "when and as soon as the same is surveyed," and it appears that the survey is necessary before a proper conveyance could be made, the grantee is relieved by the very nature of such a contract from tendering a conveyance for execution until the survey shall have been made by the grantor.

[*Deacon* v. *South-Eastern R. Co.* (1889), 61 L.T.R. 377; *Metropolitan R. Co.* v. *Great Western R. Co.* (1900), 82 L.T.R. 451, referred to.]

3. EASEMENTS (§ II C—27)—UNDEFINED RIGHT-OF-WAY — GRANTOR TO OBTAIN SURVEY.

Where the vendor upon the sale of a portion of his land agrees to give the purchaser a right-of-way across the remainder of his property from a certain road to the parcel sold and to make a grant of such right-of-way "as soon as the same is surveyed" it is the duty of the vendor to define the way by selecting its precise location and having a survey made.

[*Deacon* v. *South-Eastern R. Co.* (1889), 61 L.T.R. 377; *Metropolitan R. Co.* v. *Great Western R. Co.* (1900), 82 L.T.R. 451, referred to.]

Statement

APPEAL by the plaintiffs from the judgment of the Junior Judge of the District Court of the District of Nipissing, dismissing the action, which was brought to compel the defendant to make a survey and deliver a conveyance of a right of way, or for damages.

The appeal was allowed.

*R. McKay*, K.C., for the plaintiffs.

*G. F. Shepley*, K.C., for the defendant.

Riddell, J.

RIDDELL, J.:—In April, 1906, the defendant entered into an agreement with the plaintiff Thomas Burney for sale to him of a part of lot 10 in the 5th concession of the township of Burke, which is wholly landlocked. The agreement—it is under seal—concludes: "The party of the first part further agrees to give the party of the second part a right of way across lot number 11 . . . from the Haileybury and New Liskeard Road to the property above described, and agrees to make a grant of such right of way when and as soon as the same is surveyed."

The agreement was transferred by Burney to his wife, the other plaintiff—and the defendant duly conveyed the land to her on the 6th April, 1907.

Before the conveyance was made, and shortly after the execution of the agreement, the parties agreed as to the location of the way—the only convenient location, it would seem, on the

servient tenement. No survey was made and no conveyance given.

Some time thereafter, the defendant sold part of the land over which ran the way, to one Gillies: but the continual use of the way by the plaintiffs was not interfered with by Gillies. It would seem that the female plaintiff has attempted to sell the property, but failed, as the proposed purchasers objected that she "had no legal right to the right of way." The property is worth about $500 if the right of way be secure, and it is not far from Haileybury.

According to the evidence of Mrs. Burney, which is not contradicted, in the spring of the year 1910 the defendant absolutely refused to give her a grant. He said: "I can't give you the right of way now, because I sold it, but later on I will give you the right of way over another portion of the land." "I told him then that what he proposed to give at a future date was also Mr. Gillies'. This was in May last, after I threatened action, but before the writ was issued."

This action was begun in May, 1910, both husband and wife suing as plaintiffs. They set up the agreement; that the defendant, in 1906, laid out the right of way pursuant to the agreement, and placed them in possession thereof; that they have daily used it: that they have requested him to have it "surveyed and conveyed as agreed;" but the defendant neglects and refuses so to do, and, on the contrary, has sold it, but admits that he has the power to obtain it from his grantee. They claim a survey and grant, or damages.

The defendant admits the agreement, the setting apart of the right of way, and the use thereof by the plaintiffs with his assent; but alleges that the obligation to survey rests upon the plaintiffs, and that he is not called upon to make a grant until after the survey has been made. He says he was not tendered a deed, but is willing to execute a proper deed if tendered to him.

The case came on for trial before His Honour Judge Leask in the District Court of Nipissing. The learned Judge reserved his decision until May, 1912, when he gave judgment dismissing the action with costs. The plaintiffs now appeal.

The ground of the decision of the County Court Judge is, that "the plaintiffs could not . . . be excused from the duty of preparing and tendering a conveyance of the right of way for execution by the defendant before action could be brought; and, if it were necessary for the preparation of such conveyance that a survey be made, then the survey should be made by them."

I am of opinion that the judgment is wrong on both points. Assuming, without deciding, that this conveyance of the

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right of way should have been prepared by the purchaser, I think that, as matters were at the date of the writ—and in strictness that is what we must consider—the tender of the conveyance was waived. *McDougall* v. *Hall* (1887), 13 O.R. 166, decides that where, if a tender had been made, it would have been refused, the tender should, since the Judicature Act, be considered as waived—at least if that appear from the pleadings. I do not think there is any need to wait for the pleadings to determine whether it is safe to proceed without formal tender if it sufficiently appear that a tender would have been a mere useless formality.

In the present case, too, the defendant should not be allowed to be in better case than he would have been had his representations upon or at least after which the action was brought been true. He said that he could not give a deed because he had sold the land. If he had sold the land so as to incapacitate himself from giving the deed, it is plain that no tender of the conveyance was necessary before bringing an action on the agreement: *Knight* v. *Crockford* (1794), 1 Esp. 190; *Lovelock* v. *Franklyn* (1846), 8 Q.B. 371.

But there is more in the case. The agreement provides for the defendant giving a deed of the right of way "when and as soon as the same is surveyed." It is plain that the survey was required not that the parties should know the position on the ground, but that a proper conveyance could be made; and it is equally plain that no proper conveyance could be made without a survey. The parties might have agreed to define the extent of the right of way by fences, stakes, or other marks on the ground, but they chose—and wisely chose—to have the right of way defined by survey.

Where one person is entitled to a right of way over the land of another, the precise location not having been determined, it is the grantor who has the right and duty to select the precise location, to "define" the way. This is so in rights of way by necessity: *Clarke* v. *Rugge*, 2 Roll. Abr. 60, pl. 17, where it is said, "The feoffor shall assign the way where he can best spare it;" *Packer* v. *Wellstead*, 2 Sid. 111; *Pearson* v. *Spencer*, 1 B. & S. 571, 3 B. & S. 761; *Bolton* v. *Bolton* (1879), 11 Ch. D. 968; and also in cases of contract: *Deacon* v. *South-Eastern R. Co.* (1889), 61 L.T.R. 377; *Metropolitan R. Co.* v. *Great Western R. Co.* (1900), 82 L.T.R. 451; and once the way is "defined," it cannot be changed by the grantor: *Deacon* v. *South-Eastern R. Co.*, 61 L.T.R. 377.

It is, to my mind, clear that the parties agreed that the way should be "defined" by a survey. This, I think, made it the duty of the defendant to have the survey made. When he refused, I think an action lay at the instance of the female plain-

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tiff. Moreover, a survey being a prerequisite to a conveyance, the refusal to make a survey was a waiver of the conveyance.

We need not consider whether the defendant should have the deed prepared, as the plaintiffs express their willingness to have that prepared at their own expense.

I think the defendant must have a proper survey made of the way already agreed upon (which is said to be 16 feet wide), and furnish the correct description to the plaintiffs, and pay the costs of the action and appeal. He must also execute a proper deed of conveyance if and when tendered him on behalf of the plaintiffs—if the parties cannot agree, the conveyance to be settled by the Judge.

Some argument was advanced—perhaps it is better to say some regret was expressed—that the Court should be troubled with this matter, which was described as petty. For my part, I have no sympathy with the suggestion. It should not be considered beneath the dignity of the Court to consider on its merits any question properly before it—and contracting parties should not be allowed wilfully to break their contracts because the damage is small.

Leave should be reserved to the plaintiffs to bring an action for damages, if for any reason the defendant fail to make title.

BRITTON, J.:—I agree.

Britton, J.

FALCONBRIDGE, C.J.:—I agree in the result.

Falconbridge, C.J.

*Appeal allowed.*

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## JOHNSTON v. CLARK & SON et al.

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*Ontario High Court. Trial before Middleton, J. November 1, 1912.*

1. ELECTRICITY (§ III A—16)—INJURIES RESULTING FROM—KNOWLEDGE OF PERIL—ELECTRIC COMPANY—DUTY TO ABATE DANGER.

Where an electric company with notice that their wires are in dangerous proximity to a crudely constructed pile-driver in operation over a river does not itself proceed to abate the danger but relies upon the promise of the operator of the pile-driver to do so, the electric company is not necessarily liable for resultant injuries, by reason of its being in control of a dangerous electric current; the electric company's undertaking being authorized by law there is no liability unless negligence can be affirmatively found.

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, distinguished; *Dumphy* v. *Montreal Light, Heat, and Power Co.*, [1907] A.C. 454, applied.]

2. ELECTRICITY (§ III A—16)—INJURIES RESULTING FROM—KNOWLEDGE OF PERIL—CONTRACTOR — LIABILITY — CONTACT WITH CRUDELY CONSTRUCTED PILE-DRIVER.

Where a pile-driver was ignorantly and crudely constructed and the contractor in whose control it was, continued, after notice of its dangerous proximity to high voltage electric wires to maintain it there

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without utilizing the protective measures pointed out to him by the electric company which he had thereupon agreed to introduce, and where an employee was killed by the electric current coming in contact with the pile-driver, the contractor is liable in damages.

3. MASTER AND SERVANT (§ III B 3—305)—WHO ARE INDEPENDENT CONTRACTORS—MUNICIPAL CORPORATIONS—QUESTIONS OF LAW.

Where a municipal corporation enters into a contract with certain contractors for the construction of a bridge, but some difficulty arising as to the remuneration for the piling, a $6 per diem charge was by a subsequent agreement allowed for the contractor's own time and the use of his piling plant, but the contractor still retained complete control over the entire work and he could select his own employees, he is in law an independent contractor and not an employee of the municipality, and the municipal corporation is not liable for his negligence.

4. TRIAL (§ II C—50)—PRECAUTIONARY SUBMISSION OF QUESTION OF LAW TO JURY—IGNORING OF JURY'S FINDING.

Where at the trial a question which is in truth a question of law is, as a precautionary measure, submitted by the judge as one of the questions of fact to the jury and the jury makes its finding thereon, the trial judge may, upon a motion for judgment upon the verdict, ignore that portion of the jury's findings and assume control of the question as one of law alone.

5. DAMAGES (§ III I 4—195)—FATAL ACCIDENTS ACT (ONT.)—ASSESSMENT OF DAMAGES—QUANTUM—COSTS.

In an action under the Fatal Accidents Act (Ont.) 1 Geo. V. ch. 33, for damages for the death of a son the following are proper matters of consideration upon the quantum of damages: (*a*) the age of deceased; (*b*) his length of absence from home; (*c*) what help he had given his parents during that absence; (*d*) what interest he had shewn in his parents; (*e*) his wages and habits as to economy.

6. COSTS (§ I—10)—GIVING OR REFUSING—SET-OFF OF EXTRA COSTS—VERDICT FOR SUM WITHIN INFERIOR JURISDICTION.

Gross misconduct of the defendant causing the death for which damages are awarded against him under the Fatal Accidents Act (Ont.) constitutes a good ground for refusing a set-off in favour of defendant against the verdict of his extra costs of defending in the High Court in which the action was brought when the verdict was for an amount within County Court jurisdiction.

Statement

THE plaintiff sued, under the Fatal Accidents Act, to recover damages for the death of his son on the 18th July, 1912.

The action was tried with a jury at Owen Sound.

Judgment was given the plaintiff against Clark & Son for $500.

*D. Robertson*, K.C., for the plaintiff.

*W. H. Wright*, for the defendants Clark & Son.

*G. G. Albery*, for the defendants the Meaford Electric Light and Power Company.

*Glyn Osler*, and *J. S. Wilson*, for the defendants the Corporation of the Town of Meaford.

Middleton, J.

MIDDLETON, J.:—Clark & Son made a contract with the Corporation of the Town of Meaford for the construction of a concrete bridge across the Big Head River. After some preliminary

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work had been done, it was found necessary to place piling as a foundation of one of the piers, because, instead of finding a rock bottom, quicksand was encountered.

Some negotiations took place between the contractors and those representing the town corporation—which it will be necessary to discuss more at length—resulting in an arrangement by which a pile-driver was constructed and erected by Clark & Son.

The leads of this pile-driver were thirty-five feet high; and, when it was placed in position, the head of the leads was immediately under two of the electric light company's wires, which carried a current of 2,200 volts. The upright leads had been raised against these wires, lifting them and subjecting them to considerable strain. An iron bolt passed through the head of the leads, midway between the two wires, which were eighteen inches apart. This iron bolt extended some four inches above the head, and rested upon an iron washer four inches in diameter; so that it was about six inches from the live wire on either side. The bolt supported an iron pulley or sheave, over which passed a steel cable used in raising the hammer. This cable ran through a sheave at the base of the leads, through another sheave at the rear of the machine and some ten feet to one side, thence to the winding drum of the hoisting machine.

It passes one's comprehension how the apparatus could have been erected in this fashion without fatal injury to some one; but so dense was the ignorance of the contractor Clark and his son—a young man who said that he had successfully passed his third year examination at the School of Practical Science—that no one up to this time seems to have appreciated the danger of the situation.

The manager of the electric light company was sent for. He was indignant at what had been done, pointed out the danger of the situation, and finally acquiesced in what was proposed by young Clark, namely, that a board should be nailed upon the head of the leads, sufficiently high to carry the wires above the iron bolt. The manager then left the place, assuming that this would be adequate protection.

For some reason this board was not placed. The hammer of the derrick, weighing a ton, had been put on the ground some feet below the foot of the leads. The cable was attached to it, and the engine was started, with the intention of hoisting the hammer so that it would swing below the leads and then be placed in position. The pile-driver was not weighted nor braced; it was merely chained to the main beams, upon which it rested, these in turn resting at one corner upon some loose blocks placed on some old piles which had been cut off at a lower level.

When the strain came upon the cable, it caused the derrick to move far enough to bring the bolt above in contact with the

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electric wire. The electricity passed immediately, followed the cable, and killed the man operating the hoisting drum. The hammer jammed at the foot of the leads, and, as the engine was not stopped, the whole machine was pulled over to one side, and the blocks fell out below. Johnston, who had been below, attempting to get the hammer into position, started to escape by climbing up the bank. As the pile-driver swung over, the cable came in contact with an old iron stay or bolt running from one of the old piles into the bank as an anchor. Johnston grasped this rod, and received a shock which instantly killed him.

Upon these facts, those responsible might well have been prosecuted for manslaughter.

At the trial, most of the facts were not controverted, and counsel agreed upon a series of questions to be submitted to the jury, to determine matters upon which there was dispute. The jury have found negligence against Clark & Son in the erection of the pile-driver upon insecure foundations, and in working it so as to come in contact with the electric wires, and in not having it properly guyed or weighted, and in leaving the driver in contact with the wires after the conversation with the superintendent of the electric company. They have assessed the damages at $500. Upon these findings judgment must go against the defendants Clark & Son for that amount.

I submitted a question to the jury, whether, in their opinion, there was "negligence on the part of the power company in failing to remove their wires or to cut off the current after they knew of the erection of the driver." This they have answered in the negative. I take it that this means that they thought the manager of the company was justified in leaving the power on after Clark had agreed to place the board above the dangerous bolt so as to prevent a metallic contact with the wires.

Notwithstanding these findings, the plaintiff's counsel asked for judgment; basing his claim upon the theory that the electric light company, being in control of a dangerous electric current, and knowing that a condition of peril existed by reason of the unauthorised and entirely improper conduct of Clark, owed a duty to all who might be brought in contact with that dangerous current by reason of this unauthorised act, to see that such precautions were taken as would secure safety.

I do not think that this is a case falling within the doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330: this not being the case of a non-natural user by the defendants of their own property and premises. It is, on the contrary, carrying on an undertaking authorised by the law of the land; and there is no liability unless negligence can be affirmatively found. The jury have found that there was no negligence. I do not think that I am in a position to say that, upon the undisputed facts,

there was negligence. The case is very much like *Dumphy* v. *Montreal Light, Heat, and Power Co.*, [1907] A.C. 454, and cannot be distinguished unless the mere fact of knowledge imposes an additional obligation.

As to these defendants, the electric company, I think the action fails, and should be dismissed with costs.

It is sought to make the Corporation of the Town of Meaford liable upon the theory that in the pile-driving Clark & Son were not contractors, but merely servants of the municipality. At the hearing, I thought that this was a question of law, and that in no possible view of the evidence could Clark & Son be regarded as other than contractors. Counsel, however, thought that in one aspect of the evidence Clark & Son should be said to be employees, or that it would be open to the jury so to find; and, as a precautionary measure, I submitted a question to the jury, in answer to which they have found that Clark & Son were not contractors but were employees.

I retain the impression that this was a matter of law for me, and that in no possible aspect of the case is the answer to the jury justified. There was a contract for the construction of the bridge. Under this contract, the contractors probably had to do all work necessary for the completion of the structure. At any rate, they ultimately assumed the task of doing the piling. Some difficulty arose as to the remuneration. Under the contract, this had to be agreed upon before the work was undertaken, or no allowance would be made. The engineer named a sum which the contractors thought inadequate. A conversation took place with the Mayor, as the result of which the contractors went on with the work.

There is a difference in the recollection of the witnesses as to this conversation. Clark says that the Mayor said: "Go on; do the work; we will pay you what it costs, and allow $6 a day for your own time and for the use of your plant." This is as strong a way as it can be put in favour of the plaintiff; and, accepting it to the full, I think Clark & Son were still contractors, and that this can only be said to be a means of adjusting the price to be paid. Clark, not the municipality, retained dominion over the work. Clark could procure his material where he pleased and when he pleased. Clark could employ whomsoever he thought necessary, and pay such wages as he thought proper. The municipality had surrendered to him complete control of the whole undertaking; and this, it appears to me, is the true criterion.

In this view, the action fails as to these defendants, the municipality, and should also be dismissed with costs.

I was not asked to give a certificate to prevent a set-off of costs, as the amount recovered is within the County Court juris-

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diction. After some hesitation, I conclude that I should certify to allow the plaintiff County Court costs without set-off. I think that the verdict of the jury is more than the plaintiff ought reasonably to have hoped to recover. The young man at the time of his death was 27 years old; had been away from home for five years; had during that time given his father $55 and some trifling presents. He seemed to have lost all interest in his home, as he worked near to it for two seasons and never troubled to go and see his parents. He was in receipt of good wages, yet when he died he had no money except the wages due to him for the few days since the last pay-day. Had I thought the damages assessed on an illiberal scale, I would have given High Court costs. I refuse the set-off because of the gross misconduct of Clark & Son, which disentitles them to any kind of consideration.

*Judgment for plaintiff against Clark & Son; action against Electric Company dismissed.*

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## WALKER v. HARRIS et al.

*Alberta Supreme Court, Simmons, J. October* 30, 1912.

1. APPEARANCE (§ I—5)—CONDITIONAL APPEARANCE—VARIANCE IN FORM.

While the proper practice under Order XII., rule 30, of the English practice rules, applicable in Alberta, providing for an entry by defendant of a conditional appearance is to apply *ex parte* for leave to do so, and for the clerk upon filing the conditional appearance to stamp on the memorandum words to the effect that it is to stand as unconditional unless the defendant obtains an order to set aside the writ, an appearance entered in the ordinary form, but adding that it is without prejudice to defendant's right to apply to discharge or set aside the order authorizing the service of the writ upon her and to set aside the service of the said writ and to set aside the said writ, is sufficient as a conditional appearance, since it is sufficient notice to plaintiff that the appearance is conditional and such an appearance entitled the defendant to apply to set aside an order allowing service of a writ to be made substitutionally.

[*Mayer* v. *Claretie*, 7 Times L.R. 40, applied.]

Statement

AN application to set aside an order allowing the service of a writ of summons to be made substitutionally.

The order for substitutional service was set aside.

Simmons, J.

SIMMONS, J.:—The plaintiff, mortgagee, sued upon a certain mortgage made by the defendant Frederick Richardson.

The defendant Eva M. Harris is the owner of the lands in question through a purchase from said Richardson, and the defendant Eva M. Harris has executed a mortgage to the defendant Eliza Scheer.

The writ of summons is dated Feb. 17, 1912. On March 1st, 1912, the plaintiff obtained an order from His Honour Judge Crawford that

the plaintiff be at liberty to issue a concurrent writ for service out of the jurisdiction on the defendant Frederick Richardson, who resides at Hastings, in the Province of Ontario, and also an order that the plaintiff be at liberty to effect service of the writ of summons and statement of claim in this action by delivering copies thereof together with a copy of this order upon Charles F. Harris, of near the town of Macleod.

Both orders for service were apparently issued upon an affidavit of John Walter Macdonald, barrister, of Macleod, who swears that in his belief said Charles F. Harris is in communication with said Eva M. Harris, who is temporarily residing at Minneapolis, in the State of Minnesota, and that service upon said Charles F. Harris will come to the notice of the defendant Eva M. Harris. On June 5th, 1912, service was made upon said Charles F. Harris pursuant to said order.

On July 3rd, 1912, Joseph Hecks, as solicitor for Eva M. Harris, entered a conditional appearance as hereunder:—

Enter an appearance herein for the above-named defendant, Eva Maud Harris, named in the writ herein, Eva M. Harris, without prejudice to her right to apply to discharge or set aside the order authorising the service of the writ upon her and to set aside the service of the said writ and to set aside the said writ.

On September 23, 1912, the plaintiff obtained an order *nisi* from His Honour Judge Crawford, for judgment against the defendants Richardson and Eva M. Harris for the amount of the mortgage debt and costs and fixing the period of redemption at three months. This order, it is now admitted, was obtained upon an incorrect affidavit of Donald G. Mackenzie, dated September 6th, 1912, to the effect that no appearance had been entered by the defendants. Subsequently the plaintiff's solicitors discovered the mistake and moved before the local Judge in Chambers at Macleod to set aside the order *nisi* obtained by them and in the meantime the defendant Eva M. Harris obtained a summons returnable in Chambers at Calgary for plaintiff to shew cause why the original writ of summons and order for substitutional service and all subsequent proceedings should not be set aside. The local Judge in Chambers at Macleod thereupon adjourned the application pending the result of defendants' application to set aside the writ, which application is now before me.

The proper practice under Order XII., Rule 30, of the English Rules, which provides for an entry by defendant of a conditional appearance is to apply *ex parte* for leave to do so. It appears the rule was intended to do away with the necessity of an order for leave to enter a conditional appearance which according to the Chancery practice was necessary where the defendant desired to set aside a writ irregularly served upon him: *Tottenham* v. *Barry*, 12 Ch. D. 797.

In practice, however, the time limited for appearance gener-

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ally expires before the application to set aside can be made and, therefore, it is generally necessary to apply for leave to enter the conditional appearance. When the conditional appearance is filed with the clerk he should stamp on the memorandum:—

> This appearance is to stand as unconditional unless the defendant applies within days to set aside the writ or service thereof and obtains an order to that effect.

In the present case this was not done. The number of days allowed is usually ten.

Unless the application to set aside the writ or service is made within the time limited and the order obtained the appearance stands as unconditional: *Bonnell* v. *Preston* (1908), W.N. 155, 24 Times L.R. 756.

It appears, however, that appearance if accompanied by a protest either by a separate letter or by a memorandum indorsed upon the appearance does not preclude the defendant applying to set aside the writ or notice or the order or service: *Mayer* v. *Claretie*, 7 Times L.R. 40.

The conditional appearance then of the defendant in this case while not in conformity with the practice would seem to be a sufficient notice to plaintiff to come within the rule laid down in *Mayer* v. *Claretie*, 7 Times L.R. 40. It was filed during holiday term and ten days after the expiration of the midsummer holiday term the defendant made the application now under consideration.

The plaintiff admits that his position is this, that he has taken no proper steps in the meantime for the order *nisi* obtained by him is admitted to have been improperly obtained.

The issue of the writ is not irregular, even though the defendant may be out of the jurisdiction when it was issued, for the plaintiff may await an opportunity to serve the defendant if the latter comes within the jurisdiction: *Fry* v. *Moore*, 23 Q.B.D. 395. In this case, Lindley, L.J., observes:—

> Nothing could be easier than to issue an ordinary writ against a foreigner who was residing out of the jurisdiction and then to obtain an order for substituted service and thus the very mischief at which the rules relating to service out of the jurisdiction are directed would be brought back.

The present case appears to come quite within the principle here laid down as a clear violation of it. The result is that the order for substitutional service upon Charles F. Harris is set aside with costs.

*Order set aside.*

## PATTERSON v. OXFORD FARMERS MUTUAL FIRE INSURANCE CO.

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*Ontario High Court. Trial before Mulock, C.J.Ex.D. October 21, 1912.*

1. INSURANCE (§ III E—75)—CONDITIONS IN APPLICATION FOR INSURANCE—BINDING EFFECT ON APPLICANT—FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS—INSURANCE ACT—R.S.O. 1897, CH. 203.

A condition of an application for fire insurance to the effect that the applicant's covenant or agreement that certain statements were full and true expositions of all the facts and circumstances, so far as known to him, regarding the condition, situation, value and risk of the property to be insured, together with the diagram of the premises accompanying the application, should be held to constitute the basis of the company's liability, and form a part of and be a condition of the contract of insurance, is not binding on the applicant if not evidenced in the manner prescribed by secs. 169 and 170 of the Ontario Insurance Act, R.S.O. 1897, ch. 203.

2. EVIDENCE (§ II K—313)—BURDEN OF PROOF OF ESTABLISHING MATERIALITY OF ALLEGED MISREPRESENTATIONS OR CONCEALMENTS.

In an action on a policy of fire insurance, the onus rests upon the insurance company of establishing the materiality of alleged misrepresentations or concealments by the applicant of material circumstances affecting the risk.

[*Lount* v. *London Mutual Fire Ins. Co.*, 9 O.L.R. 549, 555, referred to.]

3. INSURANCE (§ III E—75)—REPRESENTATIONS—FILLING OUT APPLICATION FORM SIGNED IN BLANK—INTENTION.

There is no misrepresentation or concealment by an applicant for a policy of fire insurance of the fact that the property was incumbered, where, without being aware that the application called for such disclosure, the applicant signed a blank application, which was filled out several days later by the agent of the insurance company, who, without the applicant's knowledge, wrote the word "none" after the clause relating to incumbrance, and placed a diagram of the premises on the application, since, under the circumstances, there was no intentional misstatement or concealment by the applicant.

[*Guardian Ins. Co.* v. *Connely*, 20 Can. S.C.R. 208, referred to.]

4. INSURANCE (§ III E—76)—VITIATING CONTRACT—REPRESENTATION MADE INNOCENTLY.

The failure of an applicant for fire insurance to disclose to the insurance company all material circumstances pertaining to the property to be insured, even though the applicant is innocent of wrong intent, will vitiate the contract of insurance where the company has been prejudiced by such non-disclosure.

5. INSURANCE (§ III E—76)—NON-DISCLOSURE OF FACT THAT PROPERTY INCUMBERED—PREJUDICE OF INSURANCE COMPANY.

The defence to an action on a policy of fire insurance of the non-disclosure by the plaintiff of the fact that the property to be insured was incumbered, rests upon the question whether the insurance company was prejudiced by such non-disclosure.

6. EVIDENCE (§ XII K—979)—ADMISSIBILITY OF TESTIMONY OF PRESIDENT OF INSURANCE COMPANY AS TO ACCEPTANCE OF APPLICATION—PREJUDICE.

Testimony of the president of an insurance company to the effect that in his opinion, the board of directors would not have passed an application for insurance had the existence of an incumbrance on the insured property been known, is inadmissible to shew that the company was prejudiced by the non-disclosure of such fact, since such testimony

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did not tend to shew that the board of directors would have taken a similar view.

[*Burrell* v. *Bederley*, Holt, N.P. 285, and *Campbell* v. *Richards*, 5 B. & Ad. 841, referred to.]

7. EVIDENCE (§ XII K—979)—NON-DISCLOSURE OF FACT THAT PROPERTY WAS INCUMBERED—ABSENCE OF EVIDENCE OF VALUE OF PREMISES—MATERIALITY.

In the absence of evidence of the value of insured property it is impossible to say that the failure of the applicant to disclose that the property was incumbered was a non-disclosure of a material circumstance of which the insurer should have been informed.

8. INSURANCE (§ III E—76)—CONCEALMENT—FAILURE TO STATE THAT THREAT WAS MADE TO BURN APPLICANT'S PREMISES.

The defence to an action on a policy of fire insurance of the concealment by and the failure of the applicant for the insurance to state in his application that he feared incendiarism fails, where the only evidence on the question was that seven or eight years before a threat had been made to burn him out.

9. INSURANCE (§ VI A—247)—PROOFS OF LOSS—FALSE STATEMENT—STATUTORY REQUIREMENTS—R.S.O. 1897, CH. 203.

A false statement by an insured person in a statutory proof of loss as to a fact not required by the Ontario Insurance Act, R.S.O., 1897, ch. 203, to be stated, will not vitiate a claim for loss under subsec. (*c*) of condition 15 of the Act.

[*Goring* v. *London Mutual Fire Ins. Co.*, 10 O.R. 247, referred to.]

10. INSURANCE (§ VI A—246)—RELIEF FROM FAILURE TO GIVE NOTICE OF LOSS—R.S.O. 1897, CH. 203, SEC. 172.

The court may, under section 172 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, if deemed equitable, relieve an insured person from an omission to give an insurance company written notice of loss.

[*Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 44 Can. S.C.R. 40, and *Bell Bros.* v. *Hudson Bay Ins. Co.*, 44 Can. S.C.R. 419, referred to.]

11. INSURANCE (§ V B 5—230)—FAILURE OF INSURED TO GIVE STATUTORY NOTICE OF LOSS—ABSENCE OF PROOF OF PREJUDICE TO COMPANY—ACTS OF OFFICERS OF INSURANCE COMPANY.

The failure of an insured person to give written notice of loss is waived by an insurance company, since it did not appear that it was thereby prejudiced, where, on the day after the destruction of the insured property the president and two of the directors of the company, in response to a message from the insured, came and inspected the ruins, and told him that they would return the next day, which they did, when they obtained detailed particulars of the loss, which they reduced to writing, and pursuant to their instructions, the insured attended the next meeting of the board of directors of the company and gave them all the information they desired, and the secretary of the company prepared and the insured signed a statutory declaration of loss, which, together with the policy, were retained by the company, and where the insured subsequently paid an assessment on his premium note, and, after the insured and the company were at arm's length, the former gave the latter a further statutory declaration of loss, after which the company returned the premium note and declared the policy of insurance cancelled.

Statement

ACTION on a fire insurance policy, to recover $1,500 insurance on a barn, $200 on a shed, and $1,251 on contents of the destroyed buildings, situate on the east half of lot No. 29 in the 10th concession of the township of West Zorra, in the county of Oxford.

Statement

The grounds of defence as relied upon at the trial were:—

1. Material misrepresentation and concealment in representing the property as free from incumbrance at the time of the application for insurance, whilst it was at the time subject to a mortgage for $4,500 and to a life charge in favour of the plaintiff's mother.

2. Concealment of the fact that the plaintiff feared incendiarism.

3. False and fraudulent statements by the plaintiff in the proofs of loss, in overvaluation of certain of the destroyed chattel property, viz., certain wheat and hay, and in stating that "there was no one except my own family about the place when I returned," whilst in fact one Dennis had returned with him.

4. Omission forthwith after the loss to give written notice to the company.

*W. T. McMullen*, and *James Wallace*, for the plaintiff.

*S. G. McKay*, K.C., for the defendants.

Mulock, C.J.

MULOCK, C.J.:—Dealing with the alleged misrepresentation and concealment respecting the incumbrances on the realty, it appears that the plaintiff acquired the land in the year 1893, under his father's will, subject to a life interest in favour of his mother in a small portion of it, and also to her maintenance and to the payment to her of the annual sum of $50 during her life. All these interests cease on her death. She is still alive, and the plaintiff has met all charges in her favour. Except as to charges created by the will, the property was unincumbered when acquired by the plaintiff in 1893. There was no barn upon it, and in the year 1899 the plaintiff raised by mortgage $2,500 wherewith to erect a barn and otherwise improve the farm. In 1907, that mortgage was discharged. On the 12th June, 1908, he mortgaged the property for $3,500. This mortgage was discharged in July, 1910, when he effected a new mortgage for $4.500. This last-named mortgage was in force when, on the 10th November, 1910, the plaintiff signed the application for the policy in question.

The application contains the following printed words: "Incumbrance, state full particulars;" and, following them in writing, the word "none." This word "none" was written by W. H. Sutherland, the company's agent who canvassed the plaintiff for the application, but when and by what authority is in dispute.

Then at the foot of the plaintiff's application, above his signature, is the following printed matter: "That said applicant hereby covenants or agrees to and with the said company that the following is a just, full, and true exposition of all the facts and circumstances in regard to the conditions, situation, value, and risk of the property to be insured, as far as the same are known to the applicant, and agrees and consents that the same,

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with the diagram of the premises herewith, shall be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract."

The condition contained in this covenant may be disregarded, it not being evidenced in manner prescribed by secs. 169 and 170 of the Ontario Insurance Act (the Act then in force).

Dealing with the first ground of defence, the onus is on the defendant company to establish the materiality of the alleged misrepresentation and concealment: *Morton* v. *Anglo-American Fire Insurance Co.*, 2 O.W.N. 237, 1470; *Lount* v. *London Mutual Fire Insurance Co.*, 9 O.L.R. 549, 555.

I accept the plaintiff's evidence that at the solicitation of Sutherland, the defendants' agent, the plaintiff signed the application in blank, nothing having been said between them as to the existence of any incumbrance on the property, and the plaintiff not being aware that the application called for information on the point, and that subsequently Sutherland filled in the word "none."

He admits having placed the diagram on the back of the application at his own house some days after it was signed by the plaintiff, but is unable to say by what authority. Thus, the application was admittedly incomplete when received from the plaintiff, a circumstance which lends colour to the correctness of the plaintiff's statement. In canvassing the plaintiff, Sutherland was the defendants' agent, and if, as I find he did, he thought so little of the matter of the incumbrances as not to refer to them when obtaining the application, the plaintiff should not be blamed for not appreciating its importance: *Guardian Insurance Co.* v. *Connely*, 20 Can. S.C.R. 208.

The answer "none" was not the answer of the plaintiff and he is not bound by it. The non-disclosure of the existence of the incumbrances was innocent; but, nevertheless, if a material circumstance, it was the plaintiff's duty to have made it known to the company; and the real question is, whether the defendants have been prejudiced by such non-disclosure. Mr. Smith, one of the directors when the application was passed and now the president of the company, swore that, in his opinion, the board would not have passed the application if they had known of the existence of the incumbrances. That is, doubtless, Mr. Smith's present individual opinion; but it does not follow that the board would have taken the same view; and I think Mr. Smith's evidence on the point inadmissible: *Burrell* v. *Bederley*, Holt N.P. 285; *Campbell* v. *Richards*, 5 B. & Ad. 841.

There being no evidence as to the value of the property, it is impossible to say that the existence of the incumbrances was a material fact that should have been made known to the company in order to guide them in their action. If the property was

worth a substantial sum over and above the amount of the incumbrances, the company would, in my opinion, have accepted the application. For example, if it were worth $10,000, not at all an excessive value on a farm of the extent of that in question, I have no doubt that the company, with a full knowledge of the incumbrances, would have issued the policy in question. They having failed to prove the materiality of the alleged misrepresentation and concealment, this ground of defence fails.

As to the defence that the plaintiff concealed the alleged fact that he feared incendiarism, the only evidence is what he says: "I was threatened to be burnt out seven or eight years ago by Thomas Scott." That evidence does not prove the existence of any danger of incendiarism at the time of the application, or that the plaintiff then "feared incendiarism;" and this ground of defence fails.

The next ground of defence, that of over-valuation and the proofs of loss as to the value of certain farm produce, I disposed of at the trial adversely to the defendants' contention.

As to the defence that in the proofs of loss the plaintiff falsely stated that "there was no one except my own family about the place when I returned" (referring to his return home on the night of the fire), even if this was a false statement, it would not vitiate the claim. The policy is subject to conditions 13 and 15 of the statutory conditions. (I refer to the Insurance Act, R.S.O. 1897 ch. 203, and not the Ontario Insurance Act, 1912). Sub-section (c) of condition No. 13 declares that, with reference to the loss, a person claiming the insurance money is to furnish to the company a statutory declaration in regard to certain particulars; and condition No. 15 declares that any fraud or false statement in a statutory declaration in relation "to any of the above particulars" shall vitiate the claim. The alleged false statement in question is not one of the particulars required to be so furnished, and its truth or falsity would not affect the claim: *Goring* v. *London Mutual Fire Insurance Co.*, 10 O.R. 247. This ground of defence is, therefore, disallowed.

As to the last ground of defence, viz., omission by the plaintiff to give notice in writing of the loss. Such notice was not given, but the Court may, under sec. 172 of the Insurance Act, if it deems it equitable, relieve from such omission: *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.*, 44 Can. S.C.R. 40; *Bell Brothers* v. *Hudson Bay Insurance Co.*, 44 Can. S.C.R. 419.

The fire occurred on the morning of Friday the 19th October, 1911, and on the same day the plaintiff caused his sister to telephone to the company informing them of the loss. The same day, in consequence of such notification, the president and two other directors came to the plaintiff's premises, there saw the

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ruins, had some conversation with the plaintiff, and stated that it was too late to do anything, but that they would return on another day. On the following Monday they returned, again discussed the loss with the plaintiff, and obtained detailed particulars from him of the loss, which they took down in writing, and on leaving instructed him to attend the first meeting of the directors. This the plaintiff did, and at that meeting gave them all the desired information touching the fire and the loss. The secretary of the company, who was present, prepared for the plaintiff a statutory declaration which he then made, setting forth the circumstances in connection with the fire, the particulars of the destroyed property, and the extent of the loss. This, together with the policy, the secretary then obtained from the plaintiff, and the same have ever since remained in the company's possession.

The plaintiff, doubtless, thought that the visit of the directors to his premises and the subsequent action of the board above referred to had to do with his claim.

On the 14th October, 1911, the company had made an assessment against the plaintiff on his premium note, which assessment he paid on the 9th November, 1911. Subsequently, the parties got at arms' length; and on the 31st January, 1912, the plaintiff sent to the company a further statutory declaration dealing with the loss and claim, and on the 14th May, 1912, the company wrote to the plaintiff returning the premium note and stating that the policy was cancelled. Under these circumstances, the company does not appear to have been prejudiced by the absence of a written notice of the loss. If it should have been given on or about the date of the fire, the conduct of the directors in visiting the plaintiff's premises in consequence of the verbal notice was calculated to cause the plaintiff to suppose that the verbal notice was sufficient; and I am of opinion that the conduct of the directors and the board was an adoption of the verbal notice as sufficient; and that, therefore, the plaintiff is entitled to the benefit of the relieving section. I, therefore, disallow this objection to the claim.

Thus the various defences fail, and judgment should be entered for the plaintiff for $2,951.70 with costs.

*Judgment for plaintiff.*

## Re JOHNSON.

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*Ontario High Court, Mulock, C.J.Ex.D. October 22, 1912.*

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Oct. 22.

1. WILLS (§ III G 2—125)—CONSTRUCTION OF BEQUEST OF PERSONALTY—NATURE OF ESTATE OR INTEREST—LIFE INTEREST—ABSOLUTE GIFT.

A life estate only, and not an absolute gift of the corpus, in money, notes and mortgages, was created by a bequest to a widow in her deceased husband's will, of all of his money, notes and mortgages, and real and personal property, for the term of her natural life, or widowhood, with remainder to his children in the event of her death or remarriage.

[*Re Thomson's Estate, Herring* v. *Barrow*, 13 Ch. D. 144, and 14 Ch. D. 263, referred to.]

Statement

APPLICATION by the widow and one of the executors of William Johnson, deceased, for an order determining a question arising upon the construction of his will.

*M. B. Tudhope*, for the applicant.

*D. Inglis Grant*, for Janet Ratcliffe, one of the daughters of the testator.

Mulock, C.J.

MULOCK, C.J.:—The question is, what interest the testator's widow takes in that portion of his personal estate described in his will as "all my money, notes, and mortgages." She claims to be entitled to it absolutely, whilst the daughter's contention is that she takes but a life interest in it. The will is as follows:—

"I give devise and bequeath all my real and personal estate . . . in the following manner . . . I give devise and bequeath unto my wife Agnes Johnson my house and lot in Rugby . . . together with all my money, notes, mortgages and all my real and personal estate of every nature and kind whatsoever of which I may die possessed or interested in at the time of my decease for the term of her natural life she remains my widow . . . In the event of her remarriage or death then the following legacies shall be paid forthwith if there is sufficient funds to pay the same . ." Then follows a list of specific pecuniary legacies. Then the will proceeds: "From and after the remarriage or death of my wife Agnes Johnson I give devise and bequeath my said house and lot together with furniture, household furnishings and effects or any live-stock and chattels, to my oldest unmarried daughter. . . . If at the time of the remarriage or death of my wife my daughters are all unmarried, then my said property shall be sold and proceeds of sale divided equally among my daughters then living. Of the residue of my estate of every nature and kind not hereinbefore disposed of, I give devise and bequeath unto my daughters equally share and share alike. If an unmarried daughter comes into possession of my house and lot at Rugby, at her marriage or death, if she is still possessed of it,

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it shall go into possession of my next oldest unmarried daughter, and so on whilst any of the unmarried daughters are alive." Then follows the appointment of executors.

I am unable to see how, under the language of this will, the widow is entitled to the corpus of the "money, notes, and mortgages." The testator in the first clause gives her his house together with the moneys, notes, etc., "for the term of her natural life she (sic) remains my widow." Doubtless the word "whilst" was intended to precede the word "she." On her death (an event which must happen) or remarriage, the house is disposed of in remainder. In the event of the widow's death or remarriage, the pecuniary legacies are to take effect. By the same set of words, the testator gives his widow the house and "my money, notes, and mortgages," not absolutely, but at longest for the term of her natural life. These words would be meaningless if she took the money, notes, etc., absolutely: *In re Thomson's Estate, Herring* v. *Barrow*, 13 Ch. D. 144, affirmed, 14 Ch. D. 263. That the testator did not so intend is further shewn by the provision that "in the event of her remarriage or death then the following legacies shall be paid forthwith if there is sufficient funds to pay the same." The widow taking the personalty absolutely would defeat this provision. Then from and after the marriage or death of his wife, the testator gives the house, furniture, household furnishing and fixtures, live-stock and chattels, to his eldest unmarried daughter. The gift to his wife of all his money, notes, and mortgages and all his "real and personal estate" for the term of her natural life would, unless cut down by other words, include his furniture, etc., but the gift over of the furniture, etc., to a daughter after his wife's death or remarriage, shews that the widow was not to take the furniture, etc., absolutely, but only during her lifetime at farthest, and leads to the same construction as to her interest in his "money, notes, and mortgages." Further, the testator contemplated a residue after the widow's death or remarriage and after the payment of the legacies; and this residue he disposes of by the residuary clause of his will: "All the residue of my estate of every nature and kind not hereinbefore disposed of, I give devise and bequeath unto my daughters equally, share and share alike," etc. If the widow took all his personalty absolutely, there would be no residue.

The will, as a whole, makes clear the testator's scheme for disposing of his estate, namely, to give an interest to his wife during her natural life, or until her remarriage, and thereafter to distribute the estate amongst his children.

For these various reasons, I am of opinion that the widow is entitled to a life interest only in the testator's "money, notes, and mortgages."

Mr. Tudhope stated that this was the only question upon which the opinion of the Court was desired. The application was a proper one, and the costs of all parties should be paid out of the estate.

*Order accordingly.*

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## STODDART v. TOWN OF OWEN SOUND.

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*Ontario High Court, Middleton, J. October 26, 1912.*

1. PARTIES (§ III—120)—INTERVENTION TO CARRY ON APPEAL—PUBLIC MATTER—MUNICIPAL BY-LAW.

Where in an action by a ratepayer against a municipal corporation the submission of one of its by-laws was by a competent court declared a nullity and its operation was held not to prevent the submission of a similar by-law in the January following if the corporation should see fit to submit it, and where the decision of the Court was by resolution of the council formally and duly acquiesced in by the council of the municipality, a motion by another ratepayer for leave to intervene and appeal will be refused.

[*Re Mace v. County of Frontenac*, 42 U.C.Q.B. 70, distinguished.]

2. MUNICIPAL CORPORATIONS (§ II C 1—50)—BY-LAW — RESOLUTION OF MUNICIPAL COUNCIL—BINDING EFFECT ON INDIVIDUAL RATEPAYERS.

Where a municipal corporation by its municipal council has determined on the course to be taken in connection with pending litigation, that determination binds all the ratepayers, because the voice of the council is the voice of the municipality which, under the Ontario municipal system, is represented by its council and municipal action or inaction must be determined thereby.

Statement

MOTION by F. W. Millhouse, a ratepayer of Owen Sound, for leave to intervene and appeal, either in his own name or in the name of the defendants, and upon proper terms as to indemnity, from the judgment of Lennox, J., in *Stoddart v. Town of Owen Sound*, 3 O.W.N. 83.

The motion was refused.

*W. E. Raney*, K.C., for the applicant.

*H. S. White*, for the plaintiff.

*Joseph Montgomery*, for the defendants.

Middleton, J.

MIDDLETON, J.:—The action was brought by a ratepayer for the purpose of having it declared that the submission of a by-law to repeal a local option by-law in January last was, by reason of the failure to observe the provisions of the Municipal Act, a nullity, and does not operate to prevent the submission of a repealing by-law in January next, if the municipality see fit.

At the trial, judgment was given in the plaintiff's favour for the relief indicated.

The municipal council have considered the question of appealing from the judgment, and have determined to accept the

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decision. There is no suggestion that the decision of the council was arrived at from any other than proper motives. The resolution to acquiesce in the decision of the Court was moved by a member of the council who is an open and strong supporter of local option, and was passed without any opposition.

No authority was cited which would authorise the making of the order now sought. *Re Mace* v. *County of Frontenac*, 42 U.C.R. 70, manifestly falls very far short of what is now desired.

Upon principle, I think the motion fails. Under our municipal system, the municipality is represented by the municipal council. Municipal action or inaction must be determined by its voice alone; and where a municipality has by its municipal council determined upon the course to be taken in connection with a particular piece of litigation, that determination binds all the ratepayers.

There is nothing unique or peculiar in this particular action to take it out of the general rule. The council, elected by a majority of the electors, has determined against an appeal. It is not open to an individual ratepayer or to a group of ratepayers, even if they constitute a majority, to overrule the decision of the constituted authority. The whole idea is repugnant to the established system of municipal government. If I allowed intervention here, why might I not allow a ratepayer to intervene in a "damage action" where he thought the verdict against the municipality was unjust—if the council determined not to appeal?

The motion fails, and must be dismissed with costs.

*Motion dismissed.*

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## STEWART & MATTHEWS CO. v. ROSS.

*Saskatchewan Supreme Court, Wetmore, C.J., Johnstone, and Lamont, JJ. March 10, 1912.*

1. GARNISHMENT (§ III—61)—AFFIDAVIT—VALIDITY OF, WHEN SWORN PRIOR TO ACTION.

The affidavit upon which a garnishing summons before judgment can be issued may be sworn prior to the commencement of the action.

[Rule 505 of Sask. Jud. Rules (1911), former Jud. Ord. rule 384, construed.]

2. GARNISHMENT (§ III—61)—AFFIDAVIT — TITLE OF CAUSE.

It is not material whether the affidavit, upon which a garnishing summons is issued, when made before the action is commenced, is or is not entitled in the cause about to be commenced.

[Rule 409 of Sask. Jud. Rules 1911, former Jud. Ord. rule 294; and rule 747 of Sask. Jud. Rules 1911, former Jud. Ord. rule 538, referred to.]

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3. GARNISHMENT (§ III—61)—AFFIDAVIT—INFORMATION AND BELIEF WITHOUT SETTING OUT GROUNDS.

An affidavit required to be filed under Sask. Rules (1911) as a basis for the issue of a garnishing summons before judgment is not an affidavit for use on an interlocutory motion, and therefore does not require to have set out therein the grounds of belief but may be made on information and belief simply.

[*Nohren* v. *Auten and Markham* (1910), 15 W.L.R. 417; Rule 505 of Sask. Jud. Rules (1911), former Jud. Ord. rule 384, applied; *Salander* v. *Jenson* (1907), 6 W.L.R. 401; Rule 410 of Sask. Jud. Rules (1911), former Jud. Ord. rule 295, referred to.]

Statement

THIS was an appeal by defendant from the judgment of BROWN, J., in Chambers, dismissing an application on behalf of the defendant to set aside the garnishee summons issued by the plaintiff.

The appeal was dismissed.

Argument

*H. E. Sampson*, for defendant. The affidavit upon which the garnishee summons was issued was sworn to before the issue of the writ, and was upon information and belief without stating the grounds therefor, and was therefore insufficient. The requirements of the rule as to garnishee proceedings are imperative and should be strictly enforced: *Nagengast* v. *Miller*, 3 Man. L.R. 241; *French* v. *Martin*, 8 Man. L.R. 362, at 364; *Shorey* v. *Baker*, 1 Man. L.R. 282. For the reasons stated the affidavit in question was a nullity: Jud. Rules 294 and 384; *Williams* v. *Davies*, 2 Coopt. Cott. 172; *Anon.*, 4 Maddock 271; *Hollis* v. *Brandon*, 1 B. & P. 36; *Western Benefit Building Society*, 33 Beav. 368; *Francome* v. *Francome*, 13 W.R. 355; *Silber* v. *Lewin*, 33 Sol. J. 75; *Bowen* v. *Bowen*, L.R. (Ir.) 7 Eq. 251; Daniel Ch. Prac., 7th ed., at 527; *Mackenzie* v. *Mackenzie*, 21 L.J. Ch. 386. The reason why such an affidavit is treated as a nullity is that the person making it could not be prosecuted for perjury: *Reg.* v. *Pearce*, 9 Cox C. 258; *Reg.* v. *Hughes*, 4 Q.B.D. 614; *R.* v. *Cohen*, 1 Stark (N.P.) 511. The affidavit is also insufficient in that the grounds of information and belief are not stated. This is quite consistent with the deponent having no knowledge whatsoever. See *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch.D. 501, at 508. The provisions of Rule 295 are imperative and apply to garnishee proceedings: *Salander* v. *Jensen*, 6 W.L.R. 401; *Bonnard* v. *Perryman* [1891], 2 Ch. 269, 287-288; *In re J. L. Young Manufacturing Co. Ltd.*, [1900] 2 Ch. 753.

*J. N. Fish*, for plaintiff. It is not an irregularity to entitle the affidavit in garnishee proceedings in the action: *Hargreaves* v. *Hayes* (1855), 5 E. & B. 272; the affidavit need not be sworn after the issue of the writ: *Schletter* v. *Cohen*, 7 M. & W. 389. These cases have been followed in this jurisdiction in cases of replevin, the rules in regard to which do not differ materially from those applicable to garnishee proceedings. See *Marcy* v. *Pierce* (No. 1), 4 Terr. L.R. 186; *Gougeon* v. *Tompkins* (1905),

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1 W.L.R. 114. As to the objection that the affidavit should have disclosed the grounds of the belief of the deponent, the affidavit having followed the exact wording of Rule 384 (b) has complied with the requirements of that rule. Rule 295 has no application, being confined to interlocutory proceedings, and garnishee proceedings are not interlocutory within the meaning of the rule. Even if irregular, however, it is submitted that the irregularity may be cured under Rule 538. See *Reynolds* v. *Coleman* (1887), 36 Ch.D. 453; *Dickson* v. *Low*, [1895] 2 Ch.D. 62.

Wetmore, C.J.

March 10. WETMORE, C.J.:—In so far as the questions raised by this appeal, that the affidavit on which the garnishee summons was issued was sworn before the commencement of the action, and that it is intituled in the cause, are concerned, I am unable to distinguish this case from *Marcy* v. *Pierce* (1899) 4 Terr. L.R. 186, and I continue of the same opinion with respect thereto as set forth in the report of that case. I have nothing further to add to the judgment of my brother Brown, either upon this point or the other point decided by him, except to say that on an application to hold to bail mentioned in *Marcy* v. *Pierce* the affidavit would have been held good whether intituled in the cause or not. Probably it would have been more in accordance with this practice not to entitle it in the cause at all, but if an objection of this character is to be held fatal to the proceeding by the omission to comply with Rule 294, then it seems to me that Rule 538 of the Judicature Ordinance serves no useful purpose. In my opinion, the intituling may be considered a surplusage. What information does it give, after all said and done? The facts that are necessary to support the proceeding are set forth in the body of the affidavit. I am of opinion that the appeal should be dismissed with costs.

Johnstone, J.

JOHNSTONE, J.:—This is an appeal by the defendant from an order made in Chambers dismissing the defendant's summons on the hearing of an application on the defendant's behalf for an order setting aside the garnishee summons issued by the plaintiffs, on grounds of irregularity. The alleged irregularities raised consisted of two: first, the affidavit filed was not in accordance with sec. 384 of the Judicature Ordinance; second, the affidavit was made on information and belief as to the indebtedness of the garnishee to the defendant, and the grounds of belief were not set forth.

The writ of summons in the action issued on the 12th day of May, 1910, on which day the garnishee summons also issued on an affidavit of the vice-president of the plaintiff company, sworn before A. G. Kemp, a notary public in and for the Province of Manitoba, and, as appears from the jurat, at the city of Winnipeg, in the Province of Saskatchewan, on *the 5th day of May, 1910.*

This affidavit was intituled: "in the Supreme Court of Saskatchewan," in the style of cause in the garnishee proceedings. As to the objections to the affidavit, rule 384 of the Judicature Ordinance regulates the practice as to garnishee proceedings in so far as the issue of the writ is concerned. This rule reads:—

"Any plaintiff in an action for a debt or liquidated demand before or after judgment, and any person who has obtained a judgment or order for the recovery or payment of money may issue a garnishee summons in the form or to the effect of form C in the schedule hereto. Such summons shall be issued by the clerk upon the plaintiff or judgment creditor, his advocate or agent filing an affidavit:

"(a) Shewing the nature or amount of the claim or judgment against the defendant or judgment debtor, and swearing positively to the indebtedness of the defendant or judgment debtor to the plaintiff or judgment creditor;

"(b) Stating to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor."

Richards, C.J., in *Tiffany* v. *Bullen*, 18 U.C.C.P. 91, at p. 95 of the report, makes this statement as to the practice which then existed: "Garnishment proceedings are sometimes characterized as extraordinary remedies not known to the usual and ancient practice of the Court at common law. I apprehend that the Court could not call on a person indebted to a judgment debtor to pay that debt to a third person, and the right to do so is, as to the Courts of common law, a new right, and I take it, when a new right such as this is created, we must enforce it in the manner pointed out by the statute creating it."

In *Nagengast* v. *Miller*, 3 Man. L.R. 241, Taylor, J., took this view. In delivering judgment, the learned Judge said: "In the case of a garnishing order, before judgment, tying up the defendant's property and effects before the plaintiff has established the validity of his alleged claim, the greatest strictness should be required as to the material upon which the order is granted."

If the procedure regulating our practice here were statutory, I should feel bound to follow the rule of construction laid down by the learned Judges named, but, as our procedure is governed by rules of Court, and rule 384 has remained unaltered since *Marcy* v. *Pierce* (No. 1), 4 Terr.L.R. 186, and the practice as there laid down permitting the use of affidavits for the purpose of invoking extraordinary remedies where such affidavits have been sworn before the commencement of the action has been recognized, I feel such practice should be followed in arriving at a conclusion in this appeal, but not without expressing the hope it may soon be changed. The practice, in so far as rule 384 is concerned, is absolutely farcical. See *Clarke* v. *Cawthorne*, 7 Term Rep. 321.

As to the second objection, I agree with the judgment of my brother Lamont.

SASK.

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STEWART AND MATTHEWS CO. v. ROSS.

Lamont, J.

January 12. LAMONT, J.:—This is an appeal from an order made in Chambers by my brother Brown. The grounds on which the appeal is based are: (1) That the affidavit on which the garnishee summons was issued was entitled in the action and sworn to seven days before the action commenced; and (2) that the allegations contained in such affidavit as to the indebtedness of the garnishee to the defendant are merely upon information and belief, and the grounds of such belief were not set forth in the affidavit.

As to the first of the above grounds, it is to be observed that Rule 384 provides that any plaintiff in an action for a debt or liquidated demand before or after judgment may issue a garnishee summons, and that such summons shall be issued by the clerk upon the plaintiff, his advocate or agent filing an affidavit containing certain information. For the defendant it was argued that the affidavit was a nullity because it was sworn a week before the commencement of the action. The affidavit was sworn to on May 5th, and the writ was issued on May 12th and the garnishee summons the same day.

From the use of the phrase, "plaintiff in an action" in this Rule, it was contended that the Legislature intended that an action must be commenced before the affidavit was sworn. This same inference was sought to be drawn from the fact that Rule 294 provides that every affidavit shall be entitled in the cause or matter in which it is sworn. No case was cited to us, nor can I find any, in which the question was raised as to the validity of an affidavit sworn prior to the commencement of the action in so far as garnishee proceedings are concerned, but we were referred to the case of *Marcy* v. *Pierce* (No. 1), 4 Terr. L.R. 186, where it was held by the learned Chief Justice that in replevin proceedings an affidavit upon which the writ of replevin was issued, sworn before the issue of the writ of summons in an action, did not afford a ground upon which the writ could be set aside. I cannot see any difference in principle between the present case and *Marcy* v. *Pierce*. The requirements of the rules as to replevin are practically the same, so far as the questions involved are concerned, as the one in question. Rule 426 provides that "in any action brought for the recovery of personal property . . . the plaintiff may at any time after the issue of the writ of summons obtain a writ of replevin," and Rule 427 provides that the clerk of the Court shall issue a writ of replevin upon the plaintiff or his agent filing an affidavit setting forth certain things. In both garnishee proceedings and replevin proceedings the plaintiff may, after the issue of the writ of summons, obtain a garnishee summons or a writ of replevin upon filing an affidavit. For the reasons given by the learned Chief Justice in *Marcy* v. *Pierce*, which I cannot distinguish, I am of opinion this objection cannot be sustained.

I am also of opinion that the appellant must fail on the second

ground of appeal. By Rule 364 (b) the person making the affidavit is required to swear to the best of his information and belief that the proposed garnishee (naming him) is indebted to the defendant. In the affidavit filed the deponent says as follows: "To the best of my information and belief, Charles C. Goodwin, the proposed garnishee, is indebted to G. R. Ross, the above named defendant." In *Salander* v. *Jensen* (1907), 6 W.L.R. 401, the Court *en banc* for Yukon Territory held that an affidavit on information and belief was not sufficient unless the grounds of the belief were also set out, and the Court arrived at this conclusion after referring to a number of English cases in which that had been held. With great deference to the learned Judges who decided *Salander* v. *Jensen*, I am of opinion that under our Rule it is not necessary to set out the grounds of the deponent's belief. The English cases referred to have held that the grounds of belief should be set out. The English Rule, however, differs from ours, and requires the deponent to swear that the proposed garnishee *is indebted* to the defendant, and the English cases referred to have held that if the person making the affidavit swears to information and belief, stating the grounds thereof, that the rule is complied with. Our Legislature, possibly realising how difficult it would be for an honest plaintiff in many cases to swear positively that the proposed garnishee was indebted to the defendant, did not adopt the English rule, but required the deponent to state to the best of his information and belief that such indebtedness existed. I do not think a plaintiff is obliged to set out more than the rule calls for, and as it does not call for the grounds of the deponent's belief, I am of opinion they need not be set out.

I agree with what was laid down by Chief Justice Harvey in *Nohren* v. *Auten and Markham* (1910), 15 W.L.R. 417, when he said: "Rule 295, which requires the grounds of belief to be stated in affidavits used on interlocutory motions, can have no application, both because the affidavit is not for use on an interlocutory motion, and because the rule itself only requires it to be 'to the best of the deponent's belief,' without more."

I am, therefore, of opinion that the decision of my brother Brown was right and should be affirmed.

*Appeal dismissed.*

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Oct. 26.

Horace Ashmore JACKSON and E. A. Lacey (plaintiffs) v. PEOPLE'S TRUST COMPANY, Limited (defendants).

*Yale County Court, British Columbia, Swanson, J. October* 26, 1912.

1. VENDOR AND PURCHASER (§ I E—25) — EXPRESSION OF OPINION NOT GROUND FOR CANCELLATION OF AGREEMENT OF SALE.

A representation by an agent of a vendor of land, which is merely an expression of opinion, and not a misrepresentation of a material ascertainable fact, does not, in the absence of fraud, constitute ground for the cancellation of the agreement of sale.

2. FRAUD AND DECEIT (§ III—10)—REPRESENTATION THAT LAND WAS IN BUSINESS SECTION OF PROPOSED TOWN MERE EXPRESSION OF OPINION.

Where an agent of a vendor of land represented that the purchasers were buying a business lot in the business section of a proposed town and the vendees, who were buying on speculation, knew that no business section existed at that time, such a representation must be read in the light of existing circumstances, and must be considered as looking to the future development of the town, and hence is purely a matter of opinion and not a misrepresentation of a material ascertainable fact.

[*Cave* v. *Horsell* (1912), 48 Times L.R. 543, 81 L.J.K.B. 981, specially referred to.]

3. FRAUD AND DECEIT (§ III—10)—REPRESENTATION THAT PURCHASER COULD DISPOSE OF LAND AT INCREASE MERE MATTER OF OPINION.

It is merely an expression of opinion and not a misrepresentation of fact where an agent of a vendor of land represents to the purchaser that the latter would be able to dispose of the land at from two to three times the price before the third payment on the land was due.

4. FRAUD AND DECEIT (§ III—10)—REPRESENTATION THAT MAIN STREET OF PROPOSED TOWN WOULD BECOME PRINCIPAL STREET IS EXPRESSION OF OPINION ONLY.

A representation to a purchaser by the agent of the vendor of land in a proposed town that the main street of the town would become a principal street, does not amount to a representation at law, but is only an expression of opinion.

5. VENDOR AND PURCHASER (§ I E—25)—STATEMENT THAT ADJACENT LAND WAS RESERVED FOR RAILWAY PURPOSES NOT AN INDUCEMENT TO MAKING OF CONTRACT JUSTIFYING CANCELLATION.

A statement by the agent of a vendor that land adjoining that sold to the purchaser had been reserved by a railway for trackage and other purposes, when honestly made, is not, in the absence of fraud, such a material inducement to the formation of the contract as would justify cancellation of the agreement of sale, where it later appears that such was not the case.

[*Dunn* v. *Alexander*, 2 D.L.R. 553, distinguished.]

Statement

TRIAL of an action for cancellation of an agreement of sale dated April 7th, 1911, whereby defendants as vendors agreed to sell to the plaintiffs, and the plaintiffs agreed to buy from the vendors the east half of lot 3, block 9, plan 1701, in the townsite of Port Mann, B.C., for the price of $1,000, payable $250 on the execution of the agreement, and balance in four equal instalments of intervals of 6 months from April 7th, 1911, with interest at 7 per cent.

The action was dismissed.

*A. D. Macintyre*, and *G. W. Black*, for plaintiffs.

*W. A. Macdonald*, K.C., and *Adam Johnson*, for defendants.

SWANSON, COUNTY JUDGE:—A clerical error has apparently been made in drafting the prayer for relief, the date of the agreement being there stated to be January 10th, 1912, instead of the 7th day of April, 1911. Permission is granted accordingly to amend the plaint.

The plaintiffs allege that they were induced to enter into the agreement in question through the false representations of the defendants' agent, Mr. Hibbert. They allege that Mr. Hibbert verbally, wrongfully and fraudulently and knowing the same to be false represented to them that the plaintiffs were

1. Buying a business lot in the business section of Port Mann, B.C.;

2. That the plaintiffs would be able to dispose of the land at from two to three times the price paid before the 3rd payment on the land was due;

3. That the main street of the town of Port Mann—the Bon-Accord road—ran directly up from the wharf of the Fraser river past the land in question and that it would be the Granville street of Port Mann, meaning thereby that the said main street would occupy the same relation to Port Mann as Granville street does to the city of Vancouver, and,

4. That the whole of the flat land lying between the said land and the waterfront of the Fraser river had been reserved by the Canadian Northern Pacific Railway Company for trackage and other purposes, and that relying on these representations which they now claim to be false they entered into the agreement in question, and paid the cash payment $250, and the first instalment $187 as therein provided. The plaintiffs accordingly ask for a cancellation of this agreement and a return of their money paid.

As there is no proof whatever of fraud the case resolves itself into one as to whether the facts proved entitle the plaintiffs to be relieved from their contract through the innocent misrepresentation of Hibbert or not. The issue is whether the statements alleged to have been made by Hibbert constitute representations in law, and whether under the circumstances the plaintiffs should be relieved from their contract. In my opinion the plaintiffs are not entitled to succeed.

The plaintiffs frankly state that they believe that Hibbert honestly believed the statements which they allege he made to them to induce them to purchase the land in question. I have very carefully considered the evidence in the case, which as far as allegation (1) is concerned is quite unique.

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Dealing with allegation (1): The plaintiff Jackson, at pages 48 and 49 of the transcript of evidence, furnished by the stenographer, says:—

> Q. Now what representations did Mr. Hibbert make as to these lots? A. He said it was a business lot in a business centre of Port Mann.

A statement which Jackson repeated at different times in his evidence. The plaintiff Lacey in somewhat similar language confirms this statement.

There was no business section and no business of any kind being done at Port Mann at the time of the agreement in question, as the plaintiffs frankly admitted they perfectly well knew at the time, the city of Port Mann being still only a city on paper. The townsite had then only been cleared in part by the Canadian Northern Pacific Railway Co., and the plaintiffs admitted a similar condition of affairs as existing at the date of the trial herein, September 4th last. The plaintiffs knew that the lot they were buying, being 33 feet by 120 feet, was a portion of a sub-division of 40 acres owned by the defendants or by a syndicate represented by them, and marked in a red block on a small printed map similar to exhibit No. 2, and shewn to them at or before the time of the sale. The plaintiffs knew they were buying the defendants' land and not the Railway Company's land. The defendants' lands in question are, as a matter of fact, clearly in the heart of the land holdings of the railway company at Port Mann. About a quarter mile to the north of the defendants' lands is a bluff rising some 200 feet above the flats. It is about a quarter mile from the bluff to the water-front, Fraser river. The old Bon-Accord road ran along the east side of the defendants' lands, and northerly towards a wharf marked "B." on plan Ex. 2, at the Fraser river. The plaintiffs admit they purchased this land as a pure speculation, expecting by buying early to turn it over at a considerable profit. Some months following the purchase by the plaintiffs the railway company put on the market lots in the vicinity of the defendants' lands, but larger in size and at a less value than the defendants were offering theirs, the railway company also cutting up some of the flats lying between the proposed railway tracks and the bluff into what they designated as business lots. The consequence was to depreciate the value of the defendants' lands and the plaintiffs claiming they did not get what they say they bargained for, viz., a business lot in the business centre of Port Mann, ask to be relieved of their obligations under the contract, and a repayment of moneys paid by them.

Even accepting the story of the plaintiffs on this point I am of the opinion that they cannot succeed.

It was a pure matter of opinion on Hibbert's part as to the

lot in question being a business lot, and being in a business centre of the town, or as to the likelihood of such a contingency.

The expression "business lot in a business centre" in view of the admitted facts of the case, if it had any meaning whatever, must be considered as looking to the future development of Port Mann, and not as contemplating the actual condition of affairs at the date of the sale in question. It was a pure matter of opinion as to what was going to happen or likely to happen in the future, an opinion too as the plaintiffs frankly say honestly believed in and honestly given by Hibbert. The plaintiffs knew there was at the time no such a thing actually as a "business lot" or a "business section or centre" *in presenti* in the townsite of Port Mann. They knew at the time there was no business being done there, and no people there at that time to do business with. How then can they claim they were deceived or damnified by such a statement, when they say they knew all these facts beyond a question? The law is I think quite clear that a misrepresentation to be material should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion. It may be said that the expression "a business lot in a business centre" is a definite ascertainable fact. But if it is to have any intelligible meaning, it must be read in the light of the surrounding circumstances, of the undoubted facts fully known to the plaintiffs at the time, that such a thing as business or a business district did not actually exist at Port Mann at that time, and the expression can therefore have only one meaning, and that is as anticipatory of the future, thus turning the expression, in my opinion, clearly into one of mere opinion. The third allegation should be read in the light of the first allegation, and the very form of it as set out in the plaint destroys its effect as a representation in law, and clearly shews that Hibbert's words (adopting the plaintiff's version for the time being) concerning Bon-Accord road were simply matter of opinion or propheey on his part as to Bon-Accord road one day equalling Granville street, Vancouver, in importance—clearly a mere expression of opinion for which no liability attaches to the defendants. I have so far dealt with allegation (1) on the assumption that the plaintiffs' version of Hibbert's representations is the true one. Hibbert, however, puts it in a different form, and one which I think is more conformable to common sense when we consider the full knowledge of the facts of the situation possessed not only by Hibbert, but by the plaintiffs. Hibbert says at page 108 of the transcript of evidence:—

> Q. Will you say that you never hinted to anybody that they were business lots? A. I did not.
>
> Q. That is different to what you said to your counsel, do you directly contradict Mr. Lacey and Mr. Jackson in saying that business lots were not mentioned? A. I never said they were not mentioned.

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Q. Well then what was the word? A. Excuse me: I said that I think as far as I remember I can give you my own words; I said that it was a pretty good supposition, looking at that map that you got there, it was a pretty good supposition to suppose that that property being in the centre of the Canadian Northern Townsite that one might take it, not a certainty, but at any rate a good sporting chance that you might hit somewhere near the business section of the city.

If I adopt Hibbert's statement, and on the whole I am inclined to prefer this statement as it appears to me a more probable account of what actually transpired, I am clearly of the opinion that the plaintiffs cannot succeed. Both sides are equally interested in giving their testimony, the plaintiff Lacey and his father-in-law Jackson are anxious to get rid of what they now believe to be a bad bargain, and Hibbert as agent of his company is anxious to defend the defendants' interests. Hibbert is not joined as a party defendant. He says he has shewn his faith in the defendants' property by himself purchasing four lots, in which he says he still believes.

The parties here have entered into a solemn agreement under seal. This should not be lightly disturbed without the clearest and most cogent reasons. Where a contract is made between adults of competent understanding where they are at arms' length, and where fraud, duress, undue influence or other disabling circumstances do not intervene, it is a wholesome principle that a man should stand by and be held to his bargain. Sir Wm. Ritchie, C.J., in *Beatty* v. *Neelon*, 13 Can. S.C.R. 1, p. 5, says:—

> I take it there is no proposition better established than that fraud must be distinctly and clearly proved; that the law will presume in favour of honesty and against fraud. As Baron Parke said in *Shaw* v. *Beck*, 8 Ex. 392: "Defendants who seek to set an instrument aside as fraudulent must establish fraud, upon the universal principle that every transaction in the first instance is assumed to be valid, and the proof of fraud lies upon the party by whom it is imputed." Therefore, unless the alleged fraud is established beyond a reasonable doubt, the presumption of law would be that the proceeding on the part of the defendants was fair and honest.

In a leading Manitoba case between two prominent parties (one of them the Chief Justice and the other, afterwards the Governor of that province), *Shultz* v. *Wood* (1881), 6 Can. S.C.R. 585, at 613, the same learned Judge says:—

> In rescinding a contract under seal the evidence should be unequivocal and conclusive.

Sir George Jessel, M.R. in one of his latest judgments, *Wallis* v. *Smith* (1882), 52 L.J. Ch. 145, at 153, says:—

> I think it necessary to say so much because I have always thought, and still think, that it is of the utmost importance as regards con-

tracts between adults—persons not under disability and at arms' length—that the Courts of law should maintain the performance of contracts according to the intention of the parties, that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware there are exceptions, but these are chiefly of a legislative character.

Lord Lindley, when Master of the Rolls, in *Underwood* v. *Barker* (1899), 68 L.J. Ch. 201, at 204, uses equally strong words as to the inviolability of contract, deliberately entered into which is not induced by fraud, etc. Mr. Justice Story in his work on Equity Jurisprudence, p. 199, says:—

> Courts of equity like Courts of law do not aid parties who will not use their own sense and discretion upon matters of this sort.

Kerr, on Fraud and Mistake, 3rd ed., at p 47, says:—

> A representation which merely amounts to a statement of opinion, judgment, probability or expectation or is vague and indefinite in its nature and terms or is merely a loose, conjectural or exaggerated statement goes for nothing, though it may not be true, for a man is not justified in placing reliance on it.

and at page 48:—

> They are, strictly speaking, *gratis dicta* and a man who relies on them does so at his peril, and must take the consequences.

As to exaggerated expectation held out by over-sanguine company promoters in prospectuses, Kerr, at p. 49, adds:—

> No prudent man can, owing to the well-known prevalence of exaggeration in such documents accept the prospects which are held out by the orginator of every new scheme without considerable abatement.

In all these matters the prudent man must keep before him the old maxim *caveat emptor*. See Lord Halsbury's Laws of England, vol. 20, at p. 665 *et seq.*, and at page 670, where the subject of exaggeration not being representation is dealt with.

Sir Frederick Pollock, in the last edition of his work on Torts (1912), at page 292, dealing with "Deceit," says:—

> A man cannot hold me to account because he has lost money by following me in an opinion which turns out erroneous.

Similarly Sir Wm. Anson in his Treatise on Contracts, 9th ed., on the subject of Misrepresentation, says:—

> A mere expression of opinion is not a statement which if it turns out to be false invalidates a contract. Nor are commendatory expressions such as men habitually use in order to induce others to enter into a bargain dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser, though it must be admitted that the border line of permissible assertion is not always discernable.

It may be that the principles binding in a Court of morals in these matters are not always of equal binding force in a

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Court of law, but the Judge's function is to decide what the law is not what it ought to be.

Cyprian Williams in his Treatise on Vendor and Purchaser (1910), at pp. 816 and 817, sets out eight facts which must be proved to give rise to the right to rescind a contract for misrepresentation. The eighth fact, at p. 822, is set out as:—

> The party claiming to have been misled must not have known that the statement was false.

In the case at bar the plaintiffs frankly admit that they knew throughout the whole negotiations leading up to the contract herein that there was actually no business district established in Port Mann, and no business being done there, in fact that the whole city was merely one on paper without any actual settlement whatever excepting only a few men engaged in clearing the townsite. They were, accordingly, not deceived by this alleged representation. I have dealt with the most serious allegation No. 1, also No. 3 which is closely related thereto. As to allegation No. 2 I do not think that amounts to a representation at law. I express no opinion as to whether the plaintiffs' case as disclosed in their evidence on this point amounts to a subsidiary agreement, for the breach of which they might have redress in damages, as this point was not raised in this way on the pleadings and was not discussed at the bar. As to allegation No. 4 I do not think that any representation to that effect would be a material inducement to the formation of the contract. Besides there is no evidence that what Hibbert is alleged to have said on this point was false at the time it was said, and the plaintiffs were satisfied with his honesty in making the alleged statement.

Williams, at page 819, states that the 4th fact which must be proved is

> the representation must be of some material fact having relation to the proposed contract.

Hibbert believed in the truth of the statement he made in this regard. Even if the statement under the 4th heading were false it is open to question whether Hibbert would make the defendants liable by disparaging the property of the C.N. Pac. Ry. Co., on the flats as alleged with the object of securing a purchaser for the defendants' lands. Kerr, at p. 50, says the purchaser is not liable for disparaging the property which he proposes to buy, and assertions of value by the vendor are not fraudulent in law though erroneous or false. Nor is a buyer liable for misrepresenting a seller's chance of sale or probability of his getting a better price. It is a false representation in a matter merely *gratis dictum* by the bidder in respect of which he is under no legal duty to the seller for the correctness of his statement, and upon which the seller would be incautious to

rely: *Vernon* v. *Keys*, 12 East 637 (Lord Ellenborough, C.J.), affirmed, 4 Taunt. 488.

The plaintiffs' counsel has referred me to the reasons for judgment given by the learned Chief Justice of the Court of Appeal and of Mr. Justice Galliher, in *Dunn* v. *Alexander*, 2 D.L.R. 553, an action concerning the sale of lands alleged to be within the C. N. Pac. Ry. townsite of Port Mann. I take it from perusing the judgments of the learned Chief Justice and of Mr. Justice Galliher, that the gravamen of the charge against the defendant was that he falsely and fraudulently represented that the lands in question were within the C. N. Pac. Ry. townsite, whereas the facts shewed otherwise. The facts in the present case are, in my opinion, of quite a different nature, and I accordingly think *Dunn* v. *Alexander*, 2 D.L.R. 553, is distinguishable from the case at bar. Since writing the above I have read the decision of the Court of Appeal in *Cave* v. *Horsell* (1912), 48 Times L.R. 543, 81 L.J.K.B. 981. I refer to this case relative to the interpretation I have above placed on the words "a business lot in a business centre," where I have read them in the light of the surrounding circumstances of the case. In *Cave* v. *Horsell*, *supra*, the Court had to interpret the meaning of the word "adjoining" used in a lease. The headnote states that the defendant was the owner of six shops in a terrace forming part of the Limes estate, and numbered 1 to 6 consecutively. No. 4 was let for a term of years to plaintiffs, who covenanted not to carry on any trade or business except certain specially named, including that of cabinet-makers. Defendant also covenanted with plaintiffs that he would not at any time during the continuance of the lease let any of the adjoining shops belonging to him in the Limes estate for the purposes of certain trades including that of cabinet-makers. Subsequently defendant let shop No. 6 to G. for purposes of carrying on business of cabinet-maker. In an action to recover damages for breach of covenant, held that shop No. 6 was an adjoining shop within meaning of covenant. It was argued that according to the plain ordinary and primary sense the term "adjoining" meant immediately touching or in physical contact with, that is as applicable only to shops No. 3 and 5, in accordance with the principle of interpretation enunciated by Lord Wensleydale in *Grey* v. *Pearson* (1857), 6 H.L.C. 61, but the majority of the Court, Fletcher-Moulton, L.J., and Buckley, L.J., refused to place so narrow a construction on the word, but read it in the light of the context, of the surrounding circumstances of the case. Fletcher-Moulton, L.J., at page 986, says:—

> Its purpose was admittedly to protect the business of the plaintiffs from the danger of a rival in the same business establishing himself

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close at hand. Under these circumstances I do not think that it would occur to anyone but a lawyer to interpret the words as applying only to the houses next door.

Later on the same learned Judge says:—

I fully accept the authority of those cases, but in my opinion, we have not here to decide the abstract question of the meaning of the word "adjoining" apart from the context. We are entitled and bound to bear in mind the surrounding circumstances, and then it is our duty to construe the words as a whole. We are entitled among other things to consider the object of the covenant. This is pointed out by Lord Justice Bowen in his judgment in *Lightbound* v. *Higher Bebington Local Board*, 182 B.D. 577, at 584. He was there dealing with a section of an Act of Parliament, and he lays down that there is a broad rule of construction "that in construing the words you must look at the subject-matter of the section and see what is its scope and object."

Further on he says:—

The meaning of words is fixed by user alone.

Lord Justice Buckley in the opening part of his judgment says:—

There are few words, if indeed there be any, which bear a meaning so exact as that the reader can disregard the surrounding circumstances and the context in ascertaining the sense in which the word is employed. Not even words expressive of number escape the ordeal. There are trades in which a dozen does not mean twelve nor a hundred five score. There are words upon whose primary meaning there is no room for doubt. I may instance again the word "dozen." But this is not true of all words. Many are not of fixed but of flexible meaning. Such a word may have many primary meanings. It is for the reader, looking at the context, to say in which of those meanings it is employed. In making that determination he must look at the subject-matter dealt with by the language in which the word occurs, and see what is the scope and object of the instrument in which he finds it. Much discussion has passed before us upon Lord Wensleydale's language in *Grey* v. *Pearson* (1857), 6 H.L.C. 61. He is not speaking of the meaning of a single word, etc.

There will be judgment for the defendants, dismissing the action with costs.

*Action dismissed.*

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**ALBERTA PACIFIC ELEVATOR CO. (defendants, appellants) v. VANCOUVER MILLING AND GRAIN CO. (plaintiffs, respondents).**

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. May 7, 1912.*

1. CONTRACTS (§ IV B—325)—FUTURE DELIVERIES—JUSTIFICATION FOR BREAKING OFF.

A persistent failure on the part of the vendors to respond to the frequent calls of the vendee for more grain under several contracts for future delivery justifies a breaking off of the contract on the part of the vendee.

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2. CONTRACTS (§ IV C 2—351)—SUFFICIENCY OF TENDER—WITHDRAWAL OF TENDER OF GOODS—QUESTION OF PRO TANTO FULFILMENT.

A tender on the part of the vendors during the lifetime of a contract for future delivery of grain by sending a number of cars loaded for the purpose of fulfilling the contracts or some one of them, but subsequently diverting such shipments to some other destination at the request of the vendee, is not a *pro tanto* fulfilment of the contract, in the absence of a shewing that the parties intended to treat the tender of these cars as such part fulfilment.

APPEAL from the Court of Appeal for British Columbia.

The appeal was dismissed.

*Chrysler*, K.C., and *C. C. McCaul*, K.C., for appellants.

*C. W. Craig*, for the respondents.

FITZPATRICK, C.J., and DAVIES, J., agreed that this appeal should be dismissed with costs, for the reasons given by the trial Judge, Murphy, J. Fitzpatrick, C.J. Davies, J.

IDINGTON, J.:—I fail to see how the appellant can under the facts and circumstances existent herein avail itself of either the objection to the jurisdiction of the learned trial Judge or the admission of Mr. Strong's evidence given in response to orders for discovery. Idington, J.

Of the exceptions taken on the merits to the judgment appealed from the two or three chiefly relied on and which bore a plausible look at first sight, a word or two may be properly said.

The appellant under its several contracts with respondent for selling and shipping grain to the latter had on the way at the time when the latter's elevator was burned down, a number of cars loaded for the purpose of fulfilling the said contracts or some one of them.

The respondent's manager appealed to the appellant to turn these cars to some other destination as it was impossible for respondent to use them under the circumstances.

The appellant very properly responded to this request and disposed of these cars elsewhere, but I think very improperly seeks to apply such tender as a *pro tanto* fulfilment of the contracts.

If it had been the case that the parties had intended to treat the tender as such part fulfilment of the contracts, we would have had some facts or circumstances pointing that way. In fact we have not one such fact, but, on the other hand, every circumstance bearing on the question and spoken to by the conduct and correspondence of the parties, points the other way. Then, the property in, or control over, these cars so tendered never passed out of the appellant and the probabilities are a profit was made by the diversion. If there had been a loss we assuredly should have heard of it.

As to the next point there was no breach, no abandonment of the contracts or of intention to fulfil them on the 12th of June,

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it appears to me an impossibility to argue, therefore, unless we shut out of sight part of the correspondence.

If persistent failure for weeks to respond to calls of respondent for the grains, does not furnish ground for breaking off, I do not know what would. The courteous form of request for fulfilment might have been framed in an angry, boisterous tone and contained loud threats, but would have been rendered thereby no more commendable.

The contract of March for ten thousand bushels sold for May delivery, seems to have been so completely ignored that it is mere idle talk, as it seems to me, to try and read into the contract a term and condition, relative to tendering cars, which the parties never seem to have had in mind in framing it and the contract itself does not provide for.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J., agreed that the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Reading the contract of the 12th of March, 1909, in the light of the correspondence which took place in May and June, I entertain no doubt that it was the intention of the parties that the vendor should supply cars for shipment of the 10,000 bushels of wheat covered by that contract, as they were bound to do for the shipment of the 70,000 bushels under the October contract. The fact that the defendants might ship from any one or from several of some fifteen or twenty points in Alberta to be selected by them differentiates this case from *Marshall* v. *Jamieson*, 42 U.C.R. 115, and *Coleman* v. *McDermott*, 1 E. & A. 445, relied upon by the appellant.

But if it were the duty of the plaintiff to furnish cars under the March contract, in my opinion, the defendant, who had the duty of delivery and the selection of the exact point or points of delivery, was at least bound to notify the plaintiff when and where the wheat lay ready for delivery and shipment in order that the latter might send cars for it to such point or points: *Vogt* v. *Schienebeck*, 2 A. & E. Annotated Cases 814, 818(*n*). On this branch of the case I see no reason for interference with the judgment of the learned trial Judge, confirmed as it is by the Court of Appeal.

On the 70,000 bushels contract there was an admitted shortage of 698.44 bushels. The defendant says that since this shortage was less than a carload it is not liable for it. This might perhaps be an answer if there had not been the other contract for the 10,000 bushels. The correspondence shews that the parties treated the two contracts in such a way that this 698.44 bushels might have been shipped as part of a carload

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in the course of delivery under the 10,000 bushels contract. A car of wheat, we are told, carries about 1,100 bushels.

On the oats contract, I am satisfied that the diversion of cars made by the vendor at the purchaser's request was with the intent on the part of both parties that the diverted cars should be treated as not having been applied on the contract, and that, notwithstanding the forwarding and diversion of them, the vendor should remain at liberty to enforce acceptance by the purchaser of the whole 150,000 bushels of oats as if they had never shipped the diverted cars or to claim damages in the event of refusal, with corresponding rights on the part of the purchaser to enforce delivery or to recover damages, for default. There was no intention so far as I can glean from the evidence on the part of either party that the 150,000 bushels of oats to be delivered by the plaintiff should be reduced by the quantity contained in the cars so diverted. The learned trial Judge has so found; his finding has been confirmed by the Court of Appeal; no case, in my opinion, has been made for disturbing it.

Non-delivery under the contract for winter wheat is admitted. The attack made upon the basis on which the damages in respect of this item were assessed was, I think, unsuccessful.

The demands of the plaintiff in May and June were within its right under its contract. There was undoubted and continued default on the part of the defendant and the trial Judge has found that it sufficed to justify the plaintiffs' action of the 12th June, in refusing to take further deliveries.

On the whole I find no ground for interfering on any point with the judgment of the learned trial Judge.

This appeal should be dismissed with costs.

*Appeal dismissed.*

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## WILKS et al. v. MATTHEWS.

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*Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll and Gervais, JJ. October* 31, 1912.

1. CONTRACTS (§ III D—272)—DEPOSITING MONEYS FOR SPECULATION—ILLEGAL GAMING CONTRACTS—RIGHTS OF WINNERS AND LOSERS—C.C. QUE. ART. 1927.

Where parties entrust moneys to a financial agent for him to carry on imaginary speculations of every kind for their benefit, so as to yield them fantastic benefits, they are participants in illegal gaming contracts under art. 1927 of the Civil Code (Que.), hence the winners of the game have no action to recover their profits nor the losers any action to recover the profits paid out, even if these were fictitious and in reality paid with their own (the losers) moneys.

[*Wilks* v. *Matthews*, 41 Que. S.C. 155, affirmed on different grounds.]

2. INSOLVENCY (§ III—12)—RIGHTS OF ASSIGNEE—RECOVERY OF MONEYS PAID BY INSOLVENT—ILLEGAL "BLIND POOL"—CONTRACT.

Where a so-called financial agent, who obtains moneys for investment in a blind pool under promises of 30% profit per month, becomes

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insolvent and absconds, and, prior to his absconding, has paid out to some of the depositors fictitious profits out of the moneys deposited with him by the mass, no action lies in favour of the curators named to the abandonment to recover these profits from the winner.
[*Forget* v. *Ostiguy*, [1895] A.C. 318, distinguished.]

Statement

THE appeal was dismissed on a different ground from that given by the trial Judge.

The judgment of the Superior Court, Greenshields, J., so affirmed as to the result was rendered at Montreal on December 9th, 1911, *Wilks* v. *Matthews*, 41 Que. S.C. 155.

Argument

*A. W. Atwater*, K.C., and *H. N. Chauvin*, K.C., for the appellants, claimed the full amount on the ground that the payment injured Sheldon's creditors and was made when Sheldon was insolvent to the respondent's knowledge: C.C. 1035, 1036; and made a special claim to the sum of $7,836 which represented profits on the ground that that was paid as a gratuity, and had not been earned, at a period when Sheldon was insolvent: C.C. 1034 and 1140. Knowledge of insolvency can be proved by circumstantial evidence: 3 Toullier, Des Contrats, title 3, 2nd part, no. 355; 5 Mignault, p. 299; 10 Duranton, nos. 385-6; 25 Demolombe, no. 204; *Kane* v. *Racine*, 24 L.C.J. 216; *Gilmour* v. *Letourneux*, 1 Que. Q.B. 294. This circumstantial evidence results from the press campaign, the "run" on Sheldon, the respondent's refusal to accept a post-dated cheque, etc. Knowledge of the wife is knowledge of the husband: *Standard Life Ass.* v. *Trudeau*, 9 Que. K.B. 499, at 515; *Chrétien* v. *Crowley*, 2 D.C.A. 385; Am. & Eng. Ency., 2nd ed., vo. Agency, p. 1144. It is conceded by the trial Judge that the profits were not earned. It follows they were not due and payment thereof can be recovered for it was made either in error or as a liability: 5 Pothier, *Condictio Indebiit*, no. 160; 31 Demolombe, nos. 278-9; 20 Laurent 353; 5 Mignault, p. 320; C.C. 1047, 1036. Creditors have the right to attack gratuitous contracts in fraud of their rights and have them set aside where the debtor himself could not do so: C.C. 1033, 1034, 1140. The present action being brought under 1032 C.C. is distinguished easily from *Parent* v. *Leclaire*, 1 Que. Q.B. 244, referred to by the trial Judge, and should be maintained.

*C. H. Stephens*, K.C., and *L. A. David*, for the respondent, submitted no knowledge of insolvency existed and that the respondent like thousands of others believed in good faith in the financial genius of Sheldon, who was not afraid to answer press attacks and explain his system. To the moment of his departure there is no evidence that Sheldon was insolvent. In an action of this kind it is necessary from the very institution of the *actio pauliana* to prove the knowledge or complicity of the person benefited by the payment or transfer: Edict of May, 1609, Ordonnance of 1673; 13 Elizabeth ch. 5; Halsbury's Laws of England, vol. 15, sec. 164; C.N. 1167; Imperial Bankruptcy Act of

1883 (46, 47 Vict. ch. 52, sec. 4, sub-sec. 1, and sec. 49). Cf. R.S. Ont. 1897, ch. 1471, sec. 3, and *Danna* v. *McLean*, 2 O.L.R. 466. See also Parker, Frauds on Creditors, 116. In both England and France proof of an intention to defraud appears the principal test: Halsbury, *ibid.* Title Bankruptcy, sec. 471. Moreover the insolvent could not have recovered any of the moneys he paid as profits; therefore his creditors cannot have greater rights than he had: *Parent* v. *Leclaire*, 1 Que. Q.B. 244; *Kitching* v. *Hicks*, 6 O.R. 749; *Robinson* v. *Cooke*, 6 O.R. 590, 594; C.C. 1032 *et seq.* Besides every one knew that these profits were to be made by speculations on the stock or grain exchanges, therefore they belong to that category of gaming contracts to which the law lends no countenance nor assistance.

*Atwater*, K.C., in reply.

The judgment of the Court was unanimous to confirm the judgment of the Superior Court, opinions being handed down by CROSS and GERVAIS, JJ.

Cross, J.

CROSS, J.:—The action is taken by the curators to the bankruptcy abandonment of one Sheldon to recover $13,738 from the respondent on the ground that the latter procured Sheldon to pay the amount at a time when Sheldon was utterly insolvent to the knowledge of the respondent.

There is reason to say that the respondent should be held to have known that Sheldon was insolvent when he paid the money and that the defence is consequently unfounded, but a difficulty of greater weight stands in the way of the appellants' success in the question whether the Court, having due regard to morality and decency, should entertain an action launched for the object sought to be accomplished in this suit.

The appellants alleged in their action that Sheldon was an "investment broker" who gave his customers to understand that by investing their money he made large profits for them.

At the trial it was shewn that the supposed investments, with the exception of a relatively small amount of unprofitable operations in bucket shops, were all moonshine, and at that stage, instead of being referred to as a brokerage investing business, it was called a "blind pool," and now in their factum in appeal the appellants shortly call it a "swindle."

It has not been explained what a blind pool is, and I think that the two other characterizations are inapplicable.

The respondent's accounts as entered in Sheldon's books have been put before us and cover a period extending from January or February, 1911, to September, 1911. They even closed on the 10th October, 1911. The respondent had paid in sums aggregating $7,102. He had drawn out $1,200 before October, and drew $13,743 on the 11th October as already stated.

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Sheldon had over five thousand accounts. The accounts were all treated alike in that they were all credited with "profits" monthly at the same rate for the same month.

For six months of the period above mentioned the "profits" were as follows: April—20%; May—43%; June—28%; July—30%; August—25%; September—25%.

Persons of age and not mentally and morally deficient do not need to be told that the making of profits on any such scale as has just been indicated is an impossibility particularly in a business having no such outward evidence of productiveness as a gold mine or actively operating manufactory, but one of such an elusive nature that its operations could not be explained and in fact were not explained to its patrons.

Regarding Sheldon's so-called "business," it may be said shortly that its nature was such that, as long as there was a sufficiency of money contributions of "investments" from old and new patrons to provide money with which to pay the withdrawals of that portion of the old patrons who desired to withdraw their contributions and "profits," the thing could go on but no longer. Now that operations have stopped, the situation is that there are over four thousand so-called "creditors," whose claims represent $859,883.51 of money paid in, and, if the "profits" be added, these claims would mount up to $2,138,008.40.

There are assets estimated at $19,951.29 of which the principal items consist of house and furniture $4,858.23 and a Government deposit of $9,800. The persons who provided money to Sheldon in the expectation of withdrawing with so-called profits at the rates per month above mentioned were gambling. To speak of such acts as investing or doing business is to misuse language.

It is not surprising to find that many of the patrons did not like to have their names appear in Sheldon's books, and it is in evidence that the practice of having accounts opened in the names of Sheldon's servants "in trust" was very largely resorted to. Thus respondents' accounts, for example, stood in the names of:—

Charles Stephen; C. D. Sheldon, trustee J.F.M.; W. S. Hunton, in trust J.F.M.; Wm. Crawford; J. G. Matthews, special; S. C. Matthews.

And there appears to have been a seventh account which was not included in the settlement and not identified at the trial. It was the respondent's wife who closed the six accounts and drew the money, and it was at first arranged that the cheque would be sent to her by her son, but afterwards she called for it herself, giving as her reason for so doing her desire that her son should not discover how much money she had entrusted to Sheldon. She had reason to be so minded.

It appears from the appellant's own statement of claim that Sheldon's operations were carried on for account of his patrons

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in consideration of twenty per cent. of the profits to be deducted by him.

I consider that it follows from the facts above mentioned that the operations are of the character of what are treated as gaining contracts in the Code, and that the so-called "creditors" represented by the appellants frequented and assisted the gaming house where the operations were carried on.

The keeper of the place has been imprisoned, but the patrons not only appear not to have been proceeded against but are actually attempting by this action to procure some of the money salvage from the gaming operations to be collected so as to be divided among themselves by officers of the Superior Court.

One should look at the real nature of the operations and not be misled respecting them by the employment of such respectably sounding words as "investment broker," "clients" and "creditors," as have been freely misused at the trial of this action.

The employment of such words has suggested to me the equally decorous language of the bill for a partnership accounting in the old English case of *Everest* v. *Williams*, referred to in Lindley, Partnership, 6th ed., p. 101, note (*n*), as follows:—

> The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, ale-houses, markets and fairs; that the plaintiff and defendant proceeded jointly to Hounslow Heath, where they dealt with a gentleman for a gold watch . . . that they went to Finchley and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things, etc., etc. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined £50 apiece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported.

Operations of the kind shewn to have been carried on by Sheldon and his patrons represent one of the worst vices which taint the commercial life of Canada, and I consider it of the greatest importance that they should meet with nothing but reprobation or punishment in a law court.

Any action or plea grounded upon matters arising out of them should not be entertained, whether the immoral character of the cause of action be pleaded or not: *Scott* v. *Brown*, [1892] 2 Q.B. 724.

The curator to an abandonment in insolvency is an officer of the Superior Court, and should not be required to act as croupier to the patrons of a gaming house. My conclusion is that this appeal should be rejected and the parties sent out without costs to either side.

Gervais, J.

GERVAIS, J. (translated):—On December 9th, 1911, Mr. Justice Greenshields dismissed with costs the action for $13,738, which

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the appellants, in their quality of curators to the insolvent estate of Charles D. Sheldon, had instituted against the respondent to compel him to refund this amount which had been paid to him by the insolvent on October 10th, 1910, the day before he failed, on the ground that the respondent knew of Sheldon's insolvency.

The trial Judge held that it had not been proven that the respondent knew of the insolvency in question, and therefore dismissed the action, holding the payment to have been properly made.

Should this judgment be reversed?

The reasons for the dismissal of the action of the Court below might be questioned.

Sheldon had started carrying on business in Montreal in January or February, 1908. A few months before he failed a formidable press campaign had been organized and thundered against his methods and doings regarding the deposits made with him by his clients. The considerable profits which he was promising to his clients should have been to them a constant notice of his absolute insolvency.

Are we to decide this appeal on the reasons given by the Court below?

"Considering that the proof fails to establish a knowledge by the defendant or his wife of the insolvency of C. D. Sheldon at the time the payment was made;

"Considering in like manner the proof made by the plaintiff fails to establish any fraud on the part of the defendant or of his wife;

"Considering that in the absence of such proof the plaintiffs are not entitled to the restoration of the amount so paid by the insolvent to the defendant's wife on the 10th of October, 1910;

"Considering that the plaintiffs in their quality, in the absence of proof of fraud, cannot demand the restoration to them of that part of the amount paid to the defendant's wife on the 10th day of October, 1910, which represents alleged profits or dividends."

But might not, on the other hand, this judgment be upheld on another ground in virtue of the denial of the right of action to recover what has been paid under a gambling contract decreed by C.C. 1927?

This article enacts that there is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet, except in the case of fraud, or in the case of exercises for promoting skill in the use of arms, and of horse and foot races and other lawful games which require bodily activity and address.

Like the Code Napoleon at article 1967, our Code prohibits purely and simply all gambling contracts as did the Roman law, the old French law and subsequent legislation. As in all these cases, our law represses or attempts to repress the gambling instinct.

The jurisprudence accepted by the Privy Council in the case of *Forget* v. *Ostiguy*, [1895] A.C. 318, 64 L.J.P.C. 62 (Brodhurst, Stock Exchange, p. 188, and also p. 183), in holding that stock exchange speculations on margin were valid, has marked the extreme limit of the legal recognition of contracts of speculation.

Can the speculations brought into fashion by Sheldon be considered analogous to the speculations as defined and recognised in *Forget* v. *Ostiguy*, [1895] A.C. 318. Not for one moment.

Sheldon's speculations in which his clients participated, including the "auteurs" of the appellants—for these are but their judicial agents for the purposes of the insolvency—were fictitious and imaginary speculations in order to hide a well-known form of embezzlement which leads straight to the criminal Courts: the procuring of a constant increase of deposits so as to pay enormous profits on the first deposits by means of the last deposits.

The ultimate object of the author of these financial tactics is to obtain for himself, at a given moment, a goodly portion of these deposits, either through absconding or through a haze and cloud of imaginary transactions.

This is exactly what happened with Sheldon. Without going so far as supposing that the appellant's "auteurs" as well as the respondent himself were conscious participants in this colossal fraud which has been practised oft-times in the United States and in Europe, we may at least state that the appellant's "auteurs" and the respondent, all of them deposited moneys with Sheldon that he might carry on imaginary stock exchange speculations, illegal speculations in any event; in other words, that he might carry on, to their benefit, all kinds of financial and stock exchange speculations, that is to say, all kinds of forbidden games; that is to say, all kinds of gaming contracts giving rise to debts, which once paid, cannot be recovered according to 1927 C.C.

In order to be convinced that these transactions were nothing but illegal financial gaming contracts we have but to look over the evidence of record, and to refer to the appellants' factum itself (pp. 4 and 5).

"Some time in January or February, 1908, Sheldon began operations in Montreal in a small way, speculating with money entrusted to him by customers. At first, and for some time afterwards, he pretended to keep each customer's money separate, and he pretended to make large profits. These alleged profits were added to the capital and rolled up into large sums. The news spread, and his customers increased, until they reached to about five thousand, when the crash came. Hardly any of his customers withdrew the whole of their investment, as Sheldon was ever ready with the plausible argument that withdrawals reduced the profits. In March, 1910, Sheldon's business had grown to considerable proportions. In April, 1910, he received $57,581.14. Sheldon took advantage of the increase to make a change in his

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method. Thereafter it was blind pool, and each customer was to receive a proportionate share of the profits. Thereafter all moneys were pooled, and at the end of each month the percentage of profit was declared, and each customer's account was credited accordingly. That is to say, for the month of May, 1910, the profit declared was 25%. A customer with $1,000 to his credit at the end of May, was credited with $250 profit. If the customer had $2,000 to his credit the profit became $500. No person had any control over the speculations. Sheldon looked after that side of the business. He admitted no assistants. He was the "wizard." The only information vouchsafed by Sheldon was given in a daily report, which he handed to an employee named Burnside, who was supposed to be in his confidence. Burnside, from these daily reports, calculated the profits, and posted the results each month. These reports all disappeared with Sheldon, and if Burnside is to be believed, he was as much taken in as the outsiders. As a matter of proof, it appears that Sheldon, far from being a "wizard" of finance, was the dupe of his own imagination. The proof does not disclose a single profitable speculation. All his deals seemed to have turned out disastrously, and yet, he still imagines he could make good his losses, if given another chance. During the summer of 1910 Sheldon's supposed operations became notorious and were the subject matter of comment in the public press. And there is no doubt that he received and paid out large sums. From the 14th March, 1910, to the 10th October, 1910, he received $1,274,093.24, and paid out to customers, $1,092,884.94. Then the press began to attack his methods and to figure his stated results to their logical conclusion, which would, at 30% per month, increase $1,000,000 to $542,000,000 in two years. From the first to the tenth of October, 1910, the press attacks increased in fierceness, and during these ten days $325,467.42 was withdrawn from Sheldon. This produced a climax, Sheldon was broke and he fled, leaving over $2,000,000 of capital and bogus profits unpaid. The defendant was the last to obtain money from Sheldon."

Let the appellants, as they will, call Sheldon a fool, a wizard, a sorcerer, a bandit of finance, it remains true none the less that both the appellants' "auteurs" and the respondent sought his intervention in order to practise all sorts of financial gaming contracts. Some succeeded in winning, a great many lost. Should the losers throw stones at the winners of the pool? We do not think so. So much the worse for those who lose, so much the better for those who win the stakes.

The denial of the right to recover gaming debts is, in the mind of the legislators, an efficacious means of discouraging and uprooting the gambling instincts. And this Court is prepared to accept this doctrine, as should be done, and apply it to the present case. *Vide* Jeu et Pari au point de vue civil, pénal et réglementaire—Frèrejouan du Saint. *Vide* also Brodhurst on Stock Exchange.

The article of our Code, outside of the exceptions above noted, ignores absolutely gaming contracts and bets. Our law does not protect the loser any more than the winner.

And this is also the teaching of English jurisprudence as summed up in Halsbury's Laws of England, vol. 15, p. 278.

"Section 3, Right of the Parties to the Contract."

Sub-section 1, Inter se 555.—"All contracts by way of gaming or wagering are void, and no action can be brought by the winner of a wager either against the loser or the stakeholder, to recover what is alleged to be won. This applies both to wagers upon games and to those upon other events. All alike are void, and, though not illegal, are of a neutral character, giving rise neither to rights nor liabilities."

This Court, therefore, unanimously confirms the judgment appealed from, not in virtue of article 1034 C.C., but in virtue of article 1927 C.C., and dismisses the appeal with costs.

*Appeal dismissed.*

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## LAURIER v. NELSON et vir.



*Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. Montreal, October 31, 1912.*

1. WILLS (§ III G 4—139*a*)—CONSTRUCTION—RESTRAINTS UPON ALIENATION.

Where the terms of a will creating substitution prohibits the usufructuary legatees or the institutes from alienating, such prohibition will not be extended by inference to the substitutes themselves.

2. WILLS (§ III H—170)—ENJOYMENT OF BEQUEST—RIGHTS OF SUBSTITUTES TO DISPOSE OF PROPERTY—LAPSING.

Substitutes may, before the opening of the substitution to which they will be called, dispose of the property of which they will eventually become absolute owners, subject only to such alienation lapsing should the substitution itself lapse.

Statement

APPEAL by the defendant from the judgment rendered by the Superior Court at Montreal, Bruneau, J., on March 23, 1912, maintaining the respondent's action to set aside a deed of transfer of certain property deeded over as collateral security.

The appeal was allowed.

The clauses in the will which are in issue are as follows:—

Donne et lègue le dit testateur à Dame Josephte Charlotte de Fleurimont, son épouse, la jouissance et usufruit sa vie durant, de tous les biens qu'il délaissera, de quelques nature et quantités qu'ils soient sans en rien excepter; pour par elle en jouir à titre d'usufruit sa vie durante, sans en rendre aucun compte à qui que ce soit ni être tenu de faire inventaire et de donner aucune caution pas même la juratoire, mais à la charge de jouir de tout en bonne mère de famille, sans pouvoir vendre, engager, ni autrement aliéner les dits biens. Et pour après le décès de la dite Dame Josephte Charlotte de Fleurimont

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passer le dit usufruit de ses dits biens à ses sept enfants nés de son mariage avec sa dite épouse, à Henri Horace Nelson, écuyer, médecin, Sophie Nelson, épouse de Cornelius M. Brosnan, Charles Arthur Nelson, Alfred Nelson, écuyer, médecin, James Walter Nelson, Julie Nelson, épouse de Jonathan Wurtèle, écuyer, Charles Nelson, marchand, pour après leur décès retourner et appartenir ses dits biens à ses petits-fils et petites-filles, nés en légitime mariage de ses enfants, et ses dits petits-fils et petites-filles auront droit à la jouissance à laquelle avaient leur père et mère, jusqu'au décès de tous et chacun des enfants du dit testateur, et lors du décès du dernier des enfants du dit testateur, il sera formé une masse des biens de sa succession qui devra être alors divisée par part et portions égales entre tous ses petits-fils et petites filles nés en légitime mariage de ses dits enfants.

Pour par chacun des légataires en usufruit ci-dessus nommés, jouir à part et devis des dits biens, après que la jouissance donné à Dame Josephte Charlotte de Fleurimont, son épouse, sera éteinte, à titre de constitut et précaire leur vie durant, et être la propriété d'iceux réversible à leurs enfants nés et à naître en légitime mariage quand l'usufruit à eux constitué par ses présentes sera éteint et fini.

Veut et ordonne le dit testateur qu'aucun des légataires en usufruit ci-dessus mentionnés ne puisse vendre, ni transporter à qui que ce soit le droit de jouissance à lui ou à elle légué par ces présentes, et que la dite jouissance, ainsi que les fruits et revenus des biens dont elle sera composée ne puisse être saisie par aucun des créanciers des dits légataires en usufruit, et que la dite jouissance soit considérée comme étant à eux laissée comme provision alimentaire.

Argument

*Paul St. Germain*, for appellant, cited DeLorimier, Bibliothèque du Code Civil, vol. 7, art. 958, p. 565; C.C. (Que.) 1190.

*J. C. Lamothe*, K.C., for respondent, referred to *Muir* v. *Muir*, 18 L.C.J. 96, 5 Rev. L. 637, L.R. 5 P.C. 66, 19 Rev. L. 228, 43 L.J.P.C. 7, 30 L.T. 205, 21 Que. Q.B. 365, 527, 535; *Millot* v. *Millot*, 30 L.C.J. 328.

Gervais, J.

GERVAIS, J. (translated):—By judgment of March 23rd, 1912, the Superior Court for the district of Montreal, on the ground of the non-divisibility and untransferable character of the property in issue in the case, maintained the respondent's action to set aside a deed of transfer passed before G. Beaudoin, N.P., on March 19, 1901. This deed was made by the respondent in favour of the appellant, and transferred his share

à devenir due à la cédante en vertu du dit partage provisionnel (fait en justice, sur rapport d'experts, le 27 mars 1875), dans les revenus de la propriété située au coin des rues Saint-Laurent et Craig, de cette cité, et connue et designée sous le numéro 59 du cadastre officiel du quartier St. Louis, de la ville de Montréal,

according to the terms of the last will of the late Wolfred Nelson received before Belle, N.P., and his colleague on May 6th, 1861.

Under this will the property is charged with a substitution extending to three degrees; the first in favour of the testator's

widow, Dame Josephine Charlotte de Fleurimont; the second in favour of his seven children, and the third and last in favour of his grandchildren.

The terms of this will do not create a substitution extending to more than two degrees exclusive of the institute. This would be contrary to law (C.C. 1632), and contrary to the interpretation put thereon by the legatees themselves.

It is admitted by the parties that the transferor is one of the testator's grandchildren; that the prohibition to alienate is directed only against the usufructuary legatees; that the partition can take place between the substitutes only after the usufruct has become extinguished as regards all of the testator's children so that the living substitutes may benefit from any accretion that may occur.

Now it is a well-known rule of law that the existence of a substitution does not prevent the alienation of the property subject to such substitution, either by the institute, or by the substitute, under resolutory condition in the first case, under suspensive condition in the second case: C.C. 949, 956. Nor can the prohibition to alienate be extended from one person to another. In the present case it cannot affect the substitutes, inasmuch as it is stipulated only as regards the usufructuary legatees or the institutes.

In view of articles 689, 696, 928, 949, 950, 955, 956, 968, and 975 of the Civil Code, we are of opinion that there is error in the judgment of the Superior Court.

The appeal is unanimously allowed, and the action dismissed with costs.

*Appeal allowed.*

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## MERCER v. BRITISH COLUMBIA ELECTRIC R. CO. Ltd.



*British Columbia Supreme Court, Murphy, J. October* 14, 1912.

1. PLEADING (§ I N—113)—AMENDMENT OF STATEMENT OF CLAIM BEFORE TRIAL.

An amendment of the statement of claim consisting of the substitution of the word "train" for "motor-car" will be allowed if the defendant is not thereby prejudiced in going to trial on the date fixed.

2. PLEADING (§ I N—121)—AMENDMENT—LAPSE OF STATUTORY PERIOD AS TO NEW DEMAND—EMPLOYERS' LIABILITY ACT..

A plaintiff will not be allowed to amend his statement of claim in an action for personal injuries by inserting an alternative claim under the Employers' Liability Act after the statutory period, within which an action under that Act must be brought, has expired.

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[*Weldon* v. *Neal*, 19 Q.B.D. 394; *Morris* v. *Carnarvon County Council*, [1901] 1 K.B. 159, followed; *Hosking* v. *Le Roi*, 9 B.C.R. 551, 34 Can. S.C.R. 244, referred to.]

THIS is an application by the plaintiff to amend his statement of claim.

The application was allowed in part and dismissed in part.

*Douglas Armour*, for application.

*L. G. McPhillips*, K.C., contra.

Murphy, J.

MURPHY, J.:—The pleadings herein are closed and the action was set down for trial on September 3, 1912, and has been adjourned to November 8, 1912. Plaintiff now applies to amend his statement of claim by substituting the word "train" for "motor car." This amendment is granted. Apparently it is of small consequence but if defendant is in any way prejudiced as to going to trial on the day fixed the matter may be spoken to again.

The plaintiff, however, also wishes to amend his statement of claim by raising an alternative claim under the Employers' Liability Act. It is, I understand, common ground that the statutory period of six months within which such action must be brought has elapsed. Defendant, therefore, objects that to grant such amendment would be unfair and in fact illegal, citing *Weldon* v. *Neal*, 19 Q.B.D. 394. This case is followed in *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 159. I find that this very matter was before the Scotch Court of Session in Appeal and that such amendment was refused. (See Minton-Senhouse on Accidents to Workmen, 2nd ed., p. 52.) The only distinction was that there the trial had actually taken place, but the ground of the decision was the one raised here by defendant's counsel. It was held by the former full Court of this province in *Hosking* v. *Le Roi, No. 2, Ltd.*, 9 B.C.R. 557, that a litigant is bound by the manner in which he prosecuted his case and though this decision was reversed in the Supreme Court of Canada, *Hosking* v. *Le Roi, No. 2, Ltd.*, 34 Can. S.C.R. 244, such reversal was on other grounds. It is argued that the writ as endorsed would justify a statement of claim based on the Employers' Liability Act which is quite true but the answer is that the statement of claim does not raise such a case, or if it does (which is suggested) then there is no need for the amendment asked. This branch of the application is refused. The matter of costs may be spoken to again.

*Application allowed in part.*

## SCHOOL COMMISSIONERS OF WESTMOUNT v. GALARNEAU.

QUE.
S. C.
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Oct. 18.

*Quebec Superior Court, Tellier, DeLorimier, and Greenshields, JJ.*
*October* 18, 1912.

1. COURTS (§ II A I—150)—JURISDICTION OF SUPERIOR COURT, QUEBEC—HYPOTHECARY ACTION TO RECOVER SCHOOL TAXES.

A hypothecary action to secure recovery of school taxes or assessments, whatever be the amount thereof, is of the exclusive jurisdiction of the Superior Court.

2. COURTS (§ II A I—150)—JURISDICTION OF CIRCUIT COURT, QUEBEC—PERSONAL ACTION TO RECOVER SCHOOL TAXES.

A personal action for the recovery of school taxes or assessments is of the exclusive jurisdiction of the Circuit Court, whatever be the amount thereof.

Statement

THIS was an appeal by the plaintiffs from the judgment of the Superior Court, Charbonneau, J., rendered at Montreal on April 13, 1911, maintaining in part the declinatory exception of the defendant, who alleged that the action did not fall under the jurisdiction of the Superior Court.

The appeal was allowed.

*C. A. Duclos*, K.C., for appellants.
*Paul Rainville*, for respondent.

Montreal, October 18, 1912. The formal judgment of the Court was delivered by

Tellier, J.

TELLIER, J.:—Considering that, in the present case, the plaintiffs' action is brought to have the defendant condemned as third holder of the immoveable described in the declaration to abandon the said immoveable that the same may be sold by due process of law, unless the defendant prefer to pay the sum of $26.65 due to the plaintiffs for school taxes imposed on the said immoveable before its acquisition by the defendant herein, the whole with interest and costs;

Considering that if, on the one hand, the Circuit Court has original and final jurisdiction to the exclusion of the Superior Court to know of all demands for school taxes or assessments whatever be the amount thereof, it has on the other hand no jurisdiction, in the *chef-lieu* of the district of Montreal, to entertain an action in declaration of hypothec which is subject to appeal;

Considering that the present case is not a demand for school taxes or assessments; that it is, on the contrary, an action in declaration of hypothec to have the defendant condemned as third party to abandon an immoveable that the same may be sold by due process of law in satisfaction of taxes which were imposed on the said immoveable but which taxes are not due and payable by the defendant personally;

Considering that, under these circumstances, the defendant was not justified in opposing a declinatory exception to the

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hypothecary action of the plaintiffs herein; nor the Superior Court in maintaining partially the said declinatory exception and ordering that the present case be referred to the Circuit Court of the district of Montreal;

Considering that there is error in the judgment *a quo* doth quash and annul the same with costs against the defendant, and proceeding to render the judgment which should have been rendered by the Court below, doth dismiss the said declinatory exception with costs against the defendant.

THE COURT reviewed the jurisprudence on this question, stating that these principles had always obtained.

*School Commissioners of St. Raphael* v. *Tousignant*, 7 Que. S.C. 209. Andrews, J.:—

> A personal action in the Circuit Court (and not an hypothecary one in the Superior Court) is the proper mode to recover school taxes from those who owned and possessed the lands assessed when such taxes were imposed.

The Superior Court has no jurisdiction to hear suits for the recovery of school taxes: *School Commissioners of Hochelaga* v. *Hogan* (Torrance, J.), 20 L.C.J. 298; *Corporation of Township of Acton* v. *Felton* (Torrance, Rainville and Jetté, JJ.), 24 L.C.J. 113.

An action brought in the Circuit Court for the recovery of school taxes cannot be evoked to the Superior Court even though this action may affect future rights: *School Commissioners of St. Henri* v. *City of St. Henri* (Mathieu, J.), 14 Que. S.C. 144.

Under art. 1053 C.P. (54 of the new Code of Civil Procedure, Que.) the Superior Court has not jurisdiction to take cognizance of a hypothecary action of $60 due for school taxes.

The Circuit Court has exclusive jurisdiction in actions for the recovery of school taxes, whatever the amount: *School Commissioners of Sillery* v. *Gingras*, 6 Q.L.R. 355, Meredith, McCord, JJ. (Caron, J., dissenting).

*School Trustees of St. Henri* v. *Salamon*, 11 Que. S.C. 329, Tait and Jetté, JJ. (Archibald, J., dissenting). Art. 1053 C.P. (54 of present Code), which says that the Circuit Court has ultimate jurisdiction to the exclusion of the Superior Court in all suits for school taxes or school fees, does not apply where the action is a hypothecary one. In such case, under arts. 1054 and 1142 C.P., the Superior Court has jurisdiction. In this case Loranger, J., had maintained a declinatory exception on the ground that the hypothecary action should be brought before the Circuit Court. But the Court of Review, considering that the present action is a hypothecary action, and as such appealable, and that the Superior Court at Montreal has now jurisdiction in appealable actions, seeing arts. 1054 and 1142 C.C.P., doth dismiss the declinatory exception.

*Labbé es qual.* v. *Routhier*, 3 Que. Q.B. 263, decided that "une action hypothécaire doit, au chef-lieu d'un district, être intentée devant le Cour Supérieure, et non devant la Cour de Circuit."

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*Appeal allowed.*

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## MacKENZIE v. SCOTIA LUMBER CO.

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1912
Nov. 11.

*Nova Scotia Supreme Court, Graham, E.J. November* 11, 1912.

1. TROVER (§ I B—10)—CONVERSION—WHAT CONSTITUTES—DEALING WITH ANOTHER'S GOODS AS OWNER.

Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is a conversion, although such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled.

[*Hollins* v. *Fowler*, L.R. 7 H.L. 757, applied.]

Statement

TRIAL of an action of conversion and also of trespass in respect to the plaintiff's raft of lumber, about 14,000 feet.

Judgment was given for the plaintiff.

*J. A. Wall*, for plaintiff.

*R. R. Griffin*, for defendants.

Graham, E.J.

GRAHAM, E.J.:—The plaintiff had sent the raft down the St. Mary's river and the men tied it up to a raft of Hattie's lying in the river at the defendant's wharf at Sherbrook. It went adrift from there and got into a cove and some one tied it to a boom across that cove. The Maritime Lumber Co. was moving that boom necessarily and they took the raft back to the defendant's wharf and tied it to the Hattie raft.

Some rafts of deals, two I think, were being brought down the river to the defendant and the up river people fastened them to the plaintiff's raft. Hattie, in order to help Chaplin about his nets, moved the plaintiff's raft and the two rafts of defendant down a few yards to a boom, and moored them off shore. They were all tied together by rope. That night the three rafts went adrift and stranded on a ledge called Stopper Rock. Hattie next morning fastened them to a raft of logs of his there by putting a plank or planks from the plaintiff's raft to his raft and putting weight on it.

The defendants, learning that their rafts had also gone adrift sent two of their men from their mill, not quite a mile away, namely Joseph McDonald and James Nauffts for their rafts. The men went up in a boat and brought all three rafts to their mill. That was on the 14th of June, 1912.

They brought the plaintiff's raft attached to theirs in mistake as well as defendants' supposing it was the defendants'. I find that as a fact. Because Hattie does not identify them as the two men he says he saw there and told one of them that the third raft was the plaintiff's. They are positive about it and Cluney

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is corroborative as well as Michaud in respect to the fact that it was these two men who took the raft.

Going back a little in the narrative, the plaintiff had made an arrangement with Hattie to take out the plaintiff's lumber and dry it before shipping. He was also going to ship lumber of his own. Also the plaintiff had offered to sell his lumber to the defendants and the defendants' offer of $10 per M. for it was not accepted. Hattie wrote to the plaintiff that the defendants' men had taken his raft to their mill and the plaintiff on the 15th June, 1912, received that communication. On the 17th he telephoned to the defendants' mill and the defendants learned for the first time that it was the plaintiff's raft which had been brought in with theirs. I believe Alexander A. Gunn, the secretary, when he says he left the telephone and went to where the rafts were tied up to see about it and found it was the plaintiff's raft with theirs. He told the plaintiff they would hold it securely until he came down and the plaintiff said he would come down. Adam Gunn knew that it was a stray raft, that the company had not bought it. Two or three days afterwards the plaintiff came down to the mill and saw Adam Gunn, the vice-president. The plaintiff asked him for a boat to take the raft back. He told him he could have a boat but by the wind it would be impossible to get up the river. The plaintiff was convinced of this. He talked about coming down in the night for it. Mr. Gunn said he would send it up if he saw a chance, and the plaintiff said he would come down for it.

The plaintiff saw the president, Mr. Anderson. I think the plaintiff claimed that it should be sent back to the wharf from which it went adrift and Mr. Anderson said they had taken it from Stopper Rock. The plaintiff evidently reserved this point so that he might find out where Hattie wanted it. Because it was unreasonable that it should be sent back to Stopper Rock as that was advantageous to no one. The lumber could not be taken out there. After communicating with Hattie, apparently, the plaintiff wrote to Mr. Alexander Gunn as follows, on the 19th June:—

> Please have my raft taken back to where your men took it away from, so that Hatties can pull it out, or if I miss shipping with them your company will have to take the lumber at the same price.

The defendants within a reasonable time sent the raft up the river and moored it to a permanent boom within fifty yards of the place where Hattie's own lumber was, which happened to be within the defendant's boom, but with the boom between. This was the 21st. Hattie went home on the 22nd. On the 24th the plaintiff consulted a solicitor. By the 26th the plaintiff had given instructions to Hattie not to accept even if it was taken to Stopper Rock after the 26th. Not till July or August did Hattie take out his own lumber and he had not shipped it by the time

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of the trial. He took it out at two wharves on the Goldenville side. The plaintiff's raft could be moved as conveniently from where it was moved to these wharves on the Goldenville side as from Stopper Rock. Hattie says now he wanted to get the plaintiff's out first as it had been longer in the water. If Hattie had intended to take it out at Anderson's wharf on the other side Stopper Rock was nearer of course to it than the point at which the raft had been moored, but that depended upon Anderson's permitting him to take it out and dry it there. And if the plaintiff or Hattie expected the defendant to put the raft inside of their boom with Hattie's lumber Hattie had already been informed that he would have to raft his own outside of the boom or it would be in their way in moving their own lumber. I think that the raft was left at a reasonable place for Hattie to get it in order that he might pull it out.

In my opinion, the taking was in law a conversion. The matter is not entirely free from doubt.

In Clark & Lindsell on Torts, 4th ed., 233, it is said:—

> In most cases of conversion . . . there are two elements—first of all, a dealing with the goods in a manner inconsistent with the right of the person entitled to them; secondly, an intention, in so doing, to deny his right or to assert a dominion which is in fact inconsistent with such right. Ignorance of the right will not affect the quality of the act done, but it may have a material bearing on the question of intention. If a man, taking a flock of sheep from a market, by mistake, drives among them a sheep which does not belong to him, it is a trespass, but it is not, it is apprehended, a conversion, for there is no intention to assert dominion over that particular or to interfere with the right of the true owner.

In *Fowler* v. *Hollins*, L.R. 7 Q.B. 616, 630, which afterwards went to the House of Lords, Brett, J. (as he then was) in the Exchequer Chamber, refers with approval to an American case, *Nelson* v. *Whatmore*, 1 Rich. (S.C.) 318, 323:—

> This action was brought to recover the value of a slave named Frank, a man of doubtful colour, who was passing as free in a public conveyance and was taken as his servant by the defendant, and the case turned upon the inquiry whether the defendant knew Frank to be a slave. If he did not, the treatment of Frank as a servant and consequent facilities of escape afforded to him may, said Wardlaw, J., have been acts in themselves lawful, certainly did not indicate an assertion of property.

Brett, J., continues (L.R. 7 Q.B. 631):—

> In this case there were as must be seen when it was proved that in fact Frank was the plaintiff's slave, possession and use by the defendant, but, under the circumstances, that is, on account of the want of knowledge that the man was a slave, a possession and use without reference to any question of property in the plaintiff, the defendant or anyone else.

In *Frome* v. *Dennis*, 45 N.J.L.R. 515, the headnote is:—

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The defendant borrowed the plaintiff's plough from one who had possession of it, but had no right to lend or use it, and, after using it a few days, returned it to the possessor, the defendant all the time supposing that it belonged to the possessor. Held that the defendant was not guilty of conversion.

In this case *Hollins* v. *Fowler*, L.R. 7 H.L. 757, was discussed. But this decision of the House of Lords seems according to Pollock on Torts, 9th ed., 368, to establish this:—

> Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is, therefore, a conversion. . . . It makes no difference that such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled.

And I follow that. If that constitutes a conversion the subject of demand and return becomes immaterial. I think that if it was necessary to decide that question, I should hold that there was not a refusal to comply with the demand. In any event the defendant would be liable for trespass.

In this view the question of the return becomes immaterial: *Hiort* v. *London & N.W. R. Co.*, 4 Ex. D. 188, 195.

I assess the damages at $142 and in this view the defendants will have the raft. In respect to costs there has been very unreasonable conduct in respect to the acceptance of the return of the logs on the part of the plaintiff and also in the bringing of the action. Servants will continue in mistake to bring in the wrong article, articles misdelivered at the door, sheep which they cannot separate from their master's own, logs and lumber in the river which get mixed with their master's own, and even masters will take the wrong umbrella and the wrong overshoes and when a return is demanded not be able to remember the exact locality from which they were taken, or it will itself have moved away.

And men will continue to moor rafts at the wrong wharf when they should not be there and men like Hattie will without authority move a neighbour's rafts of lumber and fasten them where they will go adrift. But I rely on the good sense of people not to bring actions about such wrongs, even if I do not deprive the plaintiff of costs in this case.

The costs will follow the event.

*Judgment for plaintiff.*

## MOORE v. TOWN OF CORNWALL.

ONT.

D. C.
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Oct. 21.

*Ontario Divisional Court, Riddell, Kelly, and Lennox, JJ. October 21, 1912.*

1. MUNICIPAL CORPORATIONS (§ II G 3—237)—LIABILITY FOR OBSTRUCTIONS IN A DRAIN—BACKING-UP OF WATER.

The neglect of a town to clean out an open drain which it had defectively constructed adjacent to the land of the plaintiff in such a manner that the drain would fill up, will render the municipality liable for injuries sustained because of the water of the drain backing-up and flooding the plantiff's land, and also for causing a more continuous seepage of water into it, notwithstanding that some small portion of the injury was occasioned by the backing-up of the waters of a creek, and that the plaintiff might have diminished the damage by digging a watercourse, where, on the whole, the greater portion of the injury was due to the negligence of the town.

[*Smith* v. *Township of Eldon* (1907), 9 O.W.R. 963, specially referred to.]

Statement

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, dismissing the action, which was brought to recover $300 damages for injury to the plaintiff's land alleged to have been caused by the defendants bringing water thereon by means of a drain.

The appeal was allowed.

*C. H. Cline*, for the plaintiff.

*R. Smith*, K.C., for the defendants.

Riddell, J.

RIDDELL, J.:—The plaintiff is the owner and occupier of lot 7 south of Ninth street, in the town of Cornwall. On a lot a short distance west of his lot is built a furniture factory. Some years ago, the defendants constructed a tile or covered drain opposite this factory, on the south side of Ninth street, from the west nearly to the east line of lot 9—then dug an open ditch or drain east on the south side of Ninth street past the plaintiff's lot and on down to Fly Creek. The plaintiff complains that his lot has been overflowed by water from this drain from time to time.

In 1905, a committee of the town council reported as follows: "Your committee begs to report having investigated Mr. Wm. Moore's claim to have suffered damage through water flowing over his lot No. 7 south side 9th St. As the principal damage was alleged to have been caused by the flow of hot water from the Cornwall Furniture factory, your Committee asked Mr. Edwards and Mr. Moore to meet them and discuss the matter. As a result of this Mr. Moore consented to modify his claim of $40. Your committee now recommend that Mr. Moore be paid $20 for the hay destroyed in the years 1903 and 1904, the amount to be divided equally between this municipality and the Cornwall Furniture Company, the company to be relieved from any further liability."

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The plaintiff accepted this proposition: he was paid $10 by the municipality and $10 by the company.

But the trouble continued, and the plaintiff brings his action.

At the trial, it was, to my mind, proved beyond controversy, by witnesses to whom the learned Judge gave a high character, that the difficulty is, that the defendants constructed the open drain in such a way as that it will fill up, and they neglect to clean it out. It is true that the plaintiff might a little diminish the evil effects of the defendants' negligence himself by digging a watercourse; but he is not called upon to do that. And, while it is true that some little of the damage to his lot is done by the occasional backing-up of Fly Creek, it is clear that most is due to the negligence of the defendants.

The neglect of the defendants to clean out the open drain has caused the plaintiff's lot to be overflowed from time to time by the waters of the drain and also a more continuous seepage into the plaintiff's land.

For this an action lies: *Smith* v. *Township of Eldon* (1907), 9 O.W.R. 963, and cases cited.

I do not see that there is any real contradiction by the witnesses for the defence—and I would allow the appeal with costs here and below.

It is not easy to estimate the damages on the evidence before us; and it may be that the parties will desire to have the damages assessed by the County Court Judge. If, however, the plaintiff will be content with damages assessed at $200, with costs on the County Court scale here and below, I think he should have judgment accordingly. If not, the defendants will be allowed to have the damages assessed by the County Court Judge; and costs of the action, appeal, and reference will be disposed of by one of us on application after the report of the County Court Judge.

Kelly, J.

KELLY, J.:—On the evidence submitted to us I am unable to see how defendants can escape liability. The cause of the trouble of which plaintiff complains is found in the manner in which defendants constructed the ditch, or drain, and allowed its contents, at times, to overflow onto plaintiff's lands when they should have kept the ditch cleaned out. This is clearly shewn by the evidence of the witnesses called for the plaintiff, and their evidence is not contradicted to the extent necessary to remove the burden of liability from the defendants. In fact it is not difficult to find in the statements of defendants' witnesses corroboration of plaintiff's contention in material particulars.

As to the damages to which plaintiff is entitled, while I have some doubt, on the evidence, what these should be assessed at, I am inclined to the belief that the $200 suggested by my

brother Riddell would fairly compensate the plaintiff. I, therefore, agree with his conclusion as to the manner of disposing of the appeal.

LENNOX, J.:—I think the appeal is well founded. The plaintiff is entitled to relief, and, if there is not a new trial, he should be allowed a substantial sum for damages, with costs.

I have had the advantage of reading the judgment of my brother Riddell, and I agree with him as to the way in which the appeal should be disposed of.

The trial occupied two days. The learned Judge of the County Court makes no findings and gives no reasons for his judgment. Brevity is rare, and is usually commended as a distinguished virtue, but, if I may say so without offence, it may be overdone, and its lustre obscured when shrouded in some seven hundred folios of undigested evidence, as in this case.

This thought is not at all new. The neglect of County Court Judges to assign reasons has frequently been referred to in appeals, and in a very recent case Mr. Justice Riddell is reported as saying:—

> The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at; it seems necessary to repeat this once more.

I have read the evidence. It is established beyond question, almost beyond controversy, that before the construction of the sewer and drains complained of, the plaintiff was always able to grow good hay, and at times grain crops, upon the flooded land. It is also clear upon the evidence that immediately upon the construction of the drain, and ever since—except when the ditch has been temporarily kept clean—the plaintiff's land has been flooded and for the most part rendered unfit for crop of any kind. Independently, therefore, of the direct evidence of many witnesses, shewing the actual flow for the last nine years, the conclusion is practically irresistible that the drain complained of had the effect of flooding the land in question; and, whether by direct overflow or by percolation does not, to my mind, matter at all.

The plaintiff and his witnesses, all who appear to have impressed the learned County Judge by their knowledge of the situation and their honesty, swore specifically to seeing the water upon the plaintiff's lands from year to year since the drain was constructed, that the water came from this drain, and that the land in question, now useless, was fairly good agricultural land before the construction of the drain.

Several witnesses were called by the defence, but they left practically undisturbed the evidence put in by the plaintiff.

As to the evidence of the experts—an engineer called by each party—I think it may be left out without any sensible loss

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to anybody. The learned trial Judge said, concerning the expert witness called for the defence:—

> When you bank everything upon an engineer's evidence you are putting theory against fact, and it is wonderful how they conflict at times. You can work out things most beautifully theoretically, but when it comes to facts, things arise which conflict with theory.

Then as to the other witnesses for the defence, there are few of them who do not on some important point corroborate the plaintiff or his witnesses, or conflict with other evidence for the defence. For instance, the defendants' engineer swore that the bank at the lowest point was twelve inches high, and this would be sufficient to retain the water; but Henry Williams, who examined it on three different occasions, says

> there was not much water, it might have been two or three inches deep, but the top of the water, I should say, would be on an average of two or three inches below the top of the bank;

or, in other words, from four to five or six inches deep, all told.

A persistent effort was made to ridicule and discredit the evidence which traced the source of the water on the plaintiff's land by shewing that steam was frequently rising from it and that there were disagreeable odors at times; but this evidence was in the end clearly corroborated by John Green, an engineer in the furniture factory, who shewed that the water-closets of the factory emptied into this drain, that water of high temperature was discharged into it, that in the winter he found that this drain was not frozen, and that little frogs were wintering there.

Charles Lant, the defendants' general superintendent of works, testified that when the ditch was cleaned out in June, 1911, the depth was increased from two to four inches, and that after that, there was from three-quarters of an inch to an inch and a quarter of water in it, and that the water could then rise six or eight inches without overflowing. This gives a total depth, when cleaned out, of, say, eight inches, and of from four to six inches before cleaning out. Yet, until this evidence was given, there was no pretence by the defence that six or even eight inches would be a sufficient depth to prevent an overflow.

Referring to this, and to the fact that the engineer had sworn to a depth of one foot at the lowest point, his Honour the trial Judge said:—

> I see the most violent conflict in this case. A number of reputable citizens have sworn to a certain state of facts which your engineer has worked out theoretically as impossible. I am not going to find out the particular reasons why these things occur. The engineers have agreed that if the ditch was flooded it would overflow. It seems to be a ditch that would very easily overflow, and a number of reputable witnesses have sworn that it did overflow.

James H. Ramsay saw the ditch after it had been cleaned

out, and could detect from the banks how deep it had been. It had ranged at the lowest places from three or four inches to nine inches; and he says that in that condition "it was sufficient if no back water from the creek."

Speaking of drainage by Sidney street, he says:—

> It would be a better outlet for the water, but there would be a longer distance of pipe.

He is asked:—

> But you think, irrespective of distance, that it would be a better mode of drainage?

and he answers:—

> Yes, I do.

In reference to this the learned Judge said:—

> I cannot see why there should be any difficulty about running a pipe down Sidney street to Fly creek, and it looks reasonable that if there is anything like half a mile difference, that you would get better drainage down there and less liability of blocking.

There were some witnesses who were sure that the water did not come in directly from the drain in question; but their evidence was theoretical, and could not reasonably displace the testimony of reputable witnesses speaking from the actual knowledge. It is difficult, therefore, to surmise on what the judgment is based. If I may judge from the line of cross-examination of the plaintiff's witnesses, and enquiries made from time to time by the learned Judge, the error seems to be in assuming that if the lands in a state of nature were wet and comparatively useless—receiving large quantities of water from the lands to the north and west of them—it followed, *per se*, that there was no ground of complaint.

This, at all events, seems to me to be the only, even plausible, ground upon which the judgment could rest. But it is clear that the defendants cannot collect and concentrate even surface water and pour it upon the plaintiff's lands: Moss, J.A., in *Ostrom* v. *Sills*, 24 A.R. 526, at p. 539; *Tucker* v. *Newman*, 11 A. & E. 40; *Fay* v. *Prentice*, 14 L.J.C.P. 298; *Billows* v. *Sackett*, 15 Barb. 96. In a state of nature this surface water was certainly widely diffused. Increasing the quantity or the velocity, too, makes the defendants liable: *Malott* v. *Township of Mersea*, 9 O.R. 611.

Bringing hot and foul water, as the defendants did, from the factory, they must keep it there, at their peril; and this is the rule as to what Lord Cairns denominates "the non-natural use" of the defendants' premises, whether the thing brought there "be beast or water or filth or stenches": *Rylands* v. *Fletcher*, L.R. 3 H.L. 330. As said in *Tenant* v. *Goldwin*, Salk. 21, 361: "He whose dirt it is must keep it that it may not trespass."

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To send down polluted water is always actionable: *Hodgkinson* v. *Ennor*, 32 L.J.Q.B. 231, 8 L.T. 451; *Womersley* v. *Church*, 17 L.T.N.S. 190; *Reeve* v. *Toronto*, 21 U.C.R. 60; *Matthews* v. *City of Hamilton*, 6 O.L.R. 198. And the parties may be enjoined: *City of St. John* v. *Baker*, 3 N.B. Eq. 358; *Ballard* v. *Tomlinson*, 29 Ch.D. 155. The plaintiff is not called upon to shew actual damage: *Crossley* v. *Leighton*, L.R. 2 Ch. 478.

The plaintiff need not have any property in the water until it actually comes upon his land, and it matters not whether it comes visibly, as by overflow, or invisibly by seepage underground: *Ballard* v. *Tomlinson*, 29 Ch.D. 155, where the whole question of pollution is fully considered.

A laboured effort was made, and much time taken up, to shew that Fly creek chokes up and blocks this drain, and that the condition of Fly creek at high water accounted for the flooding of the plaintiff's land. Perhaps it did to some extent; but does it matter at all? The defendants argue that the creek overflows and the water spreads out west and reaches the plaintiff's land. Does it alter the situation if it does? A municipal corporation is not allowed to collect water and bring it down to the plaintiff's land without providing a proper outlet: *City of Indianapolis* v. *Lawyer*, 38 Ind. 248; *Weese* v. *Mason*, 39 Am. Rep. 135; *Burford* v. *Grand Rapids*, 53 Mich. 98.

Having brought this dangerous thing down to the plaintiff's land, the defendants were bound to keep it under control and carry it safely on to a proper outlet. It cannot affect the question of their liability whether they poured it directly from their drain or emptied it into an already full reservoir where of necessity, as the defendants claim, it would overflow upon the defendants' land.

This drain was in porous, mucky land; seepage was inevitable at all times, and would be rapid when the waters dammed up. The defendants knew of the damming—there was constant complaints—and even if they had only "reason to believe that the drain would choke," the municipality is liable: *Scroggie* v. *Guelph*, 36 U.C.R. 535. They must exercise reasonable care in the construction of their works: *Derinzy* v. *Ottawa*, 15 A.R. 712, at 716; *Reeve* v. *Toronto*, 21 U.C.R. 60.

The defendants were wrong *ad initio*. This drainage work was constructed at the instance of and mainly for the benefit of the factory company, and the defendants have no right to exercise their powers for the convenience of individuals: *Fontaine* v. *Corporation of Sherrington*, Q.R. 23 S.C. 532 (Ct. Rev.); and they are liable for the acts of the factory company: *Van Egmond* v. *Town of Seaforth*, 6 O.R. 599.

The plaintiff asks for an injunction, and I think the facts shew him to be entitled to have it; but damages from time to

time, if the defendants are so ill-advised as to persist, will be a fairly adequate remedy; and the plaintiff himself has not regarded the injury as irreparable, if we may judge from the long delay in bringing this action.

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*Appeal allowed.*

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## Re FARRELL.

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*Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.*

Nov. 19.

1. WILLS (§ III L—194—INTERPRETATION — REVOCATION CLAUSES.

Gifts by will given in plain and explicit language are not to be held revoked by uncertain language of a codicil, particularly where the same testamentary writings contained as to other bequests revocations clearly expressed.

[*Re Farrell*, 4 D.L.R. 760, affirmed on appeal.]

Statement

APPEAL by Edward Farrell from the judgment of Teetzel, J., *Re Farrell*, 4 D.L.R. 760, 3 O.W.N. 1909, on a motion by the trustees under the will of Dominick Farrell for an order construing said will. The provisions of the will and the questions arising in connection with it, are set forth in the report referred to.

The appeal was dismissed.

*D. L. McCarthy*, K.C., for the appellant.

*I. F. Hellmuth*, K.C., for the adult respondents.

*Glyn Osler*, for the trustees.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—It is impossible for me to tell, with any feeling of certainty, just what the testator intended should be done, under the provisions of the codicil to his will, in question upon this appeal; but, if I were bound to come to some conclusion upon the subject, my conclusion would accord with that reached by the Judge of first instance, Teetzel, J., and would be reached in much the same way as that in which his conclusion was reached; but I prefer to put another prop, and a firm one I think, to that conclusion, thus: the gifts contained in the will, given in plain and explicit language, are not to be revoked by the very uncertain language of the codicil, and the less so, because the testator used in the same testamentary writings very plain and appropriate words of revocation in other respects. That which is very uncertain ought not to override that which is very certain.

I would dismiss the appeal.

*Appeal dismissed.*

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## Re RYAN and McCALLUM.

*Ontario High Court, Middleton, J., in Chambers. October 31, 1912.*

1. BUILDINGS (§ I A—9*a*)—BUILDING PERMITS—MUNICIPAL REGULATIONS—ALTERATION IN PLANS—AMENDMENT IN EFFECT A FRESH APPLICATION.

Where a building permit is regularly granted to an applicant by the city architect of a municipal corporation for an apartment house and subsequently owing to certain building restrictions affecting his title, the owner is compelled to deviate substantially from the original plans, and applies to the city architect for his assent to the alterations, such later application being for a building substantially different from that originally proposed although in form an application for leave to alter the plans of the original building is in truth a fresh application for a building permit, and the architect may legally apply to such fresh application the civic by-laws and regulations in force at its date, including those passed in the interim since the date of the first permit.

[*City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424, distinguished.]

2. BUILDINGS (§ I A—9*a*)—BUILDING PERMITS — VESTED RIGHTS.

An applicant for a building permit within a municipal corporation who regularly obtains same from the city architect of the municipality and proceeds to erect and partially completes his building pursuant to the permit, acquires a vested right only with respect to the building plans submitted with and approved upon the granting of the permit which cannot be interfered with by subsequent municipal by-law unless the statute under which the by-law is based clearly discloses such intent.

[See Annotation on building permits generally, p. 422, *post*.]

Statement

MOTION by Bridget Ryan for a mandatory order directing the City Architect to issue a certificate approving of the alterations of certain plans for an apartment house in course of erection at the intersection of Palmerston boulevard and Harbord street, in the city of Toronto.

The motion was refused.

*W. G. Thurston*, K.C., for the applicant.

*C. M. Colquhoun*, for the respondent.

Middleton, J.

MIDDLETON, J.:—Prior to the passing of the by-law prohibiting the erection of apartment houses in residential districts, and prior to the passing of by-law 6023 hereinafter mentioned, the applicant had applied for a permit for the erection of an apartment house. The City Architect, being of opinion that the application ought to be considered by him with reference to the law, municipal and otherwise, as it was on the date of the application, granted a permit. After the building had progressed to some extent, an action was brought, by the owner of an adjoining parcel of land, to restrain the erection of the building, as being a violation of certain building restrictions existing in respect to lands upon Palmerston boulevard.

The action was tried before Mr. Justice Teetzel, who found that the building did infringe the restrictions; and an injunc-

tion was granted restraining its erection unless the structure was so modified as to make it conform to the restrictions.

The applicant then prepared modified and amended plans, supposed to comply with the building restrictions. These plans were submitted to the City Architect, with a request for approval. This approval has been declined; and the present motion is the result.

I am not now concerned with the question whether the plans conform to the restrictions, as that matter is not before me in any shape.

There is nothing, so far as I can see, in the Municipal Act, which authorises the passing of a by-law requiring the obtaining of a building permit. The Municipal Act, sec. 542, authorises the passing of a by-law "for regulating the erection of buildings." As I understand the law, this would enable the council to lay down certain requirements to which buildings to be erected must conform; but I cannot see that it authorises the granting of a permit.

Neither counsel desired to take this position. They asked me to deal with the motion upon the assumption of the validity of the building by-law.

This by-law, in the first place, provides, by sec. 2, that the erection of any building must not be commenced until the owner obtains a permit from the City Architect. Plans of the proposed building are to be deposited; and, when the Architect finds that they are in conformity with all civic requirements, he shall officially stamp the plans and issue the permit. Sub-section 4 provides, inter alia: "If during the progress of the work it is desired to deviate in any essential manner from the terms of the application, drawings or specific notice of such intention to alter or deviate shall be given in writing to the Inspector of Buildings, and his written assent must first be obtained before such alteration or deviation may be made." It is conceded that the alterations sought are alterations which require the assent of the Architect.

On the 15th April, 1912, a by-law was passed amending the building by-law by requiring an open space or yard area of not less than five hundred square feet for each and every suite of apartments or dwellings situated on any floor of the building. The proposed building does not comply with this requirement; and the Architect takes the position that he is justified in refusing to grant what is in effect a new permit based upon the application made on the 4th October, 1912, for permission to alter the plans.

It is also contended that, although the applicant had a vested right to erect the building, by reason of the granting of the original permit on the 20th April, 1912—notwithstanding the

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passing of by-law 6061 on the 13th May, 1912, prohibiting the erection of apartment houses in the district in question, as I held in *City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424 —yet, when the building for which the permit was granted cannot be erected by reason of the judgment referred to, the Architect is justified in treating this application as substantially a new application for a building permit for an apartment house, which he is, by reason of the by-law of May, 1912, justified in declining to issue.

In the third place, it is said that, while the by-law imposes a duty upon the Architect to issue a permit when the plans conform to the requirements of the building by-law, no duty is imposed to permit alterations; the written assent of the Architect, required by sub-sec. 4, being entirely discretionary with him.

I am of opinion that the first two grounds relied upon by the Architect are sufficient to dispose of this case. The application is for a building substantially different from that originally proposed; and, though in form an application for leave to alter the plans of the original building, it is in truth an application for a building permit; and the Architect rightly applies to that application the civic by-laws and regulations in force at its date. He was, therefore, justified in refusing to grant the permit sought under either by-law 6023 or by-law 6061.

If I am right in the view that I have indicated, that the provision of by-law 4861, requiring the issue of a permit, is ultra vires, the refusal of this application should not prejudice the applicant if she has the right to complete the building in any way which she pleases, so long as it is in conformity with the requirements of the building by-law at the time she commenced its erection on the 10th October last; this aspect of the case, by reason of the nature of the present application, not being open for consideration.

I can see no reason for withholding costs.

*Motion refused.*

Annotation

Municipal regulation of building permits.

**Annotation—Buildings (§ I A—7)—Municipal regulation of building permits.**

Vested rights cannot be interfered with by municipal by-laws as to building restrictions except where the language of the legislation conferring the power to enact them clearly discloses such intent: *City of Toronto* v. *Wheeler*, 4 D.L.R. 352.

If a municipality has power to pass a certain by-law, the question of its reasonableness is, generally speaking, one for the judgment and conscience of the council, and, except in extreme cases, the Court will not hold by-laws passed by municipal bodies within the limits of their authority to be invalid for unreasonableness: *Re Dinnick* v. *McCallum*, 5 D.L.

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**Annotation (*continued*)—Buildings (§ I A—7) — Municipal regulation of building permits.**

R. 843; *Kruse* v. *Johnson*, [1898] 2 Q.B.D. 91; *Stiles* v. *Galinski*, [1904] 1 K.B. 615; *Re Wood and City of Winnipeg*, 21 Man. L.R. 426.

The completion of a building on a certain street, which was begun under a permit from a city, for use as a garage for hire and gain, cannot be prevented by a municipal by-law prohibiting the "location" of structures of that character on such street; which was adopted subsequent to the granting of such permit: *City of Toronto* v. *Wheeler*, 4 D.L.R. 352; nor can a by-law of a municipal council be altered by a mere resolution passed by the council: *City of Victoria* v. *Meston*, 11 B.C.R. 341.

Without statutory authority a building by-law cannot declare that repairs to a building erected prior thereto, shall, if of the value of forty per cent. of the existing building, be considered a re-erection and subject to the building by-law applicable to the erection of new buildings: *The King* v. *Nunn*, 15 Man. L.R. 288.

Clause (*c*) of sec. 541*a* of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.) ch. 40, sec. 10, does not authorise the prohibition by by-law of an apartment or tenement house or garage which has already been "located": *City of Toronto* v. *Williams*, 5 D.L.R. 659; *City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424.

Where the land was purchased for the purpose of erecting an apartment house thereon, the obtaining from the municipality of a permit for the work and of a water service, and the performance of some work on the apartment house although not rapidly proceeded with, where there is nothing to indicate bad faith on the part of the owner, constitute a "location" of the apartment house within the meaning of section 541*a*, clause (*c*), of the Ontario Municipal Act 1903, as enacted by 2 Geo. V. (Ont.) ch. 40, sec. 10, consented to by the municipality: *City of Toronto* v. *Williams*, 5 D.L.R. 659.

The purpose of a city by-law under the Municipal Act, 1903 (Ont.) section 541*a* as amended by 4 Edw. VII. ch. 22, sec. 19, is to protect residential districts in cities from being disturbed by proximity of buildings in which general business is actively carried on and goods kept for sale, or wares are bought and sold or machinery or other commodities are manufactured, repaired, or otherwise generally dealt in: *Re Hobbs and City of Toronto*, 6 D.L.R. 8.

The prohibition of the "location" of garages on certain streets of a city by a by-law is distinguishable from the "erection and use" thereof, and a garage that was in the course of construction under a permit from the city at the time such by-law was adopted, was completely "located" by virtue of such permit so as not to be affected by the subsequent adoption thereof: *City of Toronto* v. *Wheeler*, 4 D.L.R. 352.

Section 541*a* of the Consolidated Municipal Act, 1903, as enacted by 4 Edw. VII. (Ont.) ch. 22, sec. 19, authorizing cities and towns to pass by-laws prohibiting the erection of buildings out to the street line in residential districts is intended to aid in improving and beautifying the districts embraced in the by-law: *Re Dinnick* v. *McCallum*, 5 D.L.R. 843, *per* Kelly, J.

The fact that a municipal by-law may have the effect of preventing a resident of the municipality from making the most profitable use of his

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**Annotation (*continued*)—Buildings (§ I A—7) — Municipal regulation of building permits.**

property is not any ground for holding the by-law invalid for unreasonableness, so long as it is within the powers of the municipality and honestly passed in the public interest: *Re Dinnick* v. *McCallum*, 5 D.L.R. 843.

A permit to erect a building for the mere purpose of storage or safe-keeping of furniture or machinery or implements does not fall within the class of buildings for "laundries, butcher-shops, stores, and manufactories" which may be prohibited by city by-law under the Municipal Act, 1903 (Ont.), sec. 541*a*, as amended in 1904 by 4 Edw. VII. ch. 22, sec. 19: *Re Hobbs and City of Toronto*, 6 D.L.R. 8; but the permit for a building as a place merely for the storage of commodities may be restricted so as to provide that machinery or other articles which may be stored therein shall not be repaired, refurnished, painted, traded in, bought or sold, as would ordinarily be done in a repair shop, salesroom, or factory: *Ibid.*

Sub-secs. (*a*) and (*b*) of sec. 607 of the Municipal Act R.S.M. 1892, ch. 100, as amended prior to 8th May, 1899, authorized the council of the city of Winnipeg to pass by-laws for regulating the erection in special parts of the city of wooden buildings or additions thereto or alterations thereof, and for prohibiting the erection of buildings, with the walls other than of brick, iron or stone, within defined areas, and for regulating the repairing or alteration of roofs or external walls of existing buildings within the said areas, so that they might be made more nearly fireproof, also for regulating the size and strength of walls, beams, joists, rafters and roofs, and their supports in all buildings to be erected or repaired or added to, and for compelling production of the plans of all buildings for inspection and for enforcing the observance of such regulations it was held that the council had no power under that statute to pass a by-law requiring the submission of plans and specifications of proposed repairs to a building inspector and the obtaining of his certificate before the commencement of repairs to any building; and the conviction of the defendant for breach of such by-law was quashed: *The King* v. *Nunn*, 15 Man. L.R. 288.

As to by-laws prohibiting certain classes of buildings it was decided that under the charter of the city of St. Henri (Que.), the council may by a by-law prohibit the construction of buildings of less than two storeys which are not cottages, and a conviction under such by-law will not be quashed in *certiorari*: *Saint-Pierre* v. *City of St. Henri*, 5 Que. P.R. 362.

A municipal by-law prohibiting the erection of any building within certain limits other than of stone, brick, iron, or other material of an incombustible nature is *ultra vires* in prohibiting buildings of combustible materials other than wood: *Attorney-General* v. *Campbell*, 19 Gr. 299.

A municipal by-law providing that no roof of any building already erected within certain fire limits shall be relaid or recovered except with one of certain materials therein enumerated, cannot affect a house which had been standing for many years before the by-law was passed, and is *ultra vires*, in so far as it refers to existing buildings or ordinary repairs or changes thereof, not being additions thereto: *Regina* v. *Howard*, 4 O.R. 377.

A by-law of a municipal corporation by which "it is forbidden to erect and put in operation, within the limits of this municipality, any factory, saw mill, or other mechanism run by steam without having previously con-

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**Annotation (*continued*)—Buildings (§ I A—7)—Municipal regulation of building permits.**

ferred with this municipal corporation and obtained permission therefor, the said council to decide upon the places in the municipality for such business" is illegal and void for not conforming to the provisions of arts. 616 and 648 M.C.; and a by-law of this kind, to be valid should itself contain the enumeration of all the conditions on which the council will permit such construction and the designation of the places in the municipality where it can be made: *Village of Ste. Agathe-des-Monts* v. *Reid*, Q.R. 26 S.C. 379 (Ct. Rev.), reversing 24 S.C. 461.

The city of Victoria corporation, under the Municipal Act 1881, passed a by-law which defined fire limits, within which limits no wooden building was to be altered without the permission of the inspector and a majority of the fire wardens. The defendant was convicted of a breach of this by-law for having altered his building (a wooden building existing in 1881), without permission:—Held, that the corporation under the Municipal Act, 1881, ch. 16, sec. 104, had no power to regulate mere alterations in existing houses, and therefore the by-law was *ultra vires*: *Regina* v. *On Hing*, 1 B.C.R., pt. 2, 148.

A municipal by-law prohibiting the erection of steam engines within the village limits without the leave of the council is *ultra vires* in that it applies to all cases whether there was danger in causing or promoting fires or not: *Regina* v. *Webster*, 16 O.R. 187.

It has been held that a municipal by-law prohibiting the erection of buildings upon the lots fronting or abutting on a residential street within a certain distance from the street line is within the authority conferred by sec. 541*a* of the Consolidated Municipal Act (Ont.), 1903, as enacted by 4 Edw. VII. (Ont.) ch. 22, sec. 19: *Re Dinnick* v. *McCallum*, 5 D.L.R. 843.

In *Frankel* v. *City of Winnipeg*, a motion for a mandamus to compel the issue of a building permit was refused on 29th November, 1912, by Mr. Justice Galt of the Manitoba King's Bench. See report of the case to follow in this volume.

The recourse of the party who objects to a municipal by-law in Quebec as being unjust and discriminating is by appeal to the county council. An application to the civil Courts to have it quashed is only open in case of illegality or *ultra vires*: *Parish of St. Pierre de Broughton* v. *Marcoux*, Q.R. 17 K.B. 172.

In the absence of fraud, or of an undue invasion of private rights, or of the wilful infliction of a palpable and manifest wrong, the Courts of Quebec will not use its reforming and revisory power to interfere with municipal corporations in matters left by law to their discretion: *Mercier* v. *County of Bellechasse*, 31 Que. S.C. 247.

Ordinances to restrict the erection and alteration of buildings within the limits of a municipality are in derogation of the common law, and must be construed strictly, and they cannot be enlarged by implication; hence a builder has, as against such ordinances, the right to erect, alter and repair his building in so far as not strictly inhibited by the ordinances in that behalf: *Inhabitants of Houlton* v. *Frank W. Titcomb*, 10 L.R.A. (N.S.) 580, 583.

The "erection or placing" of buildings includes the removal of a building to a site within the prohibited area but does not affect "ordinary repairs"

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**Annotation** (*continued*)—**Buildings** (§ I A—7) — **Municipal regulation of building permits.**

not amounting to an erection or addition. Biggar's Municipal Manual, 1900, p. 609; *Reg.* v. *Howard*, 4 O.R. 380; *Williams* v. *Wallasley Local Board* (1886), 16 Q.B.D. 718, referred to.

In an English case where a builder had built a house with a conservatory on the first floor in accordance with plans duly passed by municipal authority, and where subsequently he pulled down the conservatory and in its place built a bedroom a portion of one of the external walls of the house being raised for that purpose but the bedroom was of the same height as and occupied no greater space than the conservatory for which it was substituted; the mere fact that the bedroom occupied no greater space than the erection for which it was substituted did not necessarily prevent its being an addition to an existing building within the meaning of sec. 111 of the Hastings Improvement Act 1885, 48 and 49 Vict. ch. 196: *Meadows* v. *Taylor* (1890), 24 Q.B.D. 717.

Building permits are in some jurisdictions made subject to revocation should the inspector of buildings or any of his inspectors, ascertain that the work being carried on under such permit is being done in a manner that does not reasonably comply in every respect with the plans and specifications submitted for approval when such permit was granted. In such case a further proviso is sometimes included to the effect that the revocation of a permit shall be in writing and shall be served on the owner or his agent, or in their absence on any one doing any of the work, and that after any such revocation of permit, all parties doing any work in or about said structure or premises shall render themselves liable to the penalties of the by-law, and that persons attempting to proceed with any of the works hereinbefore referred to without a permit will render themselves liable to be similarly dealt with: Toronto by-law No. 4861, passed March 11, 1907.

A municipal corporation has no inherent power to interfere arbitrarily with the common-law rights of real estate proprietors in the use and improvement of their property. But under the police power some measure of authority for building regulations is found to reside in nearly every municipality. The power of regulation extends to erection, alteration, and repair: *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310; see *Greene* v. *Damrell*, 175 Mass. 394, 56 N.E. 707; compare *Newton* v. *Belger*, 143 Mass. 598, 10 N.E. 464; *New York Fire Dept.* v. *Wendell*, 13 Daly 427, 430; *People* v. *Crain*, 47 Misc. 281, 95 N.Y. Suppl. 906 [affirmed in 95 N.Y. Suppl. 1164], construing the Tenement House Act of 1901. And whenever the owner's right to pursue his own plans in building, altering, or repairing is challenged, it is determined by two tests (1) has the municipality power to forbid the contemplated erection, alteration, or repair? (2) has it lawfully exercised the power by enacting a prohibitory ordinance? An affirmative answer to both questions is essential to sustain the municipal authority: 28 Cyc. 737.

An ordinance which provides that no person shall erect, add to, or generally change any building, without first obtaining the permission of the board of aldermen, is void in prohibiting the erection of buildings, irrespective of the materials to be used: *State* v. *Tenant*, 110 N.C. 609, 14 S.E. 387, 28 Am. St. Rep. 715, 15 L.R.A. 423; *State* v. *Starkey*, 49 Minn. 503,

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Annotation

Municipal regulation of building permits.

**Annotation (*continued*)—Buildings (§ I A—7) — Municipal regulation of building permits.**

52 N.W. 24; *Hubbard* v. *Paterson*, 45 N.J.L. 310, 46 Am. Rep. 772; *Smith* v. *Milwaukee Builders' etc.*, Exch. 91, Wis. 360, 64 N.W. 1041, 51 Am. St. Rep. 912, 30 L.R.A. 504.

It is competent for a municipal corporation in the exercise of the police function to reasonably regulate the use of property within the city limits. Thus, it has been held proper to regulate the construction, erection, or maintenance of awnings, billboards, or signs near the streets, fences, fire-escapes, floor openings, and railways, and leaders for conducting water from roofs of buildings. An ordinance declaring that no sign or billboard shall be erected on any boulevard or pleasure drive, or in any street where three-fourths of the buildings are devoted to residence purposes, without written consent of at least three-fourths of the residents and property owners on both sides of the street in the block where it is desired to erect such board is an arbitrary and unreasonable exercise of legislative power: 28 Cyc. 738; *Chicago* v. *Gunning System*, 214 Ill. 628, 73 N.E. 1035, 70 L.R.A. 230, affirming 114 Ill. App. 377. So an ordinance requiring sign or billboards to be constructed not less than ten feet from the street is a regulation not necessary for public safety, and cannot be justified as an exercise of the public power: *Passaic* v. *Paterson Bill Posting, etc., Co.*, 72 N.J.L. 285, 62 Atl. 267, Ill. Am. St. Rep. 676. See also *Crawford* v. *Topeka*, 51 Kan. 756, 33 Pac. 476, 37 Am. St. Rep. 323, 20 L.R.A. 692.

It is the duty of the builder to comply with any building regulations, and should he fail so to do he may be fined. Where the obtaining of a permit is necessary and the contract is silent upon the subject it seems the duty of the builder to obtain it, unless under the statute or regulation it is the duty of the owner so to do. It is the duty of the owner to obtain a permit to build under N.Y. Consolidated Act, sec. 503, and, where a contract requires the contractor to proceed with the work promptly and diligently, an implied obligation is imposed on the owner to procure the permit to enable the contractor to proceed with the work, and for a breach of such obligation the contractor may recover such damages as have been occasioned: *Weeks* v. *Trinity Church*, 56 N.Y. App. Div. 195, 67 N.Y. Suppl. 670.

Where a builder seeks to recover from the owner damages caused by his failure to obtain a building permit, which resulted in an enforced suspension of the work, the builder may shew that the specifications were not filed until after the contract was made, and were so defective that the building superintendent refused a permit, and that the owner's attention was called to the defect too late to obtain a permit. Such evidence is sufficient to entitle the builder to have the question whether the owner did not fail in his obligation to procure a permit submitted to the jury: *Weeks* v. *Trinity Church*, 56 N.Y. App. Div. 195, 67 N.Y. Suppl. 670.

It is not the builder's duty to obtain a permit that can be issued only upon the owner's personal application, unless the contract goes further than to provide that a permit must be obtained before commencing work: *Leverone* v. *Arancio*, 179 Mass. 439, 61 N.E. 45; 6 Cyc. 53.

Where the contract requires a builder to obtain a permit from the building department of a city he must file plans reasonably free from ob-

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Municipal regulation of building permits.

**Annotation (*continued*)—Buildings (§ I A—7) — Municipal regulation of building permits.**

jections and acceptable to the department, as their filing is a pre-requisite to a permit: *Strom* v. *Dongan*, 31 Misc. (N.Y.) 754, 64 N.Y. Suppl. 57, holding that unless this was done a builder was not entitled to payment of a first instalment of the contract price. See also *Hawke* v. *Brown*, 28 N.Y. App. Div. 37, 50 N.Y. Suppl. 1032, in which case it was held that the filing of a plan shewing the size and dimensions of contemplated improvements, which was afterward amended and approved by the bureau of buildings, was sufficient.

A mandamus to compel a building inspector to grant a permit will be refused where the inspector considers that the plan submitted fails to comply with statutory requirements as to public health: *Rafferty* v. *Haddock*, 6 Pa. Dist. 667; 6 Cyc. 53.

An ordinance enacted by the mayor and council of the city of Omaha, regulating the construction of buildings in that city, which provides that it shall be unlawful to erect a gas tank or holder therein, without the written consent of all the owners of all the property within a radius of 1,000 feet from the site of such structure, is, as to such proviso, void; the decision being based on the following reasons: (*a*) because such an ordinance is, or in practical operation may readily become prohibitory, on account of the difficulty or impossibility of procuring the unanimous consent of all the owners of property in any locality of the city; (*b*) because such an ordinance assumes to confer upon individual property owners within the prescribed radii absolute and arbitrary powers, whose exercise is dependent solely upon caprice, and which have no necessary connection with the public safety, health, or morals, and are of such a nature that the governing body itself could not safely or lawfully be intrusted with them: *State of Nebraska ex rel. Omaha Gas Co.* v. *Charles H. Withnell*, 8 L.R.A. (N.S.) 978.

Where a general by-law prohibited the erection of buildings in a residential district within fifteen feet of the street line, an amending by-law for the benefit of one owner was held valid whereby he was permitted to build within six feet of the street line in consideration of his conveying the front six feet and a triangle at the corner to the municipality for street widening, it appearing that the bargain was one of public advantage: *Wood* v. *City of Winnipeg* (1911), 21 Man. L.R. 426.

A municipal by-law for certain restrictions against carrying on certain manufactures and trades as likely to cause or promote fires, which provided that the restriction should not exist if the owners of adjacent property within a certain radius should consent to the maintenance of factories and trades and their consent should be approved by a chairman of the Board of Works is *ultra vires*, in that it makes such persons the judges of the right involved, thereby permitting favouritism and delegating in part the exercise of the judgment and discretion which should be exercised by the enacting body of the municipality alone: *Regina* v. *Webster*, 16 O.R. 187; *Re Kiely*, 13 O.R. 457; *Re Nash and McCraken*, 33 U.C.Q.B. 181, applied.

A building is on a residential street and the residential street is in front of the building, within the meaning of sec. 541*a* of the Consolidated Municipal Act, 1903, as enacted by the Municipal Amendment Act, 4 Edw.

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Annotation

Municipal regulation of building permits.

**Annotation (*continued*)—Buildings (§ I A—7)—Municipal regulation of building permits.**

VII. (Ont.) ch. 22, sec. 19, when it is on a corner and one side faces upon the residential street though the front of it faces on another street, in its effect disapproving the principle laid down by Falconbridge, C.J., in *Schultz* v. *City of Toronto*, in so far as the decision in that case interfered with the application to corner lots of municipal by-laws inhibiting building up to street lines in residential districts: *Re Dinnick* v. *McCallum*, 5 D.L.R. 843. See *City of Toronto* v. *Schultz*, *Schultz* v. *City of Toronto*, in footnote, 5 D.L.R. 846.

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## WEBSTER v. LEARD.

P.E.I.

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*Prince Edward Island Supreme Court, Sullivan, C.J., Fitzgerald and Haszard, JJ. May 7, 1912.*

1. MILITIA (§ I—5)—CIVILIAN RIFLE ASSOCIATION—PROTECTION OF MILITIA ACT.

The members of a civilian rifle association, purporting to be constituted in pursuance of powers conferred by the Militia Act, R.S.C. 1906, ch. 41, and of regulations made under secs. 63 and 64 of that Act, having its range selected, approved and inspected by military officers and financially aided by the federal government and having its ammunition supplied by the military authorities, are, while engaged in a shooting competition, approved by the district officer and under the command of a deputy captain, acting in pursuance of the Militia Act, and are entitled to the benefit of its provisions, in an action to recover for alleged injuries due to their negligence while engaged in such competition.

[*Edward* v. *St. Mary's, Islington*, 22 Q.B.D. 338, referred to.]

2. VENUE (§ I—7)—ACTION AGAINST CIVILIAN RIFLE ASSOCIATION.

An action for injuries alleged to have been received by reason of the negligence of a civilian rifle association, acting in pursuance of the Militia Act must be laid and tried in the judicial district where the act complained of was committed.

3. LIMITATION OF ACTIONS (§ II F—60)—NEGLIGENCE OF CIVILIAN RIFLE ASSOCIATION.

The members of a civilian rifle association in an action for injuries, alleged to have been received by reason of their negligence, while acting in pursuance of the Militia Act, are entitled to the benefit of the provision of that Act, requiring an action to be commenced within six months from the time the act complained of was committed.

4. ACTION (§ II B 3—17)—NOTICE OF—NEGLIGENCE OF CIVILIAN RIFLE ASSOCIATION.

The provision of the Militia Act, requiring at least one month's notice in writing to be served upon defendant or left at his usual place of abode before action can be brought against any officer or person acting in pursuance of that statute, applies where an action is brought against members of a civilian rifle association for alleged negligence while engaged in an act done in pursuance of the Militia Act, R.S.C. 1906, ch. 41.

Statement

APPEAL by the defendants on a rule *nisi* to set aside the verdict rendered at the trial in favour of the plaintiff for $950, in an action brought to recover damages, from the members of a

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civilian rifle association, it being claimed that the plaintiff was struck by a stray bullet and seriously injured.

The rule was made absolute and nonsuit entered.

*N. McQuarrie*, K.C., and *J. J. Johnston*, K.C., for plaintiff.

*J. H. Bell*, K.C., *D. C. McLeod*, K.C., and *A. C. Saunders*, for defendants.

Sullivan, C.J.

SULLIVAN, C.J.:—This case was tried at Georgetown last July term, before Haszard, J., and a jury. It was an action for damages for bodily injury sustained by the plaintiff under the following circumstances. The defendants were members of a civilian rifle association, and on one of their days for practice, viz., 31st August, 1910, were engaged at their range near Summerside harbour in a shooting competition for a prize then offered on behalf of the Government of Canada. The plaintiff was sailing with some friends in a motor boat in Summerside harbour, when she was struck by a bullet, fired as she alleged, from the defendants' rifle range. The bullet entered her back, and passed through her body, causing her serious injury.

At the trial the defendants' counsel moved for a nonsuit on the grounds that the defendants being members of a civilian rifle association constituted under the Militia Act, and the deed complained of having been committed in Prince county, the cause should have been tried in that county; that the action should have been commenced within six months after the cause of action arose; and that the defendants were entitled to notice of action. None of these requirements of the Militia Act had been complied with on the part of the plaintiff.

The motion for a nonsuit did not succeed, and the jury found a verdict for the plaintiff for $950. The case comes before this Court on a rule *nisi*, obtained on behalf of the defendants, to set aside the verdict. The grounds in the rule comprise, amongst others, those already mentioned, as argued by the defendants' counsel, in moving the trial Court for a nonsuit. The same questions are also raised by demurrers submitted in the course of the pleadings.

The provision, already referred to, in the Militia Act is as follows:—

> Every action against any officer or person, for anything purporting to be done in pursuance of this Act or of any regulation, shall be laid and tried in the judicial district where the act complained of was done, and shall be commenced within six months from the time of the act committed. . . .
>
> No action shall be brought against any officer or person for anything purporting to be done in pursuance of this Act, or of any regulation, until at least one month after notice in writing of such action has been served upon him, or left at his usual place of abode.

It appears by the evidence that the association in question,

which has an enrolment of about one hundred members, and is designated the "Summerside Civilian Rifle Association," purported to be constituted in pursuance of powers conferred by the Militia Act, R.S.C. 1906, ch. 41, and of regulations made under secs. 63 and 64 of that Act; that the site for the range was selected and approved by the District Officer commanding the military district in which it was situated; that it was afterwards inspected and approved by a military engineer, sent specially to examine it, after which the range and the requisite appurtenances were constructed; that subsequently, and after all the structures which were deemed requisite had been completed, the District Officer commanding again inspected the whole work, took measurements of the requisite distances, the ranges being established at 200, 500 and 600 yards, and finally approved and passed the entire range as ready for use. The association then obtained a grant of money from the Federal Government in aid of the construction of the range, and the military authorities supplied them with the ammunition, and other requisites in order to enable them to commence target range practice. Notices of their days for practice and for the prize competition were duly published. Regarding the prize competition in which they were shooting when the accident in question occurred, the following correspondence passed between the secretary of the association and the District Officer commanding in their military district. On 2nd August, 1910, the secretary wrote to the District Officer as follows:—

Dominion of Canada Prize.

We propose shooting for above prize on Wednesday, August 3rd, 17th, 24th and 31st, which I trust will meet with your approval.

On 4th August, 1910, the District Officer commanding replied as follows:—

I beg to acknowledge the receipt of your letter of the 2nd instant, and to inform you that I approve of your shooting for the Dominion Salver on the dates mentioned therein.

When the range was finally inspected and approved by the District Officer commanding there was no artificial stop-butt on its harbour front, and it was so situated on the day of the prize shooting when the accident in question occurred. On that day the members of the association including the defendants, whilst engaged in the prize competition already mentioned, were under the command of a "Deputy Captain," appointed in pursuance of regulations made under the Militia Act. The question is whether, by the terms of the Militia Act, and upon the facts which I have stated, the defendants were entitled as claimed, in respect of the place of trial, the time within which the action should have been commenced, and the notice of action. By the terms of the Act they are entitled to have the action "laid

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and tried in the judicial district where the act complained of was done," and commenced within six months from the time the act was committed, and to notice of action, if the cause of action was for "anything purporting to be done in pursuance of the Act or of any regulation."

It becomes necessary, therefore, to construe the words of the statute, and to consider whether the injury to the plaintiff was the consequence of something which is brought within those words. According to the decisions upon similar words, a thing is to be considered as done in pursuance of the Act, when the person who does it is acting honestly and *bonâ fide*, either under the powers which the Act gives, or in discharge of the duties it imposes. Though he may erroneously exceed the powers the Act gives, or inadequately discharge the duties, yet if he acts *bonâ fide*, in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the Act, and is to be entitled to the protection conferred upon persons whilst so acting. This is established by *Gaby* v. *Wilts Canal Company*, 3 M. & S. 580; *Theobald* v. *Crichmore*, 1 B. & Ald. 227; *Cook* v. *Leonard*, 6 B. & C. 351; *Smith* v. *Shaw*, 10 B. & C. 277; *Hughes* v. *Buckland*, 15 M. & W. 346; *Selmes* v. *Judge*, L.R. 6 Q.B. 724; *Chamberlain* v. *King*, L.R. 6 C.P. 474; *Lea* v. *Facey*, 19 Q.B.D. 352.

Where a statute containing provisions similar to those in question, imposes a duty, the omission to do something that ought to be done in order completely to perform the duty, or the continuing to leave any such duty unperformed, amounts to an act done or purporting to be done in pursuance of the statute: *Wilson* v. *Halifax Corporation*, L.R. 3 Exch. 114; *Jolliffe* v. *Wallasey Local Board*, L.R. 9 C.P. 62; *Edwards* v. *St. Mary's, Islington, Vestry*, 22 Q.B.D. 338.

These positions were not controverted by the plaintiffs' counsel upon the argument; but it was contended that the case was altogether outside the provisions of the Militia Act and the regulations, inasmuch as there was no stop-butt erected in front of the range between the target and the harbour; that the defendants had no colour or authority under the Act to conduct the shooting in which they engaged on the day in question, and had no reasonable ground for supposing that they were acting in pursuance of the statute and the regulations.

I am unable to accede to that view of the case. The rifle association in the selection of their site and in the construction and equipment of their range acted under the supervision, direction and control of the District Officer commanding in their military district, who in turn acted or purported to act in pursuance of the statute; and the defendants on the occasion in question had, in the circumstances, abundant reason for believ-

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ing that they, in the course of their practice and competition, as well as in the providing of their range, were acting in pursuance of the statute and regulations.

The cause of the accident is no doubt attributable to some defect in, or some deficiency appurtenant to, the range, possibly to the absence of a sufficient stop-butt. But the range was constructed under the authority, or supposed authority, of the Militia Act. Where persons act strictly in pursuance of a statute they do not require any protection; the object of provisions such as are in the Militia Act is to give protection in cases where the parties believe that they were acting under the authority of the statute, although it turns out, on strict examination, that their act cannot be supported on that ground. There was some argument at the bar as to whether the defendants, or the Government of Canada, were liable for damages in this case; but that is not the question that is involved.

The decision herein is based upon the non-compliance on the part of the plaintiff with the conditions required by the statute to be observed anterior to the commencement of the action, and it must not be understood to mean that an act such as is the subject of this suit can be committed with impunity, or that the defendants would not be held liable if the provisions of the statute had been observed on the part of the plaintiff. In that case the defendants would have had the privilege of tendering amends to the plaintiff before the commencement of the suit against them. The injury to the plaintiff was the consequence of an act clearly within the words of the statute, and the defendants are entitled to the protection which the statute affords.

The rule for entering a nonsuit must be made absolute with costs.

FITZGERALD and HASZARD, JJ., concurred.

Fitzgerald, J.
Haszard, J.

*Nonsuit ordered.*

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Nov. 18.

## BEER v. LEA.

*Ontario High Court. Trial before Middleton, J. November 18, 1912.*

1. CONTRACTS (§ I D 4—63)—WITHDRAWAL OF OFFER—OPTION TO PURCHASE.

A statement by the giver of an option to purchase, which is not under seal, and for which there is no consideration, that the option has expired and that he will have nothing further to do with the holder of it, constitutes a sufficient withdrawal of the offer contained in the option.

2. VENDOR AND PURCHASER (§ I E—28)—OPTION—FAILURE TO PAY PURCHASE PRICE.

An option to purchase for a certain sum, which provides for payment of part of such sum in cash, can be effectually accepted only by making the cash payment, and, until such payment, no contractual relationship arises.

[*Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed; see also *Miller* v. *Allen*, 7 D.L.R. 438, *post*.]

3. CONTRACTS (§ I D 4—61)—NECESSITY OF ACCEPTANCE OF OFFER.

One who has made an offer cannot dispense with an acceptance thereof, so as to create a contractual relationship without such acceptance.

4. CONTRACTS (§ V 3—409)—FAILURE TO ACCEPT OFFER—ACCEPTANCE EVADED BY OFFERING PARTY.

Where one who has given an option to purchase land, arranges to meet the holder of the option at a certain place and time, for the purpose of closing the sale, and, with the intention of evading acceptance of the option, fails to attend at the place and time arranged, he is not precluded from setting up an absence of any acceptance of the option.

5. BROKERS (§ II A—6)—REAL ESTATE AGENT—OPTION TO PURCHASE OR SELL.

Where an agent for the sale, who also holds an option to purchase the property, agrees for a re-sale at an advanced price, he cannot exercise his option until he has divested himself of his character as agent, and, in order so to divest himself, he must disclose his contract for re-sale.

[*Bentley* v. *Nasmith*, 3 D.L.R. 619, 46 Can. S.C.R. 477, followed.]

6. TIME (§ I—3)—MEANING OF "DAYS"—EXPIRATION OF OPTION.

An option for a certain number of days is an option for that number of consecutive periods of 24 hours, running from the hour at which the option is given, and expires at the corresponding hour of the last day, and not at midnight of that day.

[*Cornfoot* v. *Royal Exchange*, [1904] 1 K.B. 40, applied.]

Statement

ACTION for specific performance of an agreement for sale of lands at Leaside Junction by the defendant Lea.

The action was dismissed.

*E. F. B. Johnston*, K.C., and *S. W. McKeown*, for the plaintiff.

*A. W. Anglin*, K.C., and *H. A. Reesor*, for the defendant Lea.

*Glyn Osler*, for the defendant Ogilvie.

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MIDDLETON, J.:—The defendant Lea, who owns a block of some 17 acres of land near Leaside Junction, discussed with Dr. Perry E. Doolittle, his medical attendant, the sale of this land. Dr. Doolittle, having in mind some idea that the property might be advantageously used for a sanitarium, undertook to become Lea's agent for the sale of the property; and at that same time took an option upon the property in his own favour. This dual relationship is evidenced by two documents dated February 1st: by one of which a ten days' option is given to purchase at $2,000 per acre, and by the other, terms are arranged for the payment of the price "in the event of Dr. P. E. Doolittle disposing of my property." This document further provides: "If Dr. Doolittle succeeds in making the sale of my property I agree to give him a commission of two and a half per cent."

After the expiry of the time limited by this option, on the 12th February, 1912, a new arrangement was made, evidenced by a written memorandum in the words following:—

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I hereby grant to Dr. P. E. Doolittle a thirty days' option to purchase my property at Leaside consisting of seventeen and three-tenths acres for the sum of two thousand dollars per acre, along with the further sum of two hundred and fifty dollars to be paid me by him in case this option is not exercised on or before the 22nd inst., and another added sum of two hundred and fifty dollars in the further event of this option not being exercised on or before the third day of March. All costs of searching title to be borne by you. Joseph N. Lea."

Contemporaneously another memorandum bearing the same date was signed, giving the terms of payment "in case the option on my property at Leaside is exercised by Dr. Doolittle." These terms called for payment of $10,000 if the option was exercised within the first ten days of its currency, $10,250 if exercised within the next ten days, and $10,500 if during the last ten days. Notwithstanding the argument of counsel, I think this is the meaning of the document. At the same time, the words "on completion of sale only" were added to the earlier document of February 1st, relating to the commission payable, thus shewing that the relationship of principal and agent still continued.

The option of the thirteenth of February purports to be in consideration of one dollar, but no money was actually paid.

The thirteenth of March, was the thirtieth day after the giving of the option. The thirteenth fell on a Wednesday. Dr. Doolittle had interested the plaintiff Beer in the purchase. An interview had taken place on the Monday, when a draft agreement of purchase had been discussed. Many terms had been assented to, but no final agreement was concluded. It was then

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arranged that the parties should meet on Wednesday at 2.30 p.m., and that the transaction should be completed. For the purpose of avoiding any uncertainty as to this, Dr. Doolittle during Wednesday forenoon telephoned to the plaintiff advising him that he would be ready to close at the hour named, and the defendant promised to keep the appointment.

At the time stipulated Dr. Doolittle and Mr. Beer attended at the place appointed, but Lea did not put in an appearance. Not anticipating any difficulty in closing the matter in the ordinary mercantile way, by cheque, Dr. Doolittle and his purchaser Beer had not money with them for the purpose of making any formal payment or tender; but I find that if Lea had been present, Mr. Beer was prepared to make the cash payment. He did not have the money standing to his credit in his bank, but he had securities deposited with the bank entitling him to draw to an amount exceeding that required.

Lea had in the meantime learned of the plans of the Canadian Northern Railway, and was satisfied that he could sell the lands to the company at a much larger price. He had the view that the option expired at 4.00 p.m., it having been signed at that hour; and he deliberately refrained from attending at the place named, for the purpose of evading the receiving of any communication of the acceptance which he anticipated would then be made.

Doolittle was of the view that he had until midnight of the thirteenth to accept. He telephoned Lea at 6.30 p.m., asking an explanation of his failure to attend. Lea then told him that the option expired at 4.00 o'clock and he would have nothing further to do with him.

What then took place I think amounts to a revocation of the offer, and an intimation by Lea that he would no longer sell.

Dr. Doolittle, for the purpose of accepting the offer within the time limited (in his view of the meaning of the option) wrote and mailed a letter to Lea enclosing a marked cheque for five thousand dollars and accepting the offer.

This was not an adequate acceptance, because the contract did not contemplate acceptance by mail. The letter did not reach Lea until after the expiry of the option, upon either theory. Five thousand dollars was the amount of the marked cheque, because in course of the negotiations which took place on Monday, some willingness had been expressed on the part of Lea to assent to a variation of the terms of the sale by reducing the cash payment from $10,500 to $5,000. At the time the cheque was marked, Dr. Doolittle did not anticipate any attempt on the part of Lea to prevent the transaction being carried out, and anticipated that the five thousand dollars would be all that would be required.

Fearing that the mailing of this letter and cheque would not be sufficient, Dr. Doolittle went to Leaside and met Lea, well on in the evening, and then gave him a letter accepting the offer together with an unmarked cheque for $10,500. These were not accepted by Lea, who insisted that the option was at an end at 4.00 o'clock, and who further refused to regard the cheque as payment.

At this time Dr. Doolittle only had a very small sum in the bank to his credit; but I have no doubt that if the cheque had been accepted by Lea, Doolittle would have arranged for payment in some way. But, as a matter of substance, (apart from form), the cheque was by no means the same as money.

Lea then sold the property to Mr. Ogilvie, representing the Canadian Northern Railway, for sixty thousand dollars. It is admitted that Ogilvie took with notice, and has no higher position than Lea himself.

Upon these facts I think the plaintiff fails. I do not think there was any acceptance of the offer before it was withdrawn. The option being in fact without consideration and not under seal was nothing more than a mere offer. The telephone conversation at 6.30 p.m. amounted to a withdrawal of the offer. Up to that time there had been no acceptance.

Beyond this, I think that the offer could only be accepted by a cash payment of the sum stipulated for, and that this was a condition precedent to the existence of any contractual relationship; *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555.

Mr. Johnston very forcibly contends that Lea ought to be precluded from denying that there was an acceptance of the offer, because of his failure to attend at the place arranged when the contract was to be closed. I cannot follow this. There can be no contract unless there is an offer and an acceptance of that offer. If there is a contract, then either party may—as in *MacKay* v. *Dick*, 6 App. Cas. 251—by his conduct dispense with the fulfilment of the contract, according to its terms, by the other, but so far as I can find, it has nowhere been suggested that one who has made an offer can dispense with an acceptance so as to create a contractual relationship. There would obviously be no mutuality.

Upon a different ground I think also that the plaintiff fails. Dr. Doolittle was an agent for sale. He had also the option referred to. He was re-selling to Beer at an advance of two thousand dollars. He falsely stated to Lea that he was selling at an advance of four hundred dollars. In *Bentley* v. *Nasmith*, 3 D.L.R. 619, 46 Can. S.C.R. 477, it was held that where an agent had under the terms of his employment a right to himself become the purchaser, he could not purchase until he had divested himself of his char-

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acter as agent, and that to do so he was bound to disclose all the knowledge he had acquired as to the probability of selling at an increased value; and, a fortiori, he must honestly disclose the facts with relation to any contract of re-sale which he may have already made.

The question as to the duration of the option is both important and interesting. In *Cornfoot* v. *Royal Exchange Assurance Corporation*, [1903] 2 K.B. 363, and [1904] 1 K.B. 40, the Court of Appeal determined that thirty days in an insurance policy, whereby a ship was insured for thirty days in port after arrival, meant thirty consecutive periods of twenty-four hours, the first of which began to run upon the arrival of the ship in port.

I can see no reason why the same meaning should not be attributed to the expression in all contracts. Any attempt to give any other meaning would create difficulty. It is true that in most cases the law takes no notice of the fraction of a day; but this rule has been modified, and the true principle now seems to be that as between private litigants the exact time can be ascertained, when necessary to determine the rights of the parties litigant. See *Clarke* v. *Bradlaugh*, 7 Q.B.D. 151, and 8 Q.B.D. 63; *Barrett* v. *Merchants Bank*, 26 Gr. 409; *Broderick* v. *Broatch*, 12 P.R. 561.

The action therefore fails; but I think the circumstances justify me in dismissing it without costs.

*Action dismissed.*

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## MILLER v. ALLEN.

*Ontario High Court. Trial before Middleton, J. November* 18, 1912.

1. CONTRACTS (§ I D 4—62)—OPTION TO PURCHASE CONTAINED IN A LEASE —OFFER WITHOUT CONSIDERATION.

A clause in a lease not under seal giving to the lessee the option to purchase the demised premises at a stated price, is not necessarily an integral part of the lease and where it is not founded upon any consideration, specific performance of the option will be refused.

[*Davis* v. *Shaw*, 21 O.L.R. 474, and *Maltezos* v. *Brouse*, 19 O.W.R. 6, applied; *Hall* v. *Center*, 40 Cal. 63, referred to.]

2. VENDOR AND PURCHASER (§ I E—28)—OPTION—FAILURE TO PAY CASH PORTION OF PURCHASE PRICE.

Where an option stipulates for payment of part of the purchase price in cash, acceptance of the option by letter is not sufficient, and no contractual relationship can exist until the cash payment has been made.

[*Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed; see also *Beer* v. *Lea*, 7 D.L.R. 434.]

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3. ACTION (§ I B 1—7)—PREMATURITY — ACCEPTING OFFER TO SELL AFTER ISSUING WRIT.

A cause of action must be complete before an action upon it is commenced; and, therefore, an action cannot be maintained upon a contract, where the offer was made before, but was not accepted until after, the issue of the writ.

4. SPECIFIC PERFORMANCE (§ I A—5)—OPTION TO PURCHASE CONTAINED IN LEASE—EXERCISE OF WITHIN PRESCRIBED TIME—FAILURE TO TENDER CASH PAYMENT.

Where a lease, not under seal, contains a clause giving to the lessee an option to purchase the premises for a certain sum, of which part is to be paid in cash, and the remainder secured by mortgage, and a letter is written within the time prescribed, notifying the lessor of the exercise of the option by the lessee, but no tender is made of the cash payment, an action for specific performance will fail, because of the absence of any tender, and the plaintiff cannot rely upon a tender made on the day following the issue of the writ.

5. TENDER (§ I—2)—SUFFICIENCY OF—OPTION TO PURCHASE CONTAINED IN A LEASE.

Where a lease, not under seal, contains a clause giving to the lessee an option to purchase the premises for a certain sum of which part is to be paid in cash, and the remainder secured by mortgage, and a letter is written within the time prescribed, notifying the lessor of the exercise of the option by the lessee, but no tender is made of the cash payment, an action for specific performance will fail, because of the absence of any tender, and the plaintiff cannot rely upon a tender made on the day following the issue of the writ.

**Statement**

ACTION for specific performance of agreement for sale of land under an option contained in a lease.

The action was dismissed.

*W. C. Hall*, for the plaintiff.

*W. N. Tilley*, and *W. R. Cavell*, for the defendant.

**Middleton, J.**

MIDDLETON, J.:—On the 29th May, 1911, a lease for two years was executed, purporting to be in pursuance of the Short Forms Act, and containing the following clause:—

"The said lessor further agrees to give the said lessee the option to purchase the above premises for one year, ending the third of June, 1912, for the sum of four thousand five hundred ($4,500), paying $1,000 cash, and giving mortgage for balance repayable $100 half yearly, with the privilege of paying more at any time without notice or bonus, and with interest at six per cent. per annum."

This lease is not under seal, although it purports so to be.

On the 9th May, 1912, the plaintiff's solicitors wrote the defendant stating that their client (the plaintiff)—"intends to exercise the option of purchasing the premises at $4,500 given him in your lease to him dated the 29th of May, 1911, and we would be glad if you would kindly accept this as notice of his exercising the option."

This was followed by a request to have a deed prepared and submitted, and some requisitions upon the title, and the state-

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ment: "Subject to the above the title appears satisfactory, and we think our client will be ready to close as soon as the papers are in shape."

No reply was made to this letter; and on the 23rd of May the solicitors wrote to the defendant that—

"Failing to hear from you or your solicitor by Monday with a draft deed we shall take it as an intimation that you do not intend to carry out the transaction, and shall be obliged to issue a writ for specific performance."

The writ was issued on the 31st of May.

Up to this time the purchaser had made no tender of either deed, mortgage, or money; and he was in point of fact in default in payment of the rent, the last rent paid being that due on the 3rd of April.

On the 1st of June, the plaintiff and his solicitor attended on the defendant at his place of business, and then made a tender of one thousand dollars cash and of a mortgage for $3,500 dated on the 1st of June, and carrying interest from that date.

The plaintiff's solicitor seeks to avail himself of what then took place, in support of his action. I do not think that this is open to him. His cause of action must be complete before the action is instituted; and if what then took place is relied upon as an acceptance of the offer embodied in the option, the contract was not made until after the action was brought.

The letters which I have referred to are put forward as constituting an acceptance. I do not think that they are sufficient. The case of *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, shews that where an option stipulates for a cash payment, the cash payment is a condition precedent to the existence of any contractual rights.

This case affords a good illustration. The vendor stipulated for cash. The purchaser accepts, and substitutes for cash a payment "as soon as the papers are in shape."

There is another aspect of the case that also presents difficulty. Before the plaintiff can justify his action he must shew not only a contract, but that the defendant is in default. Clearly the defendant was not called upon to do anything until the tender was made.

Also, the tender was insufficient, if based upon the theory that the letter of May 9th, constituted an acceptance. Interest ought to have been paid on the cash, and the mortgage ought to have provided for interest running from that date.

That renders it unnecessary to consider the other defences relied upon.

In dealing with the case, I have considered myself bound by the decisions in *Davis* v. *Shaw*, 21 O.L.R. 474, and in *Maltezos* v. *Brouse*, 19 O.W.R. 6, to regard the clause in question as a

mere offer or option, quite distinct from the lease, and not founded upon any consideration. Were it not for these cases I would have found myself unable to answer the question put in *Hall* v. *Center*, 40 Cal. 63, "How is it that the Court would thus compel the lessor to part with an estate for years at the mere option of his tenant, but would at the same time permit him to violate his agreement to part with the fee, if the tenant elect to purchase it?" For I take it to be clearly established by a series of English cases that the Court will decree specific performance of an agreement to grant a renewal of a lease.

Even if this were so, the plaintiff would yet fail in this action, for the reasons I have given. The action must, therefore, be dismissed with costs.

*Action dismissed.*

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## ROLLAND v. GRAND TRUNK R. CO.



*Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. Montreal, January 24, 1912.*

1. APPEAL (§ II C 1—50)—AWARD OF ARBITRATORS UNDER RAILWAY ACT (CAN.).

No appeal lies in the Province of Quebec to the Court of King's Bench from the judgment of the Superior Court upon an appeal under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, from the award of an arbitrator.

2. EMINENT DOMAIN (§ II D—101)—REVIEW OF AWARD UNDER RAILWAY ACT (CAN.).

An application to the Superior Court in the Province of Quebec under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, to set aside an award of arbitrators, made in expropriation proceedings under that Act, on the ground of the inadequacy of the compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from a decision of an inferior court, and that the court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application.

Statement

MOTION to quash appeals on the ground of want of jurisdiction.

An order was made quashing the appeals.

*Barnard, McKeown & Barry*, for the appellant.
*A. E. Beckett*, K.C., for the respondent.

The following opinion was handed down.

Cross, J.

CROSS, J.:—The respondent moves that these appeals be quashed, on the ground that there is no right of appeal to this

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Court. The proceedings in the Superior Court, upon which judgment was rendered, consisted of an application to set aside an award of arbitrators, made in expropriation proceedings taken under the Dominion Railway Act, R.S.C. 1906, ch. 37.

The appellant, from whom the land was to be taken, complained of the proceedings of the arbitrators and of the award, alleging, amongst other things, that the amount awarded was grossly inadequate. The respondent also attacked the proceedings of the arbitrators and their award, alleging, amongst other things, that the amount awarded was excessive. In so far as the proceedings in the Superior Court are to be considered as appeals to that Court from the award, it is acknowledged, by both parties, that no right of appeal from the judgment of the Superior Court to this Court exists.

Section 209, Railway Act, provides for an appeal from the award, upon any question of law or of fact, to a Superior Court. It has been held, that, in view of the terms of that section, only one appeal was provided for, and that, after having appealed to the Superior Court, a party could not appeal from the decision of the Superior Court, to this Court. This is now conceded by counsel for the appellant. But the appellant says, in answer to the motions, that sub-section 4 of section 209, provides that the right of appeal, given by that section, does not affect the existing law or practice in any province, as to setting aside awards, and he contends that the proceedings in the Superior Court were not simply appeals to that Court, but were, in effect, actions to set aside the awards, as well. The sole question for decision is, therefore, involved in the answer to be given to the question whether the proceedings in the Superior Court were simply appeals to that Court, from the award and nothing more, on the one hand; or whether, on the other hand, they were not merely appeals to the Superior Court, but were, at the same time, in effect, actions to set aside the award. That question is to be decided by what the substance and purport of the proceedings really are, rather than by any particular name which may have been given to them by either party.

Taking, in the first place, the proceedings in the Superior Court, instituted by the present appellant, I find that they were commenced by a petition, addressed by him to the Superior Court, wherein he prayed "That a writ of appeal, in the nature and form of an appeal from a decision of an inferior Court, to this honourable Court, do issue, etc.;" that the arbitrators be summoned to produce the papers and to hear the judgment, and that, upon said appeal, the Superior Court should annul and set aside the award as illegal, irregular, insufficient and inadequate, and that the Court should proceed to

adjudge and decide upon the amount of compensation and damages, and should render the award that the said arbitrators should have rendered in the first instance.

Leave having been given to issue out the writ, the appellant thereupon took his writ and attached to it his statement or demand and conclusions. This demand is addressed to the Superior Court sitting in and for the district of Montreal, as a petition. It commences by setting out the giving of a notice of expropriation; the appointment of arbitrators and the making of the award; the paragraphs to this effect concluding with the statement "and your petitioner is desirous of appealing from same, both on questions of law and of fact."

The statement goes on to set forth that the award is illegal and contrary to the evidence adduced, for a number of reasons set forth, namely:—

(*a*) Because the said award is inadequate and insufficient; (*b*) because the amount so awarded is considerably less than the amount of compensation and damages proved before the arbitrators; (*c*) because the said award is null and void upon the face thereof and is informal; (*d*) because the said award does not comply with the requirements of the Railway Act; (*e*) because the lands and other property and the rights and privileges, for which the said award is intended to be compensation, are not stated clearly or sufficiently in said award; (*f*) because the award, as made in notarial form before the said Leclerc, notary, on the 2nd of April, 1909, is not the same as the award actually made at the meeting of the arbitrators, on the 27th of March, 1909.

Specific complaint is made that the notarial deed of award varies from the arbitrator's minute of award, by making the sum awarded cover damages, whereas, by the minute, it purported to be awarded for land only. Then follow the conclusions of the demand, which are as follows:—

Wherefore your petitioner, who hereby appeals from the said award of said arbitrators, prays that a writ of appeal in the nature and form of an appeal from a decision of an inferior Court to this honourable Court, do issue to summon, and that, upon same, the said arbitrators may be summoned to be and appear before this honourable Court, within six days after the service upon them of said appeal, and to produce and file all papers, writings and documents which they may have in connection with the said award, and more especially the notes of evidence taken by them and the exhibits filed therewith, and be further summoned, together with the said respondent, to hear the judgment of this Court in the premises, and that, upon the said appeal, this honourable Court do annul and set aside the said award so rendered on 27th of March last, 1909, as aforesaid, as also the said pretended award (*sentence arbitrale*), rendered before the said notary Leclerc, by the said arbitrators on the 2nd of April last, 1909, as illegal, irregular, insufficient and inadequate, and that this Court do proceed to adjudge and decide upon the amount of compensation and

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damages to which your petitioner may be entitled by law, and the statutes in such case made and provided, and do render the award that the said arbitrators should have rendered in the first instance, and do therefore, condemn the said respondent to pay your petitioner such amount of compensation for such lands and for said damages, as this Court finds should have been so awarded your petitioner by said arbitrators, the whole with costs *distraits* to the undersigned.

I do not see how a demand, worded as is this one, can be regarded as anything else than an appeal to the Superior Court under the Railway Act. As has been pointed out, that is distinctly the way in which the appellant himself characterized it. He prays, in the opening of his conclusions, for a writ of appeal and proceeds to state what is to be accomplished by the appeal, namely: transmission of the papers; the setting aside of the award, which he expressly asks to be ordered "upon the said appeal," and then he proceeds to make a demand which is distinctly characteristic of an appeal and not appropriate to an action to annul, namely: the demand that the Superior Court shall proceed to adjudge and decide upon the amount of compensation and should render the award that the arbitrators should have rendered. The entire demand has, thus, fastened upon it, the character of an appeal. Then, in regard to the proceedings initiated by the railway company respondent, in the Superior Court, it may be said that the same mode of commencing by a petition for issue of a writ and of subsequently taking out the writ upon leave given, was adopted. The recitals of the petition for issue of the writ would seem to be a copy of those of the application made by the appellant. Then in regard to the statement of claim and conclusions, the same form of averment is adopted. The expropriation proceedings, the arbitration and the award are set out, and thereupon the respondent alleges:—

> That inasmuch as by a petition served upon your petitioner by respondent, said respondent prays leave to appeal from the said award, both on questions of law and of fact; your petitioners are desirous of filing a cross-appeal from the said award, both on questions of law and of fact.

Thereupon, the grounds taken against the award are set out much after the same manner as they were set out in the demand or statement of claim of the appellant, though the complaint, as regards amount, is made in the opposite direction and upon opposite grounds. The prayer is a counterpart of the prayer made by the petitioner in his appeal to the Superior Court, concluding with the same demand that the Superior Court shall render the award that the arbitrators should have rendered, and, to that end, declare that the amount offered by the notice of expropriation was sufficient.

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In both cases, I would, therefore, say that the action cannot be called an action to set aside the award. My conclusions, therefore, would be that the motions should be granted. It may be added that the circumstance that the appellant tendered and pleaded a confession of judgment upon the respondent's petition, does not affect the question raised by these motions.

*Appeals quashed.*

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## TURGEON es qual. v. ST. CHARLES.

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*Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. October* 31, 1912.

1. INTOXICATING LIQUORS (§ II A—39a)—RIGHT TO SELL A LICENSE TO SELL LIQUORS.

A license certificate for the sale of spirituous liquors is a commercial object and may be transferred and dealt with like any other commercial asset.

[*Canadian Breweries Co.* v. *Gariépy*, 16 Que. K.B. 44, followed.]

2. SALE (§ I C—15)—RESTAURANT LICENSE—CONDITIONAL SALE—SUSPENSIVE CONDITION.

The sale of a restaurant license under deed of transfer stipulating that the purchaser will become proprietor thereof only when he has paid to the vendor all the instalments of price due, and that failure to make any of these payments will cause the assets sold to revert to the vendor, is a valid sale under suspensive condition.

3. INSOLVENCY (§ III—10)—WHAT PASSES TO ASSIGNEE—PURCHASE OF LICENSE UNDER SUSPENSIVE CONDITION—DEFAULT IN PAYING INSTALMENTS—EXISTENCE OF CONSIDERATION AND ABSENCE OF FRAUD.

If a purchase upon a sale of a restaurant license under suspensive condition becomes insolvent before all the instalments are paid, and there results a default under a suspensive condition which provides that failure to pay any instalment should entitle the vendor to re-take possession and that the ownership of the license should revert to him, the vendor is entitled to re-take the license sold, even though such license be the only asset of the creditors, provided always the sale was made for good consideration and without fraud.

Statement

THIS was an appeal by the curator to the estate of an insolvent from the judgment of the Superior Court, Greenshields, J., rendered at Montreal, on June 30th, 1911, granting the respondent's petition to have transferred unto him the stock-in-trade and restaurant license of the insolvent.

The appeal was dismissed, TRENHOLME and CROSS, JJ., dissenting.

Argument

*Paul St. Germain* and *E. Lafleur*, K.C., for the appellant:—The judgment appealed from is evidently based on the case of *Canadian Breweries Co.* v. *Gariépy*, 16 Que. K.B. 44. That case is easily distinguished, for there it was held that, inasmuch as the curator to an insolvent estate represented all the creditors, a particular creditor was not receivable to attack a judgment in a case in which the curator had been party. In the present instance, however, we contend that the conditional sale was

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fraudulent; that the license claimed is a renewal of the license transferred, and, therefore, never belonged to the respondent; and that, as the insolvent made an abandonment prior to a retrocession, the only recourse of the respondent was one in damages against the estate. A license for the sale of intoxicants is personal to the licensee: R.S.Q. 923, 924, 5, 6, 928-9, 930, 936, all shew that the personality of the applicant is the chief object the law has in view. The respondent was never granted this license by the license commissioners; he bought it from a third party, and immediately passed it in to the insolvent—an absolutely illegal transaction, an attempt to have a mortgage on moveable property. The license law requires absolute publicity as to transfers. The deed of transfer was an attempt to defraud even subsequent creditors: 1 Larombière, Obligations, art. 125, no. 15, *ibid.* art. 1167, no. 20; 4 Massé, Droit Commercial, p. 79, no. 2178; 28 Demolombe, Contrats et Obl., vol. 5, no. 59; Sirey, 1866-1-105; *Murphy* v. *Stewart*, 12 Rev. Leg. 501; *Ivers* v. *Lemieux*, 5 Q.L.R. 128. And, lastly the obligation of the insolvent was a promise to do certain things; the promise remained unfulfilled at the time of the abandonment; the abandonment, therefore, vested in the curator all the insolvent's rights for the benefit of the creditors, and the respondent's only recourse is one in damages.

*D. R. Murphy*, K.C., and *A. Perrault*, for the respondent:—The only serious argument of the appellant is that the license could not be the object of a conditional sale. C.C. 1079 recognizes such a transaction, however, and so have the Courts: *Waterous Engine Works Co.* v. *Hochelaga Bank*, 5 Que. Q.B. 125; *Hochelaga Bank* v. *Waterous Engine Works Co.*, 27 Can. S.C.R. 406; nor does 923 R.S.Q. prohibit this. This statutory enactment does not decree that the person named in the license certificate be the owner, but only the holder thereof. And 953 (*b*) R.S.Q. shews that the license law recognizes this distinction between the holder and owner of a license certificate. Besides, art. 923 must be interpreted restrictively, as it is a penal enactment. Nor does the fact that the license is renewed from year to year alter the case: R.S.Q. 943, 940; *Gariépy* v. *Choquet et al. and Turgeon*, 16 Rev. de Jur. 314. If the sale was in fraud of the creditor's rights, then the curator should have taken action to set it aside; having failed so to do, the petition of the respondent had of necessity to be maintained. The principle laid down in the *Canadian Breweries* case was followed by Tellier, J., in *Chartrand et al.* v. *Laurence et al.* (unreported, December 15, 1908), by Fortin, J., in *Labelle* v. *Turgeon and Gariépy and the National Breweries* (unreported, Oct. 4, 1910.)

*Lafleur*, K.C., in reply.

The judgment of the majority of the Court was delivered by

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LAVERGNE, J. (translated):—Judgment was rendered on June 30th, 1911, in favour of the respondent's contentions.

The petitioner respondent alleges that on December 14th, 1906, by sale under certain conditions, before Biron, N.P., he, together with one Ferdinand Paquette—whose testamentary executor he now is—sold his stock-in-trade and all the accessories of a licensed restaurant situate at 27 Craig street east, Montreal, to one Goderre, now insolvent, that this sale comprised the goodwill, license, merchandise, cigars and liquors, and the unexpired portion of the lease, as well as the fixtures of the said restaurant; and that Goderre, the insolvent, bound and obliged himself to fulfil all the obligations of the petitioner and Paquette under the said lease. The sale was made for a consideration of $11,500, of which $1,000 was paid cash and the balance was made payable as follows: $4,500 to one Thibault, to the petitioner's and Paquette's exoneration, the said sum payable in sixty monthly instalments of $75 each, the first of which should be paid on January 14th, 1907, with interest at six per cent.; and as to the balance, it should be paid in seventy monthly instalments, the first of which payable on January 14th, 1909, the next thirty-six instalments to be of $50 each, and the last thirty-three of $125 each, the purchaser giving his promissory notes for all of the said payments. That it was stipulated in the said contract that, should the purchaser fail to meet any of the payments, even one only, or fail to fulfil any of the obligations stipulated therein, the petitioner and the said Paquette could immediately and without notice retake possession of all the assets sold, including the license and any renewal thereof, and that all of such assets should revert in ownership to the said petitioner and Paquette. That when the said Goderre made an abandonment of his property, eighty-four of the said notes were still unpaid and many of them past due; that Goderre had failed to fulfil his obligations as to the payment of these notes and had failed to execute his obligations; that the petitioner was, therefore, personally and *es qualité* entitled by law to exercise all rights and recourses given to him by the said contract; that on March 21st, 1910, Goderre made an abandonment of his property, and Turgeon, the appellant, was named curator to the said abandonment, and as such took possession of the restaurant and accessories, including the license, which had been renewed from year to year, and that the said curator had even obtained a confirmation of the said certificate for 1909-10, but had neglected to pay the fee thereon, which the petitioner, in order to protect his rights, was obliged to pay, to wit, $413. The curator gave notice that the license would be sold on May 31st, 1910. The respondent, therefore, concluded his petition by praying that he be authorized to retake possession of the restaurant, accessories and the license, and tendered into Court all the unpaid notes,

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and that the curator be ordered to deliver over to him the said stock-in-trade, including the license, less, however, the cigars and liquors.

The curator-appellant answered, denying certain allegations and averring that Paquette and the respondent were not the owners of the license in question, and had never transferred it to the insolvent, who had acquired the same directly from its then owner. He admits that the license was paid for by the respondent, but with the understanding that the respondent would be reimbursed in the event of his failure to be declared the owner thereof. The appellant further alleged that when Goderre made his abandonment he owed to divers creditors $9,900, and that he had no assets other than his license; that if the respondent obtained this license, even the privileged creditors of Goderre would remain unpaid; that the insolvent's creditors advanced him merchandise because he was personally proprietor of the license in question and of all its subsequent renewals; that the deed of December 14th, 1906, is null, fraudulent and simulated, and should be set aside, inasmuch as the license was the property of the insolvent only; that the deed is contrary to the provisions of the license law; that the insolvent could not transfer his property in advance and thus render himself completely insolvent; that there was collusion between the insolvent and the respondent to deceive the creditors of the former.

The respondent replied to this contestation that he bought the license in question with the said Paquette, together with other property, from one Thibault, and thereafter agreed to the deed of December 14th, 1906, which is perfectly legal.

The allegations contained in the petition are true. On December 14th, 1906, the petitioner and Paquette bought the stock-in-trade, lease and restaurant in question from Thibault by authentic deed, filed of record, for $9,500, and thereafter on the same day executed in favour of Goderre the deed now attached. No fraud appears as to the deed impugned. All of Goderre's creditors are creditors subsequent to this deed. The only things sold by these creditors to Goderre are merchandise, such as liquors and cigars, which are not claimed by the respondent and which he leaves to the curator. The respondent and Paquette were owners in good faith of this license, acquired for good and valuable consideration. This license, as well as all renewals thereof, may be the object of a legal sale, either absolute or conditional, either under suspensive or resolutory condition. The whole realm of the license law shews that these licenses, which are considered as commercial things, may be the object of a sale.

The holder of the license need not necessarily be the true owner thereof. These transfers of licenses have been sanctioned by the Courts. The very letter of the license law (R.S.Q.) proves that these licenses are of an essentially commercial nature, and

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that the holder of the license is not necessarily the owner thereof, and may be the representative or agent of other persons. The insolvent in this case never was the proprietor of the license mentioned in the deed of December 14th, 1906, because he could only become proprietor after having paid for it and after having fulfilled all the obligations mentioned in the said deed, and this he failed to do.

Under the stipulations of the said deed, the respondent is entitled to reclaim possession of the things sold, including the license. We are not called upon to decide whether the license commissioners shall be bound to confirm the transfer of this license or the certificate which will be presented to another holder, whom, no doubt, the respondent will bring forward. The petitioner's demand at the moment concerns but the respondent himself, the insolvent and the curator.

As for the insolvent, he cannot oppose the respondent's demand unless the contract between him and the respondent were simulated or fraudulent. There is no question as to the *bonâ fide* reality of the contract. St. Charles resold for $11,500 what he had really paid $9,500. The transaction was a perfectly legal and honest one. Nor is there any fraud. The sale was not made to defraud his future creditors. It was simply made under a suspensive condition for the vendor's protection, and without such condition would not have been entered into. Besides, for several years the insolvent met his obligations. He only became insolvent in 1909, when he purchased another restaurant and assumed a greater burden than his financial resources warranted. Moreover, his insolvency was also hastened by imprudent endorsements given in favour of one Hubert Raymond, who left the province, leaving behind him heavy liabilities.

The publicity attached to licenses is not, in my opinion, enacted for the purpose of protecting creditors; it is a police measure taken in the public interest. Goderre's creditors have no greater rights than their debtor could have, and their debtor has none as against the respondent.

We arrived at the same conclusion in 1896, in the case of the *Canadian Breweries Company* v. *Garièpy*, 16 Que. K.B. 44.

For these reasons I would dismiss the appeal.

Archambeault, C.J.

ARCHAMBEAULT, C.J., concurred. He said he was somewhat doubtful whether this was the true interpretation to be given to the license law on this point, but he felt bound by the decision of this Court in the *Canadian Breweries* case. The holding in that case must have been known to the legislators. Yet they did not see fit to alter the law as it stood under such interpretation. The decision had been followed by the Superior Court and the Court of Review, and the public were entitled to consider this view as the proper interpretation, at any rate until the question was decided in another manner by a higher Court.

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TRENHOLME and CROSS, JJ., dissented.

*Appeal dismissed,* TRENHOLME *and* CROSS, *JJ., dissenting.*

N.B.—The appellant has lodged an appeal to the Supreme Court of Canada.

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ONT.

D. C.
1912

Nov. 14.

## WILKINSON v. CANADIAN EXPRESS CO.

*Ontario Divisional Court, Falconbridge, C.J.K.B., Riddell, and Lennox, JJ. November 14, 1912.*

1. CARRIERS (§ III J 1—499)—SHIPMENT OF GOODS—EXPRESS COMPANY'S RECEIPT TO PARTY OTHER THAN THEIR CUSTOMER—SPECIAL CONDITIONS.

A person who forwards his railway baggage checks to an express company with instructions to take delivery of the baggage and re-forward it by express may claim damages for its loss in transit while in their custody as upon the company's common law liability, and is not bound by a condition of a shipping receipt issued to the railway company on receiving delivery from it, purporting to limit the maximum liability of the express company in case of loss, where the contract evidenced by such shipping receipt is in terms made between the express company and the railway company only and its provisions were not communicated to the owner of the baggage.

[But see *Edwards* v. *Sherratt*, 1 East. 604; *Lohden* v. *Calder*, 14 Times L.R. 311; *Hayward* v. *Canadian Northern R. Co.*, 6 Can. Ry. Cas. 411; *Mercer* v. *C.P.R.*, 8 Can. Ry. Cas. 372.]

2. CARRIERS (§ III G 3—455)—SHIPMENT OF GOODS—STIPULATIONS LIMITING LIABILITY.

The fact that an express company is enabled by statute to make use of a special form of contract impairing, restricting, or limiting its liability does not prevent the company from contracting upon the basis of a more extended liability as upon its contractual rights at common law, although such special form has received the approval of the Railway Commissioners of Canada, exercising governmental powers of supervision over common carriers.

Statement

APPEAL by the plaintiff from the judgment of Winchester, Senior Judge of the County of York, in an action to recover $500 for the value of a magic lantern and slides alleged to have been lost by the defendants in transit, and for damages. At the trial judgment was awarded the plaintiff for $50 with costs up to payment into Court, and no set off allowed the defendants.

The appeal was allowed.

*T. N. Phelan,* for the plaintiff.

*W. E. Foster,* for the defendants.

Riddell, J.

RIDDELL, J.:—The plaintiff, a clergyman living in Aylmer, had a magic lantern outfit which had been carried on the G.T.R. to Stratford in a trunk as baggage. He left this in the baggage-

room at Stratford: he went to Woodstock. From that city he wrote a letter to the "Canadian Express Company, Stratford," instructing the Company to ship it from Stratford to Galt. The letter is not produced: but there is produced a letter written immediately after as follows:

"Canadian Express Co. Woodstock, June 5/11.
Stratford.

I, in my haste dropped my previous letter in the office forgetting to enclose the check of my box. Find it enclosed with this.

Yours, etc.,
T. J. Wilkinson."

The agent at the depot at Stratford for the defendants received these letters in due course of mail: he took the check to the G.T.R. baggage-room, paid 55 cents for warehousing charges, gave up the check, received the trunk, made out the usual receipt and gave it to the baggage-man who probably threw it into the waste paper basket. The receipt read "Received of G.T.R. (herein called the shipper) 1 box said to contain not given valued at not given 100 dollars addressed Rev. Wilkinson, Galt, which the Canadian Express Company herein called the Company agrees to carry and deliver upon the terms and conditions on the back hereof to which the shipper agrees and as evidence of such agreement accepts this shipping receipt. . . .

For the Company,
A. Jones Agent."

On the back were printed certain conditions of which the following seem to be material: "2. This agreement shall extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership . . . of the shipment. . . .

"3. The liability of the company upon any shipment is limited to the value declared by the shipper . . . If the shipper does not declare the value of the shipment, liability is limited to $50. . . ."

The trunk went astray and cannot be traced: the plaintiff sues for the value thereof, claiming $500: the defendants pay $50 into Court and claim that they are not liable for more. The trial Judge, Winchester, Co.J., gave effect to this contention, the plaintiff now appeals.

Much argument was addressed to us to induce us to hold that the special contract did not apply in the present case and several cases were cited, amongst them: *Lamont* v. *Canadian Transfer Co.*, 19 O.L.R. 291; *Corby* v. *G.T.R. Co.*, 23 O.L.R. 318; *James* v. *Dominion Express*, 6 Can. Rwy. Cas. 309; *McMillan* v.

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*G.T.R.*, 12 O.R. 103; S.C. 15 A.R. 14; *Grand Trunk R. Co.* v. *McMillan*, 16 Can. S.C.R. 543.

I do not think it necessary to decide that point because, assuming that the contract does apply, it does not bind the plaintiff. The language is the language of the Express Company—they say in so many words that in that contract "shipper" means the G.T.R.—and the contract is in terms binding upon the shipper and his privies. The plaintiff, for the purposes of the special contract is neither the shipper—that is the G.T.R.—nor a person in privity with him: the plaintiff is not, therefore, within the special contract at all. What has happened is that the defendants on being requested to carry certain goods for the plaintiff take it upon themselves to purport to carry them on a special contract with some one else.

They are liable in my view for the full value.

We are told that the Railway Board have approved of this form as the only form to be used. This must of course, be read as meaning the only form of contract "impairing, restricting, or limiting the liability of" the company: R.S.C. ch. 37, sec. 353—it does not mean that the company may not carry on its common law rights so long as no attempt is made to impair, restrict or limit its liability—e.g., there is nothing to prevent the express company agreeing to pay twice the value of the goods carried, the order of the Railway Board notwithstanding, and in this case what they have done is to take the plaintiff's goods as a common carrier and lost them, without limiting their liability to him.

The evidence justifies a verdict for $280 and I think the plaintiff should have judgment for that sum with costs here and below.

Falconbridge, C.J. Lennox, J.

FALCONBRIDGE, C.J.K.B., and LENNOX, J., agreed in the result.

*Appeal allowed.*

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ONT.
H. C. J.
1912
Nov. 4.

## Re ANNE CAMPBELL.

*Ontario High Court, Sir G. Falconbridge, C.J.K.B. November 4, 1912.*

1. WILLS (§ III B—90)—DEVISE TO TWO PERSONS JOINTLY—JOINT TENANCY.

A devise of a parcel of land to two persons "jointly" with a direction that they are to pay a sum of money to a third person creates a joint tenancy.

2. EVIDENCE (§ VI E—538)—PAROL EVIDENCE AS TO TESTATOR'S INTENTION—SURROUNDING CIRCUMSTANCES—ADMISSIBILITY OF TESTATOR'S DECLARATION.

Declarations of a testator are not admissible to prove what he

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Statement

meant by his will, but extrinsic evidence of surrounding circumstances is admissible to shew what he probably intended.

[*Davidson* v. *Boomer* (1868), 17 Gr. 509, followed.]

MOTION by John W. Campbell, a devisee under the will of Anne Campbell, deceased, upon the return of an originating notice, for an order determining a question arising upon the terms of the will.

*W. S. Hall,* for John W. Campbell.

*R. A. Pringle,* K.C., for the administrators of the estate of Martha S. Campbell.

Donald W. Fraser, surviving executor of Anne Campbell, though duly notified, did not appear on the motion.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The question to be decided arises under the will of Anne Campbell, wherein, after certain specific bequests, the following paragraph appears:—

"I hereby bequeath unto my nephew John Campbell and my sister Martha Campbell jointly a piece of land situate west side of the south part of lot number 5 in the ninth concession of East Hawkesbury containing twenty acres of land more or less, and they are to pay my nephew George Campbell the sum of two hundred dollars within three years after my decease and the residue of my estate I give and bequeath to my sister Martha Campbell."

At the time of the death of the testatrix, and for some years previous thereto, John W. Campbell resided with his aunt, Martha S. Campbell, who is the person referred to in the will as Martha Campbell; and John W. continued to reside with his said aunt until her death (which occurred on or about the 17th August, 1910), on an adjoining farm, which she owned. The said parcel of 20 acres was cultivated in the ordinary course of the farming operations which Martha and John were then carrying on, and John says that the said Martha and he were thus in joint possession of the said parcel of 20 acres from the date of Anne's death until Martha's death.

The parcel of land mentioned is the only land of which Anne Campbell was possessed at the time of her death.

Neither Martha nor John ever conveyed away or incumbered or otherwise disposed of their interest in the said parcel of twenty acres.

The sum of $200 directed by the will to be paid to George Campbell, the nephew, was duly paid to him.

John W. Campbell now contends that, under the devise set forth above, Martha and he became joint tenants of the said parcel, and that he, as the survivor, is now entitled to the whole.

I have outlined the situation of affairs as above, because, while

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declarations by the testator of what he intended by his will will not be received, yet extrinsic evidence of surrounding circumstances to shew what he probably intended is admissible: *Davidson* v. *Boomer* (1868), 17 Gr. 509. It would be entirely reasonable to confer a joint tenancy on a young man and his maiden aunt working and living upon the adjoining farm.

And I think, apart from circumstances, that the use of the word "jointly" in the will creates a joint tenancy, especially when it is coupled with the direction that "they are to pay my nephew George Campbell the sum of $200;" not that each of them is to pay the sum of $100 to George Campbell.

I find two cases in different States of the Union where the law is practically the same as R.S.O. 1897, ch. 119, sec. 11. In *Case* v. *Owen* (1894), 139 Ind. 22, it was held that the word "jointly" in the addendum of the deed creates in the grantees a joint tenancy. Coffey, J., says, at p. 24: "As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles, the word "jointly" can find no place in describing an estate to be held by them." See also *Davis* v. *Smith*, 4 Harrington (Del.) 68.

The four unities which are the requisites of joint tenancy all here exist.

The judgment, therefore, will be that, on the true construction of the will, Martha S. and John W. Campbell became joint tenants, and that he is now solely entitled by jus accrescendi.

Costs to all parties out of the estate.

Counsel referred also to the following authorities: Encyc. of the Laws of England, vol. 7, p. 513; Jarman, 6th ed., p. 1783 *et seq.*; *Re Gamble*, 13 O.L.R. 299; Wharton, 7th ed., p. 392; *Kew* v. *Rouse* (1685), 1 Vern. 353; Am. & Eng. Encyc. of Law, 2nd ed., vol. 17, p. 658; *Richardson* v. *Richardson*, 14 Sim. 526.

*Judgment accordingly.*

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ONT.
H. C. J.
1912
Nov. 18.

**Re GLOY ADHESIVES, Limited.**

*Ontario High Court, Latchford, J. November 18, 1912.*

1. PRINCIPAL AND AGENT (§ II C—20)—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.

A principal is responsible for the fraud of his agent within the scope of the agent's authority, whether the agent be acting for his own benefit or not.

[*Lloyd* v. *Grace and Co.*, 28 Times L.R. 547, referred to.]

2. CORPORATIONS AND COMPANIES (§ VI C—332)—RIGHT OF LIQUIDATOR—FRAUDULENT SALE OF SHARES—RECOVERY OF MONEY PAID BY COMPANY.

Where one who has been employed by another to sell shares in a company belonging to that other, sells them by fraud, but procures payment of the purchase price to be made to the company, and not to

the vendor of the shares, the vendor cannot recover the money from the company, since to do so would be to obtain an advantage from his agent's wrongful act, but the money is, nevertheless, not the money of the company, and, therefore, the liquidator of the company cannot recover from the vendor any part of such money which has been paid over to him by the company.

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Statement

APPEAL on behalf of T. B. Hughes from the report of the Master in Ordinary, declaring Hughes not to be entitled to twelve hundred dollars paid by one Crosby for shares held by Hughes. He claimed to be entitled to rank on the assets of the company to the extent of the twelve hundred dollars. On behalf of the liquidator of the company the report of the Master was sought to be varied in so far as it holds that the liquidator is not entitled to recover from Hughes a sum of $800 paid to Hughes by the company.

The appeal and cross-appeal were both dismissed.

*A. C. McMaster*, for the appellant.

*W. R. Wadsworth*, for the liquidator.

Latchford, J.

LATCHFORD, J.:—That the twelve hundred dollars was received by the company for Hughes is undoubted. It was, with the eight hundred dollars in question, obtained by H. E. Vanderberg from the boy Crosby, by gross and unconscionable fraud. To hold Hughes entitled to the twelve hundred dollars would be equivalent to determining that he could rightly profit by Vanderberg's wrongful—and, as I regard it, criminal—course in plundering young Crosby.

The circumstances under which the two thousand dollars was obtained by Vanderberg are so extraordinary that I think the evidence taken before the Master should be submitted to the Crown officers charged with the administration of the criminal law; and I am directing the registrar accordingly.

The relation of principal and agent did not, as the Master has rightly found, at any time exist between Crosby and Vanderberg, in regard to the purchase of the worthless shares of Hughes. Vanderberg was no doubt instructed by Hughes to sell his stock, and did sell it. Vanderberg was *the* company, as the Master puts it; meaning, I assume, that he conducted all the affairs of the company; the board of directors, of whom Hughes was one, leaving all matters in Vanderberg's hands. Vanderberg induced Crosby to make the cheque for the two thousand dollars which Crosby had obtained from his widowed mother, payable, not to Hughes, but to the company, which was at the time in a moribund condition. The company had the benefit of twelve hundred dollars out of the two thousand, only eight hundred being handed over to Hughes; but the company was not entitled either to the eight hundred dollars or to the twelve hun-

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dred dollars; it was simply made a conduit for the money between Crosby and Hughes, and part of the money remained with the company; a part only, the eight hundred dollars, passing on to Hughes.

Crosby has chosen to regard the company as his debtor, not only to the extent of the twelve hundred dollars of his money which it retained, but also as to the eight hundred dollars which Vanderberg passed on to Hughes in part payment for his shares.

The liquidator has apparently not contested Crosby's claim. The Master in fact had allowed it, and the liquidator has not appealed upon the point. Hughes is not entitled to claim the twelve hundred dollars which the company received through his agent's fraud. He is, moreover, in my opinion, liable for Vanderberg's fraud, whether Vanderberg was acting for his own benefit or not. Dicta to the contra were recently expressly dissented from in the House of Lords: *Lloyd* v. *Grace & Co.* (1912), 28 Times L.R. 547, reversing the decision of the Court of Appeal, *Lloyd* v. *Grace Smith & Co.*, [1911] 2 K.B. 489. Hughes is, in my opinion, not entitled to rank on the assets for the twelve hundred dollars, and his appeal should be dismissed with costs.

The cross-appeal also fails. The eight hundred dollars which Hughes received was not the money of the company, but the money of Crosby. It reached Hughes in part payment of shares which Vanderberg had sold for Hughes to Crosby. Had Hughes received the whole two thousand dollars, and not merely part of it, the company would, in my opinion, have no right, whatever Crosby's right might be, to recover these moneys from Hughes. The company had parted with nothing in exchange for Crosby's money, and it has not, I think, in any way become subrogated to the rights which Crosby had, or might have had, if he had not elected the company as his debtor for the eight hundred dollars as well as for the twelve hundred dollars. No costs of the cross-appeal.

*Appeal and cross-appeal both dismissed.*

## LOCKE v. SNYDER & WEBBER.

SASK.

S. C.

1912

Oct. 12.

*Saskatchewan Supreme Court. Trial before Newlands, J. October 12, 1912.*

1. SPECIFIC PERFORMANCE (§ I E—30)—OPTION TO PURCHASE LAND—QUOTATION OF PRICE BY OWNER—ESTABLISHING RELATION OF PRINCIPAL AND AGENT.

An agency contract between the owner and a real estate agent is not necessarily established by the owner's answer quoting price sent in reply to a telegram from the real estate agent asking the best cash price although it also stated as a reason for an immediate answer that the sender had a man "who will buy this if he can get it right." and the owner may still shew that his negotiations with the sender of the telegram were only as with a prospective purchaser.

Statement

AN action for specific performance of an option to purchase land, or the return of deposit paid.

Judgment was given dismissing the action against Snyder, and for $100 against Webber.

*C. J. Lennox*, for plaintiff.

*G. E. Taylor*, for defendant Snyder.

*N. R. Craig*, for defendant Webber.

Newlands, J.

NEWLANDS, J.:—The defendant Webber, on the 25th January, 1910, wired the defendant Snyder as follows:—

Wire me your best cash price on lot 17, blk. 55. I have a man who will buy this if he can get it right. He is leaving on to-morrow's train, so hurry up the wire and state your very best price. Can close the deal if price is right.

Snyder wired in reply:—

Eleven fifty net for lot 17, block 55.

Upon receipt of this telegram, Webber sold the lot to the plaintiff for the sum of $1,200, and he and Webber signed an option for the purchase of the said property by the plaintiff, and the plaintiff paid Webber $100. Webber signed as agent for Snyder.

As I held at the trial, the above telegram did not authorize Webber to act as agent for the defendant Snyder, and he had no other authority. The subsequent correspondence shews that Snyder treated Webber as the purchaser and not as his agent.

I hold, therefore, that there is no agreement in writing for the sale of this lot by Snyder to the plaintiff, and as he has pleaded the Statute of Frauds, the plaintiff cannot recover from him.

As the option shews that the plaintiff paid the $100 to Webber as the defendant Snyder's agent, and as I have held that he was not such agent, the plaintiff will be entitled to recover from him that amount.

There will, therefore, be judgment for the defendant Snyder, with costs against the plaintiff, and judgment for the plaintiff against the defendant Webber for $100 and costs.

*Action dismissed.*

ALTA.

S. C.

1912

Nov. 14.

GORDEAN v. DOUGLAS.

*Alberta Supreme Court, Stuart, J. November 14, 1912.*

1. JUDGMENT (§ I F—45)—GROUNDS FOR REFUSING SUMMARY JUDGMENT—ACTION ON CHEQUE—HOLDER IN DUE COURSE.

In an action against the drawer of a cheque, summary judgment will not be granted where the material is sufficient to justify the suspicion that the plaintiff, to whom it was endorsed, is not the holder in due course; and it appears that a defence may be established as between the drawer and the payee.

Statement

THE plaintiff moves for summary judgment in an action on a cheque for $700 drawn by the defendant and of which the plaintiff claims to be the holder in due course.

The motion was dismissed.

*Charman*, for plaintiff.

*Ryan*, for defendant.

Stuart, J.

STUART, J.:—I think that the defendant should be allowed to defend the action. Enough appears from the cross-examination upon their affidavits of the plaintiff and Charles Bell, the payee of the cheque, to justify the suspicion that the plaintiff is not the holder of it in due course. He claims to have bought it from Bell on the 3rd of September. The defendant's cheque, although actually given in August, was post-dated to the 15th of September. Bell swears that he sold it to the plaintiff for $650 because he needed the money very badly but he took in payment of this sum of $650 the plaintiff's cheque for that amount upon the understanding that he would not present it for payment until a later date as there were not then funds of the plaintiff in the bank to meet it. This cheque of the plaintiff has, as a matter of fact, never been paid or even presented for payment. The reason given for this is that Bell lost it. He says he missed it "seven or eight, ten or twelve days after," meaning I suppose after the plaintiff gave it to him. No cheque has been given in substitution for it and Bell has therefore received nothing in money out of this transaction. A Judge might on this evidence hold that the plaintiff is not a holder in due course.

If he is not such holder any defence which would have been open to the defendant if Bell was the plaintiff would, of course, be available to him in this action. The material filed satisfies me that there is a defence which the defendant may be able to establish, namely, that of a total or partial failure of consideration, and I think he should have a chance to do so.

The motion is dismissed and the costs of it will be in the cause.

*Motion dismissed.*

## WILLIAMS v. BRITISH COLUMBIA ELECTRIC R. CO.
(Decision No. 2.)

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Oct. 26.

*British Columbia Supreme Court. Trial before Murphy, J. October 26, 1912.*

1. STREET RAILWAYS (§ III B—30)—CONDUCTOR GIVING PERMISSION TO INTENDING PASSENGER TO RIDE ON STEPS OF CAR—KNOWLEDGE OF COMPANY.

Although it was beyond the scope of the authority of a street car conductor to give the plaintiff, an intending passenger, permission to stand on the car step, the jury may properly find that the intending passenger had the leave and license of the defendants, where it was shewn that the practice of standing on the car steps was so common at the particular time and place, and was followed under such circumstances, that the defendants must have known, or ought to have known of it.

Statement

TRIAL of an action for damages for personal injuries.

Judgment was given for the plaintiff.

The plaintiff an intending passenger was standing on the lowest step of a crowded street car when the conductor signalled the motorman to back up. This was done and a collision took place with another car coming up behind, resulting in injury to the plaintiff for which he claimed damages in this action.

Defendants' counsel asked for a nonsuit at the trial on the ground that plaintiff had no right to be where he was, and was, therefore, a trespasser.

*M. A. McDonald*, for plaintiff.

*L. G. McPhillips*, K.C., for defendants.

Murphy, J.

MURPHY, J.:—In my opinion the question of nonsuit decides the question of contributory negligence and concurrent negligence by defendant and I therefore deal with the motion for nonsuit first.

That depends on whether there was evidence given on which the jury could reasonably find that plaintiff was not a trespasser; in other words, whether they could reasonably find that plaintiff was on the car steps by the leave and license of defendants. I agree that the conductor could not give such permission as it would not be within the scope of his authority. If, however, there is evidence on the record justifying reasonable men in concluding that the practice was so common and was followed under such circumstances that the company must have known or ought to have known of it, then, I think, it was my duty to let the case go to the jury. I think there was such evidence. The plan and other evidence shews that the locus of the accident was close to, and the overcrowding at, an interurban station of defendants. It is a reasonable inference, I think, that officials of the company would be about such station. Even if this inference should not be drawn on the evidence of Williams, on pages 10 and 11, I think it was open to the jury to find that "crowded" cars mean cars on which people stand on the last step and his

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WILLIAMS v. BRITISH COLUMBIA ELECTRIC R. CO. (No. 2.)
Murphy, J.

evidence is that that condition had existed for over 12 months previous to the accident. The evidence of Lang, on pages 29, 30 and 33, is, I think, open to the same construction, especially when read with his rebuttal evidence, and he states his experience extended over 6 or 7 years. When he says, in effect, that people habitually to his knowledge for some years have stood on the last step of the 5.30 car when he (referring to Patterson, the conductor) took it out, I think the jury may reasonably say he means that was the usual practice on the 5.30 car at all times within his experience, not particularly when Patterson was conductor. Even on the other construction, if Patterson did allow such practice for a long time, that in itself would be material evidence which might possibly justify the verdict. Taken with Lang's evidence in the main case and with plaintiff's evidence above referred to, I hold the nonsuit must be refused and the matter become one for the jury. This, to my mind, disposes of the "concurrent negligence" argument. If the company must be held to have known and allowed the practice—and the jury have so found—then the conductor, as their servant, should have looked to the condition of the steps and for approaching cars before he gave the signal for the car to back. He admits the car would not have moved but for such signal having been given. If the car had not backed quite possibly this accident would not have occurred. The conductor of the city car probably would have stopped before he reached the interurban car.

Judgment for plaintiff for amount of verdict.

*Judgment for plaintiff.*

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ALTA.
S. C.
1912
Nov. 13.

## BANK OF HAMILTON v. McALLISTER.

*Alberta Supreme Court, Walsh, J. November 13, 1912.*

1. RECORDS AND REGISTRY LAWS (§ III A—10)—ALBERTA LAND TITLES ACT —AMENDING RECORD BY SUBSTITUTING ACTUAL DATE OF RECEIPT OF INSTRUMENT.

Where a registrar of land titles in Alberta has registered as of a certain date an instrument received by him prior to such date, and gives as his reason the complicated description of the lands mentioned in the instrument and the time involved in examining the same, the court will order the date of registration to be changed to the date of the receipt of the instrument, notwithstanding that, since the date of receipt but before the date of registration, a caveat has been registered in respect of a transaction prior in date to the instrument in question, the only question for decision in such case is whether the instrument was registered as of its proper date, and the court will not inquire whether the instrument should, in fact, have been registered at all, or how the equities stand between the parties.

Statement

AN application by a mortgagee under the provisions of the Alberta Land Titles Act by way of petition for an order direct-

ing the registrar to amend the records of the registration of his mortgage by substituting the 18th of June, 1912, for the 18th of July, 1912, as the date of recording the same, the former date being that on which it was received for recording.

The application was allowed.

*W. P. Taylor*, for mortgagee.

*F. C. Moyer*, for caveators.

WALSH, J.:—On the 18th day of June, 1912, a mortgage made to the Bank of Hamilton was received at the land titles office in Calgary for registration, but the date of registration given to it is the 18th day of July. A caveat affecting the mortgaged lands was received by the registrar on the 20th of June and recorded on the same date, it being founded upon an unregistered transfer of these lands made by the mortgagors to the caveators at a date prior to the execution of the mortgage. The result is that, although the mortgage was handed in for registration two days before the caveat, the latter was registered nearly a month before the mortgage which thereby loses the priority to which it would have been entitled if it had been registered as of the date of its receipt.

Being dissatisfied with the act of the registrar in giving to the registration of this mortgage the date which he has given to it and with his refusal to change the same, the mortgagee applies by petition under sec. 112 of the Act for an order directing him to amend his records by entering the 18th of June, instead of the 18th of July, as the date of such registration.

The registrar gave in writing, as required by sec. 112, his reasons for his failure to register the mortgage on the 18th of June, they being

> the complicated description of the lands mentioned therein and the time involved by my examining staff in examining the same.

He further states that

> my refusal to now rectify such registration is due to the fact of service on me of an injunction issued out of the Supreme Court of Alberta at the instance of the above-named mortgagor, Ole J. Amundsen.

The facts as I find them are as follows:—

When the mortgage was received at the land titles office it was in proper form for registration and the duplicate certificates of title to all of the lands described in it were then in the land titles office except that covering lot 15 in block 10 which was evidently included in the mortgage by mistake. The description originally contained in the mortgage of the lots in block 10 was "lots 2 to 15, 17, 18, and 20." Some one in the land titles office changed the figure 5 in 15 to 4, making the description read, "lots 2 to 14" instead of "2 to 15." With

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this exception the mortgage was recorded exactly in the form in which it reached the land titles office and without any one supplying or being asked to supply any further material than was in the hands of the registrar when it reached him.

Section 20 requires the registrar to enter in the day-book

> a short description of every instrument . . . which is given in for registration with the day, hour and minute of its so being given in,

and the time so entered is by the section declared to be the time of registration. This mortgage was admittedly given in for registration on the 18th of June, and it was obviously the duty of the registrar to enter it as of that date in the day-book and when satisfied that it was in proper form for registration to register it as of that date. The day-book entry of this instrument was made under date of the 18th of July and this was unquestionably wrong. The mortgage should upon the facts before me have been entered in the day-book and registered under date of the 18th of June.

I do not think that the alteration of 15 to 14 to which I have referred affects the question for decision here. The mortgage was undoubtedly accepted by the registrar as being fit for registration and was in fact registered by him. The only question to be determined here is whether or not he has attributed the right date to this registration. It may, perhaps, be that, under the circumstances, he should not have registered the mortgage at all or it may be that as the mortgage was in every respect complete for registration against all the land except this lot 15 he was entitled to register it against everything covered by it except lot 15 even if this change had not been made. These are larger questions beyond the scope of the present enquiry which I cannot dispose of on this application and with reference to which it is therefore unnecessary that I should express an opinion.

Neither should I concern myself by considering how the equities are as between the parties. I cannot, on this application, at any rate, determine the equities. There is only one point for determination here and that is the date upon which this mortgage was registered.

I am quite unable to appreciate the bearing which the facts disclosed in Mr. Moyer's affidavit, and the facts which he established by the production of the original records from the land titles office have upon the point which I have to decide. I fancy that they were proved for the purpose of shewing that the mortgage should not have been registered at all but that seems to me to be quite beside the question under consideration.

The injunction which the registrar refers to as the reason for his present refusal to correct his error does not stand in

his way. It was issued on the 30th of July in an action brought by the mortgagors against the caveators and restrains the defendants and the registrar "from registering transfers of or otherwise dealing with any lands registered in the names of the plaintiffs." The correction of a mistake in the date of the registration of this mortgage, which registration was completed before the injunction was issued, would not have constituted a breach of it.

I think that I have the power under sec. 112 and perhaps, under sec. 116 as well, to order the registrar to correct this error. The caveators did not acquire their interest in the land in reliance upon the fact that this mortgage did not appear of record when they registered their caveat. Their interest was acquired even before the mortgage was made and they therefore have not been misled to their prejudice by the error. I direct the registrar to make the necessary changes on the certificates of title and the duplicate certificates and in the day-book and in the certificates of registration endorsed on the mortgage and on the registered duplicate to shew a registration of the same on the 18th of June, 1912, instead of the 18th of July, 1912.

This contest has been between the caveators and the mortgagee. Before the motion was launched the caveators were applied to through their solicitor for their consent to the change which I now order, the registrar being willing to make it with such consent, but it was refused. They have vigorously opposed this application and they must pay the mortgagee's costs of it.

I have referred to the registrar throughout this judgment. It probably is unnecessary but I think it only fair to say that the evidence shews that the registrar himself had nothing to do with this matter until after the mistake had been made, the fault being that of some member of his staff. I have simply used the words "the registrar" for convenience.

*Order accordingly.*

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## QUIST v. SERPENT RIVER LOGGING CO.



*Ontario High Court. Trial before Britton, J. October 24, 1912.*

1. MASTER AND SERVANT (§ II A 1—43)—EMPLOYERS' LIABILITY—NOTICE OF INJURY UNDER STATUTE.

Where a workman, a foreigner, under the impression that he was in the employ of a firm, which was the owner of several timber berths in the vicinity in which he was working, and which also owned and operated a saw mill and conducted extensive logging operations in the same district, gave to the said firm the requisite statutory notice pursuant to the provisions of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, secs. 9 and 13, of the injuries received by him within the time limited by the said Act, his action was maintained against his actual employer, a limited liability company operating

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one of the berths owned by the said firm, notwithstanding the want of strict statutory notice to the company, where it appeared that the foreman in charge of the latter's works, in which the plaintiff was injured, knew of the accident and all the circumstances surrounding the same, and the evidence shewed that defendant company was in no way prejudiced by such failure to give the formal notice, and where the defendants had not pleaded want of notice as a defence but had subsequently, pursuant to sec. 14 of the Act served notice of intention to set it up at the trial.

Statement

ACTION for damages for injuries sustained by the plaintiff while in the service of the defendants owing to the negligence of the defendants or their other servants.

The action was tried at Sault Ste. Marie before BRITTON, J., and a jury.

*W. A. Henderson*, for the plaintiff.

*J. E. Irving*, for the defendants.

Britton, J.

BRITTON, J.:—The plaintiff was a workman in the employ of the defendants. The defendants were constructing a road, over which it was their intention to haul timber from limits owned by them. In the construction of this road, it was necessary to remove rock by blasting. The plaintiff alleges that he was inexperienced in the use of dynamite and other explosives; and the persons in the employ of the defendants under whose orders and direction the plaintiff was working, had no reason to think otherwise.

The plaintiff was ordered to do this work of blasting, and in doing it he was injured, by a premature explosion of dynamite, to such an extent as to lose the sight of both eyes. He was rendered totally and permanently blind.

Questions in reference to negligence of the defendants were submitted to the jury, and the answers, if warranted by the evidence, entitled the plaintiff to the damages assessed, unless the plaintiff's remedy is barred by reason of his not having given the notice in respect of his injury as required by secs. 9 and 13 of the Workmen's Compensation for Injuries Act. No notice within the time was served upon these defendants.

The accident occurred on the 16th January, 1912. The plaintiff was at once thereafter brought to the Toronto General Hospital, where he remained for a considerable time under treatment. He is a foreigner, and made his home at the village of Cutler. Cutler is the chief place of business of Loveland & Stone. Their large mill is there. They have many men in their employ, and they are reputed owners of extensive timber limits. The plaintiff, not knowing personally the proprietors of either the Loveland & Stone or the defendants' business, thought he was in the employ of Loveland & Stone, and made the mistake of so instructing his solicitors. That was a mistake of fact—not of law. The plaintiff's solicitors served the notice upon Loveland & Stone on

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the 30th March, 1912. On the 6th May, 1912, a writ was issued in due course against Loveland & Stone, and it was not until after that date that the mistake was discovered, and it was then more than 12 weeks from the time of the accident. On the 2nd July, the plaintiff commenced this action against the defendants, who were the employers of the plaintiff.

The defendants in their statement of defence do not allege want of notice; but on the 28th September, pursuant to sec. 14, caused to be served upon the plaintiff's solicitors the notice of their intention to rely upon want of notice of injury as a defence to this action. The defendants' road foreman was well aware of the accident and injury, and all particulars. He was present at the time. All who knew anything connected with the plaintiff's employment, or who knew of the instructions given by the defendants and of the supervision given by the defendants, were present, and, so far as is known, gave evidence at the trial.

I am of opinion that there was reasonable excuse for the want of notice of injury, and that the defendants have not thereby been prejudiced in their defence.

Upon the answers by the jury to the questions submitted, and upon my findings, there should be judgment for the plaintiff for $1,500 with costs.

*Judgment for plaintiff.*

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*Nova Scotia Supreme Court, Meagher, J. November* 12, 1912.

1. JUSTICE OF THE PEACE (§ I—2)—STIPENDIARY MAGISTRATES—STATUS—RELATIONS TO MUNICIPALITY.

The stipendiary magistrate of an incorporated town in Nova Scotia is an independent judicial officer appointed by the Lieutenant-Governor-in-Council and in no wise subject to the control or direction of the town council, the only relation of which body towards the magistrate is that it is required to fix his salary.

2. MUNICIPAL CORPORATIONS (§ II A—34*a*)—TOWN OFFICERS—SALARY OF STIPENDIARY MAGISTRATE.

The provisions of the Towns Incorporation Act (R.S.N.S. 1900, ch. 71, secs. 121 to 124) empowering a Judge of the Supreme Court to reinstate, when improperly removed, a town officer whose appointment is during good behaviour, or to rescind a resolution reducing his salary where such resolution is not passed in the exercise of the *bonâ fide* discretion of the town council, do not apply to stipendiary magistrates appointed by the Lieutenant-Governor-in-Council, although the magistrate's salary is fixed by the town council.

3. COURTS (§ I C 3—102)—JURISDICTION — CONTROL OVER MUNICIPAL ORDINANCES.

The Court cannot, under the provisions of R.S.N.S. 1900, ch. 71, secs. 121-124, interfere where a resolution was passed by the town council reducing the salary of its stipendiary magistrate not in the

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exercise of the *bonâ fide* discretion of the council, but for the purpose of forcing him to resign, with the intention of securing the appointment of a successor in the hope that the latter's decisions in connection with liquor license prosecutions would be more in accordance with the wishes of certain members of the council.

APPLICATION of Charles S. Pelton to rescind a resolution of the council of the town of Yarmouth, reducing his salary as stipendiary magistrate for that town and as clerk of the Police Court.

The application was dismissed.

*H. Mellish*, K.C., and *J. B. Kenny*, for the applicant.

*W. E. Roscoe*, K.C., for the town council.

Meagher, J.

MEAGHER, J.:—The applicant was appointed stipendiary by the Governor-in-council in May, 1907; the salary for that position and that of clerk of the Police Court had been previously fixed at $850 by the town council.

In June, 1910, a by-law was enacted by the council and approved by the Governor-in-council placing his salary as stipendiary at $850, and as clerk at $150 per annum. On the 11th of January, 1912, a resolution was passed in terms, repealing the above by-law so far as the stipendiary's salary was concerned. It was sent to the executive for approval; it was refused on the ground it was not necessary. On the 18th of April last, a resolution was passed by the council reducing the stipendiary's salary to $500 and the clerk's to $100 from March 31st, 1912. On the 23rd of October, 1911, the Governor-in-council appointed one Charles McKay, an additional stipendiary for that town, and on the 29th of February, 1912, the council, by resolution, fixed his salary at $400 per annum.

The application is founded on sec. 121, etc., of the Towns Incorporation Act, R.S.N.S. 1900, ch. 71. The contention made was that the resolution was not passed in the *bonâ fide* exercise of discretion by the council, nor in the public interest; but to compel or induce the stipendiary to resign, and that it required the approval of the Governor-in-council to render it effective.

Counsel for the town controverted the above and further urged that the stipendiary was not an officer of the town in any sense and therefore the invoked statute did not apply.

I was referred to sec. 111 of chapter 71 to shew that the stipendiary was regarded by it as a town officer—to sec. 121, which speaks of "any officer," and to sec. 263, sub-sec. 4, to shew that the statute made no distinction between officers appointed by the Crown and those by the town.

Section 111 provides that the town clerk shall hold office during good behaviour, and section 118 contains a like provision in respect to the town solicitor. These appear to be the only

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officers of the town under the statute whose tenure is expressly provided to be during good behaviour.

Section 121 enacts—omitting portions not at present material—that any officer of the town, the tenure of whose office is during good behaviour, whose salary, as such officer, to be then fixed by by-law or resolution, is reduced by resolution of the council may apply to a Judge to have such resolution rescinded; section 1221 prescribes the procedure therefor, and section 123 refers to a case of removal.

Section 124 (sub-section 1) provides that in the case of reduction of the salary of any such officer, if the Judge determines that the resolution was made in the *bonâ fide* exercise of the discretion of the town council and made in the public interest, and with due regard to the efficient performance of the duties of such office, he shall dismiss the application and sub-section 3 empowers the Judge to rescind the resolution if he finds it was not made in the *bonâ fide* exercise of discretion, or that it was to compel or induce such officer to resign.

There is no reference in this provision to the public interest or the efficient performance of the duties of such office, which appear in sec. 124. This is a new and special jurisdiction and therefore one must be reasonably sure that what he does is within the powers conferred, or arises by necessary implication from the purview of the statute. Ordinarily the Courts do not interfere in merely administrative matters with the action of municipal bodies.

I do not attach any importance to the question touching the need for a new by-law displacing or modifying the old one on the subject, or its approval by the Governor-in-council, because section 121 appears to recognize a right in the council to act in the matter of reduction whether the salary of the town officer was fixed by resolution or by-law. I am unable to find anything in the statute which expressly or by necessary implication makes the stipendiary an officer of the town. The fact that amongst the many officials the town may appoint or who hold positions affecting town interests, two only are named as holding office during good behaviour, is opposed to the view that there can be an implication in favour of the position contended for.

The words "any officer" in section 121 is governed by what follows defining the status of the officer to be affected, or benefited, by the provisions. It was also contended that section 115 supported the view that the stipendiary was recognized as an officer of the town, but I can find no words in it in the least helpful in the direction claimed. The officer to whom section 121 refers is one appointed by the town, and who is therefore its officer, and whose tenure is during good behaviour; that seems to be its intention and meaning.

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The applicant was not appointed by the town nor has the town the slightest power over him as stipendiary; he is an independent judicial officer, a public officer in no wise subject to the control or direction of the council; it would be lamentable if he were so subject. Chapter 33 provides that stipendiary magistrates shall be appointed by the Governor-in-council, shall hold office during good behaviour, and shall be paid by the town council such annual salary as may be agreed upon but not in any case less than $150.

The only relation, therefore, filled by the council towards the applicant under the law is that it is obliged by statute to fix his annual salary at $150 or upwards; and that I am unable to regard as constituting him an officer of the town, and consequently I am not in a position to exercise the jurisdiction invoked. Several affidavits were produced on both sides upon the subject of the alleged conduct of the applicant, and the causes which induced the adoption of the resolution attacked.

The duties and responsibilities of a stipendiary have been materially increased in recent years, and meantime there has been a very substantial increase in the cost of all the necessaries of life, and in view of these, and the fact that the town has been receiving very considerable sums from the fees of the office of stipendiary, it would be but reasonable to expect his salary would have been left untouched. Certainly one would not look for a reduction either in the public interest or as a matter of economy. Moreover, the reduction of the salary did not effect any saving of revenue, and I am quite persuaded the council neither expected nor intended it should. The sum payable to the additional stipendiary equals the reduction made in the applicant's stipend. It is therefore obvious the reduction was not made in the interest of economy. Under the conditions produced by the action of the council the stipendiary has been doing about two-thirds of the work, and the additional stipendiary about one-third, and that not the most onerous. This cannot well be regarded as a fair distribution either as regards work or compensation.

In my opinion there is little or no room for doubting that the proceeding attacked was prompted by a desire to get rid of this applicant because of alleged dissatisfaction with his decisions in proceedings for breaches of the Canada Temperance Act. It was a colourable proceeding with that end in view. Councillor Kinney, a member of the temperance committee, appeared to be the mouthpiece of the council, and, in the debate on the resolution, his expressed desire was "to have a stipendiary to try cases under the Canada Temperance Act who was in sympathy with the cause of temperance." The person who would advocate the appointment of another stipendiary for the

reason he gave must possess a strangely constituted mind on the duties of judicial officers and the due administration of justice. The only qualification he seemed to think necessary—or at any rate the most material one—was sympathy with the temperance cause: a quality which would be liable to aid that cause regardless of what justice demanded. I say this because no other ground of complaint against the stipendiary was put forward at all prominently. Mr. Kinney seemed to forget that the stipendiary's oath of office obliged him "to do right to all manner of people after the laws of the province without fear, favour, affection, or ill-will." Under that oath sympathy with the temperance cause would be as much out of place in a stipendiary's mind as sympathy with those accused of breaches of the Canada Temperance Act or any other statute or rule of law; yet Mr. Kinney was ready to punish for the supposed existence of the latter while eager to secure the possession of the former in the new incumbent. The language he used is all the more objectionable because the council of which he was a member filled a position not far removed from that of prosecutor in the liquor cases. Temperance is, of course, a necessary virtue in all circumstances and in all things; but justice is equally necessary in human affairs; the latter, however, in the minds of extremists, when they deem the interests of temperance involved, is of little moment. In the estimation of a good many so-called temperance people, whose minds are either not well balanced or whose moral construction has been defective, temperance appears to be the only virtue worth upholding.

It will be an evil day for Nova Scotia, as far as the administration of justice is concerned, when the tenure, even of stipendiaries, not to speak of other judicial officers, or their characters, depends upon the opinions of extremists, and those who co-operate with them, as to the correctness of their decisions or the propriety of their behaviour. My experience in legal matters of nearly half a century confirms me in the belief that it is those who know the least about the facts or the law of a given case, who talk most vehemently and comment most unsparingly upon the decision in it, and are always the most ready to impute dishonesty, or ignorance, to the judicial officer or tribunal which gave it. Vulgar, noisy criticism (and but rarely it has any better quality) in nearly every instance, proceeds from ignorance, audacity, or empty-headedness, and a vain desire to be deemed of importance in the community.

It is matter for greater regret that even members of the Bar who fail in their advocacy of a certain cause, or series of causes, are sometimes found adopting much the same line of conduct, and lending their aid to bring the administration of justice into disrepute in order, perhaps, to account for the failure of the

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cause they supported, or to retain the good opinion of those who employed them and those who co-operated with such employers. Such a course is an easy and convenient one, but it is very rarely a true or just one, and still more rarely an honest or manly one in this province.

The application must fail as a matter of law, but I shall not say anything on the subject of costs at this stage, because the statute is silent on the branch. Neither shall I refer further to the charges made against the applicant.

*Application dismissed, costs reserved.*

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## LEBEL v. BRADIN.

*Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.*

1. CANCELLATION OF INSTRUMENTS (§ I—5)—SETTING ASIDE WIFE'S DEED GIVEN AS SECURITY FOR HUSBAND'S DEBT—C.C. QUE. ART. 1301.

Where a person lends a sum of money and accepts as security a mortgage on an immoveable belonging to the borrower's wife, by means of a deed of sale of the property secured with right of redemption or otherwise, he has no action against the wife for the recovery of the money loaned, and the wife can have the deed set aside as being in violation of art. 1301 C.C. (Que.), which makes void any obligation contracted by the wife with or for her husband otherwise than as being common as to property, saving the rights of creditors who contract in good faith.

2. CANCELLATION OF INSTRUMENTS (§ I—5)—WIFE'S DEED AS SECURITY FOR HUSBAND'S DEBT.

The purport of the words "saving the rights of creditors who contract in good faith," which were introduced by an amendment in 1904 to article 1301 C.C. (Que.), is to authorize the courts to distinguish between the creditors who unwittingly and in good faith violate the terms of art. 1301, and those who violate it in bad faith, and to protect only the creditors of the former class from the nullification of their security.

3. HUSBAND AND WIFE (§ II D—76)—RIGHT OF CREDITOR TO RECOVER FROM WIFE—LOAN MADE DIRECTLY TO HERSELF.

Under art. 1301 C.C. (Que.), as amended 1904 in order to be able to recover upon a security given by a wife upon her separate estate, a creditor must have contracted in good faith and such good faith can only exist in case the amount of the loan is paid directly to the wife and the lender has no suspicion that the money will be used for the benefit of any one but the wife; if these two conditions exist then the lender is not obliged to verify the use made by the wife of the money loaned to her.

Statement

AN appeal from the judgment of the Court of Review, Tellier, DeLorimier and Weir, JJ., rendered at Montreal on May 8, 1912, reversing the judgment of the Superior Court, McDougall, J., rendered at Hull on December 8, 1911, which had dismissed with costs the action of the plaintiff-respondent, to have a deed of sale of her property with right of redemption and the registration thereof set aside as being in violation of the terms of art. 1301 C.C.

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The judgment of the Court of Review, now affirmed, contained the following *considérants:*—

Considering that it is established by the evidence of the defendant himself, that he knew perfectly the nature of the transaction which he made, not with the plaintiff, whom he did not know at all, but with the husband of the latter, the said Thomas Sims;

Statement

Considering that it is proved that plaintiff never received any value or consideration whatever, for signing the act of sale of the 30th October, 1907, but on the contrary the result of the proof is that the husband of the plaintiff, said Thomas Sims, himself received and employed such consideration, to regulate his own personal affairs;

Considering that, under the circumstances, the act of sale of the 30th October, 1907, consented by plaintiff, in favour of the defendant, as above set forth, is an act null, illegal and fraudulent, and made in contravention of the prohibitive dispositions of art. 1301 C.C., as amended; and on the whole the said act should be declared null, illegal and fraudulent;

Considering that plaintiff has proved the material allegations of her action, and that there is error in the judgment of the Court of first instance, which dismissed the said action;

This Court reverses and annuls the judgment rendered in this cause, by the Court of first instance, the 18th day of December, 1911, and proceeding to render that which the Court should have rendered, maintains the action of plaintiff; declares null and void to all intents and purposes, the said act of sale with right of redemption, consented by the plaintiff in favour of the defendant, the 30th October, 1907, and annuls to all intents and purposes the enregistration of the said act, unless the defendant prefers within fifteen days from the date of the present judgment, to pay to plaintiff the sum of $2,000, value of the said property, and in any event condemns the defendant to pay the costs and expenses, as well in the Court of first instance as in this Court.

Argument

*C. J. Brooke*, K.C., for the appellant, submitted that he might have had the knowledge imputed to him and yet be in perfectly good faith. He had no knowledge which would vitiate the deed, being a resident of Ontario, ignorant of Quebec law. No bad faith existed. The notary himself never questioned the legality of the transaction. The respondent signed without objection and acquiesced for three years. Besides she benefited in part from the transaction as her husband bought a property with this money which fell into the community therefore, and on which she could exercise her rights. The amendment, 4 Edw. VII. ch. 42, was passed purposely to protect a person such as appellant, after the draconian judgments in *Globensky* v. *Boucher*, 10 Que. K.B. 318, and *Kerouack* v. *Gauthier*, 12 Que. K.B. 295, from

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which two Judges dissented. Besides art. 1301 C.C. never applied to purchases, sales, or exchanges of immoveable property, or to emphyteutic leases made by married women. The transaction in question being a deed of sale therefore escapes absolutely from any application of the article.

*A. McConnell*, for the respondent:—Art. 1301 C.C. has not displaced the burden of proof, nor has it altered the provisions of the law and the jurisprudence now well established. The notary and the appellant knew perfectly well what was to be done with the money loaned, and therefore the appellant must be held to have been in bad faith. Had respondent been made aware of the nature of the contract she would never have consented to it: *MaClatchie* v. *Gilbert*, 24 Que. S.C. 387, 394; *Globensky* v. *Boucher*, 10 Que. K.B. 318, 321; *Kerouack* v. *Gauthier*, 12 Que. K.B. 295, confirmed by P.C.; *Langlais* v. *Langlais*, 9 L.N. 90; C.C. 986-993, 994. The deed which it is sought to have declared null is against public order and should be set aside.

*Brooke*, in reply.

Gervais, J.

GERVAIS, J. (translated):—Thomas Sims, farmer, of the township of Templeton, husband common as to property of the respondent, wishing to acquire a farm known as the Main farm, in the township of Hull, for the price of $3,700, went, on October 30th, 1907, to Mr. Tétreau, notary of Hull, in order that he might procure through him a person who would lend him $1,000 required by the vendors of the Main property. The notary addressed himself to the appellant for this loan of $1,000.

The appellant had never seen the respondent before this loan, nor her husband.

The loan was put through by means of a sale with right of redemption of the respondent's property. This property is the middle portion of lot No. 24 of the township of Templeton. It was on October 30th, 1907, that notary Tétreau passed the deed of sale with right of redemption from the respondent of her Templeton property to the appellant with right of redemption in favour of the respondent.

The respondent acts therein with her husband, common as to property with her, who therein appears both for himself as well as to authorize the respondent to sell this property which she held from her father as a "*propre*," that is to say as her own personal property having acquired the same from her late father before her marriage with the said Sims.

On November 6th, 1907, six days thereafter, the respondent's husband purchased, before the same notary, from the Main estate their property in the township of Hull for $3,700, of which $1,000 cash, which cash payment was the loan made to Sims by the appellant. The respondent borrowed from the appellant, therefore, but it was the respondent's husband who got the proceeds thereof and bought therewith a property in his own name.

The appellant alleges that he acted in good faith, but the cheque filed in the case shews that he paid the amount of the loan, not to the respondent, but to the notary who acted in the case at the request of the respondent's husband and who, therefore, handed to him the cheque in question. And in this he only followed the appellant's written instructions as he had been careful to mark the cheque: "Re T. M. Sims."

The appellant further admits that he never saw the respondent nor her husband; that it was the notary who requested him to advance the sum of $1,000 to Sims to be secured on one of his wife's properties.

Mr. Tétreau, the notary, is dead. Sims sold his Hull township property and left his wife with the obligation to pay the amount of this loan.

The respondent swears that she never benefited for one cent from the loan in question; that she consented thereto only under threats made by her husband to the effect that he would leave her; that her husband benefited from this loan by purchasing property in Hull township in his own name, which property he resold and then disappeared over the United States border.

Relying on these facts, which she has proven, the respondent took the present action, which the Superior Court for the district of Ottawa dismissed, but which the Court of Review in Montreal maintained, and which the appellant now asks the present Court to once more dismiss.

The respondent bases her action on art. 1301 C.C., which reproduces in part the Senatus-Consultum Velleianum, which was of general application under Roman law, of special application under the old French law, was then abolished in France and finally re-introduced into Quebec law. It is of interest here to explain the object of this Senatus-Consultum which prohibits a wife from binding herself with or for her husband and to review its historical vicissitudes both in France and in Canada. And for this purpose I cannot do better than to cite in its entirety the address delivered by the present Chief Justice of this Court, on April 25th, 1903, in his quality of Attorney-General for the province of Quebec, and Speaker of the Legislative Council, against the bill proposed by the Hon. Wenceslas LaRue, legislative councillor, to amend the article in question so as to protect, so it was claimed, the lender from the obligation of supervising the reinvestment (remploi) of the moneys lent to a married woman.

The Legislature did not adopt the amendment as moved, but accepted another amendment in 1904 (4 Edw. VII. ch. 42, sec. 2), which adds to art. 1301 after the words "of no effect," the words "saving the rights of creditors who contract in good faith." The primitive object of the Senatus-Consultum Velleianum, its modifications in the course of centuries, the way in which authors and Courts interpreted it, both in France and in

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the province of Quebec, all this is most clearly, completely and thoroughly explained in this speech, which should be read from beginning to end.

(The learned Judge quoted the entire address, including discussions on the following cases: *Jodoin* v. *Dufresne*, 3 L.C.R. 189; *Hamel* v. *Panet*, 3 Q.L.R. 173, 180-1; *Hogue* v. *Cousineau*, 23 L.C.J. 276; *Bank of Toronto* v. *Perkins*, 2 L.N. 252; *Boudria* v. *McLean*, 6 L.C.J. 65; *Jodoin* v. *Banque d'Hochelaga*, 6 Que. Q.B. 36; *Dupuis* v. *McTavish*, 21 Que. S.C. 455; *Boucher* v. *Globensky*, 10 Que. K.B. 318, and continued:)

Two decisions of the Court of Appeal, one in the case of *Kerouack* v. *Gauthier*, 12 Que. K.B. 295; the other in the case of *The Trust & Loan Co.* v. *Kerouack*, 12 Que. K.B. 281, confirmed by the Judicial Committee of the Privy Council in [1903] A.C. 94, had rendered lenders a trifle nervous, inasmuch as, according to the holdings of this Court and those of the Privy Council, the lender was not only obliged to pay the amount of the loan over to the wife personally, but was also bound to see that it was reinvested (remploi) for the benefit of the wife. The old art. 1301 carried, therefore, absolute prohibition for the wife to bind herself as surety for her husband, that is to say, to pledge her own personal property for the benefit of her husband, to dispossess herself thereof—that is to say, she could only bind herself for or with her husband in her quality of wife common as to property. Art. 1301 created a presumption entailing the nullity of an obligation entered into by the wife who bound herself with her husband otherwise than in her quality of wife common as to property.

And our jurisprudence on this point had been practically unwavering from the introduction of the Senatus Consultum Velleianum to the judgments of the Privy Council in 1903. So a bill was presented to the Legislature to help, as was thought, the lender who could no longer lend to married women without running the risk of losing his money as a result of the application of art. 1301. The rights of the creditor in good faith were to be protected. Just as if there could be a violation in good faith of an absolute prohibition! The amendment to art. 1301 seems to us a discovery as wonderful as that of the squaring of the circle! the allowance of a contravention in good faith to a prohibition of public order.

And this is what the Speaker of the Legislative Council said to the Council when he stated that the adoption of the amendment suggested would deprive the public of a fixed guide, of a rule well established by jurisprudence, and would replace it by an obscure, ambiguous provision which would have the annulling of the contract of loan depend on the good or bad faith of the lender, according as to whether he would lend himself or would not lend himself to lend to a married woman in order that she might dispossess herself of her property in favour of her husband, but in utter violation of art. 1301, which absolutely forbids her to go surety

with or to bind herself for her husband on her own personal property. It is only the wife separate as to property—or the wife common as to property but having property belonging to her personally—who can bind herself to her detriment, that is to say, who can pledge her own personal individual property for the benefit of her husband.

Article 1301 always meant and still means that a wife separate or common as to property cannot pledge her own individual property for the benefit of her husband. If she does so she is violating art. 1301. And as for the lender who loans money to a married woman on the security of her own individual property (*propres*) in order that the loan may benefit the husband's affairs, he is helping the wife to violate art. 1301, he is himself violating it, he commits an illegal act, and he falls under the nullity decreed by the article.

Before the amendment, then, the lender was obliged to see to it that the moneys advanced to the wife should be spent in payment of the wife's obligations or should fall into her own personal estate. What is the purport of the 1904 amendment, "saving the rights of creditors who contract in good faith?"

Before the amendment the creditor could be in good faith, that is to say could pay the moneys directly to the wife, but if she benefited her husband therewith the lender lost all recourse against her because he had not taken the precaution to see that the proceeds of the loan should go to the wife's benefit.

Does this amendment mean that the lender is relieved from this obligation of seeing to it that the proceeds of the loan should go to the wife's benefit? The amendment might have stated this in a few words, but it is silent on the question. Yet in order to give the amendment a practical effect conclusions must be drawn therefrom, even if with a little hesitation.

What can be meant by "creditors in good faith" under this 1904 amendment in view of the jurisprudence under the old article? Before the amendment a creditor could be in good faith only where the money was handed over to the wife, or, in any event, only where this money went to the wife's exclusive benefit. And this money could not be to the wife's exclusive benefit if it were not employed by her for the conservation of her "*propre*," of her individual estate.

Can the creditor, since the introduction of the amendment, be in good faith in the absence of these two conditions?

We do not think so. At least, under the amendment, must the creditor hand over to the wife borrowing the proceeds of the loan; at least must he not by his loan help the wife to pay her husband's debts—for otherwise how could it be contended that he is in good faith? The very first element of good faith required by the amendment is that the lender should pay the amount of the loan to the borrower, that is, the wife. And the second element is this: that the lender, who is aware of this provision of public

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order forbidding the wife from binding herself for her husband, should have no reason to believe, according to the special circumstances of each case, that the loan might be to the interest of the husband.

As for this Court we are of opinion that the effect of the amendment, in many cases is to relieve the lender of the imperious obligation—whether or not there have been good faith—of supervising the use of moneys loaned made by the wife. So that under the amendment where the lender, although he has paid over direct to the wife the proceeds of the loan, knows that the husband is to obtain the benefit therefrom, art. 1301 as amended should be applied. On the other hand, where the lender, unaware of the financial situation of the husband and of the wife, makes the wife a loan on her own immovables and pays the amount thereof into her hands, he will be entitled to recover from the wife even in the event of her having handed over the sum loaned to her husband without the knowledge of the lender.

This is the distinction which a fairly constant jurisprudence had endeavoured to establish on this Senatus-Consultum from 1841 to the judgments in *Kerouack* v. *Gauthier*, 12 Que. K.B. 295; and *Trust & Loan* v. *Kerouack*, 12 Que. K.B. 281. It is, we believe, the distinction which the amendment wished to authorize, according to the circumstances of each case, between the creditors violating art. 1301 in good faith and those violating it in bad faith. Direct payment by the lender to the wife of the amount of the loan; ignorance in good faith on the part of the lender of the use to which the wife will put the loan: these are the two essential elements of good faith as required under the 1904 amendment to art. 1301.

Do these elements of good faith exist in the case of the appellant as regards his loan for $1,000 to the respondent, according to the deed of sale with right of redemption of October 30th, 1907, in order to enable the husband of the respondent to buy a piece of ground for his personal benefit six days later? Assuredly not.

The case is clear and admitted by the appellant: he lent, as a matter of fact, as he wanted and intended to lend, $1,000 to Thomas Sims, the respondent's husband, for the benefit of the latter, and took security on an immovable belonging to the wife alone, a "*propre*." The admissions of the appellant and his own cheque denounce him, condemn him, prove his guilt under art. 1301.

The appeal is dismissed and the judgment of the Court of Review at Montreal affirmed.

*Appeal dismissed*, CROSS, J., *dissenting*.

## YOUNG v. LEWIS and C. B. Lewis.

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Oct. 21.

*Saskatchewan Supreme Court, Parker, M.C., in Chambers. October 21, 1912.*

COSTS (§ I—14)—SECURITY FOR COSTS—NON-RESIDENT PLAINTIFF—OWNERSHIP OF PROPERTY WITHIN THE JURISDICTION.

To relieve a non-resident plaintiff from giving security for costs on the ground that he is the owner of property of sufficient value within the jurisdiction, the property must be liable to seizure under the ordinary execution of the Court. The plaintiff, therefore, although he was the owner in fee simple of a one-third interest in land held in the name of another in trust, was ordered to give security under rule 714.

[*Slack* v. *Malone*, 4 W.L.R. 549; *Clark* v. *Fawcett*, 4 W.L.R. 529, and *Canadian Pacific R. Co.* v. *Silzer*, 3 S.L.R. 162, followed.]

Statement

THIS is an application by the defendant under rule 714 for an order for security for costs. The plaintiff files the affidavits of himself and L. A. Walch, shewing that he is the owner in fee simple of a one-third interest in part of the north-east quarter of section 23, tp. 17, rg. 20 west of the 2nd mer. in the Province of Saskatchewan, the land, however, being registered in the name of L. A. Walch, who holds it as trustee for himself, the plaintiff and one I. K. S. Webber.

The application was granted.

*W. H. McEwen*, for plaintiff.

*C. W. Hoffman*, for defendants.

Parker, M.C.

PARKER, M.C.:—In the case of *Wills* v. *Timmins*, 2 W.L.R. 121, it was held that where the plaintiff is non-resident, but has property in the jurisdiction, granting an order for security for costs is discretionable.

In the case of *Slack* v. *Malone*, 4 W.L.R. 549, the Hon. Mr. Justice Newlands held as follows:—

> As plaintiff only has an interest under an agreement of sale in the lands mentioned in his affidavit and defendant could not realize his costs out of the same unless he took further proceedings, plaintiff will have to give security for costs.

In *Clark* v. *Fawcett*, 4 W.L.R. 529, the Hon. the Chief Justice held that an interest in property under an agreement of sale was insufficient and unsatisfactory as security. In *Ranney* v. *Stirrett*, 18 W.L.R. 5, the same was held. In *Canadian Pacific R. Co.* v. *Silzer*, 3 Sask. L.R. 162, 14 W.L.R. 274, the Hon. Mr. Justice Lamont held that

> the interest of a vendee of land was not liable to be seized under ordinary execution; and that, if it was liable to be proceeded against by a judgment creditor, it must be by some other proceeding than the ordinary execution.

The authorities appear to be quite clear that the property of the plaintiff in the jurisdiction must be liable to seizure under the ordinary execution of the Court. I am of opinion that the property of the plaintiff as set out in his affidavit, which is vir-

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tually partnership property, is as insufficient for security as the class mentioned in the cases cited.

There will be the usual order for security for costs in the sum of $300.

*Order granted.*

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Nov. 13.

## LITTLE v. HYSLOP.

*Ontario High Court, Lennox, J. November 13, 1912.*

1. EVIDENCE (§ X C—696)—ADMISSIBILITY OF STATEMENTS MADE BY A DECEASED PERSON AGAINST HIS OWN INTEREST.

Evidence of statements made to a witness by a deceased person is admissible if they are statements against the interest of the deceased.

[*Thompson* v. *Coulter*, 34 Can. S.C.R. 261, referred to.]

2. COSTS (§ I—16*a*)—RIGHT OF EXECUTOR TO COSTS AS BETWEEN SOLICITOR AND CLIENT—AMOUNT RECOVERED WITHIN COUNTY COURT JURISDICTION—HIGH COURT SCALE.

When an executor is justified in bringing an action in the High Court, having regard to the information in his hands before action, he is entitled as against the estate to costs out of the estate, as between solicitor and client, upon the High Court scale, though the amount recovered in the action is within the County Court jurisdiction.

Statement

ACTION by the administrator of the estate of Esther Hyslop, deceased, to recover $700, alleged to have been lent by the deceased to the defendant, one of her sons, and interest thereon—claiming also a lien on the property purchased with the money.

Judgment was given for the plaintiff.

*J. H. Scott*, K.C., for the plaintiff.

*O. E. Klein*, for the defendant.

Lennox, J

LENNOX, J. (after setting out the facts):—The defendant admits that he borrowed $650 from his mother, but says he was not to pay interest, and that he re-paid, and over-paid, this money to the deceased.

The evidence shews that on the date in question there was $700 drawn from the deceased's bank account; and the defendant admits that he drew out this money. But the defendant says he gave his mother $50 out of that amount, or out of money he had on hand, the same evening. His wife gives some evidence upon this point, too; and although, as I shall mention later, I place no great reliance upon the evidence of the defendant or his wife, yet the plaintiff must establish the loan; and I cannot say that I am satisfied that it was for more than $650. The defendant is not at this point giving evidence of repayment—he and his wife are shewing that only $650 was borrowed.

After careful consideration of the circumstances and evidence, I have come to the conclusion that the defendant agreed

to pay interest; and I allow interest at five per centum per annum. As between strangers a loan imports payment of interest, and, in view of the very limited means of the deceased, the doctrine of advancement could find no proper place.

The onus is, of course, on the defendant to prove repayment; and, being "an opposite or interested party" he is not then entitled to a finding in his favour "on his own evidence . . . unless such evidence is corroborated by some other material evidence:" R.S.O. ch. 73, sec. 10; *Thompson* v. *Coulter* (1903), 34 Can. S.C.R. 261. And where the alleged payments are wholly unconnected—as they are here—corroboration of an item here and there is not corroboration of the whole account: *Cook* v. *Grant* (1882), 32 U.C.C.P. 511; *Re Ross* (1881), 29 Grant 385.

The defendant called evidence which would amount to corroboration within the statute, if I could believe it. But, unfortunately for the defendant, I can place no confidence at all in the testimony of Hector McDonald; and defendant's own evidence and the evidence of his wife fell very, very far short of convincing me that they were telling the truth.

At this point, taking the testimony of these three witnesses alone, and carefully scrutinizing the various entries contained in defendant's book of account, the question of corroboration hardly arises as, even without reference to the statute, I would not be able to find in favour of the defendant as to the alleged payments.

But the evidence of Martha Wallace, as far as it goes, may, I think, be invoked to relieve the defendant. It is not corroboration—in fact, it is inconsistent with the defendant's evidence—but I am satisfied that the deceased did tell Mrs. Wallace that the defendant had paid her $100, and $30, and three or four sums of $10 each. This evidence was objected to; but it was clearly admissible even upon the narrow ground of being a statement against the interest of the deceased.

I will allow the defendants credit for the outside sum mentioned by Mrs. Wallace, $170. Upon the evidence it is difficult for me to determine when these sums were paid. If I credit the $170 as paid at the end of the third year I shall, I believe, be doing substantial justice between the parties.

The loan, with interest at five per cent. to the 5th April, 1910, will total $747.50. Deducting $170 from this, leaves a balance of $577.50.

There will be judgment for the plaintiff for $577.50, and interest thereon from the 5th April, 1910, with costs on the County Court scale; and the defendant will not be entitled to set-off costs.

The defendant has not asked for a stay of execution; and in view of this, I do not think that a declaration of lien is necessary.

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The executor was justified in claiming the full $700 and interest. The action was, therefore, properly brought in the High Court, and he will be entitled to costs out of the estate, as between solicitor and client, upon the High Court scale.

*Judgment for plaintiff.*

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Oct. 24.

## GARDINER v. WARE.

*Saskatchewan Supreme Court. Trial before Newlands, J. October 24, 1912.*

FORCIBLE ENTRY AND DETAINER (§ I—2)—FORCIBLE EJECTION—WHO MAY MAINTAIN ACTION FOR.

A person who is in rightful possession of land has a right to recover substantial damages from one who forcibly enters and ejects him from the land, but he cannot get judgment to restore the possession to him without setting up his title to possession in the statement of claim and proving it at the trial.

Statement

AN action for damages for forcible entry, and for possession of land.

Judgment was given for the plaintiff for $500 damages.

*C. E. D. Wood*, for plaintiff.

*H. E. Sampson*, for defendant.

Newlands, J.

NEWLANDS, J.:—The plaintiff in his statement of claim sets out that he was on the 8th day of June, 1912, in his occupation and possession of certain premises, and that defendant broke and entered and forcibly ejected him, for which he claims damages and possession of the land. Possession is sufficient evidence of ownership to maintain an action of trespass against a wrongdoer, but it is not sufficient in an action for the possession of the land. There the plaintiff must set out his title, so that the defendant will know what he has to answer. It not being done in this case, the plaintiff is not entitled to a judgment for possession of the land. He is, however, entitled to damages. He was in rightful possession of the land on the day he was ejected by the defendant. I do not think the defendant ejected the plaintiff by entering the premises while the plaintiff was asleep in his room upstairs, but he did eject him when he called in the police, and the plaintiff had to leave the premises under their instructions or be arrested. Under these circumstances I think the plaintiff is entitled to substantial damages, and I fix same at $500 and costs.

*Judgment for plaintiff.*

## Re HOLMAN and REA.

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Nov. 2.

*Ontario High Court, Sutherland, J. November 2, 1912.*

1. JUSTICE OF THE PEACE (§ III—10)—JURISDICTION OF POLICE MAGISTRATE —PRELIMINARY ENQUIRY.

Every police magistrate is *ex officio* a justice of the peace for the whole county or district for which, or for a part of which, he is appointed, and such a justice of the peace need not hear both sides on the preliminary hearing, before committing the accused for trial before another magistrate.

2. JUSTICE OF THE PEACE (§ III—12)—JURISDICTION—PROCEDURE IN CRIMINAL CASES.

It is the duty of a magistrate to proceed with the trial of the accused when the accused is before him, when the accused has been committed for trial before him by another magistrate who is an *ex officio* justice of the peace for the same county; and this is so, even if the complainant does not appear at the trial, but has due notice of the time and place.

[*R.* v. *Burke*, 5 Can. Cr. Cas. 29, referred to.]

Statement

MOTION on behalf of N. J. Holman for an order prohibiting G. D. Laurier, Police Magistrate in and for the Town of St. Mary's, in the county of Perth, from proceeding further in connection with a certain information or complaint laid by Holman on the 26th September, 1912, before James O'Loane, Police Magistrate in and for the Town of Stratford, in the same county, against Edgerton Rea, in which it was charged that at St. Mary's, on the 14th September, 1912, he, Rea, sold a horse, the property of one William J. Rea.

The motion was dismissed.

*Featherston Aylesworth*, for the applicant.

*R. C. H. Cassels*, for the respondent.

Sutherland, J.

SUTHERLAND, J.:—The ground set out in the notice of motion is, that the magistrate had no jurisdiction in respect of the matter.

A civil action is pending with reference to the sale of a horse, in which William J. Rea is plaintiff and Holman and one Guest, are defendants. An examination for discovery has been had in the civil action, and the defendant Holman thereafter laid the information. The alleged theft was charged to have been committed at the town of St. Mary's. A warrant was issued on the 26th September, 1912, for the arrest of Edgerton Rea, and he was arrested on that day. He appeared before Police Magistrate O'Loane in Stratford, was admitted to bail, and directed to appear the next day before Police Magistrate Laurier at St. Mary's.

Police Magistrate Laurier, in an affidavit filed in answer to the motion, states that the accused, on the 29th September, 1912, appeared before him and surrendered himself into custody on the said charge, elected to be tried before him, and pleaded "not guilty." The trial was then fixed by Police Magis-

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trate Laurier for the 30th September, at St. Mary's, at 10.30 a.m.; and the Crown Attorney was notified to appear and prosecute the charge.

On the 30th September, shortly after the hour appointed, the accused again appeared in St. Mary's before the said magistrate, and was surrendered into custody, but the complainant Holman did not appear nor any witnesses on his behalf. It appears from the affidavit of a constable that, on the 27th September, Holman had been informed that the trial was fixed for the 30th and the hour and place of trial. On that day, after Court had adjourned, Police Magistrate Laurier received a telegram from Holman's solicitors in the following terms: "Complainant Holman disputes your jurisdiction in Rea case."

On the 3rd October, at the opening of Court at 10.30 a.m., the notice of this motion was served on Police Magistrate Laurier; and counsel on behalf of Holman appeared and "disputed the jurisdiction of the Court to hear the charge."

The complainant Holman, though subpœnaed to attend, did not do so. The magistrate thereupon proceeded with the case, and, after hearing evidence, acquitted the accused.

The complainant says that Police Magistrate O'Loane directed the accused to appear before Police Magistrate Laurier without any notice to him and without his knowledge, and that he did not hear the complainant in person or by solicitor, counsel, or agent, before making such direction. Under these circumstances, he asks for the order mentioned.

Section 665 of the Criminal Code reads as follows: "The preliminary inquiry may be held either by one Justice or by more Justices than one. (2) If the accused person is brought before any Justice charged with an offence committed out of the limits of the jurisdiction of such Justice, such Justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some Justice having jurisdiction in the place where the offence was committed."

If this section applies, then the Police Magistrate at Stratford did not comply with its terms, since he plainly did not hear both sides before ordering the accused to be taken before the other Justice. As I understand the counsel for the applicant, he contends, in the first place, that there was no preliminary inquiry at all, under the section, before the Police Magistrate at Stratford; and, consequently, the magistrate could not make the order permitted by the section. He further, however, contends that, even if what was done by the magistrate amounted to a preliminary hearing, it was not regular, in that he did not hear both sides. But does this section apply? I am not clear that it does. Was the alleged offence committed out of the jurisdiction of the Police Magistrate at Stratford, who

took the information? By 10 Edw. VII. ch. 36, sec. 24 (O.), it is provided, that "every Police Magistrate shall be ex officio a Justice of the Peace for the whole county or district for which or for a part of which he is appointed."

The Police Magistrate at Stratford is, therefore, ex officio, a Justice of the Peace for the whole county of Perth, and the alleged offence was committed at the town of St. Mary's, in that county. He must, as it seems to me, have been proceeding under some other section.

It is provided by sec. 708 of the Criminal Code that "any one Justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more Justices."

He could properly proceed under this section. Even if he desired to hear a case outside the limits of the town for which he was Police Magistrate, and had the power to do so, he could not be compelled to do so. See secs. 31 of 10 Edw. VII. ch. 36 (O.)

Under sec. 708, the Police Magistrate at Stratford, therefore, as a Justice of the Peace for the County of Perth, might receive the information in this case and issue his summons or warrant thereon. He did this. He could also, under that section, do all other acts and matters necessary preliminary to the hearing. He could also admit the accused to bail, unless sec. 18 of ch. 36 applies. The alleged offence having been committed in the town of St. Mary's, it was natural and proper that it should be disposed of by the Police Magistrate for that town, either by way of preliminary hearing, or, if the accused elected to be tried by him, by trial and disposition.

Section 668 of the Criminal Code is as follows: "When any person accused of an indictable offence is before a Justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the Justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed." The Police Magistrate at St. Mary's found the accused before him after being apprehended, as already indicated, or else voluntarily. He should thereupon proceed, and I think it was his duty to do so, to inquire into the matter: *Regina* v. *Mason*, 29 U.C.R. 431; *Regina* v. *Burke*, 5 Can. Crim. Cas. 29.

On the accused electing to be tried by him, he could proceed under sec. 707 of the Criminal Code to hear and dispose of the

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case. The informant had been told of the time and place, when and where and the Police Magistrate before whom the accused was directed to appear. He did not appear then, nor on the morning first fixed for the trial. He was thereupon served with a subpœna to attend the trial on the day finally fixed therefor. He was not present in person, but was represented by counsel attending to object to the magistrate's jurisdiction. He cannot complain that full opportunity to appear and give evidence or assist in securing a conviction, if that were possible, in the circumstances of the case, were not given to him.

I think, under the circumstances, that the Police Magistrate at St. Mary's did what he did rightly, and that this motion must be dismissed with costs.

*Motion dismissed.*

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Oct. 31.

**BLACK et al. v. CARSON et al. and THE CROWN RESERVE MINING CO. Ltd. (mis-en-cause).**

*Quebec Court of King's Bench (appeal side) Archambeault, C.J., Lavergne, Cross, Carroll and Gervais, JJ. October 31, 1912.*

1. CORPORATIONS AND COMPANIES (§ V C 1—192)—TRANSFER OF SHARES TO PRESIDENT AND SECRETARY—RIGHTS OF TRANSFEREES — LIABILITY TO ACCOUNT TO MEMBERS OF SYNDICATE.

Where the members of the syndicate organizing a joint-stock company, agreed that a large number of the company's shares should issue to the promoters of the company in trust for the members of the syndicate, also that a portion thereof should, in order to form a fund for the organization of the company as well as such working capital as the directors should from time to time deem prudent, be retransferred to the president and secretary of the company, which was done, and a number of such shares were sold by the directors, the proceeds being used in developing the business, which became profitable, and the shares became valuable, the directors did not hold such shares in trust for the members of the syndicate, and they cannot be required to account for shares sold, or for dividends received on the shares held by them, or to distribute the remaining shares among the members of the syndicate, as they had, by their agreement, in order to form a working capital for the company, vested it with such shares without retaining any individual interest therein, and it did not appear but that the directors might at some future time need to sell the remaining shares in order to assure the necessary development of the business.

2. CORPORATIONS AND COMPANIES (§ V E 1—212)—RIGHTS OF MINORITY SHAREHOLDERS.

Minority shareholders of a joint-stock company are obliged to follow the administrative directions of the majority shareholders in the absence of legislation to the contrary.

3. CORPORATIONS AND COMPANIES (§ V C 1—189)—TRANSFER OF STOCK HELD IN TRUST TO PRESIDENT AND SECRETARY OF COMPANY.

A joint-stock company, organized under the Companies Act (Can.), does not wrongfully acquire its own shares, where, under an agreement of the members of the syndicate organizing it, a number of shares that were issued in trust for their benefit, were re-transferred

to the president and secretary of the company in order to form a fund for the working capital thereof, under the control of a majority of the shareholders, since, by such agreement, the sale or distribution of the shares only was postponed, and the transaction is therefore permissible under secs. 26, 80 and 132 of the Companies Act, R.S.C. 1906, ch. 79.

4. COSTS (§ II—37)—UNNECESSARY SEPARATION IN DEFENCES OF VARIOUS DEFENDANTS.

The court may restrict the costs of the successful defendants to those of one contestation where each filed a separate defence in identical form instead of a single defence for all, when all of the defendants were in the same interest.

[*Hétu* v. *Humphrey*, 32 Que. S.C. 169, and *Van Felson* v. *Boudreau*, 18 Rev. de Jur. 216, applied.]

Statement

APPEAL by the plaintiffs, appellants, from the judgment rendered by the Superior Court, Demers, J., on June 28th, 1912, at Montreal, dismissing with costs the appellants' action to have a certain trust declared at an end and the respondents condemned to account to plaintiff for 569,950 shares of the capital stock of the Crown Reserve Mining Co., Ltd.

The appeal was dismissed.

*A. Geoffrion*, K.C., and *C. M. Cotton*, for appellants.

*R. C. Smith*, K.C., and *J. E. Martin*, K.C., for respondents.

The material parts of the judgment appealed from are as follows:—

Demers, J.

DEMERS, J.:—The plaintiffs by their amended declaration allege that on the 9th January, 1907, W. Alex. Mackay, John Carson, A. G. F. Ross, J. F. Lennox, R. S. Smith, John Black, James Curry, Charles E. Potter, Herbert Ross, R. W. Garth, Percy Ross, Z. Gallagher, S. Booth, and T. Herbert Lennox entered into a syndicate agreement establishing the terms and conditions regulating the Ross syndicate tender for lands, minerals, mining rights and privileges under that part of a certain lake called Kerr Lake situated in the Township of Coleman, in the Province of Ontario; that under and by virtue of the said syndicate agreement, two of the subscribers thereto, to wit: A. G. F. Ross and Charles E. Potter, were given full authority to tender in their own names for the said lands, minerals, mining rights and privileges of Kerr Lake, and to remit to the Government ten per cent. of the amount of the said tender, which amount of money had been subscribed by the members of the said syndicate. Furthermore, under and by virtue of the said syndicate agreement, the said trustees were also given power and authority in case the said tender was accepted to incorporate a company to take over the said lands, minerals, mining rights and privileges subject to certain conditions, the whole as more fully appears on reference to a copy of said agreement: Plaintiffs' exhibit No. 1. Acting in virtue of the said agreement,

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the said Ross and said Potter on the ninth day of January, 1907, previous to the transfer (plaintiffs' exhibit No. 4), an Mines, for the Province of Ontario, for the purchase of that portion of the bed of Kerr Lake, which is situated in the Township of Coleman, in the District of Nipissing, in the Province of Ontario, plaintiffs' exhibit No. 2.

On the 9th day of January, 1907, the said tender was accepted by the Ontario Bureau of Mines, as appears by a copy of said acceptance: Plaintiffs' exhibit No. 3. In pursuance of the said syndicate agreement, the said Ross and the said Potter did cause a company known as the Kerr Lake Crown Reserve, Limited, to be incorporated with a capitalization of two million dollars, for the purpose of taking over and acquiring the said property mentioned in the said syndicate agreement; that on the 15th day of January, 1907, the said Ross and the said Potter transferred to the said Kerr Lake Crown Reserve, Limited, the lands, minerals, mining rights and privileges for which the said Ross and the said Potter had tendered for 1,999,950 shares of fully paid stock in the said company, which said stock was duly allotted to the said Ross and the said Potter who received the same for and on behalf of the members of the said syndicate, plaintiffs' exhibit No. 4; whereas the said plaintiffs allege furthermore that at the time of the transfer from Ross and Potter to the Kerr Lake Crown Reserve, Limited, there was still due and unpaid to the Ontario Government the sum of $160,650, being as and for the balance of the purchase price due by the said Trustees to the Ontario Government on the purchase of the said property; that under the said transfer from the said trustees to the said company it was agreed by the trustees that they would dispose of such shares of the capital stock of the company as might be requisite in order to raise the said balance, as also appears. Plaintiffs' exhibit No. 4.

Previous to the said transfer one of the members of the said syndicate, to wit: John Carson, one of the defendants herein, had agreed with the trustees to give $160,650.00 for 800,000 shares of fully paid stock in the said company in the event of the company taking over property; that on the 15th day of January, 1907, previous to the transfer (plaintiffs' exhibit No. 4), an agreement was entered into between John Carson, of the city of Montreal, one of the defendants herein, as party of the first part, and Charles Edward Potter, and A. G. F. Ross, as parties of the second part and the other members of the syndicate above mentioned, to whom had been added William I. Gear, David M. Lockerby, James A. Ogilvy, Jr., and Claude Macdonell, parties of the third part, the purpose of the said agreement being to authorize the said Ross and the said Potter to execute the said transfer (Plaintiffs' exhibit No. 4) and to declare and

determine in the event of the execution of the said contract all the rights and interest of the members of the syndicate in and to the stock of the Kerr Lake Crown Reserve, Limited, to be received by said trustees as the purchase price of the said mining rights, and authorize the said trustees to dispose of certain shares of the stock in the manner herein mentioned: Plaintiffs' exhibit No. 5.

By virtue of clause 2 of the said agreement the said trustees upon effecting said sale were to hold 630,000 shares of the said fully paid stock in trust, for the said subscribers respectively under the names and to the extent as set forth in the said clause 2; that by virtue of clause 5 of the said agreement the said trustees were authorized to transfer to the said John Carson 800,000 shares fully paid stock in the said company for the purpose of realizing the balance of money due to the Government; that by virtue of clause 7 of the said agreement it was agreed that after the authorized distribution mentioned above was effected the balance of the said shares, to wit: 569,950 should be by the trustees the said Ross and the said Poter, transferred to the directors of the said Kerr Lake Crown Reserve, Limited, for the purpose of providing funds for the organization of the said company and for working capital as the directors of said company might deem prudent from time to time; that on the 1st day of October, 1907, a meeting of the directors of the said company was held at the city of Toronto, at which meeting it was resolved that the said 569,950 shares of the capital stock of the company, referred to in clause 7 of plaintiffs' exhibit No. 4, be transferred by the said Ross and the said Potter to the president and secretary of the company for the purposes set forth in said clause 7, plaintiffs' exhibit No. 6.

On the 1st day of October, 1907, the said Ross and the said Potter in virtue of the resolution mentioned in the two foregoing paragraphs and in their quality of trustees under the said trust agreement of the 15th day of January, 1907, transferred, assigned and set over unto the president and secretary of the Kerr Lake Crown Reserve, Limited, their successors and assigns 569,950 shares of the stock of the said company by an agreement in writing signed by the said Ross and the said Potter of the one part and by the said John Carson and James Cooper as president and secretary of the said Crown Reserve Company, Limited, of the other part (plaintiffs' exhibit No. 7); on the 1st day of October, 1907, and at all times and periods subsequent thereto and at the present time the said John Carson, one of the defendants herein, was and is the president of the said Kerr Lake Crown Reserve, Limited, and James Cooper, the other defendant, was and is the secretary of the said company, and the defendants J. R. Laurendeau, J. G. Ross, W. I. Gear, C. A.

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Smart, H. H. Lyman, D. W. Lockerby, Ziba Gallagher, and Charles E. Potter, were and are directors of the Crown Reserve Mining Company, Limited, and that at all times since the month of January, 1908, and at the present time the defendant A. G. F. Gardner has been and still is a director and at all times since the 29th day of December, 1908, the defendant Robert Reford has been and still is a director; that since the 1st October, 1907, the name of the said Kerr Lake Crown Reserve, Limited, had been changed by a by-law duly passed and ratified to the Crown Reserve Mining Company, Limited, which is the present name of the said company; that the said John Carson, and the said James Cooper obtained possession of the said 569,950 shares of the said Crown Reserve Mining Company, Limited, under the terms and conditions of clause 7 of the trust agreement of the 15th day of January, 1907, plaintiffs' exhibit No. 4; that at various times since the 1st day of October, 1907, the said trustees have, as plaintiffs are informed, disposed of certain portions of the said shares to various persons, the exact amount of which the plaintiffs are not aware, and out of the proceeds thereof the said trustees have paid all the expenses of the organizing of the said company, and have furnished sufficient working capital for the said company to enable the said company to fully develop their mine and to place the said mine on a paying basis; that at various times the defendants have offered for subscription among the shareholders of the company certain portion of the stock so held by them in trust, at a rate less than that at which the said stock was selling in the open market which said distribution, in view of the large personal holding of the said John Carson, James Cooper and the other defendants, who, as shareholders of the company purchased a large proportion of the trust shares so offered to the shareholders, amounted to a purchase by the said trustees of the shares so held by them in trust; that the said company at present is an exceedingly wealthy company, and has been paying dividends at the rate of 64 per cent. per annum, and in addition, is possessed of a reserve fund of $437,302.68 according to the last financial statement issued by the said company; that there is no further necessity for the directors or the said defendants to hold in their possession or deal with or dispose in any way of any balance of the said stock so held by them under clause 7 of the plaintiffs' exhibit No. 2, and for the purposes mentioned therein; that the said trust is completed and at an end, the said defendants are bound to account to the members of the syndicate and to the plaintiffs in particular each for his share of the 569,950 shares so transferred under the said agreement, and for all dividends received or which should have been received on the same and to return to each member of the syndi-

cate and to the plaintiffs in particular, their proportion of all stock which were not used by the said directors for the purposes of the trust, and accrued dividends thereon, as set forth in the said agreement, plaintiffs' exhibit No. 5; that plaintiffs are members of the said syndicate and subscribers to the agreement filed herewith as plaintiffs' exhibit No. 5; that the share and interest of each of the plaintiffs in the said 569,950 shares transferred as aforesaid to the trustees of the company is as follows:

| | | |
|---|---|---|
| John Black | 27,140 | Shares. |
| A. G. F. Ross | 27,140 | " |
| R. W. Garth | 27,140 | " |
| W. A. Mackay | 27,140 | " |
| Herbert Ross | 27,140 | " |
| Percy Ross | 27,140 | " |

That the value of the said shares at the present time is at least $5.00 per share;

And praying that said trust be declared at an end and the defendants be ordered to account to the plaintiffs for 569,950 shares of stock held by the defendants under said trust deed.

The defendants have each severed in their defence and each of them plead by their amended pleas separately as follows: that the plaintiffs have no right of action against defendants by reason of anything alleged in plaintiffs' declaration, there being no *lien de droit* between plaintiffs and defendants with respect to the said 569,950 shares; that the said shares were transferred to the president and secretary of the Crown Reserve Mining Company, Limited, by A. G. F. Ross, one of the plaintiffs, and Charles Edward Potter, one of the defendants herein, for the benefit of the said company under the provisions of the plaintiffs' exhibit No. 5; that the said agreement, plaintiffs' exhibit No. 5, was a general scheme for the organization of a joint stock company, under which each member of the theretofore existing syndicate was to receive for his interest in said mining property, the number of shares of fully paid up stock provided for in paragraph 2 of said agreement, amounting in all to 630,000; 800,000 being appropriated for the realization of the balance of the purchase price of the property, namely, $160,650.00 and the remaining 569,950 being by said agreement allotted for the benefit of the company—"for the purpose of providing funds for the organizing of the said company and for working capital as the said directors may deem prudent from time to time;"—that neither the plaintiffs nor any member of the former syndicate ever had any proprietary interest, either legal or beneficial, in said 569,950 shares, which by the said agreement, were thus allotted for the benefit of the company

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to be used from time to time;—that said 569,950 shares were thus acquired by the president and secretary of the company for its use and benefit and were disposed of in part by them for the benefit of the company and in pursuance of the company's instructions as hereinafter more fully alleged; that at a meeting of the directors of the said company, held on the first day of October, 1907, a by-law was duly passed authorizing a loan of $25,000.00 for the purposes of the company, which said sum of $25,000.00 was urgently and immediately required by the company, and the said by-law was duly submitted to a general meeting of the shareholders of the said company called pursuant to regular notice and held on the first day of October, 1907, the whole as appears upon reference to exhibit D.; that in pursuance of the said by-law, those interested in the company and principally the directors thereof, entered into an agreement to lend the said sum of $25,000.00 to the said company, it being at the time impossible to negotiate a loan from banks or outside lenders, but scrip representing the security provided for in said by-law and signed by the said trustees was appropriated to each loan so made; that as provided in said by-law the stock represented by such scrip as security for said loan, amounting altogether to 500,000 shares, was in the event of said loan not being paid before the 1st day of April, 1908, to become the absolute property of the lenders. The scrip so conveyed as security for the said various loans aggregating the sum of $25,000.00 represented a value of five cents on the dollar of its par value; that under the provision of the agreement under which the said loan was made to the said company, the sum of $14,820.00 was actually advanced and when the said loan was maturing, that is, when the date was arriving at which the stock transferred as security would become the absolute property of the lenders, the company had incurred sundry pressing debts, among such debts being debts which under the laws of the Province of Ontario would carry privilege upon all the property of the company, and it was imperatively necessary to raise the said sum of $25,000.00 in order to liquidate the amount advanced under the agreement of loan and in order to prevent the stock transferred as security from becoming the absolute property of the lenders, and in order to meet the pressing necessities of the company, and it was at that time impossible to raise the said sum by ordinary loans in the usual manner, and 250,000 shares of said stock were disposed of for such purpose, the same having been offered to and acquired by the shareholders of said company, including plaintiffs *pro rata* and in proportion to their respective holdings in the company at that time, and in all that the company and its directors did in premises they acted prudently and in the interest of the company

and its shareholders, and realized more by the sale of said stock than could otherwise have been realized therefrom; that as to 88,807 other shares of the stock held by the said president and secretary, for the benefit of the company and which they were entitled to deal with under the terms of the said trust deed in the interest of the company and its shareholders, the president and secretary of the said company, acting under instructions from the said company, sold and disposed of the same in the best interests of the company and its shareholders and *bonâ fide* in the fulfilment of the said trust imposed upon them, the major portion of same going to plaintiff A. G. Fowler Ross, and his wife, to wit, A. G. Fowler Ross, one of the plaintiffs herein, on the 19th of November, 1907, 27,500 shares; to Mrs. Maud H. Ross, on 19th November, 1907, 27,500 shares; to S. D. Madden, on 24th November, 1907, 10,000 shares; to J. Roche, on the 24th December, 1907, 1,000 shares; to S. W. Cohen on the 3rd June, 1908, 20,000 shares and to divers other shareholders of the said company between the 9th February, 1907, and the 17th August, 1907, 2,807 shares; that the said plaintiffs were from time to time fully informed concerning every transaction made by the said company either as to its organization or its development and the plaintiff, Mackay, was a director and participated in the acts complained of by plaintiffs; that the president and secretary, acting under the instructions of the said company, thus dealt with 338,807 shares of the said 569,950 in the best interest of the company and its shareholders and the balance, 231,143 shares, has continued to be and still is in the hands of the said president and secretary who hold the same subject to the provisions of the said deed (plaintiffs' exhibit No. 5), and the plaintiffs have no ownership therein, the said shares representing the balance of the working capital provided for in the general scheme of organization of the company and which is available for all necessary capital expenditure from time to time as the same may be required, according to the terms of said agreement and the proceeds of the said balance of said shares will be expended from time to time upon capital account and the defendants are advised by their engineers that the same may be required at any moment in case of flooding or other similar accidents to which the property by its peculiar situation is especially exposed, the mining operations of the said company being carried on under the bed of a lake, a large reserve working capital and a large cash reserve are needed to safeguard the interest of the shareholders; and defendants separately pleading pray dismissal of plaintiffs' action.

The *mis-en-cause*, The Crown Reserve Mining Company, Limited, contest the plaintiffs' action and pleads as the defendants have pleaded.

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It appears by the terms of the agreement between the organizers and subscribers of said company that plaintiffs have transferred the property of said disputed shares absolutely to the company, the *mis-en-cause*, for the purpose of providing funds for the organizing of said company and for working capital, as the directors may deem prudent, from time to time; by this agreement, it appears the intention of the promoters was not to keep any direct interest in the said disputed shares, but to preserve for the protection of their allotted shares, a control over the said transferred shares in order that they could not be disposed of for other purposes, though they belong to said company. Without any special interest defendants have filed twelve identical separate pleas for the evident purpose of multiplying costs; Considering that no right should be abused, and that the Court should not sanction a practice which is manifestly unjust: *Hétu* v. *Humphrey*, 32 Que. S.C. 169 (C.R.), June 18, 1907; *Van Felson* v. *Boudreau*, 18 Rev. de Jur. 216.

I dismiss the action with costs of one contestation only in favour of defendants, and with costs of another contestation in favour of the *mis-en-cause*.

The appeal taken from the above decision was dismissed by the Court of King's Bench, the following opinion being handed down.

Gervais, J.

Montreal. GERVAIS, J. (translated):—The Superior Court for the District of Montreal, on the 28th day of June, 1912, dismissed the demand of the appellants, members of the organizing syndicate of the Kerr Lake Crown Reserve, Limited, later known as the Crown Reserve Mining Company, Limited, under a deed of association of the 15th of January, 1907, according to which 800,000 shares were to provide payment to the Government of Ontario for the concession; 630,000 shares to indemnify the members of the syndicate for their disbursements; and the rest, 569,950 shares, were to remain at the disposition of the company to help it in case it might need further funds for its exploitation. The appellants now wish to force the company to render an account of these last mentioned shares.

The Court of first instance has decided that under clause 7 of the deed of association, the appellants purely and simply and without reserve abandoned all rights in these shares in favour of the company for the purpose of protecting their other shares, by assuring to these an increase of value, by making it unnecessary for the shareholders of the company to make further advances, in a word, to assure the shareholders of financial aid outside of the syndicate from persons who might be willing to acquire its shares to aid the company and to put its business on a sound foundation.

The appellants gave to the trustees of the company, at the time of receiving their portion of the shares, a general and final discharge. The appellants allege to-day that the shares of the company have attained a very great value, and that consequently there is no further *raison d'être* to keep these remaining shares as a reserve; that the company has no longer reason to believe that it will need them to ensure a complete and perfect exploitation of its business.

The further question also arises, a question which arises in the administration of most of the joint stock companies with limited liability in Canada, to wit: whether the minority is obliged to follow the administrative dictation of the majority. Our Courts have decided in the affirmative, in the absence of such legislation (which by the by is very much to be desired) as exists in England and which comes to the help of the minority in certain cases, especially in that of the fusion or merger of companies, by allowing it to force the majority to buy its shares at a stipulated price, if not at a price set by judicial arbitration. In any event, in this case complete proof has not been made that the company will not need to sell its shares to assure the execution of works necessary for its ultimate development. In the second place, as we have above remarked, the appellants did not reserve any individual right in the reserved shares, which, by the deed of the 15th of January, 1907, were acquired purely and simply and without reserve by the company.

There yet remains to be decided the objection raised by the appellants, to wit: that the company could not become owner of its own shares, that is to say, of those placed in reserve under clause 7 of the agreement of association of January 15th, 1907. The purport of this clause does not, in our opinion, constitute the company the owner of its own shares, but simply postpones their sale or distribution to a later date, under such sale conditions as it may deem advisable and in the interest of the company, the care and control of which are left to the majority of the shareholders.

Clause 7 of the deed of association of the 15th of January, 1907, has no other effect in our view than that of a by-law of the directors and the shareholders regulating in the interest of the company the distribution of the 569,950 shares in question. Had not the directors and the shareholders the right so to do? Yes. Our law in virtue of articles 26, 80 and 132 of chapter 79 of the Revised Statutes of Canada, 1906, which regulate the organization and administration of joint stock companies, as that in question in the present case, to be formed under the provisions of the said chapter, gives them that power.

For a joint stock company is not bound to sell all its shares in order to be able to commence business, since article 26, which

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we have just cited, authorizes the commencement of business as soon as ten per cent. of the authorized capital is subscribed and paid in.

The reasons given by the Court of first instance for the dismissal of the action are those which this Court adopts in rejecting the present appeal with costs.

*Appeal dismissed.*

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## Re ALLEN.

*Ontario High Court, Middleton, J. November 6, 1912.*

1. WILLS (§ III G 4—138)—CONDITION IN RESTRAINT OF MARRIAGE—APPLICABILITY TO BEQUEST OF PERSONALTY.

A devise and bequest of all the testator's real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not re-marry, gives her the absolute right to dispose of the personalty.

[Compare *Re Johnson*, 7 D.L.R. 375.]

2. DOWER (§ I A—3)—NATURE AND EXTENT OF RIGHT TO—DEVISEE OF LAND.

A widow who is a devisee of the freehold in lands cannot have dower in the same lands.

3. WILLS (§ III G 4—138)—ELECTION BY WIDOW OF TESTATOR BETWEEN DEVISE SUBJECT TO RESTRAINT OF MARRIAGE AND RIGHTS UNDER DEVOLUTION OF ESTATES ACT (ONT.).

Under a devise of all the testator's real estate to his widow for her life or *durante viduitate*, the widow is put to her election between the devise and her rights under the Devolution of Estates Act (Ont.) or as doweress.

Statement

ORIGINATING notice to determine a question arising upon the construction of the will and in the administration of the estate of the late H. B. Allen, who died on the 16th January, 1910.

*A. A. Miller*, for the widow.

*E. C. Cattanach*, for the infants.

Middleton, J.

MIDDLETON, J.:—By his will the deceased gives all his real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not re-marry. Save for the appointment of executors, this constitutes the whole will. The property consists largely of real estate.

It was admitted that the will gave the widow an estate in the lands during widowhood, and that save as to this estate the testator died intestate as to his realty. It was also admitted that the personalty would go to the widow absolutely.

The widow claims that the will does not put her to her election, and that she is entitled to an estate during widowhood in the testator's lands, and is also entitled in her own right to her dower interest in the same lands. She now seeks, under the

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Devolution of Estates Act, to elect to take a one-third interest in her husband's undisposed of real estate; i.e., in all his real estate subject to her estate during widowhood, in lieu of her dower.

I think I am concluded by authority, and that, as put by Boyd, C., in *Marriott* v. *McKay*, 22 O.R. 320, "a devise of all the lands to the widow *durante viduitate* puts her to elect. That devise gave her the freehold, and as tenant of the freehold she could not have dower assigned to her while she held that estate."

This is based upon the earlier decision in *Westacott* v. *Cockerline*, 13 Gr. 79, 80, where Vankoughnet, C., upon the same reasoning, reaches the same conclusion.

The widow is, therefore, put to her election. If she elects against the will, she may then make the further election under the statute to take one-third of the land. If she elects to take her estate during widowhood, her dower right is gone, and she cannot then elect under the statute, because the right given to her by the statute is to take the third interest in the undisposed of lands "in lieu of" her dower.

Costs out of the estate.

*Judgment accordingly.*

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## WASSON v. HARKER.

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**(Decision No. 1.)**

*Saskatchewan Supreme Court, Parker, M.C. October* 16, 1912.

PARTIES (§ II B—115)—JOINDER—ADDING PURCHASER PENDENTE LITE AS A PARTY DEFENDANT—SASK. RULES 42 AND 86.

Under rule 86 of the Saskatchewan Supreme Court rules (1911), it is proper to make an order *ex parte* to add as a party defendant in a foreclosure action a person who has, after order nisi for foreclosure and before final order, acquired the equity of redemption in the mortgaged premises; rule 42 as to notice of motion does not apply in such a case.

Statement

THIS is an application by the plaintiff for an order setting aside the order made by myself on October 4th, 1912, adding Lysle J. Abbott as a party defendant to the action, on the ground that the order should not have been made *ex parte*, but on notice of motion.

*C. W. Hoffman*, for applicant.

*W. H. McEwen*, for defendant.

Parker, M.C.

PARKER, M.C.:—It was contended that an application to add a defendant under rule 42 should be made by notice of motion. I am of opinion, however, that rule 42 does not apply to the matter in question. The application to add Abbott was made under rule 86, which specially provides that applications made thereunder may be made *ex parte*, and I am of opinion that the

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order was a proper one to make under rule 86. On April 17th, 1912, the plaintiff obtained an order *nisi* for foreclosure of a certain mortgage made to the plaintiff by the defendant Harker giving the defendant six months in which to redeem. On May 27th, 1912, the defendant Harker assigned all his interest in the land to the defendant Abbott, and a certificate of title was duly issued to him. Abbott is, therefore, the assignee of the equity of redemption of Harker in the mortgage sued on, and is properly made a defendant in the action. See Annual Practice, 1912, p. 291. In a foreclosure action an assignee may be made a party, after foreclosure absolute: *Campbell* v. *Holyland*, 7 Ch. D. 166; or after order *nisi* for foreclosure: *Re Parbola Limited, Blackburn* v. *Parbola Limited*, [1909] 2 Ch. 437. See also *Guy* v. *Churchill*, 40 Ch. D. 481. The practice in the Chancery Division under the English rule 181, which is similar to our rule 86, is to make the application by motion "of course" and in the King's Bench Division *ex parte*: Annual Practice, 1912, p. 286. A motion "of course" and a motion *ex parte* are exactly the same: Annual Practice, 1912, p. 862. The motion will, therefore, be dismissed with costs to the defendant in any event.

*Motion dismissed.*

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## THE KING v. FRASER.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J.*
*November* 13, 1912.

1. HABEAS CORPUS (§ I C—12)—LACK OF JURISDICTION—MISAPPREHENSION OF MAGISTRATE—AFFIDAVIT—QUESTION TO BE CONSIDERED—EXCESSIVE SENTENCE.

An application for the discharge of defendant from gaol, under an order in the nature of a habeas corpus, based upon the one ground that the committing magistrate, in sentencing defendant for a second offence against the provisions of the Nova Scotia Temperance Act, 1910, as amended by Acts of 1911, ch. 33, sec. 8, was under a misapprehension as to his powers and sentenced the defendant for a longer term (three months) than he would have done if he had any discretion in the matter as shewn by an affidavit of the magistrate, will not be entertained as it was not competent for the magistrate to make such an affidavit, or for the Court to consider such a question, the only question being whether or not the defendant was legally detained in custody.

2. HABEAS CORPUS (§ I C—12*a*)—COMMITMENT—WHEN PRISONER IS LEGALLY COMMITTED.

A prisoner is legally detained where a gaoler has returned a good warrant, based upon a conviction which was not attacked, and which was apparently regular, the law justifying the sentence imposed.

3. HABEAS CORPUS (§ I C—12*a*)—REVIEW OF COMMITMENT BY HABEAS CORPUS.

The court cannot on an application for the discharge of a prisoner from custody by way of habeas corpus review the action of the magistrate on the merits, or send the prisoner back to the magistrate to

impose a lighter sentence where the sentence actually imposed was not in excess of what the law authorized.

4. INTOXICATING LIQUORS (§ III I—91)—PENALTY — WHETHER DISCRETIONARY.

The provision of sec. 24 of the Nova Scotia Temperance Act (N.S. Laws 1910, ch. 2, as amended N.S. Laws 1911, ch. 33) which declares that the offender on each subsequent conviction shall be "liable to imprisonment for three months," gives no discretion to the magistrate to lessen the term of imprisonment. (Dictum *per* Townshend, C.J.)

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DEFENDANT was tried before L. G. Crowe, Esq., stipendiary magistrate of the town of Truro, charged with keeping intoxicating liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, 1910, and it appearing that he had been previously convicted of a similar offence, the offence now charged was adjudged to be a subsequent offence, and for such subsequent offence defendant was adjudged to be imprisoned in the common gaol of the county of Colchester for the space of three months.

An order in the nature of a habeas corpus was obtained requiring the keeper of the gaol to return immediately whether or not the defendant was detained in gaol, together with the day and cause of his having been taken and detained, and the 12th day of November, 1912, at 11 o'clock in the forenoon, at the Supreme Court Chambers at Halifax, was appointed as the time and place for hearing the application for the defendant's discharge.

To this order the gaoler returned the commitment. On the hearing of the application, counsel for defendant produced an affidavit from the committing magistrate setting out that previous to sentence being pronounced, it was submitted on behalf of defendant that under the provisions of the Nova Scotia Temperance Act, 1910, as amended by Acts of 1911, ch. 33, sec. 8, it was not obligatory that for the subsequent offence upon which he was convicted defendant should be sentenced to the full three months' imprisonment mentioned in said sec. 8; but that he was of the opinion that he had no discretion to make the sentence for any less period of time otherwise he would have done so.

Sec. 8 referred to, after repealing the corresponding section of the principal Act and making provision for punishment of the offender in the case of a first offence, by fine or imprisonment, with or without hard labour, continues: "And on each subsequent conviction he shall be liable to imprisonment for three months with or without hard labour."

*J. Philip Bill*, for prisoner, in support of application.
*J. L. Ralston*, for prosecutor, *contra*.

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Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.N.S.:—The application in this case to discharge the prisoner from gaol is based on the one ground that the stipendiary magistrate under the impression that he had no discretion, for a second offence against the Nova Scotia Temperance Act, 1911, sentenced the prisoner to three months' imprisonment, but, as he states in his affidavit, had he thought the law would allow him to make the imprisonment for a less period, he would not have given him the sentence he did.

It is not disputed that the conviction was legal, nor is it contended that the sentence was illegal, but that in view of what has been contended, in an erroneous interpretation of his powers, the magistrate has imposed a more severe sentence than he would otherwise have done.

I may in the first place observe that I do not think it competent for the magistrate to make such an affidavit, nor for the Court to consider such a question—at any rate on an application of this kind. My duty is confined to ascertain whether the prisoner is legally detained in custody. The gaoler returns a good warrant, based on a conviction not attacked, and so far as I know regular. The law justified the sentence imposed, and I find the prisoner is legally detained.

I have been referred to Halsbury's Laws of England, vol. 10, p. 39, where he describes the writ of *habeas corpus* as

> an effective means of immediate release from unlawful or unjustifiable detention—

and it is contended that under the evidence it is here "unjustifiable." Assuming I can look at the magistrate's affidavit, how can I say that his detention is unjustifiable when the law says it is justifiable? I cannot on this application review the action of the magistrate on the merits, or even send the prisoner back to the magistrate to impose a lighter sentence.

If I do anything, it must be to discharge him from custody and he would then escape all punishment for an offence of which he has been properly convicted, and legally sentenced.

I regret that the interpretation of the statute as to the words "liable to imprisonment" cannot on this application come before me so as to enable me to give a judicial determination as to their meaning, but as I was pressed to express my view, I may say that in my opinion, the magistrate was right. The law is obligatory and he has no discretion in the matter.

The application will be refused.

*Application refused.*

## ROBINSON v. DISTRICT OF SAANICH AND AIKMAN.

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*County Court of Victoria, B.C., Lampman, County Judge.*
*February 3, 1912.*

1. APPEAL (§ I C—25)—RIGHT TO APPEAL IN CRIMINAL CASES—ACCEPTANCE OF CASH BAIL WITHOUT AUTHORITY—EFFECT ON THE APPEAL.

Even though a County Court does not possess jurisdiction to permit the giving of cash bail on an appeal from a conviction by a police magistrate under Cr. Code (1906), sec 797, upon a summary trial, an appeal is not lost where the attorney for the prosecution assents to the acceptance by the court of such bail, receives payment of the money, and permits the prisoner to go at large.

2. BAIL AND RECOGNIZANCE (§ I—12)—RECOVERY BACK OF MONEY DEPOSITED AS BAIL.

In an action brought after the allowance by a County Court of an appeal from a conviction by a police magistrate, to recover cash deposited as bail, an allegation in the plaint to the effect that such money was deposited with the defendants as security for the appearance of the appellant, while in another paragraph the money was referred to as having been given as security for costs, does not embarrass or confuse defendants as to what money was claimed by the plaintiff, where the bail money was paid to one of the defendants, since it was received by him as bail only and for no other purpose, notwithstanding that in the order allowing the appeal and requiring the money to be returned, it was referred to as having been given as security for costs.

3. BAIL AND RECOGNIZANCE (§ I—12)—RECOVERY BACK OF MONEY DEPOSITED AS BAIL.

Cash deposited as bail with the attorney for the prosecution upon an appeal to a County Court from a conviction by a police magistrate may, upon an allowance of the appeal, be recovered by the appellant.

4. BAIL AND RECOGNIZANCE (§ I—12)—RECOVERY OF CASH BAIL—DEDUCTION OF COSTS—TENDER OF BALANCE.

Where, before the granting of an order by a higher court prohibiting a County Court hearing an appeal from a conviction by a police magistrate, which order carried $75 costs, such appeal was allowed by the County Court with costs of the same amount, upon a subsequent action being brought by the appellant to recover cash deposited as bail, a tender by the defendants to the plaintiff of the amount of the bail, less the costs of such prohibiting order, was refused, the court declining on the ground that a counterclaim had not been filed, nor a tender pleaded, nor any money paid into court, to consider whether the defendants were entitled to deduct the amount of such costs from the bail money.

5. COSTS (§ I—3*a*)—ON AMENDMENT—CHANGING NAME OF DEFENDANT.

Upon permitting an amendment as to the name of one defendant from the "municipality of Saanich" to its true corporate name, "the corporation of the district of Saanich," costs will not be awarded the defendants where they were not misled by the error in the name of such defendant.

Statement

TRIAL of an action to recover from the defendants a deposit of $1,000, made as cash bail upon a proposed appeal from a magistrate's conviction, in the circumstances set forth below.

*M. B. Jackson*, for the plaintiff.
*Lowe*, for the defendant Aikman.
*Aikman*, for the defendants the corporation.

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Judge Lampman.

LAMPMAN, COUNTY JUDGE:—On the 24th August, 1911, Estelle Durlin, alias Carroll, was convicted by the police magistrate for the city of Victoria for keeping a disorderly house, and sentenced to four months' imprisonment. She appealed to the County Court, and by her counsel, Mr. Robinson, applied for bail. Mr. Aikman appeared for the corporation of Saanich. Mr. Robinson suggested cash bail; and, as Mr. Aikman made no objection—he assented to $1,000 as being sufficient—I fixed cash bail at $1,000. At that time, in some way not explained to me, or, if explained to me, not now recalled by me, the Saanich authorities then had in their possession about $250 belonging to Estelle Durlin; and, while still in my Chambers, Mr. Aikman figured out the balance required to make up the $1,000, and thereupon instructed the Saanich constable to let Estelle Durlin go free when the balance was paid to him by her. Subsequently, when the appeal came on for hearing before me in the County Court, Mr. Aikman, for the prosecution, took objection to my hearing it, contending that, as I had granted cash bail, which is a form of bail not allowed by the statute, Estelle Durlin had lost her appeal.

Just why an appellant should lose an appeal because of a mistake by me was not apparent, as I could not read the statute in that way; and, moreover, it seemed to me that Mr. Aikman had waived any right to raise such a contention, because of his assenting to cash bail, accepting the $1,000, and letting his prisoner go free. The appeal came on again before me on the 27th October, being the day set by me for the hearing; the appellant, Estelle Durlin, and her counsel appeared, but the prosecution was not represented. I allowed the appeal, Mr. Robinson for the appellant informing me that he had just come from upstairs, where a prohibition motion was being argued before Mr. Justice Morrison; and that, on his informing Mr. Justice Morrison at eleven o'clock that the appeal was coming on at that hour, and that he was in a quandary as to what to do, His Lordship suggested or intimated to him that he should attend on the appeal. I fixed the costs of the appeal at $75. The order drawn up directed "that the money paid in as security for costs, viz., the sum of $1,000, be paid out to the appellant's solicitor, Hume B. Robinson."

This was an error, as the money was never paid into Court, and the $1,000 was not deposited or paid as security for costs, but as bail money. The next day—28th October—I was served with a prohibition order made by Mr. Justice Morrison restraining me from hearing the appeal, which I had already heard and allowed. By the order, Estelle Durlin was ordered to pay the costs of the motion, fixed at $75.

On the 3rd November, Estelle Durlin assigned to Mr. Robin-

son the said sum of $1,000 paid by her as bail money, and notice of the assignment was served on the Saanich authorities and on Mr. Aikman, and on the 3rd November Messrs. Hanington and Jackson wrote to Mr. Aikman this letter:—

*Rex* v. *Durlin.*

We are instructed by Mr. Hume B. Robinson to demand from you payment of the sum of one thousand dollars deposit made in connection with appeal by Estelle Durlin, alias Carroll, from the Magistrate's Court to the County Court, and which $1,000 His Honour Judge Lampman has ordered to be paid over to Mr. Robinson.

We understand that you have possession of this money, and we are instructed to request your immediate payment of the same over to us for Mr. Robinson, otherwise we are to issue a writ to-day.

The money was not paid, and Mr. Robinson now sues. The pliant sets out the prosecution in the Police Court, the conviction, and the appeal; and paragraphs 4 and 5 of the pliant are as follows:—

4. In connection with such appeal, the said Estelle Durlin, alias Carroll, was required to deposit the sum of $1,000 as security for her appearing to prosecute the appeal, and the said sum of $1,000 was duly paid over by her, and was received by the said defendant Aikman, and the defendant Aikman still holds and retains the said sum of $1,000, either under his personal capacity or as solicitor for the defendant municipality.

5. The said appeal duly came on for hearing and was thereupon allowed by His Honour P. S. Lampman, Judge of this honourable Court, and by order allowing the appeal, it was ordered that the sum of $1,000, security for costs of appeal, should be paid out to the plaintiff herein, Hume B. Robinson, solicitor for the said appellant.

The defence consists of a general denial of the allegations in the claim; and that I had no jurisdiction to deal with the appeal is also pleaded. At the trial, the facts as alleged in the pliant, and as stated by me above, were proved; but the defendants claim to be embarrassed and confused as to what the plaintiff is really claiming from them, and they build up an argument around the inaccuracy in the order of the 27th October allowing the appeal, wherein the sum of $1,000 is spoken of as security for costs, whereas it was in reality bail money. On the trial before me, Mr. Lowe appeared as counsel for Mr. Aikman, and Mr. Aikman appeared as counsel for the corporation of Saanich; and, when paragraph 4 is read, I really cannot treat their embarrassment seriously. It is admitted that they received $1,000. What for? It was paid as bail; and I should think there could be no question that, when the condition of the payment is fulfilled, the money must be paid back to the rightful owner.

The ordinary bail bond provides that it shall be void if the accused appears when required, and does not depart without leave. The same conditions attach to a cash deposit; and, when

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the appellant appeared before me on the day set for the hearing, she did all that she was required to do; and, when her appeal was allowed, the bail money should have been returned to her. But the defendants say that they are embarrassed and confused by the statements in the pliant, and are not sure what sum of $1,000 it is that the plaintiff desires to recover, although it is admitted that this is the only $1,000 that they are aware of having been received by them from Estelle Durlin in any such circumstances. It must be a very trying position for the corporation of Saanich and their legal advisers. They are confused as to what to do with this $1,000, although they know it does not belong to them; they know they received it from Estelle Durlin; and they know or ought to know that she or her assignee should get it back; and, although the assignee has demanded it and sued for it, they are still uncertain as to what they should do with it.

If their plea that I had no jurisdiction is good, I cannot see that that helps them, as the circumstances under which they received it are the same. It was not a gift. By what process does it become their property? It would be a monstrous thing if they could not be made to disgorge.

An offer of payment of $925 was made (and not accepted), as the defendants claimed $75 as their costs of the prohibition order—as an offset against this is the $75 item of appeal costs; and, under the circumstances, I will leave this question of costs alone, as the defendants have not made any counterclaim, and have not pleaded tender or paid any money into Court. The plaintiff is entitled to judgment against the defendants for $1,000. The name in the style of cause of one of the defendants should be changed from the municipality of Saanich to the corporation of the district of Saanich; but, as I do not think the defendants were misled, they are not entitled to any costs of the amendment. The district is generally known as the municipality of Saanich, and on official documents the clerk still styles himself "clerk of the municipality of Saanich," and uses the seal of Saanich municipality.

It is only fair to the people of the old district of North Saanich to say that the defendant in this action is the district sometimes called South Saanich.

*Judgment for plaintiff.*

## Re STEWART.

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Oct. 11.

*Saskatchewan Supreme Court, Wetmore, C.J., in Chambers.*
*October* 11, 1912.

1. ASSOCIATIONS (§ I—3)—RIGHT TO INCORPORATION—LAND SURVEYORS—R.S.S. 1909, CH. 79.

A certificate of incorporation under R.S.S., ch. 79, will be denied an association having for its object the promotion of honourable practice among, and the elevation of the standard of land surveyors in the province, and also the promotion and conciliation of misunderstandings between them, as well as the hearing and determination of complaints and accusations preferred by third persons against the professional conduct of land surveyors, and the imposition of punishment for misconduct, the contemplated objects of the association not being within the scope of such chapter, since the association seeks control of all surveyors within the province and not merely over the members thereof.

Statement

APPLICATION by W. M. Stewart and seven other persons, under R.S. Sask. ch. 79, for a certificate entitling them to become incorporated under the corporate name of "The Association of Saskatchewan Land Surveyors."

*F. B. Bagshaw*, for the applicants.

Wetmore, C.J.

WETMORE, C.J.:—The petition states the objects of the association to be, among other things, as follows:—

(*b*) To promote honourable professional practice and to repress dishonourable practice and to consider all questions affecting the interests of those engaged in the profession of land surveying in the Province of Saskatchewan, and generally to promote the interests and to elevate the standard of the profession.

(*c*) To prevent and conciliate all misunderstandings between land surveyors and hear and decide all complaints and accusations preferred by third parties against them in relation to their professional conduct, and to punish any land surveyor found guilty of the facts alleged in the said complaint or accusation, according to the gravity of the offence by whatsoever measure of punishment shall be just and in accordance with the legal authority in that behalf of the association over its members.

I am of opinion that the purposes and objects of this contemplated association go beyond what was intended by the Act under which the application is made, in so far as the objects set out in paragraphs (*b*) and (*c*) are concerned. In the first place, according to paragraph (*b*), it is intended that the association shall promote honourable professional practice and repress dishonourable practice and consider all questions affecting the interests of those engaged in the profession of land surveying in the province. Now, by that they are seeking to exercise a control over persons who may not belong to their association. That, to my mind, is away beyond what the Act contemplates. And so, by paragraph (*c*) they attempt to deal with persons who may not be members of the association, and in a

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very drastic manner, namely, by hearing and deciding complaints preferred by third persons against such persons in relation to their professional conduct, and to punish any land surveyor found guilty of the facts alleged in the complaint.

I must refuse to grant a certificate under such circumstances.

*Application refused.*

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Ex. C.
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Sept. 19.

## IMPERIAL SUPPLY CO. v. GRAND TRUNK R. CO.

*Exchequer Court of Canada, Cassels, J. September 19, 1912.*

1. PLEADING (§ III B—315)—PATENT ACTIONS—WHAT MUST BE PLEADED—EXCHEQUER COURT RULES.

In a patent action pleadings and particulars have an important bearing on the questions at issue, and a plaintiff is entitled under the rules of the Exchequer Court of Canada to a full knowledge before the trial of the issues he is called upon to meet.

2. MASTER AND SERVANT (§ I A—4*a*)—RESPECTIVE RIGHTS OF, IN PATENTS OBTAINED BY SERVANT WHILE EMPLOYED BY MASTER.

The question of the respective rights of master and servant in patents obtained by the servant must be decided in each particular case upon the facts of that case.

3. PATENTS (§ I—4*b*)—INVENTION OF SERVANT—PROPERTY IN—MASTER OPPOSING GRANT OF PATENT.

In the absence of a special contract, the invention of a servant, even though made in the master's time and with the use of the master's material and at the expense of the master, does not become the property of the master, so as to justify him in opposing the grant of a patent for the invention to the servant, who is the proper patentee.

[*Re Marshall and Naylor's Patent*, 17 R.P.C. 553, referred to; *Worthington Pumping Engine Co.* v. *Moore*, 20 R.P.C. 41, distinguished.]

4. PATENTS (§ IV—30)—PATENT OBTAINED BY SERVANT—INVENTION DEVISED AT MASTER'S EXPENSE—USE OF SAME BY MASTER—LICENSE.

Where a servant devises an invention in the time and at the expense of his master and with the use of the master's material, and, having obtained a patent for the invention, assents to its use by the master, the proper conclusion is that he has given the master an irrevocable license to use the invention.

5. ESTOPPEL (§ III E—79*b*)—BY CONDUCT—MASTER USING SERVANT'S PATENT—DENIAL OF VALIDITY OF PATENT.

A master who uses an invention under a license from his servant, the patentee, which license is not express, but is implied by law from their relationship and from the circumstances surrounding the invention, is estopped from denying the validity of the patent.

[*Imperial Supply Co.* v. *Grand Trunk R. Co.* (No. 1), 1 D.L.R. 243, 13 Can. Ex. R. 507, referred to.]

Statement

TRIAL of action for infringement of patent. The judgment on a preliminary trial of certain issues is reported, *Imperial Supply Co.* v. *Grand Trunk R. Co.*, 1 D.L.R. 243.

*Casgrain*, K.C., and *G. S. Stairs*, for plaintiffs.
*Lafleur*, K.C., and *A. E. Beckett*, for defendants.

CASSELS, J.:—This case was tried before me in Montreal on the 1st May last. The evidence was heard and at the request of counsel written arguments were subsequently handed in. I have since the trial perused and reperused the evidence, and considered the various authorities cited by the different counsel in their able arguments.

On the previous trial on the 22nd May, 1911, the issue was whether the paper purporting to be a license and dated the 2nd June, 1906, was binding on the Grand Trunk Railway Co. I set out in detail in my reasons for judgment the conclusion I arrived at, holding that the document in question was not agreed to by the Grand Trunk Railway Co.

Had my opinion been the other way the case would have ended, as according to my view the Grand Trunk Railway Co. would have been estopped from disputing the validity of the patent in question. I fully explained my view on the question of estoppel. I was dealing only with the question of estoppel based on the alleged license of 2nd June, 1906.

I did not consider nor had I the evidence before me to deal with the question of estoppel by conduct or otherwise.

The case is a difficult one and open to conflicting views.

I have come to the conclusion from the reasons which follow that the Grand Trunk Railway Co. are estopped from impeaching the validity of the patents.

I have also come to the conclusion that if the defendants were at liberty to attack the validity of the patents, the evidence adduced before me is insufficient to support their defence. At the trial all the evidence as to whether or not the patentees Thomas Aikin Dalrymple and Robert Burnside, Jr., were the inventors and entitled to the patents was adduced, so that if the defence is open to the Grand Trunk Railway Co. there has been a full trial on this question.

I think the patents as between the parties are valid.

I find, however, that the Grand Trunk Railway Co. have an irrevocable license to make and use for themselves the patented inventions. This point is I think practically conceded by the plaintiffs.

I do not think the Grand Trunk Railway Co. have any right to make and sell to others. I will deal with this question later on.

In a patent action pleadings and particulars have an important bearing on the questions at issue. Both by the rules of the Exchequer Court and the English practice the plaintiff is entitled to proceed to trial with full knowledge of the issues he is called upon to meet.

It becomes important, therefore, to consider the issues raised by the defence.

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Cassels, J.

The first patent, No. 98330 was dated 3rd April, 1906; the second No. 129053, 1st Nov., 1910.

Since April, 1906, no claim has been put forward by the Grand Trunk Railway Co. for avoiding the patents or that the plaintiffs' assignors were trustees of the patents until raised by their defence. They were aware of the intended application for the patents to the patentees and assented to the issue to them.

The statement of claim was filed on the 25th Nov., 1910.

The plaintiffs are assignees through various assignments of the title of the patentees.

The first statement of defence is dated the 12th January, 1911 (filed on the 13th January, 1911). The fourth paragraph of this defence is as follows:—

> The defendants further say that prior to, and at the time of the issue to the said Thomas Aikin Dalrymple and Robert Burnside, Jr., of the said Canadian letters patent, the said Dalrymple and Burnside were in the service of the defendants; that at the time the defendants were with the full knowledge of the said Dalrymple and Burnside lawfully manufacturing, using and dealing with a device for lubricating the cylinders of steam engines; that while so in the service of the defendants, and at the suggestion and request of the defendants the said Dalrymple and Burnside devoted a considerable portion of their time in an endeavour to perfect the said device so being used and the improvements in lubricators mentioned in the statement of claim and said to be covered by the said Canadian letters patent, and for the time so spent were paid by the defendants; that for such purpose and in developing and perfecting such improvements said Dalrymple and Burnside were permitted to use and did use the premises, appliances, tools and materials of the defendants, and acted under the direction of, consulted with, and had the benefit of the advice and assistance of officials of the defendants, competent to give and render such, in consideration of all of which it was understood and agreed that notwithstanding the issue to the said Dalrymple and Burnside of the said letters patent, application for which was then made, the defendants should have the right to manufacture, use and dispose of, as they saw fit, the improvements and alleged inventions covered by the said applications and letters patent; that in view of the circumstances stated, the defendants submit that, notwithstanding the said letters patent, or anything contained therein, or of any of the provisions of the said document of June 2nd, 1906, they had and have the full and absolute right to manufacture, use and deal with the said improvements and inventions mentioned in the statement of claim to the extent which they have, and of which the plaintiffs complain in this action; that the plaintiffs acquired their alleged interest in the said letters patent with the full knowledge of the facts herein set forth, and of and subject to the rights and privileges of the defendants in, to and in respect of the said device, articles, appliances, improvements and alleged inventions, and by reason thereof are not entitled to maintain this action against the defendants.

This defence sets up a specific contract between the patentees

and the Grand Trunk Railway Co., whereby, for the consideration mentioned, the Grand Trunk Railway Co. were, notwithstanding the issue of the patents, to have certain rights set out in this paragraph of defence.

The Grand Trunk Railway Co. have failed to prove any such specific contract as alleged.

The defence impliedly concedes that as between Dalrymple and Burnside and the other employees of the Grand Trunk Railway Co., Dalrymple and Burnside were the inventors having had the benefit of the advice and assistance of the officials of the Grand Trunk Railway Co.

The amended statement of defence was filed on the 5th June, 1911. This defence was filed after the first trial of the 22nd May, 1911.

Paragraph 4 of this defence referring to patent 98330 is practically identical with paragraph 4 of the original defence.

Paragraph 5 of the amended defence is similar to paragraph 4 of the original defence quoted, except that it has reference to the later patent 129053.

For the first time the claim that the patentees were trustees for the Grand Trunk Railway Co. is set up in the counterclaim dated 5th June, 1911.

I confess I share with Buckley, J., the difficulty in understanding how a patentee can be a trustee for another of a patent which is void. The defence is inconsistent with the defence that the patents are invalid. It savours of approbating and reprobating.

See *Richmond & Co., Ltd.*, v. *Wrightson*, 22 R.P. Cases 25, 33, where the learned Judge finds that Wrightson was not the true and first inventor, but adopts the method of Mr. Justice Byrne of getting over the difficulty as reported in *Worthington Pumping Engine Co.* v. *Moore*, 20 R.P.C. 41.

On the 12th June, 1911, an order for particulars was granted requiring the defendants, among other matters, to give particulars of the 4th and 5th paragraphs of the amended statement of defence—

> Particulars of the time, place and circumstances of the alleged agreement by and under which the defendants should have the rights claimed.

Particulars were furnished and the date of the alleged specific agreement is given as of the month of March, 1905.

This particular was served on the 29th February, 1912, and repeated in further particulars of the 13th June, 1912.

As far back as June, 1906, the defendants were aware that the patentees were negotiating a sale of the patents. See letter of Maver to Robb, 4th June, 1906; also letters of 7th June,

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1906, Robb to Maver; 12th June, 1906, Maver to Dalrymple; and 18th July, 1906, Dalrymple to Maver.

Then there is the claim for a license containing certain limited rights which the patentees declined to agree to.

Considering all the facts and circumstances referred to and the laches, even if the Grand Trunk Railway Co. had a right to claim an assignment of the patents there would be, in my opinion, great difficulty in their way of obtaining a judgment declaring that the patentees were trustees of the patents for them.

I am of the opinion, however, that on the facts of this case, the relationship of trustee and *cestui que trustent* did not exist.

The law on the rights of master and servant to patents obtained by the employee is intricate and each case has to be decided upon the facts of the particular case.

In considering this case it has to be borne in mind that neither Robb nor Maver had any idea of how to obviate the defects in the lubricator then in use.

It is not the case of an employer suggesting the idea and employing a skilled mechanic to work out his idea. In this latter case it may be that a sale in advance would be implied and enforced on the issue of the patent, although the patent should probably issue to the employee. See Thornton on Patents (1910), pp. 59-60.

The law as laid down in Heald's application by the Solicitor-General on an appeal from the Comptroller-General seems to be accepted as a correct statement of the law.

In this case an application was made by Heald for a grant of a patent. The grant was opposed on the ground that the applicant had obtained the inventions from Keeler while in the company's employment. The Solicitor-General (Clarke) is reported in *Re Heald's Application*, 8 R.P.C. 4-9, at 430, as stating:—

> I look to the earlier matters in the month of May, 1889, when Mr. Heald was in the employment of the company, and in a book which was a book of the company and kept upon their premises was recording work that he did for that company. In that book he records not merely on the 20th May, but on other days certain incidents connected with the production of an improved lamp which was clearly required because the old lamp had certain defects or shortcomings which several persons in the employment of the company were trying to remedy, and there is no doubt in my mind, from that diary that it was *as the servant of the company and in the desire to serve the interests of that company* that Mr. Heald made the improvements, so far as he made them, in question.

The Solicitor-General then proceeds:—

> But then I have to deal with the proposition that an improvement made by a servant is the property of his employer so as to entitle the employer to take out a patent for it or to prevent the servant from

taking out a patent for it. I am not aware of any authority which lays down that the invention of a servant even made in the employer's time and with the use of the employer's material and at the expense of the employer thereof becomes the property of the employer so as to prevent the person employed from taking out a patent for it.

The statement at the end of the judgment, p. 431, as to the rights of Mr. Heald from the date of the issue of the patent is *obiter* and not in accordance with what I consider the right of the Grand Trunk Railway Co. to be under the circumstances of this case.

*In the matter of Marshall and Naylor's Patent*, 17 R.P.C., 553, Farwell, J., is reported at 555, as follows:—

It is laid down in Mr. Frost's book, in the absence of a special contract the invention of a servant, even though made in the employer's time and with the use of the employer's material and at the expense of the employer does not become the property of the employer so as to justify him in opposing the grant of a patent for the invention to the servant who is the proper patentee.

See also Cyclopedia of Law and Procedure, vol. 30, p. 881; Fulton on Patents, 3rd ed. (1905), 24 and 119; Nicolas (1904), 26-27-41.

In the case of *Worthington Pumping Engine Co.* v. *Moore*, 20 R.P. Cas. 41, a decision of Byrne, J., the facts were different. The case turned upon the peculiar relationship which existed between the agent and his employers. At p. 47, it is stated that the patents had been taken out without communication of his intention to do so to the plaintiff. At p. 49, the learned Judge states his reasons for granting relief. It is on the ground that the act of the patentee was a breach of his obligation under his contract.

In the Supreme Court of the United States, *Solomons* v. *U.S.*, 137 United States Reports 342, at 346, Mr. Justice Brewer states the law as follows:—

If one is employed to devise or perfect an instrument or a means for accomplishing a prescribed result he cannot after successfully accomplishing the work for which he was employed plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes when accomplished the property of the employer.

So, also, where one is in the employ of another in a certain line of work and devises an improved method or instrument for doing that work and uses the property of his employer and the services of other employees to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury or a Judge trying the facts is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property and the assistance of the co-employees of his employer as to have given to such employer an irrevocable license to use such invention.

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This case was approved: *Gill* v. *United States*, 160 U.S., p. 426.

In *Bonathan* v. *Bowmanville Furniture Manufacturing Co.*, 31 U.C.Q.B. 413, the language of Wilson, J., is strong.

When this case was decided the statute in force was 32 and 33 Vict. ch. 2. Section 6 provided that the invention should not be in public use with the assent of the inventor *at the time of his application* for a patent.

The statute in force when the first patent was applied for was the R.S.C. 1886, which provides not being in public use for more than one year prior to the application for a patent. The R.S.C. 1906 is similar.

In the *Bonathan* case, the patent would have been void as it was in public use prior to the application for a patent.

In the case before me the patentees explicitly assented to the use by the Grand Trunk Railway Co. of the invention and I find that they gave to the Grand Trunk Railway Co. an irrevocable license to use the invention.

The contention of the counsel for the Grand Trunk Railway Co. is that the license extends not merely to the use but that the Grand Trunk Railway Co. have also the right to manufacture or procure to be manufactured the invention for others.

I do not agree with this contention. It is no part of the business of the Grand Trunk Railway Co. to manufacture and sell lubricators.

In *Hapgood* v. *Hewitt*, 119 U.S. 226, where it is stated at 233, that the contract of employment was a naked license to make and sell the patented improvement as a part of its business, the Court was dealing with the case of a company whose business it was to make and sell ploughs. These ploughs contained the improvements.

I think, having regard to all the facts of this case, and the fact that the Grand Trunk Railway Co. have continuously used the inventions under the irrevocable license referred to above, they are estopped from disputing the validity of the patents.

As I have stated, the evidence as to whether or not the patentees were entitled to the patents is before me and I proceed to deal with this question.

The defendants as to the first patent aver that one Hudson, an employee of the Grand Trunk Railway Co. was the first inventor having conceived the idea in the fall of 1904. He alleges he had made a sketch which he shewed to one Jehu. I think this evidence too vague. It is improbable that Hudson would have kept his information to himself and not given the Grand Trunk Railway Co. the benefit of his invention. At most according to Jehu, it was a rough sketch without any details.

The time is left very indefinite. Jehu says he spoke to his father within a week of the interview. The father is living and could have been called, but was not. Hudson's mother is still living and was present according to the witnesses at the interview with Jehu—she was not called.

According to Hudson, Burnside told him he had evolved some ideas but he, Hudson, said nothing of his invention. Clendenning, a pattern-maker, got instructions from Ellis to prepare patterns. He states Burnside came to him first. He states that Burnside told him they were getting up a new lubricator and to work to the instructions of Hudson. Burnside was Hudson's foreman. Hudson had sworn that he got instructions from Robb to go ahead and build a lubricator according to the model he shewed him. Maver, who was with Robb, says he gave instructions to Dalrymple and Burnside. I accept the evidence of Dalrymple and Burnside. It would be unsafe to destroy a patent especially after such a length of time on evidence of the character adduced.

Then it is important in considering this evidence to bear in mind the allegation in the defence of the Grand Trunk Railway Co. set out in sec. 4.

After the evidence of Hudson and others had been adduced when application was made to amend the particulars by setting up that Lees was the inventor of the invention set out in the later patent of 1st Nov., 1910, the able counsel for the Grand Trunk Railway Co. puts their case as follows:—

> We have had evidence already as to that modification (referring to 2nd patent) and I simply wanted to shew that Mr. Lees is the man who suggested that modification. My position is that these employees were all working with one common object. They were all giving their suggestions and ideas to devise a lubricator for the Grand Trunk Railway. The bulk of these suggestions appear to have been made by Hudson, Ellis and Lees.

This is hardly a claim that Hudson was a prior inventor.

I also think the evidence of Lees as to the 2nd patent is insufficient to destroy the patent.

As to the conversation Burnside referred to by Lees when recalled, Pratt, who was said to be present was not called.

In the argument a further claim was put forward to the effect that the second patent of 1910 was void by reason of the invention not being the joint invention of Dalrymple and Burnside but the invention of Burnside only. In the particulars delivered, no such claim is made. The only claim is that the invention was that of Lees. The original invention was the joint invention. It was not working as well as contemplated, and Burnside states he conceived the invention and consulted Dalrymple. They then perfected the invention and applied for and

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obtained the patent. The objection is a technical one. The later invention could not be used by the Grand Trunk Railway Co. except in connection with the lubricator patented by the earlier patent of 1906. I do not think the objection should be given effect to, even if it were open to the Grand Trunk Railway Co. to question the validity of the patent.

The plaintiffs are entitled to judgment for the usual injunction restraining the Grand Trunk Railway Co. from making or selling to others the inventions in question..

The title of the plaintiffs was acquired on the first October, 1910.

I find no assignment to them of any damages prior to that date. The damages must be confined to the period subsequent to this date. A statement of lubricators sent to the Grand Trunk Pacific has been given but no dates. I should think the parties could agree as to the damages. If not there must be a reference to the registrar.

The plaintiffs are entitled to the general costs of the action except as to the trial of the issue as to the validity of the agreement of 2nd June, 1906. The costs of this trial I think the defendants are entitled to. As the evidence given on this trial was used on the 2nd trial, I fix the costs of the defendants at $200 to be set off *pro tanto* against the costs of the plaintiffs to be taxed in the usual way.

*Judgment for plaintiff.*

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*Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Macnaghten, Lord Dunedin, and Lord Atkinson. July 25, 1912.*

1. BRIDGES (§ I—8)—LIABILITY OF IRRIGATION COMPANY TO BRIDGE OVER HIGHWAYS—NORTH-WEST IRRIGATION ACT, 61 VICT. (CAN.) CH. 35, SECS. 11 AND 15.

Where an irrigation company had received, under the North-West Irrigation Act, 61 Viet. (Can.) ch. 35, now R.S.C. 1906, ch. 61, a license to take water to use in its business in the North-West Territory and obtained authority to cross with its works road allowances not yet used as public highways reserved from its lands by the Crown for future use as public highways, such company is itself bound, it being the party for whose convenience and profit the road allowances had been interfered with, to build bridges when the road allowances afterwards become public highways on both sides of the works constructed across them by the company, even though it had never stipulated that it would maintain the necessary bridge or bridges at the points indicated in an accompanying plan, where their works crossed road allowances or public highways as provided by sub-sec. (*b*), sec. 11 of the said Irrigation Act, now sub-sec. 1 (*b*), sec. 15, R.S.C. 1906, ch. 61, which it did in an application required of every applicant for license under the Act to file with the Commissioner of Public Works for the North-West Territories, by the aforesaid sub-section for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works.

[*Rex* v. *Alberta R. and Irrigation Co.*, 3 Alta. L.R. 70, affirmed on appeal; *Alberta R. and Irrigation Co.* v. *The King*, 44 Can. S.C.R. 505, reversed on appeal.]

2. BRIDGES (§ I—8)—CONSTRUCTION OF—IRRIGATION CANAL—NORTH-WEST IRRIGATION ACT, 61 VICT. (CAN.) CH. 35, SEC. 37.

Section 37 of North-West Irrigation Act, 61 Viet. (Can.) ch. 35, providing that any person or company constructing an irrigation works should during such construction keep open for safe and convenient travel "all public highways theretofore publicly travelled as such," when they are crossed by such works, and shall, before the water is diverted into, conveyed or stored by any such works, extending into or crossing such highway, construct, to the satisfaction of the Minister of the Interior, a substantial bridge, not less than a certain number of feet in breadth, with proper and sufficient approaches thereto, over such works, and always thereafter maintain every such bridge and approaches thereto, has, of course, no application to road allowances as in its own words it deals only with "all public highways theretofore publicly travelled as such."

3. HIGHWAYS (§ V B—256)—CROSSING BY WORK OF PUBLIC SERVICE CORPORATION—SUBSTITUTE FOR PART OF HIGHWAY SO CROSSED.

Where in the exercise of a right conferred by statute upon a public service corporation, a public highway is interrupted by the work which the public service corporation is authorized to construct, there is an implied obligation that the public service corporation shall maintain an adequate substitute for the highway by a bridge or other means.

[*The King* v. *Alberta R. and Irrigation Co.*, 3 Alta. L.R. 70 affirmed on appeal; *Alberta R. and Irrigation Co.* v. *The King*, 44 Can. S.C.R. 505, reversed on appeal. See also *The Queen* v. *Inhabitants of the Isle of Ely*, 117 Eng. Reports 671, 15 Q.B. 827, 19 L.J.M.C. 223, 14 Jur. 956; *R.* v. *Southampton*, 17 Q.B.D. 435; *Hertfordshire County Council* v. *New River Co.*, [1904] 2 Ch. 520.]

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Statement

THIS was an appeal from an order of the Supreme Court of Canada (the Chief Justice and Mr. Justice Idington dissenting) of May 15, 1911, *Alberta Railway and Irrigation Co.* v. *The King*, 44 Can. S.C.R. 505, reversing decisions of the Supreme Court of Alberta and of the trial Judge.

The appeal was allowed and the judgments of the Alberta Courts restored.

The judgment of the Supreme Court of Alberta, *The King* v. *Alberta Railway and Irrigation Co.*, 3 Alta. L.R. 70, affirmed the judgment of Scott, J., by which the action was maintained.

The action was brought, on behalf of the Government of the Province of Alberta, to compel the defendants to erect and maintain bridges across their irrigation canal at certain points where it crossed road allowances and highways which had not been publicly travelled as such prior to the construction of their irrigation works. The trial Judge entered judgment, *pro formâ*, in favour of the plaintiff and the Supreme Court of Alberta, on an appeal, affirmed the decision. The judgment ordered that the company should erect the bridges or "abate and keep abated the nuisance created through the interruption of public travel by the maintenance and operation of their said irrigation canals across the said road allowances at the points . . . mentioned respectively, so that the said original road allowances respectively, having been adopted and now being used (save as to those portions extending for a short distance on each side of the said points respectively) as highways by the public, may be conveniently travelled by the public."

The dissenting opinion of Mr. Justice Idington in the Supreme Court of Canada with which opinion the Chief Justice, Sir Charles Fitzpatrick, concurred, and which favoured the affirmance of the decision of the Alberta Supreme Court which is approved by the present judgment of the Privy Council, is here given.

Idington, J.

IDINGTON, J.:—This case is within a narrow compass, yet to understand it properly we must bear in mind the governmental and other condition of things in the North-West Territories, before and at the time of the appellants receiving their charter of incorporation, and the concession of water now in question.

These vast and almost uninhabited territories, after being acquired by Canada, in 1870, were legislated for by Parliament and within such legislation ruled by officers appointed by the Dominion Government.

Legislative as well as administrative powers were delegated from time to time by Parliament or, within lines it laid down, by the government to the council or councils which, in time, thereby grew to be representative assemblies, or partly so, concurrently with the powers of the executive council proper.

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All the details relative to this development except the one or two features directly bearing on this case may be passed by. In the delegating of these local powers from time to time the legislation therefor was not always as well expressed or the powers as well defined as they might have been. In the rapid changes thus made some confusion was apt to arise, as we will see presently, in the carrying into execution of the legislative and administrative purposes of the parent and delegated powers.

This vast territory was from its acquisition being rapidly settled. To promote that settlement the lands were surveyed from time to time, according to a plan which, speaking generally, divided the land into sections of a mile square and left for the use or creation of future highways, road allowances of a chain in width, between each of these sections, so that each section was surrounded by a road allowance.

It would be as well also to bear in mind that the Canadian Pacific Railway Company was entitled to select each alternate section in the whole stretch of country from east to west and forty-eight miles wide, which were to be free from taxation for a long period.

It was, I may observe, from the earliest period of this rule, as these enactments relative to this company shew, hoped to carve out provinces each with autonomy like that of the other provinces of Canada, and that municipal institutions should, when settlement required them, be created by each of such provinces.

There had been, as the arid, or periodically arid, character of parts of the country became known, various legislative plans adopted for meeting this obstacle in the way of settlement and improvement.

These plans, saving rights acquired under them, were set aside by the North-West Irrigation Act, 1898.* Section 4† of this Act enacted that there should be deemed to be vested in the Crown, "the property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water."

This Act covered all such water in the North-West Territories, except in specified districts, and prohibited the diversion of it, saving by those having prior rights or licenses under this Act.

The water might be used for domestic purposes on the land where found, but its use for irrigation had to be acquired by means of licenses to be issued to individuals or companies from the Department of the Interior.

A comprehensive scheme is laid down in the Act and powers

*61 Vict. (Can.) ch. 35, now contained in R.S.C. 1906, ch. 61, with different arrangement of sections.

†Now sec. 6, R.S.C. 1906, ch. 61.

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are given the Minister of the Interior for making regulations to carry it out. The Commissioner of Public Works of the North-West Territories has, in any case, to be memorialized by any one desiring a license to divert and use such water. The preliminary requirements to be observed by any of such memorialists as apply for a license for diverting, or diverting and carrying, a less quantity than twenty-five cubic feet of water per second, are of a simpler nature than those asking concessions respecting that or any greater quantity.

But the party applying for a license for the greater quantity had, in applying, to observe the same preliminary terms and conditions specified for an application for a license for the less quantity and in addition thereto a great deal more.

These several requirements are set forth in sections 11* and 12† of the Act.

I assume the prescribed mode of application set out in these sections was complied with.

Amongst other things that these sections required, was an application, under section 11, sub-section (*b*)‡ of the Act, which is as follows:—

> (*b*) An application on forms provided by the commissioner, for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works.

The following is the form used by the appellants in making their application, so far as shewn in the case herein:—

> Lethbridge, January 31, 1899.
>
> To the Commissioner of Public Works,
> Regina, Assa.
>
> Sir,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River, on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.
>
> We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary to cross the road allowance, or public highway, and we therefore, beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allowances or public

*Sec. 11 (*a*) and (*c*) are now respectively sec. 13 and sub-sec. 2 of sec. 15, R.S.C. 1906, ch. 61, and are referred to as (*b*) and (*d*) by the learned justice himself.

†Now sec. 16, R.S.C. 1906, ch. 61, also unnecessary to be set out.

‡This sub-section was sub-sec. 1(*a*) of sec. 15, R.S.C. 1906, ch. 61, but it was repealed by 7 & 8 Edw. VII. (Can.) and a new sub-section substituted.

highways at the places indicated in the accompanying plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,

THE ALBERTA IRRIGATION COMPANY,
*Per* C. A. Magrath, *Superintendent*.

The concluding words "as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act" are evidently misplaced. The sentence seems rather long for the clear expression of its purpose. These words at the end, in one way of treating the sentence, are nonsense, and hence mere surplusage. But giving them a meaning they were evidently intended to bear, as if they had been inserted after the words "point out" near the beginning of the sentence, they are comprehensible.

In any way we may treat them (unless we are to assume there never was a comprehensible application made as required by the Act, and, hence, the whole concessions given by the commissioner void), can we read the notice without imputing to the applicant the express tender of an undertaking to construct and maintain the necessary bridge or bridges at the points indicated on the plan? The only points indicated are the crossings of each road allowance or public highway. Had there been some selected from these and specially designated, such designation might have excluded the remaining crossings; but as it is, the proffered undertaking can only mean all. No doubt the parties concerned so understood the undertaking to be and acted accordingly. This is, if possible, still clearer when we turn to sub-section (*d*)* of the same section 11, which is as follows:—

> (*d*) A plan, in duplicate, on tracing linen, shewing in detail all headworks, dams, flumes, bridges, culverts or other structures to be erected in connection with the proposed undertaking,

and ask its meaning.

We find applicants thereby required to furnish along with the memorial a plan of the bridges to be constructed on the proposed work. And on turning to those filed with this application we find two distinctly different bridge plans. One is evidently intended to meet the statutory requirement of section 37† to which I will again refer, and the other is

*Now sub-sec. 1 (*b*) of sec. 15, R.S.C. 1906, ch. 61.

†This section (now sec. 25 R.S.C. 1906, ch. 61) provides that any person or company constructing any works under the provisions of this Act, shall during such construction keep open for safe and convenient travel all public highways theretofore publicly travelled as such, when they are crossed by such works, and shall, before water is diverted into, conveyed or stored by any such works extending into or crossing any such highway, construct to the satisfaction of the Minister [of the Interior] a substantial bridge, not less than fourteen feet in breadth, with proper and sufficient approaches thereto, over such works; and every such bridge and the approaches thereto shall be always thereafter maintained by such person or company.

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a twelve-foot bridge. What is this twelve-foot bridge for? Is its draft or plan not to meet this very requirement of sub-section (*d*) and its construction to fit the proffered undertaking contained in the application? What other meaning can it have? Are we to discard all these things because the western man in a hurry had not taken time to revise his form and allowed the projector to write his requisition and undertaking on a clearly defective form? It is a form that refers to some Act which I cannot discover, and which certainly is not the true title of this Act. We must treat the application as designed to meet the requirements of the Act, or as a nullity, for the parties had no power save when acting in conformity with the statute.

If we treat this application as null, what rights can appellants have? They are bound by the statute to apply on a form provided by the commissioner who impliedly must have had the instructions and regulations of the Minister of the Interior for a guide, as the express power is given him by section 51* to prescribe the forms to be used.

I see no insuperable difficulties either in the way of our maintaining the rights of the appellants or the rights of the Crown, when we have regard to the considerations already adverted to and the nature of the business the parties had in hand. The commissioner could not be endowed by the North-West council or the Legislative Assembly which defined his duties, with power to deal with such a subject, regardless of the purposes of the Dominion. The forms were to be provided by the commissioner, but the power in section 51 shews the forms were to be framed by the Minister.

It is true the commissioner was given by the Legislative Assembly in the year preceding the passing of the Irrigation Act, 1898, power to deal with questions affecting changes in, or obstruction to, roads, "including the crossing of such road allowances or public highways by irrigation ditches," but this of necessity must be referable to Irrigation Acts which, as already noted, were swept away by this Act of 1898.

It is conceivable, however, that in referring to him by section 16† of this latter Act, the granting of a certificate, regard was had to the local legislation. Now what did the commissioner do in response to this application? He granted the permission but the certificate thereof shews no reference to the proffered undertaking.

Surely that must be read as an assent to the application on the terms offered. It seems rather a strong thing to presume

*Now sec. 54, R.S.C. 1906, ch. 61.

†This section was secs. 20, 21, 22, R.S.C. 1906, ch. 61. Its sub-sec. (1) (sub-secs. 1 and 2, sec. 20 R.S.C.) was repealed by sec. 8, 7 & 8 Edw. VII. (Can.) ch. 38, and a new section substituted.

that he intended to reject the terms proffered, which were so very onerous for the applicant, and so directly for the benefit of the public and governments he represented. To do so would seem like a betrayal of the trust reposed in him. I can draw no such inference. Nor do I see the slightest ground for such an implication.

The certificate ends by using the words: "subject, however, to the provisions of section 37 of the said North-West Irrigation Act."

It is urged this impliedly relieved the applicants from the comprehensive words of the undertaking. How can that be so? It but repeats what the statute had imposed and could not be dispensed with by this officer. The applicants and he were both bound by that statutory provision which by its terms presupposes a travelled highway. It is the case of mere road allowances he had, and we have, to deal with.

It may be admitted, for argument's sake, a crossing of a road allowance was subject to his judgment, as, for example, at a point where the configuration of the ground was such as to render a highway impossible. That might be a case for his dispensing with a bridge. He could, for such or other good reason, have dealt with crossings, not covered by section 37, but yet within his power, in a way that might by his manner of selection perhaps have given rise to the application of the maxim *expressio unius est exclusio alterius* relied on, and thereby relieved the applicant in regard to other places within this power. Then this argument might have had great force if so applied to the necessary crossings under his control.

How that can apply here I cannot understand. I cannot see how any expression relative to something else than that within his power and so being dealt with by him can have any bearing on the matter. It seems to me clear that all that was meant by this reference to section 37 was of abundant caution and does not affect the matter one way or another. And when we find nothing done to alter the plans submitted for two kinds of bridges the undertaking stands good. It seems this application and the certificate were printed forms likely in use for another Act, and hence clumsy of expression relative to this, yet these words, "the necessary bridge or bridges at these points being constructed and maintained by us" have a terseness and force that cannot be set aside.

They are the language the statute provides should be supplied by the commissioner for the applicant to use, and we are not idly to assume he departed from the requirement of his own implied demand according to the statute, merely because he did not reiterate same in his assent. And I find a printed form in the case before us which suggests an evident explanation for the

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peculiarity of ending this appellants' application seems to wear. In this form a blank space is left for receiving the name or designation of the party on whom the burden of building bridges and maintaining them was to be cast. In that blank when used by the appellants (as applicants) the word "us" was written in, no doubt by its officer, and it reads in the copy used for this case as if no pause or punctuation ever could have been needed. Hence, if this surmise or inference be correct, appellants' neglect to punctuate is entirely to blame for the present misleading shape which the end of their application assumes.

The limited nature of the commissioner's powers relative to these road allowances and public highways, does not seem to me to have conferred any jurisdiction to destroy either a public highway or a road allowance or authorize any one else to do so. His jurisdiction was entirely of a preservative character.

It is evident that the construction of a canal forty-eight feet wide as proposed in the one case, or of sixteen feet wide as proposed in the other of those instances presented for our consideration, of necessity certainly had, unless provided against, this result of destruction and not preservation.

I do not think the commissioner ever supposed he was assenting to such destruction, nor do I see how we can fairly impute such kind of assent to him, in face of the accepted proposal providing for all the necessary bridges over road allowances or public highways. Nor can his adding from abundant caution the reference to the statutory provision section 37, which is entirely applicable to other cases than road allowances, justify such an inference.

The express language of the application refers to "road allowances or public highways," whilst section 37 clearly refers only to travelled public highways, and deals not with mere road allowances. The application does not restrict its undertaking to build bridges only at public highways either then existent or by future development to become, before construction, public highways. Nor should we forget that concessions of this kind given the appellants are to be restricted, and the authority therefor restricted, within what is clearly and explicitly expressed or by implication as clear as if so expressed. The intrusion involved in the execution of such works without clear authority, upon parts of the Crown domain consecrated as these road allowances were for a specific purpose, would be as illegal as if they had been fenced off by the appellants without clear and explicit authority. Either such works, including such consequences without express authority from the dominant power, must be held illegal and liable to abatement, or their continuation regardless of the tender of sufficient necessary bridges to overcome the consequences of such intrusion must be held illegal; and abatement must follow.

unless the tender thereof which induced the grant be fully implemented. I might let the matter rest here but perhaps I ought not to pass in silence other points pressed in argument.

The attempt to import section 37 into the application in substitution for the section 11, sub-section (*b*) already referred to as therein, seems without foundation. The elaborate, and I respectfully submit, irrelevant argument to prove that the term "road allowances" means only public highways, leaves them as distinctly different as ever. Every public highway may be on, or be loosely referred to as a "road allowance." But every road allowance is not a public highway; yet, when it becomes such, will need a bridge over such canals as in question here, and when, and so often as necessity therefor arises, the undertaking is to become from time to time operative.

Let us bear in mind the condition of things already briefly referred to as existing in the country in question and the claim in argument that this building and maintaining of bridges involves enormous expense. The more the expense is magnified the less force favourable to the appellants does any argument derived from expense appear to have.

If the section 37 of the statute is the only authority to be observed, and the only means out of the difficulty, there would seem to have been innumerable crossings by way of bridges and approaches to be constructed when the district got settled. And at whose expense? And for whose benefit but those holding lands thus irrigated? It seems impossible to suppose that Parliament intended to supplement this concession by assuming the burden. If local taxation is the only source left, the upland landholder deriving no benefit might have to pay thus for the man on the level plain. And until Canadian Pacific Railway lands had become taxable the burden in some districts covered by this legislation would probably fall on a fractional part of a district concerned only with the need for bridges and perhaps having none of the irrigated lands within its jurisdiction. If the cost of bridge building is borne by the water company then the charge finally falls on those who are paying for the use of the water and receiving the benefit thereof.

Every improvement helps even those not directly benefited. Yet taxation for others' benefit does not tend to promote settlement, and its incidence does not compensate. The Canadian Pacific Railway construction apparently conferred direct benefit on everyone within the range of the part exempted from taxation, yet common knowledge tells us its repetition of exemption from taxation most unlikely in 1898, for a purely private enterprise like this.

It may be said these things have nothing to do with the interpretation of the statute. I agree; nothing of statutes and con-

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tracts must be construed in such a manner as to lead to absurdity. But these things constitute the conditions and surrounding circumstances that so evidently must have been present to the minds of those who asked in no doubtful terms for a concession, but were granted it in terms alleged to be ambiguous. Again it is said some bridges have been built by the Alberta Government. What does that amount to? It is said to have been done under protest. But whether so or not the circumstances are not at all of the same character as of a man who has made a grant being met by his own acts thereafter as interpretative of his intention relative to an ambiguous term of the grant.

The province was created after all these happenings now in question, and it may well be that somebody had blundered. We have only too much apparent in this case of how errors may occur in transacting government business in a country where conditions relative thereto are rapidly changing.

The great effort in argument seemed to be addressed to the proposition that section 37 must govern all that was ever conceivably within the range of the commissioner's business vision, or powers in law, to impose. What can such a proposition lead to? When we reflect that this Act was equally applicable to the possibly common case of the farmer or farmers in need of water for irrigation purposes, applying for a license therefor. The grant prayed for in such case may involve the crossing (by means, for example, of a pipe or ditch of a capacity to carry only what a pipe of three inches or three feet in diameter might carry) of one or more road allowances not yet become travelled highways.

Who is to determine the question of the right to cross such road allowances and the terms upon which the leave is to be given? And by what procedure is such a determination to be reached? At each step in the proceedings up to the officer who finally grants the permission to cross such road allowance, the man and the officer in each such case are identical with those who had to be consulted to certify and to do all leading to the granting and to grant such permission as was given to the appellants. Yet we have two or three things urged upon us herein as if undoubted law, that if acted upon would lead to extraordinary results in the operating of this Act in this connection.

One is thus stated in the appellants' factum:—

> The "necessary" bridges were, of course, those which were rendered necessary by the statute under which the application was made. And that the Commissioner of Public Works so understood, is shewn by the language in which he couches his permission:—"subject, however, to the provisions of section 37 of the said North-West Irrigation Act."
>
> It would have been quite irregular for the commissioner to impose any condition not warranted by the Act. He did not do it. And it may fairly be assumed that the company did not voluntarily assume any such liability.

The contention means, if it means anything, that the only thing the commissioner could do in the case of the farmers requiring permission for a pipe of a capacity of three inches or three feet in diameter across a road allowance or travelled highway, was to require they should build a bridge as provided for in section 37, or put the Public Works Department or other public authority to the expense of providing for all time a culvert for the sole benefit of such grantees.

It first assumes that an officer empowered to act on behalf of the Crown can never stipulate for anything conditional to his consent unless his power has been expressly clothed with a provision enabling the public to be so protected. And in the next place it assumes that a grant obtained by virtue of such condition is perfectly good. In other words, the grantee can repudiate, and by his repudiation acquire, something he never could have got but by breach of faith.

I cannot accept such a doctrine as law. Such a grant has been obtained either by fraud or mistake, if the officer had no right to stipulate; and work constructed thereunder must be liable to abatement.

It is further to be observed that said section 16 of the Act requiring a certificate as stated above, contains all the legislation of the Dominion relative to the commissioner's power or duties in connection with the subject now in question. Certainly there is thus afforded the amplest scope for him so far as that legislation is concerned. And when we have regard to the power conferred by the above-mentioned enactment of the assembly, how can it be said he had no power to impose any conditions or stipulate for anything the public weal required at his hands in the discharge of his duty.

How can it be said he was confined to observing or to the stipulating for the observance by others of section 37 in the Act? He had no power relative thereto. He could not dispense with its operations for an instant. It bound him and it bound the promoters, and still binds appellants. And to assume as a mere matter of course he was doing so, seems either idle, or that we are to assume he was an idle and useless functionary. If he had no power beyond the limits of this section 37, which is plain and expresses a purpose that becomes operative under certain conditions and not otherwise, why should there be a reference to him at all?

Again, it seems as if the man or company demanding a right of way across a road allowance dedicated to the public use when the district had not yet become so settled as to have any need for a bridge, must as an initial step have imposed by the commissioner upon him or it, the burden of needlessly constructing a bridge such as section 37 specified, or nothing. It is unneces-

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sary in this view to consider the question of want of authority, or semblance thereof, respecting the subsidiary undertaking secondly in question herein. Any questions as to the mandatory form of the judgment directing building of bridges where no authority may exist for the constructing of the works necessitating same, can be met by modification thereof, if the respondent be so advised as to ask herein for same.

It is competent for the respondent to waive the extreme right he may have to relief, and accept in any conditional form found advisable, a judgment within and subject to such conditions. I would allow such amendment in this regard by way of variation as the respondent may desire and be advised.

Meantime I would dismiss the appeal with costs.

*Lafleur*, K.C. (of the Canadian Bar), *S. B. Woods*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, appeared for the appellant.

*Sir Robert Finlay*, K.C., *Ewart*, K.C. (of the Canadian Bar), *E. F. Haffner* (of the Canadian Bar), and *William Finlay*, for the respondent company.

Lord Macnaghten.

London, England, July 25, 1912. LORD MACNAGHTEN, in delivering their Lordships' reserved judgment, said the question was whether the Provincial Government or the respondents, the irrigation company, were bound to construct the necessary bridges at the points where the company's canals intersected the road allowances reserved throughout the Province of Alberta under the Dominion Lands Act, R.S.C. 1886, ch. 54.* The action was concerned with two typical cases. In both the company obtained permission to construct irrigation works in accordance with deposited plans which shewed the points of intersection. In the one the proceedings were regular throughout and complete. In the other some of the directions and formalities prescribed by the North West Irrigation Act, 1898, were not complied with. The claim in both cases was for an order requiring the company to erect across its canals at the points of intersection proper and sufficient bridges with approaches. The company admitted the allegations and further that unless the company were entitled to interrupt public travel, as the statement of claim alleged they had done, the plaintiff was entitled to the relief claimed.

The case might be summed up in a few words:—Road allowances are strips of Crown land reserved from public sale and settlement. They were reserved originally for the sole purpose of making roads when and as roads might be required. Before the road allowances were wanted for roads, the irrigation company obtained authority under the North West Irrigation Act, 1898, to cross the road allowances met with in their route.

*Sec. 132, now sec. 79, R.S.C. 1906, ch. 55.

That authorization necessarily gave the company the right to occupy the road allowances at the points of crossing and to dig out the surface of the land there for the purposes of their irrigation works.

Thereupon the land at a crossing which was originally vested in the Crown for one single purpose came to be so vested for two purposes—diverse and to some extent antagonistic—both touching closely the interest of the public and both perpetual; (1) the convenience of wayfarers and travellers; and (2) the improvement of the country by irrigation. The first, however, was still the primary and paramount purpose. The second was subordinate, for the land was not freed from the original purpose when the company obtained authority to take possession of it; nor, indeed, could it be freed from that purpose except in pursuance of some statutory enactment.

The suggestion that the original purpose came to an end on the expiration of the period allowed for the construction of the company's works was really not arguable. Then there came a time when the road allowances were wanted for roads. Who was to enforce the obligation of restoring them to a condition suitable for that purpose or otherwise doing what might be necessary to give effect to the original purpose—if there was a dispute about it? Clearly, the Attorney-General on behalf of the Crown. How was the obligation to be worked out? Due regard must be paid to both the purposes for which the land was held. The obvious and proper thing was to build bridges at the crossings where the road allowances had been made impassable by the company's canals.

Who was to build the necessary bridges? Surely the party for whose convenience and profit the road allowances had been interfered with. The company had power under the Irrigation Act to construct "bridges." The word "bridges" in that connexion must mean "bridges over the company's canals where they interfere with roads or road allowances." The construction of the necessary bridges was therefore one of the purposes of the company's undertaking.

It followed that the stipulation about building the necessary bridges to which the company submitted on their original application was nothing more than a stipulation binding the company to do, as a matter of contract, what it would have been bound to do if there had been no submission. The result therefore was just the same whether the company's proceedings had been regular, as in the case of No. 6, or irregular, as suggested in the case of No. 8. Their Lordships might add that in their opinion sec. 37 of the Irrigation Act, to which frequent reference was made during the argument, had no application to road allowances. It dealt only with "public highways thereto-

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fore publicly travelled as such." Their Lordships would humbly advise his Majesty that the appeal should be allowed, the judgment of the Supreme Court reversed, and the judgments of the Courts below restored without costs. The costs paid under the order of the Supreme Court must be refunded, and there would be no costs of this appeal.

*Appeal allowed.*

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Oct. 17.

## WASSON v. HARKER.

**(Decision No. 2.)**

*Saskatchewan Supreme Court, Parker, M.C. October 17, 1912.*

1. MORTGAGE (§ VII B—150)—WHO MAY REDEEM—ASSIGNEE OF EQUITY OF REDEMPTION—FORECLOSURE ORDER.

An assignee of the equity redemption purchasing after an order *nisi* for foreclosure has been made at the suit of the mortgagee, is bound by the order *nisi*, and, when added as a party defendant, he is limited by the period fixed for redemption by the order *nisi*.

[*Re Parbola, Ltd.*, [1909] 2 Ch. 437, followed.]

2. MORTGAGE (§ VI B—75)—ENFORCEMENT — RELIEF AGAINST ACCELERATION CLAUSE—APPLICATION OF 1 GEO. V. (SASK.) CH. 7, SEC. 7.

Sub-sec. (10) added to section 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, whereby relief may be given against a mortgage acceleration clause in proceedings before the registrar of land titles does not apply to court proceedings, *ex gr.*, a foreclosure action.

[*McGregor* v. *Hemstreet*, 5 D.L.R. 301, followed.]

3. MORTGAGE (§ VII B—150)—REDEMPTION—RIGHT OF PURCHASER PENDENTE LITE TO REDEEM.

A purchaser pendente lite of the mortgaged premises added as a party defendant in a foreclosure action has a *locus standi* to apply to redeem without first entering an appearance.

Statement

THIS is an application by the defendant Lysle J. Abbott (added as a defendant by order granted herein by myself on the 4th day of October, 1912) for an order that, upon payment into Court to the credit of this action of the sum of $2,118.87, together with interest thereon at 6 per cent. per annum from February 24th, 1912, until such payment in and costs to be taxed, this action be dismissed and that the defendants shall be relieved from the consequences of their default in payment of the mortgage upon which the action was brought.

The application was refused.

*W. H. McEwen*, for applicant.
*C. W. Hoffman*, for plaintiff.

Parker, M.C.

PARKER, M.C.:—An order *nisi* was issued April 17th, 1912, directing the defendant Harker on or before October 17th, 1912, to pay into Court to the credit of this cause $10,927.91 (being the

full amount of the mortgage) with interest and costs as provided in the order, and in default there was to be foreclosure absolute and the title vested in the plaintiff, and the defendant and all persons claiming through or under him were to give up possession of the lands to the plaintiff.

On October 4th, 1912, I made an order *ex parte* adding the defendant Lysle J. Abbott as a party defendant, on the ground that he was the assignee *pendente lite* of the equity of redemption of the defendant Harker. On October 16th the plaintiff moved to set aside that order on the ground that it should not have been made *ex parte*. I held that the order was properly made and the defendant Abbott is, therefore, a party to the action.

The defendant Abbott now applies to be relieved from the acceleration clause in the mortgage (by reason of which, on the default of the defendant Harker, the whole amount of the mortgage became due and payable) on payment of the principal and interest actually in arrears.

On behalf of the plaintiff it was urged as a preliminary objection that the defendant Abbott has no *locus standi* to make the application, on the ground that he has not entered an appearance and has, therefore, not submitted himself to the jurisdiction of the Court. I do not think this objection applies here. The writ of summons was served on the defendant Harker on March 21st, 1912, and no appearance has ever been entered by him. An order *nisi* was issued April 17th, 1912, giving the defendant until October 17th to redeem, and that right is still in existence. The defendant Abbott is the assignee of the equity of redemption of the defendant Harker, and has, therefore, the same right to redeem as Harker has. It would not be necessary for Harker to enter an appearance in order to redeem, and I cannot see why it is necessary for his assignee to do so. Either of these defendants is in an analogous position to a judgment debtor moving to open up a default judgment entered against him.

It was also urged by counsel for the plaintiff that I have no jurisdiction to vary the order *nisi* made by a Judge on April 17th, 1912, and that the proper party to vary that order is the Judge who made it. As I do not intend to vary that order it is not necessary for me to decide the question of jurisdiction.

As to the application itself, I am of the opinion that it should be dismissed with costs. In *Re Parbola, Limited, Blackburn* v. *Parbola, Limited*, [1909] 2 Ch. 437, the applicant was added as defendant to the action, he being an assignee of the equity of redemption. But it was held that he must be content to take his interest in the equity of redemption as he finds it, namely, as bound by the order *nisi*, and that he must redeem at the expira-

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tion of the time given for redemption. It was also held that to extend the time for redemption would be entirely contrary to the practice of the Court.

It was contended by counsel for the defendant, notwithstanding the foregoing, that section 93, sub-section (10), of the Land Titles Act, entitles the defendant to relief from the acceleration clause in the mortgage. This section reads as follows:—

> In case default has occurred in making any payment due under any mortgage . . . and under the terms of the mortgage by reason of such default the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure . . . pay such arrears as may be in default under the mortgage, together with costs to be taxed by the registrar, and he shall thereupon be relieved from the consequences of such default.

It was contended that this provision for relief applies equally to proceedings in the Supreme Court of Saskatchewan and to proceedings before the registrar of land titles. This question arose before the Hon. Mr. Justice Brown in *McGregor* v. *Henstreet*, 5 D.L.R. 301, 20 W.L.R. 642, and the learned Judge held as follows:—

> I am of opinion that that section can have reference only to proceedings taken before the registrar of land titles, in view of the fact that the section names the registrar of land titles as the person who shall tax the costs. It could never have been intended that he should tax the costs of an action brought in the Court.

I consider that I am bound by that decision, and, therefore, hold that the section does not entitle the defendant to the relief asked for. As the time for redemption expires October 17th, 1912, it was agreed between counsel that the time should be extended until October 22nd, 1912, and I will, therefore, direct a stay of proceedings up to and including that date. Costs of the motion to be costs to the plaintiff in any event.

*Motion refused.*

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Oct. 22.

## WASSON v. HARKER.

### (Decision No. 3.)

*Saskatchewan Supreme Court, Parker, M.C. October 22, 1912.*

APPEAL (§ III B—76)—STAY OF PROCEEDINGS—APPEAL PENDING—FORECLOSURE—REDEMPTION.

Where the mortgagor would be barred from re-opening a foreclosure as is probably the effect of sub-sec. 8, of sec. 93, of the Land Titles Act, R.S.S. 1909, ch. 41, and, unless the application to stay proceedings upon an appeal from an order affecting the right to redeem were granted, the mortgagee might obtain a certificate of title to the lands, a stay of proceedings should be granted pending the appeal, on payment of the costs of the application and on giving security for the costs of the appeal.

[See also *Williams* v. *Box*, 44 Can. S.C.R. 1; *Reeves* v. *Konschur*, 2 S.L.R. 125; *Richards* v. *Thompson*, 18 W.L.R. 179.]

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AN application for a stay of proceedings on the ground that an appeal was pending from the decision reported *ante*, *Wasson* v. *Harker* (No. 2), 7 D.L.R. 526.

The application was granted.

*W. H. McEwen*, for applicant.

*C. W. Hoffman*, for plaintiff.

PARKER, M.C.:—This matter first came before me on October 4th, when I made an order *ex parte* adding Lysle J. Abbott as a party defendant, he having purchased the equity of redemption of the defendant Harker in the mortgage sued on. On October 11th the plaintiff launched a motion to set aside this order, on the ground that it should not have been made *ex parte*. On October 16th I gave judgment holding that the order of October 4th was properly made, and dismissed the plaintiff's motion with costs. In the meantime the defendant Abbott launched a motion returnable on October 8th for an order that upon payment into Court of the amount of principal and interest actually in arrears under the mortgage, together with costs, the action be dismissed, and that the defendants be relieved from the consequences of their default. This motion was enlarged, first until October 14th, and again until October 16th, pending decision on the motion to set aside the *ex parte* order above mentioned, it being agreed between the parties that the defendant would not be prejudiced by reason of the fact that the time for redemption expired October 17th, and the time was, therefore, extended up to and including October 22nd. On October 17 I gave judgment dismissing the defendant Abbott's motion with costs, and he now applies for a stay of proceedings on the ground that he has appealed to a Judge in Chambers. On the argument of the motion I was asked by the defendant's counsel to direct a stay, but I expressed a doubt as to whether or not I had the power to do so, as it would, at that stage of the proceedings, be virtually extending the time for redemption. The matter was finally settled by extending the time until October 22nd by consent. In the meantime the defendant has served a notice of appeal from my order of October 17th, and now makes this application for a stay of proceedings pending the appeal. Unless this application is granted the plaintiff will be entitled to foreclosure absolute, and may thereupon obtain from the registrar of land titles a certificate of title to the lands in question, and the defendant will be absolutely debarred from his right to redeem, when he appears quite willing to do so. It is merely a question as to whether he must pay the whole amount of the mortgage or only the amount of principal and interest actually in arrears. It is true that in *Campbell* v. *Holyland*, 7 Ch. D. 166, it was held that under proper circumstances a mortgagor might redeem

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even after an order absolute for foreclosure was obtained, but this right appears to have been taken away by sec. 93, sub-sec. 8, and sec. 169 of the Land Titles Act. See the judgment of Mathers, J., in *Williams* v. *Box*, 11 W.L.R. 111, following the decision of the Privy Council in *Bank of New South Wales* v. *Campbell*, 11 A.C. 192.

I think in view of the foregoing that the defendant has made out a case for a stay of proceedings pending the appeal, upon proper terms. I will, therefore, make an order staying the proceedings in the action pending the disposition of the appeal to the Judge in Chambers. Following *Patton* v. *Alberta Coal Co.*, 2 Terr. L.R. 294; *Alexander* v. *Walters*, 11 W.L.R. 26; and *Merry* v. *Nickalls*, L.R. 8 Ch. App. 205; the defendants, however, must pay into Court forthwith the sum of $75 as security for the plaintiff's costs of the appeal, and must also pay the costs of this application forthwith after taxation thereof.

*Stay of proceedings.*

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## REX v. EBERTS.

**(Decision No. 1.)**

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*Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Walsh, JJ. June 22, 1912.*

1. TRIAL (§ III E 5—261)—HOMICIDE — PROVOCATION TO REDUCE TO MANSLAUGHTER.

Upon a trial of a murder charge the trial judge is justified in not submitting the question of manslaughter to the jury where there is no more than mere surmise or conjecture on which to rest such a finding.

2. APPEAL (§ VII L 2—477)—REVIEW OF VERDICT—MURDER — CULPABLE HOMICIDE REDUCED TO MANSLAUGHTER.

Where the appellate court is of opinion that, upon the evidence no jury could properly find that the prisoner shot the deceased while in the heat of passion caused by sudden provocation, no substantial wrong or miscarriage at the trial is shewn to warrant the appellate court in setting aside a conviction for murder or directing a new trial under the Cr. Code 1906, sec. 1019, by reason of the trial judge's instruction to the jury that they were bound, upon the evidence, either to acquit the prisoner altogether or to find him guilty of murder.

3. TRIAL (§ V C 2—290)—MURDER—MANSLAUGHTER.

Upon a trial for murder, upon a request for a charge of manslaughter upon the alleged ground that the accused shot the deceased while "in the heat of passion caused by sudden provocation," the charge was properly refused where nothing was said in the evidence as to the accused having been aroused to a heat of passion and the circumstances were, in the view most favourable to the defendant: (1) that he was on the scene with the criminal intent to steal; (2) that he believed the deceased to be a secret police officer; (3) that the only provocation suggested by the defence was that such officer came up to the accused at a place where he was lurking under circumstances justifying suspicion and thereupon pointed a pistol toward him and told him "to go to hell."

[Crim. Code 1906, sec. 261, referred to.]

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APPEAL by the accused following the refusal of a reserved case to review questions of law arising upon defendant's conviction before Simmons, J., and a jury for murder. The points raised by defendant were as to the alleged insufficiency of the Judge's instructions to the jury as to manslaughter, and as to corroboration of an alleged accomplice.

The appeal was dismissed, Beck, J., dissenting.

*J. W. McDonald*, for defendant.

*P. J. Nolan*, for the Crown.

HARVEY, C.J. Harvey, C.J.

The defendant was convicted of murder of a policeman before my brother Simmons with a jury. At the close of the case his counsel took certain objections to the learned Judge's charge to the jury and requested him to reserve a case for the opinion of the Court *en banc* which request was refused and this is an appeal from such refusal.

There are two questions raised in the appeal:—

1. Was the Judge in error in refusing to point out to the jury that they might bring in a verdict of manslaughter?

2. Was he wrong in his directions on the subject of corroboration?

The chief witness for the Crown was one Jasbec who stated that they started out at night to commit burglary, the prisoner taking his, Jasbec's, gun with him, that after making two attempts and being frightened off by some one coming and after he had suggested that they should go home to which he says the prisoner agreed, they moved on somewhere, apparently not for the purpose of going home, when they saw the figure or shadow of a man. Jasbec's evidence to this is as follows, speaking of their leaving Burns' butcher shop when he says in another part of his evidence the prisoner agreed to go home: "Then we made our way around some buildings here (indicating) and finally we came to the lane behind the Imperial hotel. And we came up here and the outlines of the man were somewhere about here (indicating), and we saw him about the same time and Eberts said, "I'll bet you that that is Jan, he wants to scare us." Jasbec's story is that the prisoner then took the gun and said he would go around the building one way and told him to go the other, that though he, Jasbec, twice requested him to go home, the prisoner started round the building, that when the prisoner was out of sight he started for home and then heard a shot when he started to run; that he was soon overtaken by the prisoner running, who just before they reached home told him that he had not seen the man at first when he went round the corner of the building, but that all at once a fellow standing in front of him pointed a revolver at him and said, "What are you doing here, go to hell" and that he then took his gun up and fired at the fellow, that he shot him and he must be dead

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because he sank down as soon as the shot was fired, without a sound, that he told him also, "I guess it is one of the secret police but I am not sure about it." Mrs. Jasbec states that he told her much the same story and she adds, "He says, 'Good, I kill him right away, it is good that I kill him.' He said that too."

The prisoner gave evidence in his own behalf and denied the story of Jasbec and denied being at the scene of the killing. If his story were true he was innocent, the jury evidently disbelieved it for they found him guilty.

If there was evidence on which they might have found him guilty of manslaughter the trial Judge should have pointed out the distinction between it and murder with reference to such evidence. If, however, there was no such evidence there was no obligation on his part to say anything about manslaughter. This was definitely decided in *R.* v. *Gilbert,* 12 Can. Cr. Cas. 127, by the Territorial Court and affirmed in appeal by the Supreme Court of Canada; *Gilbert* v. *The King* (Decision No. 2), 12 Can. Cr. Cas. 127, 38 Can. S.C.R. 284.

It is suggested that the evidence I have quoted shews an abandonment of the burglarious intents, or at least would justify a finding of such abandonment; whether it would or not I cannot see how that would help the case. The story told by him was that he shot the policeman and as pointed out in the *Gilbert* case, the law presumes the intention unless the evidence shews the reverse. The evidence contained in his story and the circumstances of the case is to my mind quite the reverse. The deliberate taking of the loaded gun from Jasbec to meet the man and the statement of satisfaction after indicate a deliberate preparation as well as a practical admission of intention. The facts also shew plenty of ground for motive. The men had been attempting to commit burglaries, some one had appeared and might have seen them. Other burglaries had been committed, then this man is seen who might be the one seen before and who as the prisoners thought, at least afterwards, was a policeman who might have seen them at their work or might arrest them and who might therefore well be put out of the way. It is suggested that there is evidence of a struggle, but all that is pointed out is that a button was pulled off deceased's waistcoat and that the doctor and undertaker subsequently found one of his arms bruised. There are, perhaps, circumstances which, coupled with others might amount to evidence of a struggle since they might easily happen in a struggle but since they might as easily happen in a thousand other ways they appear to me to have no importance standing alone for any conclusion as to this cause and would not warrant an inference of struggle.

Harvey, C.J.

As I pointed out in the *Gilbert* case, [see 12 Can. Cr. Cas. 129, at 132], a jury must have evidence and not hypothesis in which to make a finding of manslaughter. I think, therefore, that there was nothing in the evidence that would have justified a verdict of manslaughter and that, therefore, the learned Judge's charge was unobjectionable in this respect.

On the question of corroboration I have already indicated that Jasbec's wife gives evidence corroborating his. *R.* v. *Neal* (1835), 7 C. & P. 168, a decision of Parke, is cited as authority for the proposition that the evidence of the wife of an accomplice is not corroboration. I feel no hesitation in saying that I consider such a decision as entirely out of harmony with our present law and views on the subject of evidence and of the present authority. There is, however, much other evidence corroborating Jasbec and implicating the accused though it is by no means far from doubt that Jasbec was an accomplice whose evidence required corroboration, the learned Judge, however, resolved this doubt in the prisoner's favour. He also very carefully directed the attention of the jury to the interest of the wife in confirming her husband's story, as was proper. He also carefully reviewed the evidence corroborating Jasbec in collateral facts and, if, as suggested, the jury might thereby have thought that the evidence of Jasbec in such points required corroboration it would not be because of the way the direction was given and it would, in any event, have been entirely to the benefit and in no way to the prejudice of the prisoner.

As in my opinion this ground of objection is also untenable the appeal should be dismissed.

Scott, J.
Walsh, J.

SCOTT, and WALSH, JJ., agreed with HARVEY, C.J.

Beck, J.
(dissenting).

BECK, J. (dissenting):—This is an appeal from the refusal of Simmons, J., to reserve certain questions for the decision of this Court. I propose to deal with one only of these questions because in my opinion it is one which ought to be answered in favour of the prisoner and entitles him to a new trial.

The question is, whether the learned Judge erred in directing the jury that, in view of the evidence there were only two possible conclusions they could come to—a verdict of guilty of murder or a verdict of not guilty, thus excluding a verdict of manslaughter, having regard, of course, to the grounds of the direction.

I summarize as much of the evidence as seems necessary for the consideration of this question: The deceased, Willmett, a policeman in the R.N.W.M.P. came to his death in the early morning of Sunday, the 12th of April, 1908, at Frank, Alberta. The prisoner and one Jasbec were living together with their

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families in a shack in Frank. It is almost entirely upon the evidence of Jasbec that the most material facts depend. These men and also one Jan Jakubsick were miners who at the time were out on strike. Their money had run short. It appears that the prisoner and Jakubsick had on a number of previous occasions committed theft by breaking into stores to procure provisions, and Jakubsick was in the mind to continue in this course. Eberts and Jasbec both kept firearms in their possession. Jakubsick also probably did. At all events there is evidence that he was in the disposition to commit murder if it would serve his purpose. On Saturday afternoon there was talk between the prisoner and Jasbec, during which the prisoner borrowed the prisoner's double-barrelled shot-gun, saying he wanted to go hunting. Later the prisoner told Jasbec that they would go out that night and get provisions by stealing. The two went to bed together in the kitchen of the shack—they had been in the habit of sleeping together there. During the night the prisoner wakened Jasbec and told him it was time to go. They both got up. The prisoner loaded the gun. Jasbec asked him what he wanted with the gun, and the prisoner answered, "I always like to have something to defend myself with." Jasbec explains:—

> I thought that he took the gun along if a dog attacked him because he told me previously that he had tried to break into a hotel at Coleman and he got scared away by a bull dog.

The shack was on the outskirts of Frank. They went into the town to the C.P.R. depot—passed the waiting room and went to the freight shed. The prisoner gave Jasbec the gun and said, "Hold the gun," and tried to get into the window of the freight shed. Jasbec then saw a man in the direction from which they had come and told the prisoner. Jasbec says: "He said, 'Oh, that is another smart fellow going to get his stuff'" —by which I understand another man out for the purpose of stealing provisions—"and I said, 'Come let us go,' and he said all right, and we went away from there and followed the track to the bridge." They crossed the bridge, waited a short time, and then returned and came down by the Frank hotel and Jasbec says, "I told him we had better go home." Then they went behind the buildings facing on the Main street of the town, going in the general direction from which they had come when starting out from their shack. They came to the back of the Burns' butcher shop. The prisoner tried to get into the back door of the shop using a screwdriver. Jasbec says:—

> I was standing on the side and I was uneasy and I said, "Come on home," and he said, "Just wait a second, I have got to put the screws back."

They proceeded and came to the lane behind the Imperial hotel. They then both saw the outlines of a man. The prisoner said, "I'll bet you that is Jan" (Jakubsick). It appears that Jakubsick and the prisoner had been out together on previous occasions on similar expeditions. Jasbec says:—

> The man disappeared here behind the buildings as far as we could see. He (the prisoner) said, "I'll bet you that is Jan, but I want to find out who it is," and I said, "Leave it alone and come home" and he took the gun at the same time and he went in behind here. He took the gun off me and he said, "I will go round this way and you go round that way," and I said, "We had better go home" and he went round one way and I went the other and I stopped here and finally when I thought he was far enough round the corner I went off in this direction. . . . Eberts said, "You go back around this way and we will see who it is."

The building spoken of is a small building on the lane in the rear of the Imperial hotel, an ice house. Jasbec continues:—

> I started on the way home and I made a few steps when I heard a shot fired. . . . I heard a shot-gun and the first thing I thought the shadow that we had seen had shot at Eberts and I started to run and I ran a distance, I do not know how far it might be—it might be 25 yards and it might be 50 yards—I am not sure about that, when Eberts followed me up and he joined me.

At another place Jasbec says, "I waited a little and I started to go off home and when I had made a few steps I heard a shot going." Jasbec says the shot came from the direction in which he supposed the prisoner was, that when the prisoner joined him he (the prisoner) had the gun in his hand; that they both ran on to close to the prisoner's shack.

Jasbec continues:—

> And then I asked him what is the matter; and he said: "When I come around that corner first I saw nothing: all at once a fellow standing in front of me and he pointed a revolver at me and said, 'What are you doing here? go to hell'; and I thought he drawed his gun up and I fired at him."
>
> Q. Who did? A. Eberts took his gun up and fired at the fellow who pointed the revolver at him . . . and I said what became of him? And he said he shot him, he shot the fellow and he must be dead because he sank down as soon as the shot was fired without a sound. . . . He (the prisoner) said: I guess it is one of the secret police but I am not sure about it.

I note some other portions of Jasbec's evidence:—

> Q. When did you first know that the man who had been killed was a policeman? A. On the Sunday morning, when Jakubsick (who had been down town) told us he had seen him.
>
> Reverting to the time of their being at Burns' butcher shop Jasbec's evidence on cross-examination is:—
>
> Q. And then you got faint-hearted and started for home; is that not correct? A. I always said to him, "Let's go home," since we started —first started.

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Q. Why didn't you go home the regular trail? A. Because I did not like to go through the town. . . .

Q. When you left Pat Burns (the butcher shop) which way did you go? You wanted to get home—that was your intention, to get home? A. Yes, round here. . . .

Q. When you told Eberts that you had better go home, Eberts agreed to go? A. Yes.

Q. And he put the screws back in the door? A. Yes.

Q. And you started for home? A. Yes.

Q. And he agreed to do that? A. Yes.

The evidence shews that Willmett, the deceased, was dressed in civilian's clothes, that when found his condition was that he was lying on his back, had a gash on the right side of his neck, that his shirt was torn, presumably by the discharge of the shot-gun and that there was a pool of blood soaked into the ground at the right side of his neck and some blood on his right hand and that there was a small calibre revolver lying by his side, about six inches from his hand—(the revolver was identified as that of Sergeant Hazlett, Willmett's superior non-commissioned officer) that the top button was torn off Willmett's vest. According to the judgment of Dr. McKenzie, who examined the body shortly after death, the shot was fired at a distance of ten or twelve feet. The undertaker, Addison, when preparing the body for burial found two marks upon it, which appeared not to be the result of the shot, namely—"a little square mark on the shoulder, which covered an inch square exactly, not a wound, more like a bruise, the skin was knocked loose, the skin was not gone off but it was loose though, and there was a little bruise right on the forearm."

Upon this evidence and some admitted facts which I have not yet noted, it seems to me that the case might have been put to the jury in this way:—

A very large portion of the population of Frank is composed of miners, a very rough class of men of many nationalities. All these men—several hundreds in number—were out "on strike." Their food supply was running short. Many burglaries had taken place in the town without doubt committed by miners by way of providing themselves with food. They were a rough lot who kept firearms in their houses and carried them on these expeditions. Eberts was one of this class and on the night in question was out, accompanied by Jasbec, for the purpose of burglary and carried a firearm for the purpose—let it be admitted of use in effecting his escape in case of discovery. Eberts having made an attempt at the C.P.R. freight sheds, desisted on seeing a watchman. Having made another attempt at Burns' butcher shop, Eberts again desisted, not owing to fear of being surprised, but to the persuasion of Jasbec, who urged him to come home, which he expressly agreed to do and

shewed his real intention of doing by placing the screws in the door. They both then proceeded in a direction which though not in a direct line to their home, was in that general direction and the detour, which was not great, is accounted for by their wishing to keep in the shadow of buildings. Passing in the neighbourhood of the Imperial hotel, Eberts sees—and no doubt he could see for a considerable distance—the shadow of a man in the rear of the hotel. He really thought it is Jan Jakubsiek whom he knows well and who seems to have been an unscrupulous desperado. He may have feared that, contrary to his expectation, it would turn out to be another equally unscrupulous desperado whom he might not know and therefore took the gun with him. He came close to the man Willmett, whom he took to be a civilian and whom he did not know. Something occurred there, to which there were no witnesses except Eberts and Willmett, which resulted in Eberts shooting Willmett. There is clear evidence in which the jury could reasonably find that at the time Eberts caught sight of Willmett, he had abandoned his intention of committing any indictable offence on that expedition. There is evidence of a struggle between Eberts and Willmett in the torn skin on the shoulder and the bruise on the forearm of Willmett. The length of time indicated by Jasbec was more than sufficient for a mere meeting of the two men and quite sufficient for a short struggle. Apart from the two men getting into an altercation there was no motive for Eberts shooting Willmett, whom it may be supposed he still took to be a civilian—for after it was all over he only suspected him to be a policeman. There was something in the way of a threat by Willmett.

His expression was not the common one "Get to hell out of this," which means, "Go away," but "Get to hell," which may have been intended and taken to mean "I'm going to send you to hell." There is no confirmation of the evidence of Jasbec of what took place at this the crucial point of his story and little reliance can be placed upon it. With the evidence of Eberts' abandonment of his intention to commit any indictable offence; with the absence of motive on his part for a deliberate killing of Willmett; with the evidence of his not knowing Willmett to be a peace officer; with the evidence of a threat on Willmett's part; with the evidence of a struggle; with a hesitancy to accept Jasbec's story, it seems to me that a jury might not unreasonably have found a verdict of not guilty.

But if so, it seems to me that they were not properly directed by the learned Judge, inasmuch as he made no reference in his charge to any of these points which I have enumerated, but in effect told the jury that if they disbelieved Eberts' story

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—in which he set up an *alibi*—and believed Jasbee's story they had no alternative but to find Eberts guilty of murder.

It is said, however, that the only question open for our consideration is whether the learned Judge was right in excluding the possibility of a verdict of manslaughter. This may be so, but the points which I have enumerated are not, I think, compatible only with a verdict of not guilty but are, I think, compatible with a verdict of manslaughter. If it would have been not unreasonable for a jury to find a verdict of not guilty, it seems to me that it would equally have been not unreasonable for them to find a verdict of manslaughter on the ground of want of motive for deliberate killing, the threat, the struggle, the consequent arousing of sudden passion and provocation; for the facts enumerated do not tend to establish a case of self-defence or accident rather than a case of a struggle, brought about, if you wish by the prisoner, in which provocation was given and sudden passion aroused excluding malice. In *The Queen* v. *McDowell*, 25 U.C.Q.B., at p. 115, it is said:—

> By the light of modern authority all questions as to motive, intent, heat of blood, etc., etc., must be left to the jury and should not be dealt with as propositions of law.

In *Regina* v. *Brennan*, 27 O.R., at p. 674, MacMahon, J., says:—

> It is unnecessary that I should refer at length to the charges of other eminent Judges, as shewing the care (I might also say solicitude) evidenced by them, when the evidence disclosed that an assault had been committed in leaving to the jury the question whether the assault was of such a character as should have furnished provocation, and that the mortal wound was given so recently after the provocation as to reduce the killing from murder to manslaughter. The following cases may be referred to: *Reg.* v. *Kirkham*, 8 C. & P., at p. 115; *Regina* v. *Sherwood*, 1 C. & K. 556; *Regina* v. *Smith*, 4 F. & F. 1066.

I would direct a new trial.

*Appeal dismissed;* BECK, J., *dissenting.*

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**EBERTS (appellant) v. THE KING (respondent).**

**(Decision No. 2.)**

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 7, 1912.*

1. TRIAL (§ III E 5—261)—HOMICIDE — PROVOCATION TO REDUCE TO MANSLAUGHTER.

Upon a trial of a murder charge the trial judge is justified in not submitting the question of manslaughter to the jury where there is no more than mere surmise or conjecture on which to rest such a finding.

[*R.* v. *Eberts* (No. 1), 7 D.L.R. 530, affirmed.]

2. APPEAL (§ VII L 2—477)—REVIEW OF VERDICT—MURDER — CULPABLE HOMICIDE REDUCED TO MANSLAUGHTER.

Where the appellate court is of opinion that, upon the evidence no jury could properly find that the prisoner shot the deceased while in the heat of passion caused by sudden provocation, no substantial wrong or miscarriage at the trial is shewn to warrant the appellate court in setting aside a conviction for murder or directing a new trial under the Cr. Code 1906, sec. 1019, by reason of the trial judge's instruction to the jury that they were bound, upon the evidence, either to acquit the prisoner altogether or to find him guilty of murder.

[*R.* v. *Eberts* (No. 1), 7 D.L.R. 530, affirmed.]

3. TRIAL (§ V C 2—290)—MURDER—MANSLAUGHTER.

Upon a trial for murder, upon a request for a charge of manslaughter upon the alleged ground that the accused shot the deceased while "in the heat of passion caused by sudden provocation," the charge was properly refused where nothing was said in the evidence as to the accused having been aroused to a heat of passion and the circumstances were, in the view most favourable to the defendant: (1) that he was on the scene with the criminal intent to steal; (2) that he believed the deceased to be a secret police officer; (3) that the only provocation suggested by the defence was that such officer came up to the accused at a place where he was lurking under circumstances justifying suspicion and thereupon pointed a pistol toward him and told him "to go to hell."

[*R.* v. *Eberts* (No. 1), 7 D.L.R. 530, affirmed; Crim. Code 1906, sec. 261, referred to.]

Statement

AN appeal by Fritz Eberts from the judgment of the Supreme Court of Alberta *en banc*, Beck, J., dissenting, refusing to grant a new trial to the appellant who had been convicted of murder.

Judgment was rendered on the 7th of October, 1912, by which the appeal was dismissed, Duff, J., dissenting.

*J. W. McDonald*, and *Colin MacLeod*, for the appellant.

*E. F. B. Johnston*, K.C., and *W. M. Campbell*, for the Crown.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I concur in the opinion stated by Mr. Justice Idington.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the Supreme Court of Alberta, sitting *en banc*, refusing, Mr. Justice Beck dissenting, to grant a new trial to the prisoner who had been tried and convicted of murder.

The application for a new trial was based upon the contention that the trial Judge should have instructed the jury that if they believed Jasbee's account of the shooting as detailed to him by the prisoner immediately after it took place, it was open to them to find the prisoner guilty of manslaughter only, but that the trial Judge had charged the jury they were bound either to acquit the prisoner altogether or find him guilty of murder.

Article 261 of the Code reads as follows:—

> Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

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The question argued before us and which we are asked by the prisoner's counsel to decide in the affirmative, is whether, under the evidence given by Jasbec, of the conversation he had with the prisoner immediately after the latter shot the deceased, it was open to the jury to reduce the crime with which the prisoner was charged from murder to manslaughter.

No such contention was made with respect to the conversation given in evidence by Jasbec's wife. From her version one of two conclusions would have to be drawn, either that in shooting the deceased as and when he did the prisoner was guilty of murder, or that he shot deceased in self-defence and should be acquitted. It would not be possible for counsel successfully to contend, under Mrs. Jasbec's version of the prisoner's statement of the shooting, that a verdict of manslaughter could be rendered.

But counsel did not contend that on Jasbec's version of prisoner's statement the jury might have found him guilty of manslaughter only. I do not think so. I do not think in the first place that it was open to the jury on the evidence to find that the prisoner had abandoned the criminal intent to steal with which he started out that night. It might be possible for some such finding to be made with regard to Jasbec himself. Both during the unsuccessful attempt to break into Burns' store, and afterwards, while they were standing in the street in the rear of the bank, Jasbec suggested to the prisoner the abandonment of the criminal enterprise which they had jointly entered upon and a return home. He further said that when the prisoner took the gun from him and went away with it with the object of meeting the man whose shadow they had seen, he made up his mind to return home. But there was no evidence justifying any such finding as regards the prisoner.

Then as to the fact of the deceased who was shot being a secret police officer and believed by the prisoner to have been such when he shot him, I cannot see where there can be any doubt. The prisoner said to Jasbec just after the shooting, and while they were returning to their shack, that he guessed the man he shot was one of the secret police but was not sure of it. Probably not, absolute certain knowledge he hardly could have had, but he *believed* the man was a secret police officer.

The only "provocation" suggested was that stated by the prisoner to Jasbec that the man who he guessed was one of the secret police found him at the time of night and in the place he did and pointing a pistol towards him told him to go to hell. Nothing at all is said about the prisoner being aroused to a "heat of passion" by the action of the police officer. Not a word from which any such state of mind could be inferred. On the contrary, the prisoner told Jasbec that he raised the

gun he carried and shot the man dead. Looking at all the circumstances and facts surrounding the unfortunate shooting of the officer as detailed in the evidence, I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while "in the heat of passion caused by sudden provocation."

I think, reading the charge of the trial Judge as a whole and in the light of all the facts given in evidence, it cannot be said that his direction to the jury that they must either acquit the prisoner or find him guilty of murder, occasioned such a substantial wrong or miscarriage on the trial as would give us jurisdiction to set aside the conviction or direct a new trial. I think the judgment of the Court below was right and that the appeal should be dismissed.

IDINGTON, J.:—The appellant and one Jasbec, being engaged about one or two o'clock a.m., in a joint expedition for purposes of stealing in Frank in Alberta, at a time when the miners were on strike, carried with them a gun, and having tried several places unsuccessfully, saw a man or shadow of one at some distance. The appellant got the gun from Jasbec and started with it to find out who the man was, suggesting it was possibly an acquaintance come to scare them. He went one route or direction and Jasbec another as agreed between them. Jasbec tells this story and proceeds to say he concluded to go home and had gone some short distance when he heard a shot fired and in a few minutes heard running behind him the appellant with the gun. Then both ran till near appellant's shack.

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The following evidence of Jasbec contains the story as there and then recited by appellant:—

Q. Did you have any talk with him? A. And then I asked him what was the matter. And he said, "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and he pointed a revolver at me and said, 'What are you doing here, go to hell,' and I thought he drawed his gun and fired at him."

Q. Who did? A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it? What was next said by either of you after that? What was next said? Did you ask him anything then? He said he drew his gun and fired at him? He said he drew his gun up and fired at the man? A. And I said, "What became of him?" and he said he shot him—he shot the fellow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time? A. Yes.

Q. What did he say? A. He said, "I guess it is one of the secret police but I am not sure about it." That is what he said.

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The appellant gave evidence on his own behalf and denied this whole story of Jasbec and declared he had never been out of his house on the night in question.

The story of Jasbec so fitted into the surrounding facts and circumstances as to corroborate it and was so supported by evidence of others that there could be no doubt of appellant having shot one of the secret police found dead next morning with a pistol near his dead hand.

The contention set up is that it might have been the result of a quarrel or such other facts and circumstances as would, in law, have reduced the culpable homicide from murder to manslaughter.

The learned trial Judge refused to countenance this claim when counsel for the accused asked him to direct the jury that under such facts as in evidence, the offence *must*, if committed, be taken to be manslaughter. He directed the jury that there did not seem to be any ground for a verdict of manslaughter and it seemed as if there must be a verdict of guilty of murder, or not guilty.

The Court of Appeal dismissed an application made to it on this and other grounds. Mr. Justice Beck dissented, holding that the jury ought to have been directed as to what would constitute manslaughter, and to consider whether or not, if the accused were guilty of anything, a verdict of manslaughter might not be the proper verdict.

It seems to me the learned trial Judge and the majority of the Court were right in the view taken by them.

To reduce culpable homicide to manslaughter requires, in the class of manslaughter cases suggested herein, evidence of roused passions.

The man whose passions we are asked to find might have been so roused, has by his own oath denied the fact and left in his unsworn story nothing to rest such a finding upon. Moreover his remarkable career as told by himself seemed to demonstrate that he was hardly the sort of man to be roused to passion by the sight of a revolver or the sound of rought alnguage. Indeed the language he used in relating this incident now in question to Mrs. asbec slightly varies from above and indicates he felt bound to shoot or was pround of having shot first.

There is nothing but mere surmise or conjecture on which to rest such a finding as is claimed to have been legally possible.

The discarding or overlooking such a defence to a charge of killing a man he knew or believed to be a policeman, properly armed to deal with midnight prowlers carrying guns is hardly a case where we can, in the language of section 1019, find that "substantial wrong or miscarriage of justice" entitling us to interfere.

A verdict of that kind in such a case would have been a travesty of justice and made of the administration of the law a farce.

No jury could properly return such a verdict. It would, therefore, have been idle or worse for the learned trial Judge to have entered upon an exposition of the law bearing on manslaughter and thus needlessly perplexed the jury.

It might have been argued in such a case, but it was not in this, that a man faced with a revolver was put in fear of his life, and therefore shooting first was entitled to an acquittal. But where a case of manslaughter, which is supposed to fall within what section 261 of the Criminal Code defines, can find place under the very peculiar circumstances of this case, I am at a loss to understand.

If the learned trial Judge had been asked to direct an acquittal on the ground that the man having reasonable apprehension of death or grievous bodily harm, had taken the life of another, he should have explained the law bearing on the subject and left that to the jury.

True the surrounding fact and circumstances would not have seemed a very promising foundation to dwell upon such an issue, but it was the only possible issue that could have been raised on such facts as put in evidence.

The appeal should be dismissed.

As a matter of courtesy due to a man on an appeal for his life we heard argument about want of corroboration, which, I submit, needs no further observation than this: The gun found with the prisoner, the wad fitted for it found in and with the body of the deceased and a mass of evidence that connected appellant therewith (quite independent of Jasbec and his story), if well marshalled and fitted together and carefully considered might have spared us that argument.

But I may add that it is doubtful if anything except the only point upon which a judicial dissent in the Court below appeared in judgment can be brought here.



DUFF, J. (dissenting):—I think there should be a new trial because it appears to me that the effect of the learned trial Judge's charge was to withdraw from the jury evidence which ought to have been considered by them and which, if considered by them might not improperly have influenced them favourably to the prisoner in arriving at their verdict.

The main facts are stated in the judgments in the Court below and I shall refer to them only in so far as is necessary to a clear apprehension of the ground upon which I think the verdict should not be permitted to stand. The prisoner was convicted of murder. The homicide occurred at Frank, Alberta, on the 12th April, 1908. The trial took place four years

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afterwards in April, 1912. The chief witnesses as against the accused were one Jasbec and Jasbec's wife. Jasbec says that on the night in question he and Eberts set out from a shack on the outskirts of Frank intending to get food by stealing. That abandoning a projected attempt on the C.P.R. freight sheds and a partly executed plan of entering Burns' butcher shop they gave up the expedition and started for home. On the way home noticing the outlines of a man near the Imperial hotel who seemed to disappear "behind the buildings" Eberts (so Jasbec's story runs) said, "That I bet you is Jan" (meaning a common companion Jabusiek with whom they had been out before on similar expeditions), "give me the gun and I will go and see who it is"; and they separated, Eberts taking Jasbec's shot-gun and setting out towards the figure they had observed while Jasbec proceeded on his way homewards. Shortly afterwards Jasbec says he heard a shot fired, the sound appearing to come from the direction in which Eberts had gone. Later Eberts joined him and they reached their shack together. The next day the unfortunate deceased, a constable of the R.N.W.M. Police, was found in the vicinity indicated by this evidence, obviously killed by a discharge from a shot-gun. These facts and the evidence given by Jasbec and Jasbec's wife of statements made by Eberts constitute the substance of the case made by the Crown against the accused. The accused gave evidence in his own behalf and his defence was an alibi. The learned trial Judge in effect instructed the jury that if they believed Jasbec's story in its substantial features shewing that the prisoner was the author of the homicide, then they had no alternative but to convict him of murder.

The following passages give the substance of the charge so far as material:—

> But there are some specific definitions given which may possibly widen the meaning of the term murder from its common interpretation, and they are to this effect; *that when a person goes out to commit some indictable offences such as burglary or robbery, and if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence, such as burglary or robbery, or to facilitate the flight of an offender upon the commission or attempted commission thereof and death ensues from such injury, that would be murder.* So that you see a person might be guilty of murder in that sense, although he may not have had a murderous intention in the common ordinary conception of that term. He may have started out to commit a common indictable offence and may have armed himself for that purpose, in order to assist in committing the offence or to assist in his escape.
>
> . . . . .
>
> It has been pointed out to you in the address by counsel for the Crown, and quite properly, that while there is always, under our administration of justice, a presumption that a man is innocent until

he is proved guilty, that is modified by another rule of evidence—*that there may come a time when the inculpatory facts may be so numerous and so strong in their bearing that the onus shifts on to him, then. That was really the form which this trial took.* You had the evidence of a confessed accomplice in the burglary and who was with him at the time of the shooting, if true, and you have a complete history given of their proceedings that night at the time they left the shack, and the defendant has recognized that, and he has gone into the witness-box and has told a story.

. . . . . .

He has said that on the night in question he was drunk; he does not remember when he went to bed. He corroborates Jasbec in the fact that he, Jasbec, and his wife were at his house that night. He does not say that he slept with Jasbec in the kitchen, but he says that in the morning he was in his bedroom with his wife, and his wife says the same thing.

. . . . . .

*You have heard the whole of the evidence, and if you come to the conclusion he did go out, as Jasbec says, that night and that that 12-bore double-barrelled shot-gun of Jasbec's was taken with them and that that was the instrument which caused the death of the policeman Willmott, then you will consider that in relation to the explanation I have given you as to the law which applies to people who go out and commit an indictable offence and take firearms with them and kill a man either in effecting the purpose of committing that offence, or in trying to escape.*

*I am bound to say to you and instruct you that there seems to be only two conclusions you can come to, that is, a verdict of guilty of murder or a verdict of not guilty.* I cannot see where you could consider the question of manslaughter at all *in view of the statement of Eberts himself.*

. . . . . .

*It will be your duty then, having regard to the explanations I have given of the law and the way in which you will proceed to treat the evidence, to come to a conclusion as to whether Jasbec's story of the happenings of that night, from the time they left the shack until the time they got back is substantially the true story, because if it is there is then no explanation from the defendant that would enable me to give you any other instructions than what I have given you, namely, to find a verdict of guilty against him, that is, if Jasbec's story, that they started out and went to the C.P.R. freight sheds first and then went around by P. Burns' store and then around behind the Imperial hotel and that they had a gun with them and that the accused asked for the gun and got it at the time they saw the shadow or what they thought was the shadow of a man and Jasbec heard the shot, and the other evidence given by these other people, that they heard a shot then —leaves it in the position that if Jasbec's story is substantially true in regard to these important features of the happenings that night—then there is no alternative for you but to bring in a verdict of guilty.*

. . . . . .

The Court:—The rule was well known, and has been explained by me to the jury, that if they *believe beyond a reasonable doubt as*

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*reasonable men using the common sense and intellect that reasonable men use in the affairs of life, especially in relation to serious matters —using that common sense—if they as reasonable men believe that the story told by Jasbec is the true one there is no alternative for them but to bring in the verdict I have indicated—the verdict of guilty; if they have a reasonable doubt as to the truth of that story so far as it implicates Eberts they will give Eberts the benefit of that reasonable doubt.*

It cannot be doubted that from these passages the jury would take the view that their sole task was to decide whether they should believe Jasbec's story in so far as it was concerned with the incident related by the learned Judge himself and if they did so it was their duty to find a verdict of guilty.

I shall presently call attention to the passages in the evidence of Jasbec and his wife which I think the jury ought to have been asked to consider, but in the meantime, it is convenient to observe that the charge of the learned trial Judge seems calculated to mislead the jury in the important point of the burden of proof. The onus was on the Crown to establish the guilt of the prisoner to produce evidence, that is to say, which should satisfy the jury beyond any real doubt that the prisoner was guilty of murder. It is quite true that the proof of homicide alone by the prisoner might constitute a *primâ facie* case and a very strong *primâ facie* case against him. But if in proving the homicide evidence of its circumstances and incidents was given of such a character as properly to raise in the minds of the jury a real doubt as to the prisoner's guilt it would then be their duty to acquit.

In criminal cases (it is needless to observe) the degree of certitude at which a jury must arrive before it might find the issue of guilty or not guilty against the accused is higher than that which depends upon the application of the criterion of the preponderance of evidence or balance of probability applied in civil cases. As to the onus of proof, in *Rex* v. *Stoddart*, 25 Times L.R. 612, the principles applicable in criminal trials are stated in these words (at p. 617):—

> It seems to the Court that the jury ought to have been told that the prosecution having given *primâ facie* evidence from which the guilt of the defendant might be presumed, and which, therefore, called for explanation by the defendant, the jury ought to consider the evidence upon both sides, and if upon a review of the whole of the evidence they were satisfied that the prosecution had made out the case that the defendant Stoddart was a party to the conspiracy they should convict him, but that if their minds were left in a state of doubt they ought to acquit him, as the burden of proving the defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing-up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing-up cannot be

said to qualify the specific direction to which attention has been called. In the opinion of the Court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the Court is of opinion that there was a substantial misdirection.

The learned trial Judge seems (as appears from the extracts quoted from his charge) to have thought that if the jury were once convinced that the prisoner was the author of the homicide that was the end of the case because evidence of facts justifying his act or reducing his crime to manslaughter must come from the prisoner alone. That, of course, was equivalent to withdrawing from the jury all the circumstances disclosed by the evidence of Jasbec or Jasbec's wife bearing upon the degree of culpability which ought to be attached to the prisoner's act assuming the homicide to have been his act.

Before going into that evidence (of Jasbec and his wife) there are two material observations.

1st. The prisoner's statements to these two witnesses having been put in evidence by the Crown they became evidence in his favour as well as against him. In *Rex* v. *Higgins*, 3 C. & P. 603, Parke, J., said:—

> Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it.

It was for the jury to say how much of the prisoner's statement they accepted as true, but the Crown having offered the statement and got it before the jury it was the duty of the jury to consider the statement as a whole and the consideration of it as a whole could not properly be withdrawn from them; 2nd, it was for the jury to say how much they were to believe of the accounts which Jasbec and his wife gave of the prisoner's statements to them. They might believe parts of those accounts, reject other parts.

> The jurors are not bound to believe the evidence of any witness; they are not bound to believe the whole of the evidence of any witness. They may believe that part of the evidence of a witness which makes for the party who calls him and not believe that part of his evidence which makes against the party who calls him: Lord Blackburn, *Dublin* v. *Slattery*, 3 A.C. 1155, at 1201.

The point I have to discuss is whether on any reasonable view of the evidence of Jasbec and his wife (bearing in mind these

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principles) the minds of the jury might, under proper instruction from the Court, have been brought into a real state of doubt as to the guilt of the prisoner. Mrs. Jasbec's account of Eberts' statement is as follows:—

> Fritz Eberts said he was out with my husband that night but he got bad luck; when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say, *"Go to hell" but he came before and he shoot.*
>
> Q. Who shoot? A. Fritz Eberts shoot.
>
> Q. Shoot who? A. Shoot the policeman.
>
> Q. Do you remember anything else? A. He says, "Good, I kill him right away—it is good that I kill him," He said that, too.
>
> Q. Is there anything else you remember? I know it is a long time ago. Did you have any other conversation with Eberts and his wife, when they were together, or was that the only time? A. That was the only time.
>
> Q. That was the only time Eberts spoke to you about the policeman? A. Yes.
>
> Q. That was on *the Sunday that you heard of it?* A. *Yes.*
>
> Q. And had you *already heard that the policeman was killed at that time or not? A. Yes, I heard it all right.*

Jasbec's account is this:—

> Q. Did you have any talk with him? A. And then I asked him what is the matter. And he said, "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and he pointed a revolver at me and said 'what are you doing here, *go to hell,*' and I thought he drawed his gun up and fired at him."
>
> Q. Who did? A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.
>
> Q. Did you say anything more to him about it? What was next said by either of you after that? What was next said? Did you ask him anything then? He said he drew his gun and fired at him? He said he drew his gun up and fired at the man? A. And I said, "What became of him?" and he said he shot him—he shot the fellow and he must be dead because he sank down as soon as the shot was fired, without a sound.
>
> Q. Did he say anything else about that man to you at that time? A. Yes.
>
> Q. What did he say? A. He said, "I guess it is one of the secret policemen, but I am not sure about it." That is what he said.

I shall assume for the moment that this evidence was evidence which the jury ought to have considered. On that assumption the trial Judge would, of course, have instructed the jury that the first question to which they ought to apply their minds was how much of these two conversations really occurred, how far are these statements attributed to Eberts to be ascribed to him? Both witnesses were speaking of conversations which had occurred four years before. Jasbec himself had been under arrest for five months and having regard to the suspicions

naturally attaching to him (it was his gun, it will be remembered, from which the shot was alleged to have been fired) a jury would be acting wisely in examining his testimony with critical care, even with suspicion, and no lawyer would, of course, dispute that the question of what Eberts did really say in the course of these conversations was a question exclusively within the province of the jury. Did Eberts, for example, say to Jasbec, "I guess it is one of the secret police"? Did he in talking to Mrs. Jasbec express satisfaction in having killed a police officer? At the preliminary hearing, Mrs. Jasbec had not recalled this part of the conversation. It is quite within the bounds of reasonable possibility that the jury may have rejected this part of the story altogether or may have felt it to be of too doubtful credit to be acted on with safety in a capital case. Assuming them to have reached that conclusion, let us examine the effect of these statements in the light of the other evidence placed before the jury by the Crown, to see if there is any substantial foundation in them for the suggestion that the prisoner acted under such provocation or such reasonable fear of harm as to make it proper that the jury's attention should be directed to them.

There was, I may repeat, abundance of evidence from which the jury might have reached the conclusion that when they saw the figure of the man who was shot they had abandoned their criminal project and were on their way home. However, little such a conclusion may commend itself to one's own judgment, Jasbec's own evidence is perfectly clear upon the point and Jasbec had been put forward by the Crown as a credible witness. In his cross-examination, p. 405, he says:—

> Q. When you told Eberts that you had better go home, Eberts agreed to go? A. Yes.
>
> Q. And he put the screw back in the door? A. Yes.
>
> Q. And you started for home? A. Yes.
>
> Q. And he agreed to do that? A. Yes.

This is entirely consistent with the testimony given by him on his examination in chief. Again, his evidence is precise to the effect that Eberts thought the man they had seen was their friend Jan. If the jury accepted this part of Jasbec's testimony the situation they would have to consider was this: Eberts in these circumstances setting out to accost his friend Jan suddenly meeting a stranger who, to use the language of the wife, "takes a revolver and put it right in his face" and Eberts shooting. These are the bald facts presented by this story; but there is a little more. Mrs. Jasbec's report of Eberts' words is this:—

> Fritz Eberts said he was out with my husband that night but he got bad luck; when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say *"Go to hell," but he came before and he shoot.*

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There can be no possible doubt that if the jury believed these words to have been used by Eberts they were entitled to and they would regard them as indicating that Eberts acted in response to and in defence against a sudden assault with a pistol. A good deal was made on the argument of the exclamation "Go to hell." But the effect of such an exclamation upon a man in Eberts' position would depend wholly upon the attitude of the person uttering it, and it is to be observed, moreover, that Jasbec admitted upon cross-examination that it was not until after he had told his story to the police that he recalled the use of this expression. The jury might very well in the circumstances consider this part of the evidence to be negligible. The fact, it may be added, that there were lawless, not to say desperate men about is a circumstance which weighs as much at least in favour of the suggestions made on behalf of the prisoner as against him.

Weighing all the relevant considerations I am unable to convince myself that a jury properly instructed might not reasonably have taken a view of this evidence which would afford a foundation for real doubt as to the propriety of convicting the prisoner of the capital offence. I take it to be indisputable that where a homicide follows instantaneously upon acts which may be a sufficient provocation to take the act of the accused out of the category of murder it is a question of fact for the jury to say whether in the particular case there was such provocation: Crim. Code, sec. 261. It is said that there is no evidence here of passion; but where provocation is proved is it to be said that a jury is bound to convict of murder as a matter of law in the absence of express evidence of passion outside of the act of homicide itself? That is an impossible proposition. If the circumstances are such as legitimately to raise in the minds of the jury a real doubt as to the presence of malice in the legal sense then it is the duty of the jury not to convict of murder. Is it to be laid down as a proposition of law that the presenting of a pistol, in such circumstances as those we are considering, cannot properly afford a foundation for such a doubt? The case is perhaps stronger in support of the suggestion that the appellant acted in reasonable fear of bodily harm. The account given by the Jasbec woman of Eberts' conversation with her, as I have already indicated, pointedly suggests such fear as his ground of action. A Court of Appeal would, however, be assuming a very grave responsibility if finding in the record evidence of circumstances which ought to have been considered by the jury as bearing upon the question whether the accused had acted in self-defence in response to a sudden assault, it should say as a matter of law that these circumstances could afford no basis for a defence on the ground of provocation. To draw the

line between the effect of acts and words such as those attributed to the unfortunate victim in producing such a state of passion as would constitute provocation within the meaning of the law and their effect in producing a reasonable fear of bodily harm such as would afford a ground for justification would be a feat of some difficulty, and one which a Court of Appeal could rarely attempt with safety.

I suppose indeed that no competent lawyer would be found to argue that these circumstances ought not to have been considered by the jury had it not been for the fact that Eberts himself went into the witness-box and denied all knowledge of the facts alleged against him. That he did so is undoubtedly a circumstance which would tell powerfully, and properly so of course, with any tribunal against the defence now suggested. But I am quite unable to bring my mind to the conclusion that the weight to be attributed to that suggestion was not altogether a matter for the consideration of the jury.

Two points remain. As to the suggestion that Eberts' statements point to action in self-defence and not to action as a result of provocation and that since the learned Judge was asked to reserve a case only on the latter point it is not open to us to afford any relief, even assuming the prisoner to have been deprived of the benefit of a defence fairly open on the evidence—it will be unnecessary to repeat what I have said as to the bearing of the circumstances in question upon the defence of manslaughter. But there is a further observation to be made. The learned Judge ruled in the most unmistakeable way that if the jury found the prisoner was the author of the homicide then it was their duty to convict of murder. The necessary effect of his ruling was to withdraw from the jury all the considerations arising upon the prisoner's statements to Jasbec and his wife. He did not tell the jury that on the whole case they must convict of murder or acquit. He told them in effect that if they found the prisoner had killed the deceased it was their duty to convict of murder. The statement of a case then with regard to manslaughter in effect would raise the substantial question I have been discussing, namely, whether assuming the prisoner to be the author of the homicide there was any ground upon which a jury might reasonably entertain a doubt as to whether he was guilty of murder.

The remaining question is whether it appears in the language of sec. 1019 that there was any "substantial wrong or miscarriage of justice." It is contended by Mr. Johnston that the prisoner having deliberately elected to stand upon an alibi cannot avail himself of a defence which is open upon the evidence adduced by the Crown but which assumes his complicity in the homicide. In civil cases it is a rule generally acted upon that

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in order to prevent litigation going on forever a party who deliberately elects at the trial to fight his case out upon one issue and gets beaten upon it cannot raise on appeal a new and totally different issue. I should desire to consider the question long and carefully before committing myself to such a proposition as applied to prosecutions for criminal and especially for capital offences.

It is not easy to reconcile this contention with the rule laid down in *Reg.* v. *Gibson*, 18 Q.B.D. 537:—

> We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not:

*per* Mathew, J., at p. 543. In any case it had no application here. It was stated in the argument by counsel for the prisoner and not disputed that the issue of manslaughter was fully placed before the jury by counsel, and indeed the suggestion that it was not would be incredible. Then it is said that the evidence as a whole as it appears upon the record is convincing of the prisoner's guilt, and that since we can see that he was rightly convicted, we are bound to hold that there had been no "substantial wrong or miscarriage." I cannot agree. The construction of these words was authoritatively settled eighteen years ago by the Privy Council in *Makin* v. *A.-G. for N.S.W.*, [1894] A.C. 57. Apart altogether from the binding force of the decision as an authority, the reasoning of Lord Herschell at pp. 69 and 70 is complete and conclusive. This is the passage:—

> The point of law involved is, whether where the Judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.
>
> It was admitted that it would not be competent for the Court to take this course at common law, but it was contended that sec. 423 of the Criminal Law (Amendment) Act, 1883 (46 Vict. No. 17) empowered, if even it did not compel the Court to do so. That section is in these terms:—
>
> "The Judge by whom any such question is reserved shall, as soon as practicable, state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the Judges of the Supreme Court who shall determine the questions and may affirm, amend or reverse the judgment given or avoid or arrest the same, or may order an entry to be made on the record that the person convicted ought not to have been convicted, or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed, arrested or

avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

Reliance was, of course, placed upon the language of the proviso. It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The Judges are, in truth, substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appeal to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the Court might, under such circumstances, be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend in their Lordships' opinion to shew that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the Judge to consider in arriving at their verdict, matters which ought not to have been submitted to them.

In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

His Lordship is here dealing of course only with the case in which inadmissible evidence has been admitted and has gone before the jury. His observations, however, seem to apply with equal force to the case of a misdirection in consequence of which a relevant evidence has been withdrawn from the consideration of the jury which might under a proper instruction and not

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unreasonably bring their minds into a state of doubt as to the propriety of the verdict at which they ultimately arrived. Such a misdirection is error that (since it deprives the accused of his constitutional right to have submitted to the decision of a jury all the defences open to him on any reasonable view of the evidence) can only be corrected by setting aside the verdict.

ANGLIN and BRODEUR, JJ., concurred in the opinion stated by Mr. Justice Davies.

*Appeal dismissed;* DUFF, J., *dissenting.*

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## ZDRAHAL v. SHATNEY.

*Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. November 4, 1912.*

1. APPEAL (§ VII M 3*a*—550)—FACTS OTHERWISE PROVED—OBJECTION TO ADMISSIBILITY OF DISCOVERY DEPOSITIONS.

Where the defendant in a criminal conversation case was examined for discovery before the trial without objecting to testify on the ground of privilege, and where he testified in his own defence at the trial and upon cross-examination repeated substantially everything included in the discovery depositions an objection taken on appeal against the verdict on the ground that the depositions on discovery were put in evidence at the trial by the plaintiff against the defendant's objection founded on the statute 32-33 Vict. (Imp.) ch. 68, sec. 3, will not be allowed.

[*Fleury* v. *Campbell*, 18 P.R. (Ont.) 110, referred to.]

2. MARRIAGE (§ I—2)—MARRIAGE ACT (MAN.)—VALIDATION OF MARRIAGES INCLUDES PERSONS MARRIED IN FOREIGN LANDS—MANITOBA MARRIAGE ACT.

The provisions of the Manitoba Marriage Act validating (under the limitations of that section) all marriages after two years between persons not under legal disqualification notwithstanding irregularities, "so far as respects the civil rights in Manitoba of the parties or their issue, and in respect of all matters within the jurisdiction of the legislature of Manitoba," apply to persons whether married within the Province or in foreign countries. (*Per* Haggart, J.A.)

[Sec. 30 of Marriage Act, 5 & 6 Edw. VII. (Man.) ch. 41, construed.]

3. HUSBAND AND WIFE (§ III A—144)—CRIM. CON.—PROOF OF ACTUAL MARRIAGE BEYOND EVIDENCE OF COHABITATION AND REPUTATION.

In a criminal conversation action there need not be evidence of the validity of the marriage ceremony, but there must be strong evidence of the marriage itself going beyond mere evidence of cohabitation and reputation, and the best proof that could be given of an actual marriage is by some person actually present at the solemnity.

[*Morris* v. *Miller*, 4 Burr. 2057; *Birt* v. *Barlow*, 1 Doug. 171, 174; Wigmore on Evidence, sec. 2084; *Catherwood* v. *Caslon* (1844), 13 M. & W. 261, 13 L.J. Ex. 334; *R.* v. *Millis*, 10 Cl. & F. 534; *Beamish* v. *Beamish*, 9 H.L.C. 274, 337; *Mainwaring's case*, 1 Dear. & B. 139; *R.* v. *Griffin*, 4 L.R. Irish 497, 503, 14 Cox C.C. 308; *Morris* v. *Miller*, 1 W. Bl. 632, referred to.]

4. EVIDENCE (§ XII F—952)—PROOF OF MARRIAGE BY EYE-WITNESS.

The fact of a marriage having been validly solemnized may be proved by some person who was actually present and saw the ceremony performed.

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5. EVIDENCE (§ XII F—952)—PROOF OF MARRIAGE—TESTIMONY OF CONTRACTING PARTY.

In an action for criminal conversation, where evidence of a marriage can be proved by an eye-witness, in a jurisdiction wherein the old common law disqualification has been removed and a party to the action is therefore a competent witness; the husband himself is one of the best eye-witnesses and is competent.

[*Morris* v. *Miller* (1767), 4 Burr. 2057; *Birt* v. *Barlow* (1779), 1 Doug. 171 (decided long prior to ch. 68 of 32 & 33 Vict. (Imp.) (1869), qualifying the husband), distinguished.]

6. EVIDENCE (§ VII H—632)—PROOF OF FOREIGN MARRIAGE—ADMISSION OF DEFENDANT IN CRIM. CON. CASE—FOREIGN MARRIAGE LAW.

In an action for criminal conversation, the admission of the defendant, that he knew the plaintiff to be married, coupled with the affirmative testimony of those present at the ceremony, is evidence of the marriage, though it took place in a foreign country, but it is not sufficient to prove the foreign marriage law.

[*Rex* v. *Naoum* (1911), 24 O.L.R. 306; *R.* v. *Creamer*, 10 L.C.R. 404, 450*n*, referred to.]

7. EVIDENCE (§ II E 2—151)—PRESUMPTION—DE FACTO MARRIAGE.

A cogent legal presumption is raised in favour of any marriage which is shewn to be celebrated *de facto*, and this presumption of law is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

[Taylor on Evidence, 10th ed., par. 172, referred to.]

Statement

THIS action is brought to recover damages for criminal conversation by the defendant with the plaintiff's alleged wife. The action was tried before Mr. Justice Macdonald. He allowed the case to go to the jury and they gave a verdict for the plaintiff. The defendant has moved to set aside the verdict and enter a nonsuit on the ground that the evidence did not establish, to the extent required in a case like this, that the woman in question was the plaintiff's wife.

The appeal was dismissed, the Court being equally divided.

*N. F. Hagel*, K.C., for the plaintiff.

*E. L. Howell*, for the defendant.

Richards, J.A.

RICHARDS, J.A.:—The evidence shewed that the plaintiff and the woman had lived together, as man and wife, in this country. The plaintiff swore that he had been married to her in Hungary, apparently by the rites of the Roman Catholic church. He did not pretend to have any knowledge of the laws of Hungary, or to be, in any way, qualified to say whether the marriage was a legal one. The effect of his evidence is merely this, as I take it, that he went through a ceremony which he believed made himself and the woman man and wife.

There was also produced to the Court, although apparently not filed as an exhibit, according to the registrar's entries in his book, a document in the Hungarian language. A witness was called who spoke both Hungarian and English, who apparently stated its effect to the Court. There is no translation of

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it amongst the papers or in the evidence. This witness gave no evidence whatever to shew himself versed in the law of Hungary as to marriage. He stated that it was a marriage certificate, issued in the Hungarian language, by the Hungarian country, and that it was an official marriage certificate. He said that it was from a Budapest Roman Catholic presbytery, or residence of the Roman Catholic priest, purporting to be made up from a certain marriage book. Apparently he did not translate it literally but gave what he said to be the effect of it. I take his evidence only to mean that, after reading it over, it seemed, on its face, to him to be a marriage certificate.

No evidence was called as to the laws of Hungary with regard to marriages; so that there is nothing before the Court to shew where, or how the marriage ceremony might be lawfully performed according to the law of Hungary, and, there was also no evidence whatever to shew that the register, from which this certificate purported to be taken, was a public register, or record, or that either the register, or the extract or copy, whichever it was, which was produced to the Court, would be evidence of the marriage in the Courts of Hungary.

There was the further evidence relied on that the defendant, in letters he had written, had referred to the woman as the plaintiff's wife. There was no evidence to shew that he knew this, further than might be implied from the fact that he knew they were living together as man and wife.

The first English case of importance, it seems to me, is *Morris* v. *Miller*, 4 Burr. 2057 [98 English Reports 73]. That was an action for criminal conversation. Proof was given of cohabitation, and general reception of the woman as the man's wife, and it was proved that, after their alleged marriage, articles had been drawn up between them, for the settling of the wife's estate; and I assume that therein she was referred to as his wife. At the end of the argument, and before judgment was delivered, Lord Mansfield said:—

> Proof of *actual* marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances from which a marriage may be inferred.

In delivering the judgment of the Court, he said:—

> We are all clearly of opinion, that in this kind of action . . . there must be evidence of a marriage *in fact*: acknowledgment, cohabitation, and reputation, are *not sufficient* to maintain this action.
>
> This is a sort of criminal action. . . .
>
> It shall not depend upon the mere reputation of a marriage, which arises from the conduct, or declarations, of the plaintiff himself. . .
>
> No inconvenience can happen by *this* determination; but inconveniences might arise from a *contrary* determination; which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action.

There was a judgment of nonsuit.

In *Birt* v. *Barlow*, 1 Doug. 171, at 174 [99 English Reports 113], Lord Mansfield, says:—

> An action for criminal conversation is the only *civil* case in which it is necessary to prove an *actual* marriage. . . . An action for criminal conversation has a mixture of penal prosecution; for which reason and because it might be turned to bad purposes by persons giving the name and character of *wife* to women to whom they are not married, it struck me, in the case of *Morris* v. *Miller*, 4 Burr. 2057, that in such an action, a marriage in fact must be proved.

In *Birt* v. *Barlow*, 1 Doug. 171, an actual marriage was proved; but a rule for a nonsuit was made absolute, for lack of evidence of identification of the plaintiff and his alleged wife, as the actual persons who were so married. Towards the end of the judgment Lord Mansfield suggests that there might have been proof in such a case by the bell ringers, the handwriting of the parties, or the persons present at the wedding dinner, but it must be noted that, in so doing, he was only referring to the question of identification of the parties and not to proof of the marriage itself.

In the report of *Morris* v. *Miller*, in 1 W. Bl. 632, it is stated that Lord Mansfield suggested that, if the register had been burned and the parson and clerk were dead, the marriage might be proved by a person present at the wedding dinner, and that stricter proof would be required in a case of bigamy than in one of criminal conversation. Those statements do not appear in the report in 4 Burr. 2057, cited above, which seems to be really the more careful one. I can not but think that, if made, the proof by the person at the wedding dinner was meant only to refer to proof of the identity, as in the subsequent case of *Birt* v. *Barlow*, 1 Doug. 171. But, in any case, these observations, if made, were *obiter dicta*, and the suggestion as to less proof being required than in bigamy has not been followed. Also, they could not be taken as covering the case of proving a foreign marriage, as to which the case of *Catherwood* v. *Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334, and the *Perth Earldom* case, 2 H.L.C. 865, which I refer to later on, hold that there must be proved as a fact, by persons versed in the laws of such country, what the law there was as to marriage, and that the ceremony was in accordance with that law.

I take it that the marriage that had to be proved in an action for criminal conversation in England (before that kind of action was abolished there) could have been proved by the evidence of witnesses, who were present at, and saw, the ceremony take place in a church building of the Established Church of England, in England. But that would be held sufficient because the Courts took cognizance of the fact that by the law of

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England all such churches were places where marriages might lawfully be solemnized. But, even in England, where the marriage, to be so proved, took place in a chapel of any other religious body than the Church of England, the testimony of such witnesses had to be supplemented by proof that such chapel was licensed for the performance of marriages: *Reg.* v. *Mainwaring*, 1 Dear. & B. 132. In other words, such a marriage had to be proved to have taken place according to the marriage law of England. With such further evidence required of a marriage, in the very country where the action is brought, it seems to me impossible to hold that, in the case of a foreign marriage, proof that it was celebrated according to the law of the country where it took place, could, in a similar action, be held unnecessary.

*Catherwood* v. *Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334, was another action for criminal conversation. The plaintiff, an Englishman, domiciled in England, went through a marriage ceremony, at the English Consular office at Beyrout, in Syria, with the daughter of the Consul, who was an Englishman. The marriage was celebrated by an American missionary, according to the rites of the Church of England, though the missionary was not proved to have been in Episcopal Orders. The parties cohabited and were received as man and wife, and a son was afterwards born to them. The case went to the jury and the plaintiff recovered a verdict. A special case was submitted to the Court of Exchequer, by which the Court were to be at liberty to draw any inferences which, in their opinion, the jury would be at liberty to draw from the facts, and the question was, whether the proceedings constituted a marriage. Parke, B., delivered the judgment of the Court, holding (1) that because the missionary was not proved to be in Episcopal Orders such a marriage was not valid by the common law of England. He then said:—

> But, on the second argument, it was contended that in the action for criminal conversation, which is, as it was argued, an action against a wrongdoer, it was quite sufficient to prove that the parties intended to celebrate, and that *in their belief* they did celebrate, a lawful and formal marriage, and that, as they afterwards cohabited as man and wife, upon the faith of this *bonâ fide* belief, it constituted *primâ facie* a sufficient marriage *de facto*, and was a good foundation for the plaintiff's maintaining this action against the defendant, at least until the defendant shewed affirmatively that the marriage was unlawfully contracted, which it is clear he has not done here. Upon the facts as stated, we do not know what was the marriage law of Syria, where this took place, as to the marriages of British subjects there residing, not whether British Christian subjects might not marry by a form allowed in that country, without any violence to their religious feelings. And we, therefore, are left in complete uncertainty

whether the marriage be unlawful, if it be necessary for the defendant to shew that to be the case. The question, therefore, is, whether the plaintiff must, in the first instance, shew this marriage to be clearly legal, or whether he has done sufficient to cast the burden of shewing the contrary on the defendant. And we think that this burden is on the plaintiff, and that he has not done sufficient to establish a *primâ facie* case against the defendant. The cases of *Morris* v. *Miller*, 4 Burr. 2057, 1 W. Bla. 632, and *Birt* v. *Barlow*, 1 Doug. 171, and the uniform practice ever since their decision, seems to have settled, that in actions of this nature, as in the indictment for bigamy, it is necessary for the plaintiff to shew what the Courts call a marriage in fact, which we think is an actual marriage, valid, or avoidable, and not yet avoided; see 3 Inst. 88; and that acknowledgment, cohabitation, and reputation, which raise a presumption of a valid marriage, are not sufficient.

Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties *suppose* to be sufficient to constitute that relation, is not enough. It must be shewn to be sufficient according to law for that purpose. If this were not required, it might happen that a defendant might be made responsible in a case in which the act complained of was done by the supposed wife, with the full intent of putting an end to the invalid and void contract into which she might have entered. It is therefore very reasonable to hold, that a husband, in this action, must establish a contract of marriage binding both on himself and on his wife, and shew the fact of adultery during the continuance of this contract.

Here the plaintiff has not shewn such a contract. It is quite consistent with all the facts here proved, that the supposed wife of the plaintiff has quitted him, and gone to cohabit with the defendant, because, though, at the time of the ceremony, she intended to contract, and believed she did contract, marriage with the plaintiff, she has since discovered that she made no contract binding upon her on that occasion. If she married the defendant, she could not on this proof be convicted of bigamy, and according to the authorities, the two cases appear to depend on the same principle.

I have quoted this at length because it seems to me very strongly in point. It tends to shew that a marriage in a foreign country must be shewn to have been according to the law of that country, and that the burden of shewing this is on the plaintiff, and that, not having shewn it, he does not establish an actual marriage or marriage in fact. The learned Judge gives, at greater length and more fully, the same reasons which Lord Mansfield relied on in the cases above cited.

In the *Perth Earldom* case, 2 H.L.C. 865, the claimant, in proof of his pedigree, put in evidence attested copies of extracts from the register of marriages, births and deaths kept in certain places in France. The witness who produced them, and had compared them with the originals, proved that they were kept in an official place and under the care of official persons.

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It will be noted that two things were there proved which are not proved in the present case; that is, that they had been compared with the originals, and were kept in official places under the care of official persons. Yet this evidence was objected to on the ground that these documents were matter of foreign law, which foreign law should be proved by competent witnesses, and that it must be proved that the registers were kept according to the laws of France, and that they would be received in evidence in France. The Lords of the Committee agreed with this, and required the evidence of a French lawyer, to prove the above facts, before they would receive these certificates in evidence.

It is stated in a number of cases that the proof of marriage, in a case like this, must be as strong as would be required in a case of bigamy.

*Reg.* v. *Smith*, 14 U.C.R. 565, was a case of bigamy. To prove this marriage (to one Mary Patterson) two parties, who had been present at the wedding, gave evidence. One of them had himself been married at the same time. Their evidence was that the marriage took place before one Parsons, a justice of the peace, at Manchester, in the State of New York. One witness testified that he subsequently saw the fact of that justice of the peace's election, as such, in the town records of Manchester, in the possession of another justice of the peace, and in the latter's office, and was told by him that it was a record book, and that the book did contain entries of the election of town officers. Sir John Robinson delivered the judgment of the Court of Queen's Bench for Upper Canada. After reciting the facts, he stated as follows:—

> Now, we know that by the common law of England such a person could not legally solemnize marriage. In our own country we know that a justice of the peace could do so, and can still, under certain restrictions, but we are not therefore at liberty to infer that a justice can do the same in the foreign country where it is alleged the prisoner was married to Mary Patterson. Proof, therefore, was necessary of the authority, and the proof that was given amounts only to this: that Parsons was a justice of the peace in the State of New York at the time; that he did as such assume to solemnize matrimony in another instance as well as in this; and the same witness who swears this, the brother of Mary Patterson, swears in direct and positive terms that Parsons, as a justice of the peace, had authority in the State of New York to marry. The witness who gave this evidence did not state whether it was by any written law of that country that the authority was given, or whether without any written law marriages by a justice of the peace are or were then held valid in that country. We can as individuals have no doubt that he speaks correctly, for we have heard the authority of justices of the peace to solemnize marriage in the State of New York proved upon various occasions in such a manner as was clearly sufficient according to our law of evidence. But

we cannot act in a case of this kind upon the knowledge which we have acquired in other cases; and the question is whether evidence of the foreign law in this respect, given by a person who never at any time, for all that appears, was a lawyer, or an inhabitant of the foreign country in question, can be received as evidence.

We are of opinion that it can not, and that in this case such proof of a valid marriage as the law requires was not given.

*Reg.* v. *Duff*, 29 U.C.C.P. 255, was another case of bigamy. The evidence produced was, first, a deed of land, made by the accused, after the second marriage, to a trustee, to pay the rents and profits to his first wife. This deed contained a power of revocation by the grantor. The trustee named in the deed testified that the accused told him when the deed was made that the land had been bought with the first wife's money, and he wanted the rents to go to her every three months. He stated to the trustee the name and address of the first wife. The trustee's wife testified that she had heard the accused asking the trustee to take upon him the trust for the benefit of the accused's first wife and their child.

On a reserved case it was held by Wilson, C.J., and Gwynne, and Galt, JJ., that the evidence shewed that the object of the deed was, really, to deprive the second wife of any claim on the land, and that the statements of the accused, of the existence of the first wife, were not statements against his own interest, and, therefore, were not evidence against him.

In Wigmore on Evidence, section 2084 and 2085, it is admitted that the law, as to evidence necessary to prove a marriage, was plainly determined in *Morris* v. *Miller*, 4 Burr. 2057, and *Birt* v. *Barlow*, 1 Doug. 171, and has ever since been accepted. He holds the grounds taken by Lord Mansfield to be (1) that the action was penal in its nature and says that it has always been so treated in a marked manner in England, and also that, to receive habit and reputation alone, might enable a man, having a mistress, to recover damages for her seduction. Wigmore says that, so far as the first reason is concerned, it stands, or falls, with the general policy of establishing a special rule for criminal cases, and that, so far as the second reason is concerned, it is indeed based on a real contingency, yet he thinks it doubtful whether there is any need of exercising special vigilance on behalf of a defendant, whose conceded conduct deprives him of honourable sympathy.

It seems to me that, if the first ground is still the law of England, and apparently it is admitted by Wigmore to be, that a comment as to the second need not be considered, especially as that comment, though the view of the learned text-writer in no way changes the binding effect of the two decisions by Lord Mansfield and one by Baron Parke, which I have quoted.

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The plaintiff's own testimony seems to me quite insufficient to prove more than that he believed he went through a marriage ceremony. It does not prove any of the requisites of the marriage ceremony according to the law of Hungary, and I take the effect of the above authorities to be, that the law of Hungary, and compliance with that law of Hungary, have both to be proved in this Court as facts, to shew that the marriage was an *actual* one.

Marriage depends on law as well as on the fact that the parties to it purported to marry. In trials for bigamy some Judges have held (though there has been a great diversity of opinion on the point) that statements by the accused, of the fact of the first marriage, may be taken by juries to be sufficient proof of it, as a legal marriage—at least when those statements were not made, as in *Reg.* v. *Duff*, 29 U.C.C.P. 255, in the accused's own interest. It is cogently pointed out by Mr. Justice Barry, in *Reg.* v. *Griffin*, 4 L.R. Ir. 497, that

> if the admission be not evidence of a legal marriage, no man should be allowed to plead guilty to a charge of bigamy. Such decisions seem to me to be only arguable on the ground that, in an admission against his own interest, the accused should be presumed to know the law, or, perhaps that, in such a case, the moral guilt would be the same whether the first marriage was, or was not, a legal one, if the accused believed it to be according to law; that belief being implied from his admission.

But I fail to see how any such principle can apply to enable a plaintiff—seeking, in order to promote his own interest, or advantage, to recover damages in an action for criminal conversation—to ask that, because he swears he went through what he believes to have been a marriage ceremony—the legality of which depends on foreign law, of which our Courts do not take judicial cognizance, but which, when a necessary element of a case before them has to be proved as a fact—such proof should be held unnecessary and the legality of the foreign ceremony, as a marriage, taken for granted.

Some confusion has arisen from numerous dicta that, in criminal conversation, the proof must be the same as in bigamy. That may be correct in reference to proof in the ordinary way. But I think no Judge has ever laid it down (or meant to do so) that in criminal conversation the mere statement, under oath, or otherwise, by the plaintiff, that he had been married to the woman, should have the same effect, in proof of marriage, as an admission by the accused, in bigamy, might have as proof of guilt. I am unable, therefore, to see that judicial decisions as to the effect of such an admission are in any way applicable to this case.

Further, to hold that the plaintiff's uncorroborated testimony could be sufficient proofs of the marriage, would open the

door for the bringing of actions by men who were not really married to the women they claimed were their wives, as suggested in *Morris* v. *Miller*, 4 Burr. 2057. Wigmore seems to suggest, that because actions of this kind are less frequent than in Lord Mansfield's time, a less stringent rule of proof of the marriage should now prevail. I cannot see the force of that argument. Though the volume of such actions has diminished, the need for protection from possible blackmail is, in each action brought, as great as ever.

As to the certificate no attempt was made to shew that the witness, who stated what he considered its meaning, was acquainted with the Hungarian law of marriage. There is nothing in the English or Manitoba Evidence Acts that makes such a certificate evidence by itself. In the absence of proof that the certificate was an extract from a register of marriages, properly kept according to the law of Hungary, and that such a certificate would, itself, be evidence of the marriage, in the Courts of Hungary, it should, in my opinion, not have been admitted in evidence, or its effect read to the jury. I do not see that, if the witness had translated it verbatim, it would have made it any better in this respect.

The admissions in the defendant's letters cannot, because they are in writing, I think, stand on any better plane than if they were verbal admissions; and the case of *Morris* v. *Miller*, 4 Burr. 2057, shews that a verbal admission by the defendant that the woman was the plaintiff's wife, is not proof of the fact in an action such as this.

I think the plaintiff has failed to meet the burden cast upon him in respect of proving the marriage, and would set aside the verdict and enter a nonsuit.

It is argued that the effect of such a view is to make it extremely difficult for a person, married in a foreign country, to procure the evidence of that marriage, because, although it might be proved by the issue of a commission, the plaintiff would perhaps be too poor to incur the expense of the issue of a commission. I can only understand that argument as meaning that, otherwise necessary proof may be dispensed with where the party, on whom it lies to give that proof, is too poor to get it—a reason which, of course, cannot be maintained. Apart from that, however, I think that the assertion of such a ground overlooks entirely the effects which might result from the absence of such strict proof, and which are referred to by Lord Mansfield and Baron Parke, in their judgments above quoted.

PERDUE, J.A.:—This is an action brought by the plaintiff against the defendant for criminal conversation with, and alienation of the affections of, the plaintiff's wife. The jury returned a verdict for the plaintiff and awarded him damages in

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the sum of $1,000. At the close of the plaintiff's case defendant's counsel moved for a nonsuit upon the ground that the marriage of the plaintiff to his alleged wife had not been sufficiently proved. The motion was renewed at the close of the case. The defendant asks that a nonsuit be entered on this ground. He also takes the objection that the defendant's examination for discovery should not have been admitted in evidence against him on the ground that a defendant in a criminal conversation action cannot be compelled to appear and be examined for discovery, and, if he did so appear and was examined, his evidence, given on such examination, could not be used against him, under 32 and 33 Viet. (Imp.) ch. 68, sec. 3, and on the authority of *Fleury* v. *Campbell*, 18 P.R. (Ont.) 110. In regard to this latter objection it appeared that the defendant was called at the trial as a witness in his own behalf and, on cross-examination, all the important parts of his examination on discovery were reiterated by him. I do not think that it is necessary to further consider this point, especially in the view I take in regard to the first objection.

Up to the close of the plaintiff's case the only proof of his marriage is contained in the following passage in his own evidence:—

Q. You came from where? A. From Moravia.

Q. You came from Moravia? A. Yes.

Q. Were you a married man? A. Yes, I was married in the old country.

Q. What place? A. Hungary, Budapest.

Q. You were married in the old country, in Hungary, Budapest. A. Yes.

Q. When? A. 17 years ago.

Q. By what ceremony? A. In the Court and in the Church.

Q. You were married in the old country in the Church? A. Yes.

Q. That is, you were in Court, what is called a civil ceremony? A. Yes, sir.

Q. And in the Church? A. Yes, sir.

Q. What Church. A. The Roman Catholic, Budapest.

Q. That is the sacramental ceremony of marriage? A. Yes.

After the defence was closed the plaintiff's counsel tendered in evidence a document called a marriage certificate, purporting to certify to the marriage of the plaintiff and his wife. Defendant's counsel strongly objected to the reception of this document as evidence. One of the witnesses who understood the Hungarian language was recalled, and, notwithstanding the objection of defendant's counsel, the witness gave to the jury a translation of the contents of the certificate and attempted to prove other facts in connection with it. This witness was an ordinary workman and made no pretence of having any

special knowledge in regard to the certificate, beyond understanding the language in which it was written. It is not clear from the shorthand writer's copy of the evidence furnished to this Court, whether the document was filed as an exhibit or not. The Court record contains no entry of it, and the document is not amongst the papers put in at the trial.

The certificate merely purported to have been issued from an office in Hungary. The authenticity of the certificate or of the records to which it referred was not proved, and there is no evidence that the certificate was issued under any lawful authority. Nothing was proved in regard to the certificate except what appeared on its face. It is clear that the certificate was not receivable in evidence: see *Lyell* v. *Kennedy*, 14 A.C. 437, 448, 449; *Finlay* v. *Finlay*, 31 L.J.N.S. Pro. & Mat. 149. The trial Judge should not have allowed a translation of it to be given to the jury. The only evidence of marriage, therefore, which was properly before the jury was that which the plaintiff himself gave and which appears in the extract already quoted.

It has long been settled law that in an action for criminal conversation with the plaintiff's wife, the plaintiff must prove an actual marriage whereby the relation of husband and wife was really created. In *Morris* v. *Miller*, 4 Burr. 2057, Lord Mansfield said:—

> We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation and reputation are not sufficient to maintain this action. . . . This is a sort of criminal action; there is no other way of punishing this crime at common law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself.

In *Catherwood* v. *Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334, also an action of the same nature, it was sought to prove a marriage between two British subjects alleged to have taken place in Syria. Both parties were members of the Church of England. The marriage was celebrated by an American missionary, according to the rites of the Church of England. The parties afterwards cohabited and lived together as man and wife. It was held that a marriage had not been proved because it had not been shewn to have been celebrated in the presence of a priest in holy orders. Parke, B., in giving judgment, said:—

> Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties suppose to be sufficient to constitute that relation, is not enough.

These cases indicate that in a criminal conversation action, the fact that a marriage took place must be established with the same degree of certainty as would be required upon an indict-

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ment for bigamy. As to the proof required in the latter action, see *Reg.* v. *Smith*, 14 U.C.R. 565; *Reg.* v. *Duff*, 29 U.C.C.P. 255; Roscoe's Crim. Ev., 13th ed., p. 272.

In the present case the plaintiff and his alleged wife were citizens of a foreign country when the alleged marriage ceremony took place, and it was said to have been performed in that country. Our law recognizes and holds valid a foreign marriage when it has been performed according to the rites or ceremonies held requisite by the law of the country where the marriage has taken place. Our Courts give effect to the principle that the form of the contract is governed by the law of the place where the contract takes place: Dicey, Con. of Laws, 2nd ed., 615, 616:—

> The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted.

*Sottomayor* v. *DeBarros*, L.R. 3 P.D. 1, 5; see also *Ogden* v. *Ogden*, [1908] P. 46. If then the plaintiff seeks to prove in a Court of law in Canada that he was in fact married in Hungary to the woman he calls his wife, both being domiciled in that country at the time, he must shew that such marriage was performed according to the rites and ceremonies held requisite by Hungarian law. It is not sufficient for him to state merely that he was married "in the Court and in the Church." He must go further and shew that his marriage was a valid one in Hungary.

It was argued that the defendant had in effect admitted the marriage by speaking of the woman as the wife of the plaintiff. But it is clear that he was referring to her general repute as such. He does not appear to have had any knowledge that the marriage took place in fact or that it was celebrated in legal form.

It is scarcely necessary to point out that in ordinary civil actions marriage may be presumed where the parties have lived together for a long period as man and wife and have been regarded and received as such: *Doe* v. *Fleming*, 4 Bing. 266; *Piers* v. *Piers*, 2 H.L.C. 331; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, 6 A.C. 364; *Phipps* v. *Moore*, 5 U.C.R. 16. But on an indictment for bigamy, or in the *quasi* criminal action for damages against an alleged adulterer, such rule does not apply and a valid first marriage must be proved: see Taylor Ev., 10th ed., par. 172.

It only remains to be pointed out that section 30 of the Marriage Act, 1906, only applies to marriages heretofore or hereafter solemnized in this province where the minister or other person who solemnized the marriage was not duly authorized, or where any of the requirements of the earlier sections of

the Act had not been complied with, but the parties have been living together as man and wife. It does not attempt to make valid a marriage in a foreign country between citizens of that country.

I think the appeal should be allowed with costs. The verdict should be set aside, and a nonsuit entered with costs in the Court of King's Bench.

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CAMERON, J.A.:—The plaintiff was married to his wife (who was living at the time the action was brought but died before the trial) at Budapest in Hungary in October, 1896, and lived and cohabited with her thereafter until they separated in consequence of the alleged wrongful conduct of the defendant, which is the subject of this action. The charge is that the defendant had illicit and adulterous relations with the plaintiff's wife for a long time prior to the separation. The defence denies generally the plaintiff's allegations, and specifically that stating his marriage.

The case was tried before Mr. Justice Macdonald and a jury on November 18, 1911, when a verdict was found for the plaintiff for $1,000. The judgment entered thereon is now moved against on the grounds (1) that the examination of the defendant was improperly admitted as evidence, and (2) that there was no evidence of the plaintiff's marriage as alleged. Objection was also taken to the amount of the damages awarded.

I cannot attach importance to the first ground of objection. The evidence in the examination was in its main features all brought out on the defendant's examination. A new trial could not be awarded on this ground.

The second ground is more formidable. Here the evidence intended to establish the marriage is that of the plaintiff himself, who swore that he was married at Budapest in Hungary, "in the Court and in the Church," that is by both a civil and a religious ceremony. He lived with his wife for sixteen years and they had a child, issue of the marriage, who died at the age of five years. There was also put in, in corroboration, a certificate, purporting to come from the Church authorities in Budapest. To this objection was taken on various grounds, amongst them, that the provisions of the law relating to solemnization of marriage in Budapest were not given in evidence. Plaintiff's counsel did not, however, rely upon this certificate, but upon the direct evidence of the marriage contained in the plaintiff's testimony.

It is urged that this proof is wholly insufficient.

> If persons live together as man and wife, it will, in favour of morality and decency, be presumed that they are legally married.

But to this rule there are in England two exceptions.

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Both on an indictment for bigamy, and on a petition claiming damages against an alleged adulterer (which, under the Divorce Acts, has taken the place in England of the action for criminal conversation), a valid first marriage must be proved; and even the proof of a ceremony, which the parties supposed to be sufficient to constitute the relation of husband and wife, is not enough, unless it be shewn to be legally valid: Taylor on Evidence, sec. 172.

The special rule concerning evidence of marriage in actions for criminal conversation, was first laid down by Lord Mansfield in *Morris* v. *Miller*, 4 Burr. 2057. There the man and woman

were married at Mayfair Chapel. The register or books could not be given in evidence. Keith, who married them, was transported; and the clerk, who was present, was dead. So that the plaintiff could not prove the actual marriage by any evidence.

The plaintiff proved articles made after marriage,

also cohabitation, name and reception of her by everybody as his wife, though we did not indeed prove it by any register, or by witnesses who were present at the marriage.

Evidence was also given of a confession by the defendant of adultery with plaintiff's wife. Lord Mansfield held in

an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact: acknowledgment, cohabitation and reputation are not sufficient to maintain this action.

But we do not at present define what may or may not be evidence of a marriage in fact.

In this decision Lord Mansfield himself made the law as he pointed out in the subsequent case of *Birt* v. *Barlow*, 1 Doug. 171, 174.

But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes. . . . it struck me, in the case of *Morris* v. *Miller*, 4 Burr. 2057, that in such an action, a marriage in fact must be proved.

But he pointed out also that marriages are not always registered, where proof by register would be impossible and other proof would be admissible. Mr. Justice Blackstone says at p. 171:—

That the best proof that could be given of an actual marriage, was by some person personally present at the solemnity.

In *Morris* v. *Miller*, 4 Burr. 2057, as it is reported in Sir W. Blackstone's reports, at p. 632, Lord Mansfield's judgment is differently reported, thus:—

In these actions there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact; as by a person present at the wedding dinner, if the register be burnt and the parson and the clerk are dead.

So that all that is necessary is proof of a "marriage in fact" or of an "actual marriage," which signifies "as a rule of evidence, in these decisions, proof of an eye-witness, i.e., either by the register containing the parson's entry or by the oral testimony of parson, clerk or some other person present at the ceremony:" Wigmore on Evidence, sec. 2084. It is not laid down that there must be evidence of the validity of the marriage ceremony, but that there must be strong evidence of the marriage itself, more than mere evidence of cohabitation and reputation.

Now, in this case, we have the evidence of an eye-witness, to wit: the plaintiff. His evidence would not have been admissible in England at the time when *Morris* v. *Miller*, 4 Burr. 2057, was decided (1767) or *Birt* v. *Barlow*, 1 Doug. 171 (1779). The common law rule disqualifying parties to actions of this kind as witnesses remained in force until 1869 (32 & 33 Vict. ch. 68). So that until then the question of proving a marriage by the evidence of a party could not arise.

I think it can be forcibly contended that the plaintiff's evidence in this case is strong evidence of the fact of his marriage; and, in fact, the best evidence within his power to give, and, therefore, it is sufficient to meet the requirements of defendant's counsel as set forth in *Morris* v. *Miller* (p. 2058), to which the Court there gave effect, although it refused to define what might or might not be evidence of a marriage in fact (p. 2059). But that best evidence (referred to in *Morris* v. *Miller*, 4 Burr. 2057) certainly could not at the time of that decision be the evidence of one of the parties to the action and to the marriage under the common law rule, disqualifying parties as witnesses, then prevailing.

The question is undoubtedly rendered more difficult by the decision of the Court of Exchequer in *Catherwood* v. *Caslon* (1844), 13 M. & W. 261, 13 L.J.Ex. 334. The plaintiff there was an Englishman, domiciled in England, travelling in Syria, who married the daughter of the English consul at Beyrout, he being twenty-one years of age and she under that age. The marriage was celebrated by an American Missionary according to the rites of the Church of England of which both parties were members. Afterwards the parties cohabited as man and wife and had a son, issue of the marriage.

The case was twice argued. On the first argument it was held that the marriage was invalid on the authority of *R.* v. *Millis*, 10 Cl. & F. 534, which case was decided by the House of Lords, largely on the effect of the Marriage Act, 26 Geo. II. ch. 33. This judgment of the House of Lords was by a Court equally divided, and has been questioned by competent authority, to which I shall refer hereafter. In any event it was sufficient to justify the annulment of the Catherwood marriage on

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the ground that it was not celebrated in the presence of a priest in Episcopal orders.

On the second argument it was contended that the action being one of criminal conversation it was sufficient to shew that the parties had gone through a solemn ceremony with the *bonâ fide* intention of contracting a valid marriage, and had subsequently cohabited. Baron Parke, delivering the judgment of the Court, held, that, since *Morris* v. *Miller*, 4 Burr. 2057 and *Birt* v. *Barlow*, 1 Doug. 171, it was

> necessary for the plaintiff to shew what the Courts call a marriage in fact, which we think is an actual marriage, valid or avoidable, and not yet avoided.

Then he goes further, in my humble opinion, than is justified by the cases relied upon by him as authorities when he says:—

> And if the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties suppose to be sufficient to constitute that relation, is not enough. It must be shewn to be sufficient according to law for that purpose.

He further goes on to point out that the supposed wife may have left the plaintiff and gone to cohabit with the defendant because she had discovered that the contract of marriage assumed to have been entered into at Beyrout was not binding on her.

I would point out that in the *Catherwood* case, the marriage was invalid under *R.* v. *Millis*, 10 Cl. & F. 534, which case, of disputed authority, was based upon provisions of the English Marriage Acts, wholly inapplicable here. The country in which Beyrout is was at the time Mohammedan in point of religion. Furthermore, the parties in the *Catherwood* case were an Englishman and an Englishwoman, both domiciled at the time of the marriage in question in England and both were members of the Church of England. I do not imagine that Baron Parke intended his judgment to go any further than the facts of the case immediately before him warranted or necessitated. I certainly do not feel inclined to give it any wider application. To us to-day, and in this country, the decision in the *Millis* case appears to have inflicted a great wrong and would surely not now be held to be a binding authority.

As to that case, see the remarks of Lord Campbell in *Beamish* v. *Beamish*, 9 H.L.C. 274 at 337, where he says that he deemed the decision that unless a priest, especially ordained, were present at the ceremony, the marriage was null and void and the children thereof illegitimate, was so unsatisfactory that he resorted to the extraordinary expedient of entering a protest against it in the Journals of the House.

In *Mainwaring's* case, 1 Dear. & B. p. 139, Mr. Justice Wilks

declared that the decision in *Catherwood* v. *Caslon*, 13 U. & W. 261, 13 L.J.Ex. 334, turned upon *R.* v. *Millis*, 10 Cl. & F. 534, which I shall never consider as a binding authority.

Here, at any rate, the facts are wholly different from those in the *Catherwood* case. We have no declaration of this or any other Court that the marriage here in question was invalid. On the contrary, practically the opposite is the case, in that there has not been the slightest attempt to question its validity here or abroad, and, in fact, the defendant admits it himself. The man and wife here were not Canadians or British subjects, but Hungarians. Their domicile, unquestionably, at the time of the marriage was not here, but in Hungary, where they were living at the time and of which country they were citizens or subjects. The evidence is the best evidence in the plaintiff's power to give, and is more than evidence of "acknowledgment, cohabitation and reputation" for it goes back to the inception of the relation of husband and wife at and by a religious and a civil ceremony. The religious ceremony was performed in the Roman Catholic Church in Budapest in Hungary, in which the Christian and not the Mohammedan faith prevails. Surely it is the part of common sense to say that a ceremony performed under these circumstances, in a civilized and Christian country, lived up to for sixteen years, and absolutely unquestioned, can and must be assumed to be regular and duly performed. I refer to Lord Ellenborough's dictum in *R.* v. *Brampton*, 10 East 282, at 289, followed in *R.* v. *Griffin*, 4 L. R. Irish 497, 503, 14 Cox C.C. 308.

If the plaintiff were to be held here to the strict performance of the very letter of the decision of Baron Parke, what would he have to prove? The law of Hungary relating to the solemnization of marriage? That would not be sufficient, for it would fail to shew that the ceremony in question complied with the law, and that the officer or priest celebrating the ceremony acted in accordance therewith. The plaintiff would also need to prove the official character of the magistrate performing the civil ceremony sixteen years ago, and also it may be, the due Episcopal ordination of the priest celebrating the religious ceremony at the same time. And in all this proposed proof the impossibility of the magistrate or priest identifying this plaintiff and his wife (now dead) with the parties who participated in the ceremonies before them in Hungary, is apparent. These same difficulties face us in supposing an attempt to prove the marriage by virtue of a certificate. That certificate would be useless without additional evidence establishing the law of Hungary and the identity of the ceremony vouched for by the certificate with that referred to by the plaintiff and here in question, and without evidence establishing the identity of the parties named in the certificate with the plaintiff and his wife.

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Lord Mansfield said in *Morris* v. *Miller*, 1 W. Bl. 632, that in such cases there need not be strict proof from the register or by a person present, but that there must be strong evidence, and he went no further than that. There certainly is before us strong evidence, absolutely uncontradicted, of the actual marriage in this case in the testimony of the plaintiff himself, who, without the slightest attempt being made to impeach his evidence on the point, swears positively to the fact of his marriage. He regarded the woman as his lawful wife and she regarded him as her lawful husband. That is the unquestioned fact.

In addition to this we have the evidence of the defendant, who, throughout his relations with the plaintiff's wife, regarded her as his (the plaintiff's) wife, and speaks of her in that, and no other way. The defendant says that the plaintiff's wife spoke to him of the plaintiff as her husband. That he regarded her as the plaintiff's lawful wife is incontrovertible. The correspondence referred to at p. 158 and put in at the trial also shews this as the defendant's view. His evidence throughout is, I take it, an admission that he knew and acknowledged the plaintiff's wife to be his (the plaintiff's) wife, and that the defendant regarded her in no other light, whatever may have been the nature of his relations with her.

My conclusion, therefore, is that the plaintiff's evidence on the subject of the marriage is evidence of a party to it, an eye-witness, and is therefore evidence of a "marriage in fact" or "actual marriage" within the accepted meaning of the rule laid down by Lord Mansfield. Moreover, we have here the evidence of the defendant in corroboration, to which weight must be given. See Wigmore on Evidence, sec. 2086.

As for the rigid rule of proof laid down by Baron Parke, I would consider it inapplicable to this case for the reasons I have stated. To enforce that rule here or in cases like this would be simply a denial of the right to bring an action, as in practice it would be impossible to comply with it.

With reference to proof of marriage in bigamy cases, the decisions are collected in Crankshaw's Criminal Code, 338-341:—

> The fact of the marriage having been validly solemnized may be proved by some person who was actually present and saw the ceremony performed: p. 340.

In support of this the author cites *R.* v. *Allison*, 1 R. & R. 109; and *R.* v. *Mainwaring*, 1 Dears. & B. 132.

I cite also the case of *R.* v. *Newton*, 2 M. & Rob. 503, or *R.* v. *Simmonsto*, 1 Car. & K. 164. In that case the prisoner shortly after his return to England had told his wife's sister of his marriage in New York by a Presbyterian clergyman and he had also referred to her as his wife on other occasions. It was left

to the jury to say whether this was not sufficient evidence "that the law had been a valid one according to the law in force at New York." That is the important feature of that case as bearing upon the case now before us. The admission was held sufficient to establish not only the fact of the ceremony, but the validity of the ceremony according to the foreign law. This point is altogether apart from that of the obvious propriety of allowing evidence of an admission made by a party against his own interest, or from that that the defendant in a bigamy case,

> in acknowledging marriage, speaks of the fact in which he was personally concerned, and of the truth of which he cannot possibly be ignorant,

as said by Robinson, C.J., in *Campbell* v. *Carr*, 6 U.C.Q.B.O.S. 484. The *Newton* or *Simmonsto* case goes farther than that, for it holds that the admission of a defendant is not only evidence against the defendant in a bigamy case, of the fact of the first marriage, but is also evidence of the foreign law.

In *Regina* v. *Smith*, 14 U.C.Q.B. 565, proof of the first marriage was given by the brother of the woman, both of whom were brought up in Upper Canada, and were apparently British subjects. The brother said he was present at his sister's marriage with the prisoner in the State of New York before a justice of the peace, "a magistrate having power to marry," and that the two lived thereafter as man and wife for a short time. The prisoner was found guilty and sentenced to three years in the penitentiary, but a case was reserved for the opinion of the Court as to the proof of the validity of the first marriage in the State of New York. The Court held that the evidence given by the brother, that the justice of the peace had power, was insufficient as it was "given by a person who never at any time, for all that appears, was a lawyer, or an inhabitant of the foreign country in question." The decision goes no further than that. In this present case the plaintiff made no statement as to the persons who officiated at his marriage, and I can find no authority requiring that he should do so. Moreover, the plaintiff was an inhabitant of the foreign country in question here, as also was his wife. I would not extend the decision in *Regina* v. *Smith* in its application any further than required by the facts set forth. And it is to be borne in mind, that the Court considered the question of evidence in the case of a prisoner already sentenced to three years in the penitentiary.

No doubt we must take Lord Mansfield's rule as binding. But we must remember the peculiar social conditions prevailing at the time the judgment was rendered when, for reasons stated in Wigmore on Evidence, sec. 2084, note, this particular form of action flourished and was naturally an attractive means of black-

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mail. These conditions no longer exist, and so far as the defendant in such actions is concerned, and the propriety of giving him any special protection,

> it is doubtful whether there is any need of exercising special vigilance in behalf of a defendant whose conceded conduct deprives him of honourable sympathy: *Ib.* 2084.

It is on such grounds as these that I would place a liberal construction on Lord Mansfield's rule and would restrict the application of Baron Parke's judgment in the *Catherwood* case to cases similar in circumstances to that case.

Strong evidence must, it is true, be given in such a case as this of the actual marriage, something more than mere evidence of cohabitation and reputation. But if this form of action is to be allowed at all, restrictions as to evidence, impossible to be complied with, should not be thrown in its way. The modern tendency is in the interests of public justice to relax the strictness of a rule of evidence which tends practically to block the plaintiff's right to recover. When the plaintiff has gone into the box, deposed positively as to his marriage, which is not impeached in the most indirect way or by the slightest evidence, when he has lived with his wife for sixteen years, and had issue by her, and where that relationship has been acknowledged by the public, and more particularly by the defendant, by his words and conduct, it does seem to me that strong and amply satisfactory evidence has been given of the fact of the marriage within the fair intent and meaning of Lord Mansfield's rule. I must admit that I have reached this conclusion not without some difficulty but it seems to me justified by authority and by considerations of public interest.

Since writing the foregoing, I am referred to *Rex* v. *Naoum*, 24 O.L.R. 306 (1911), a judgment of the Ontario Court of Appeal, where it was held (on a case stated for the opinion of the Court upon an indictment for bigamy) that an admission of the accused, coupled with evidence of those present at the ceremony, was sufficient evidence of a marriage in Macedonia. It was held, expressly, that the testimony of these witnesses was not sufficient to prove the Macedonian law: *per* Maclaren, J.A., at 311. But the evidence, while not sufficient to prove the foreign law, was held to be not without weight. The various authorities dealing with the question as to the degree of weight, if any at all, that is to be attached to admissions in such cases are dealt with in Mr. Justice Maclaren's judgment. That such an admission, unsupported by other evidence, was sufficient was held by the Court of Appeal for Lower Canada in *R.* v. *Creamer*, 10 L.C.R. 404, 450*n*, and by the Supreme Court of the United States in *Miles* v. *United States*, 103 U.S. 304. I think the judgment of the Supreme Court in expressly upholding

(p. 311) the view set out in *R.* v. *Simmonsto*, 1 C. & K. 164, and that

> it is for the jury to determine whether what he (the accused) said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized,

is entitled to great weight. A long list of cases is given in support of this view, including *R.* v. *Upton* (1839), 1 Russell on Crimes, 7th ed., 983; *R.* v. *Newton*, 2 U. & Rob. 503, or *Simmonsto*, 1 C. & K. 164.

In the *Naoum* case the opposing decisions are referred to also; *R.* v. *Savage*, 13 Cox C.C. 178, and *Rex* v. *Lindsay*, 18 Times L.R. 761. The comment of Barry, J., in *Queen* v. *Griffin*, 4 L.R. Ir. 497, is instructive as to Lush, J.'s, statement in *R.* v. *Savage*, 13 Cox C.C. 178, as also is his remark that if an admission in bigamy be not evidence of marriage

> no man should be allowed to plead guilty to a charge of bigamy.

(In *R.* v. *Griffin*, 4 L.R. Ir. 497, the point was as to the proof of validity of the second marriage of the accused.)

The conclusion of the Court was that there was ample evidence

> if the Judge believed it, as he did, to support the conviction,

though

> it might have been well if the Macedonian law had been proved.

I consider this opinion of the Ontario Court of Appeal, concurred in by all the Judges, lends support to the view which has appealed to me in this present case.

The learned trial Judge stated expressly that the jury were to assume the marriage as a fact (p. 159) allowing the case to go to them on that assumption. After the jury brought in the verdict, Mr. Howell, said:—

> Your Lordship intimated that it would still be open to me to argue the question as to proof of the marriage, if we still saw fit?

And to this the learned trial Judge assented. It seems to me that this procedure, while perhaps unusual, was tantamount to allowing the case to go to the jury, reserving to the defendant the right to move to set aside the verdict on the ground of want of evidence, an arrangement to which the parties agreed.

I would not interfere with the damages awarded by the jury (which cannot be regarded as excessive in an action of this character), and think the motion to set aside the judgment entered must be refused with costs.

HAGGART, J.A.:—I agree with the conclusions arrived at by my brother Cameron, who in his reasons has very fully reviewed the authorities.

The trial Judge apparently was not satisfied as to the sufficiency of the proof of the marriage and in order to shorten

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matters told the jury to assume that the parties were married so the question is open and that question is whether there is sufficient evidence of the plaintiff's marriage to support the verdict.

*Rex* v. *Naoum*, 24 O.L.R. 306, is a recent case in the Ontario Court of Appeal. The Court was unanimous, and Mr. Justice Maclaren, who delivered the judgment of the Court, collected and reviewed the authorities. A case was stated by the County Court Judge before whom the defendant was tried for bigamy and convicted, and the question stated for the opinion of the Court was, whether there was sufficient legal evidence of the first marriage which took place in Macedonia to warrant the conviction. The evidence upon which the accused was convicted was that of several witnesses who were present when the ceremony was performed; that the ceremony took place in the village Greek church and was performed by the priest of that church in the presence of the villagers gathered there to witness it, and that such ceremony was performed in the same manner and by the same officiating priest as and by whom weddings usually were performed in that village (and in so far as the witnesses were qualified to speak) according to the rites, laws and customs of that country. The evidence also shewed that the prisoner and the woman with whom he went through the ceremony had lived together as man and wife and had two children born to them. There was also an admission made by the prisoner after his arrest. Mr. Justice Maclaren said that if it were necessary to prove the Macedonian law as to marriage he did not think the testimony of the witnesses would be sufficient for that purpose, and while the evidence of the Macedonian witnesses was not sufficient to prove the foreign marriage, there was ample evidence, if the Judge believed it, to support the conviction.

Does our Marriage Act apply to the question before us? What object had our Legislature in view when it revised and amplified our statute respecting the solemnization of marriages?

Before considering the wording of the Act, let us consider the law generally on this subject:—

> A cogent legal presumption is raised in favour of any marriage which is shewn to be celebrated *de facto*. . . . If persons live together as man and wife it will, in favour of morality and decency, be presumed that they are legally married.

Taylor on Evidence, 10th ed., par. 172. And text-writers put it stronger and state that the presumption of law must prevail unless broken in upon and is much stronger than any ordinary legal presumption. It is a presumption of law, not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

But this presumption of law in favour of marriage does not hold good under all circumstances. Two exceptions to this are recognized in England. On an indictment for bigamy and on a petition claiming damages against an alleged adulterer which latter is practically our present action for criminal conversation. A valid first marriage must be proved and even the proof to constitute the relation of husband and wife is not enough unless it be shewn to be legally valid: Taylor on Evidence, 10th ed., par. 172; *Catherwood* v. *Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334; *Morris* v. *Miller*, 4 Burr. 2057; *Birt* v. *Barlow*, 1 Doug. 171. The foregoing is a general statement of the law laid down in the text-books.

Let us consider briefly the conditions existing in Manitoba to-day and at the time of the passing of the Marriage Act in 1906. Immigration to our country is invited and encouraged and thousands of families every year are coming from remote countries and primitive communities, and speaking different languages. It may be that more than one half the marriage ceremonies of the residents of Manitoba were celebrated in the home land. Our Legislature, with a view of insuring immigrants in the enjoyment of their marital rights and prompted by the same motives that gave rise to the legal presumptions in civil suits in favour of marriage by special enactment gave the husband and wife, in cases where their matrimonial civil rights were concerned, a position at least as strong as that enjoyed under the legal presumptions in civil cases. Let us examine our Marriage Act, ch. 41, 1906.

The former statutes are consolidated and revised and three sections, namely 28, 29, and 30, are added. Sections 28 and 29 legalize marriages solemnized by certain clergymen, Salvation Army officers and Quakers, and they apply only to marriages solemnized "in this Province."

Now, take section 30. Observe that the limiting words "in this Province" are designedly left out. It refers to "every marriage heretofore or hereafter solemnized." It evidently applies to the marriage of every person whose marital rights may be the subject of adjudication. The substance of the section is:—

> 30. Every marriage heretofore or hereafter solemnized between persons not under a legal disqualification to contract such marriages shall after two years from the time of the solemnization thereof or upon the death of either of the parties before the expiry of such time be deemed a valid marriage so far as respects the civil rights in this Province of the parties or their issue and in respect of all matters within the jurisdiction of the Legislature of Manitoba, notwithstanding the clergyman, minister, or other person who solemnized the marriage was not duly authorized to solemnize marriages, and

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notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry, or in the dispensation thereof or in the issue of the license or notwithstanding the entire absence of either, etc., etc.

It has been contended that this section 30 applies only to marriages solemnized in this Province. Why were the words of limitation "in this Province" expressed in the former sections and deliberately left out of this. Take the example of a farmer just south of parallel 49 selling his farm and moving across the boundary and taking a farm in Canada and becoming a citizen. Can this enactment be invoked by his neighbour who was married in Manitoba and not by the naturalized American?

The Legislature recognized the difficulty of procuring evidence of marital contracts consummated in all quarters of the globe from all people speaking many different languages and by this enactment determined to guarantee our naturalized citizens in the enjoyment of their marital rights.

This action concerns "the civil rights in this Province of the" plaintiff. The marriage is substantially legalized. You could not offer evidence of the non-qualification of the official, nor evidence of the irregularity or insufficiency of the proclamation, or in the dispensation, nor could you question the license or assert the absence of it. The statute practically covers all that constitutes the ceremony. You cannot even challenge the marriage for its invalidity. The statute gives the party a stronger position than he would have in a civil suit under the presumptions which could be rebutted or repelled.

The plaintiff has affirmatively proved the ceremony by an eye-witness, cohabitation, living as man and wife for 16 years, the birth of issue, and the recognition by the defendant of the existence of the relationship of man and wife. This, I think, is sufficient evidence of the marriage.

If section 30 of the Marriage Act applies, then what was formerly a legal presumption has the qualities of a statutory right and covers this suit which is brought to enforce a civil right of the plaintiff.

The appeal should be dismissed.

*The Court being equally divided, the appeal was dismissed without costs.*

## THE B. & R. COMPANY LIMITED v. HUGH S. McLEOD et al.

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*Alberta Supreme Court. Trial before Stuart, J. October 14, 1912.*

1. AUTOMOBILES (§ I—1)—PUBLIC REGULATION AND CONTROL—RESTRICTION —COMMON LAW LIABILITY—2-3 GEO. V. (ALTA.) CH. 6, SEC. 35.

Section 35 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, providing that the owner of a registered motor vehicle shall be liable for any violation of the provisions of the Act while operating such vehicle, is restricted to the penal liability thereby imposed, and does not alter the common law liability of the owner of a motor vehicle for the violation of the Act, either by himself or by any other person in charge of or operating such vehicle.

[*Mattei* v. *Gillies*, 16 O.L.R. 558; and *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, distinguished.]

2. EVIDENCE (§ II H—270)—ONUS OF PROVING NEGLIGENCE FROM OPERATION OF AN AUTOMOBILE—MOTOR VEHICLE ACT, 2-3 GEO. V. (ALTA.) CH. 6, SEC. 33.

Section 33 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, providing that the onus of shewing that any loss or damage incurred by any person from the operation of a motor vehicle did not arise through the negligence or improper conduct of the owner or driver thereof, shall rest upon the owner or driver, merely establishes a new rule of evidence in civil cases, and does not alter the common law liability of the owner or driver for the negligent operation of a motor vehicle.

3. AUTOMOBILES (§ I—5)—NEGLIGENCE IN USE OF—COMMON LAW LIABILITY OF OWNER.

At common law the owner of a motor vehicle is not answerable for the negligence of the driver thereof, except where the relation of master and servant exists, and where, at the time of the negligent act, the latter was acting within the scope of his employment; and such liability can be changed by statute only by the use of distinct and unequivocal words.

[*Arthur* v. *Bokenham*, 11 Mod. 150, referred to.]

4. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—LIABILITY OF OWNER WHEN CAR BEING USED AT TIME OF ACCIDENT BY ANOTHER PERSON WITHOUT OWNER'S KNOWLEDGE OR CONSENT.

The Alberta Motor Vehicle Act (2-3 Geo. V. ch. 6) does not render the owner of a motor vehicle liable for a violation of the provisions of the Act resulting in injury to the plaintiff where the vehicle was at the time of the injury being used by another person without the owner's knowledge or consent.

5. PLEADING (§ II J—231)—SUFFICIENCY OF ALLEGATION AS TO NEGLIGENCE —AUTOMOBILE OPERATED BY OWNER'S SON—AGENCY—AMENDMENT AT TRIAL.

An allegation in the plaintiff's statement of claim for injuries received by being struck by an automobile, that such vehicle was being driven by the son of the defendant, is not a sufficient allegation of agency to render the defendant answerable, and the statement cannot, at the trial after all the evidence is in and the argument in progress, be amended to shew such an agency.

6. PRINCIPAL AND AGENT (§ III—33)—FATHER AND SON—NEGLIGENCE OF SON IN DRIVING AUTOMOBILE—PROOF OF AGENCY—LIABILITY FOR NEGLIGENCE OF SON.

The agency for the defendant of his son, whose negligent driving of an automobile resulted in an injury to the plaintiff, is not established by the facts that the son had the opportunity of using the vehicle whenever he liked, and that on the day when the accident occurred it was the intention of the defendant that his son should later in the

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day take the defendant's family riding, where it appeared that the son had obtained the car from the garage where it was kept by the defendant, and was taking a few of his own friends for a ride when the accident occurred since, at the time of the accident, the automobile was being used solely for the purposes of the defendant's son.

7. AUTOMOBILES (§ I—5)—NEGLIGENCE—DRIVING TOWARDS STREET INTERSECTION—LESS THAN AUTHORIZED SPEED LIMIT—COLLISION WITH ANOTHER CAR.

To drive an automobile towards an intersecting street at a speed of ten miles per hour, although that speed may be within the maximum permitted by law, is negligence sufficient to prevent the plaintiff recovering for a collision between his own and the defendant's automobile, which approached on the intersecting street at a greater rate of speed than was permitted by law, since the speed of the plaintiff's automobile at such place was unreasonable as he must have known the possibility of meeting other automobiles moving on the intersecting street at a rate of speed equal to his own.

8. COSTS (§ I—2)—REFUSAL OF, ON DISMISSAL—DEFENDANTS JOINED AND PLEADING WITHOUT SEVERING OF DEFENCE.

Where the owner of an automobile and the person who was running it at the time of an accident were joined as defendant and, without severing their defences, were represented at the trial by the same counsel, costs will not be granted either defendant where the damage action was dismissed as to the owner of the automobile because the person operating it was not his servant, and as to the latter because of the plaintiff's own negligence in the operation of his car.

Statement

THE plaintiffs, the owners of an automobile, sue the defendants, who are respectively the owner and the driver of another automobile for damages resulting from the collision of the two automobiles on the intersection of Centre street and 6th avenue in the city of Calgary, on the afternoon of Sunday, March 17th, 1912.

The action was dismissed against the defendants.

Stuart, J.

STUART, J.:—The plaintiff seeks to attach liability to Hugh S. McLeod, the owner of the second automobile, who was not present at the time of the collision, upon two grounds. First, it is claimed that the effect of the statute 2-3 Geo. V. (1911-1912) chapter 6, called the Motor Vehicle Act, is to make the owner who holds a certificate of registration under the Act civilly liable in damages to any person injured by his automobile even though it may not have been in charge of a person for whose negligence the owner is responsible under the common law, provided there has been a violation of the Act by the person in charge. Secondly, liability at common law was suggested in the argument.

The Act referred to provides for the registration of the owners of automobiles and for the issue of licenses to chauffeurs and contains a number of regulations and prohibitions as to speed and other matters intended to secure the safety of persons using the highways. For breaches of these regulations and prohibitions certain penalties are imposed.

Section 35 of the Act reads as follows:—

The owner of a motor vehicle for which a certificate of registration has been issued under the provisions of this Act shall be liable for violation of any of the provisions thereof in connection with the operation of such motor vehicle.

Section 33 reads as follows:—

When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

It is contended that the real effect of these two provisions is to change the common law rule and to render the certificated owner liable no matter who is in charge if the person who is in fact in charge has violated the Act and damages have been caused to anyone.

Two cases from Ontario were cited to me in support of this contention, viz., *Mattei* v. *Gillies*, 16 O.L.R. 558 and *Verral* v. *The Dominion Automobile Co.*, 24 O.L.R. 551. The Ontario statute does not differ very materially in its wording from ours. Our section 33 is an exact copy of sec. 18 of the Ontario Act while our section 35 corresponds with the Ontario section 13, except that we use the words "liable for" where the Ontario Act says "responsible for." There is, therefore, in my opinion little possibility of distinguishing the two statutes by reason of any special terms employed in them and if the decisions of the Ontario Divisional Court are correct the plaintiffs' contention would appear to be sound.

I hesitate a great deal before venturing to differ from an opinion deliberately expressed by Chancellor Boyd, Falconbridge, C.J.K.B. and Teetzel, Middleton and Latchford, JJ., of the Ontario High Court of Justice. But after careful consideration I find myself quite unable to assent to their view.

The statute is called "An Act to regulate the speed and operation of Motor Vehicles on Highways." This indicates the purpose of the statute and from the beginning to the end with section 33 as practically the only exception its sections provide what motor owners and chauffeurs must or must not do in certain circumstances. Section 36 imposes penalties for the violation of these directions. Section 35 says that the certificated owner shall be liable for any violation, the implication being that his presence or absence in the motor at the time of the violation is to be immaterial and it is in the very next section, viz., 36, that the penalties are imposed. Without reference to section 33 it seems to me that there is absolutely not a hint in the statute of any intention to change the law as to civil liability. Then all we have is section 33 which lays down a new rule of evidence in civil cases which arise out of the negligent driving of motor

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vehicles. Now, surely the mere change of the burden of proof does not imply a change in the substantive civil rights of individuals. At common law the owner of a vehicle whose driver is negligent and causes damage to another person is not liable *qua* owner but only if the driver is his servant acting within the scope of his employment. To change this rule and to make the owner liable in any case whether the relation of master and servant exists between him and the negligent driver or not is to enact a very sweeping change of the common law. It seems to me that the rule is clear that a statute can only do this by distinct and unequivocal words. In *Arthur* v. *Bokenham*, 11 Mod. 150, the Court said:—

> Statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration; for if the Parliament had that design they would have expressed it in the Act.

Statutes in derogation of the common law are to be construed strictly. See Endlich, Interpretation of Statutes, sec. 127; Odgers, Common Law of England, p. 71.

In *Rex* v. *Morris*, quoted in Hardcastle, 1st ed., p. 322, Boyles, J., said:—

> It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law.

In accordance with this rule I can find nothing in the statute which indicates a plain intention to alter the rule of the common law to which I have referred. Full effect can be given to sec. 33 by treating it as merely meaning what it says, viz., that the burden of proof in regard to negligence is hereafter shifted in the specified cases. The use of the word "owner" in the section is quite intelligible in this regard because the owner may even at common law often be the defendant even though not present himself, for the negligence may be that of a servant in charge for whom he is responsible. In such a case if the owner and not the servant is sued as defendant then sec. 33 operates to throw the burden of proof upon him. With regard to section 35 it can be given a full and sufficient meaning by confining its effect to penal liability. The section is surrounded by clauses containing directions and prohibitions and is followed directly by the section imposing penalties.

The section must be read in the light of all those other clauses and as it appears to me the obvious inference is that its effect is to be restricted to the question of penal liability. It is to be observed also that section 34 says that nothing in the Act is to be held to "curtail or abridge" any right of action for damages resulting from negligence. When the Legislature

was so careful to explain its meaning in regard to "curtailing or abridging" a right of action for damages one would infer that if it had intended to extend and enlarge that right it would have done so in explicit terms.

It is useful also to compare the former statute 6 Edw. VII. (1906) ch. 26, with the present one. In section 10 the Legislature set forth in very specific language the civil liability of an owner and in express terms gave a right of action against the owner to the person whose horses had become frightened. A right of action against the owner *qua owner* was there created although limited to a special case. If it had been intended not to destroy such right of action, but to extend it to all cases surely the Legislature would have used an unequivocal language as was used in section 10 of 1906.

I hold, therefore, that the defendant Hugh S. McLeod is not liable under the statute.

It was contended, however, that the defendant James W. McLeod who drove the car was the servant or agent of and under the control and direction of the defendant Hugh S. McLeod. There is no such allegation in the statement of claim. All that is stated is that the automobile alleged to have caused the action was "driven by the defendant James W. McLeod, son of the defendant Hugh S. McLeod." This, of course, is not a sufficient allegation of agency. It was only after all the evidence was in and in course of the argument when I pointed this difficulty out to the plaintiffs' counsel that an application to amend the statement of claim was made. This was objected to by the defendants' counsel and I think quite properly so at that stage. The question of the relationship between the two defendants was a question upon which the defendant H. S. McLeod was entitled to give evidence. He, in fact, gave none on his own behalf, because as the pleadings stood during the trial he did not need to give any. I think it was then too late to permit any such amendment. This, of course, is conclusive and decide the action in his favour so far as the defendant H. S. McLeod is concerned.

I may as well add, however, that even if I were to allow the amendment I do not think the result would be different. The only evidence of agency was contained in the testimony of the defendant H. S. McLeod called by the plaintiff. He said that his son had been driving automobiles for about three years, principally the witness' own car, that the son had the opportunity to take the car out and make use of it whenever he liked and that it was the intention that the son should take the family out in the car later on in the afternoon. The car was kept at a garage. The son had gone there, taken it, not to the family home, but down town in the city "for a little run," had got two

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friends in the car and was going over to Hillhurst, a suburb of the city, with them when the accident happened. The ride with the family was to take place after the return from Hillhurst.

There is an interesting article in Canadian Law Times, vol. 32, p. 702, on the family use of automobiles in which some American cases dealing with the question of children's agency for the father who owns an automobile are cited. In a New Jersey case, *Doran* v. *Thomson*, 72 N.J. Law 754, a daughter 17 years old had the use of her father's automobile whenever she wished. On the occasion in question she went out with it and took some of her own friends with her. The New Jersey Court held that there was not sufficient shewn to constitute her the agent of her father. The present case is very similar. The son was at the time of the accident using the automobile for his own purposes entirely. The writer of the article cited concludes with these words:—

> The controlling question in all of these cases should be whether the child was actually using the machine for his own purpose or for a family purpose for which the father was legitimately responsible.

This appears to me to be a sound view and is conclusive on the facts of the present case in favour of the defendant H. S. McLeod even if the amendment of the statement were allowed. The action is therefore dismissed as against the defendant Hugh S. McLeod.

In so far as the defendant James W. McLeod is concerned, his liability if any must rest upon the fact that his negligence was ultimately the cause of the accident. The plaintiffs' chauffeur Hodgson said that he himself was going west on 6th ave. at about 14 or 15 miles an hour and that he slackened his speed when he saw a pedestrian crossing ahead of him on Centre street to about 8 or 10 miles an hour. The defendant McLeod says that he himself had been going about 15 miles an hour north on Centre street and on reaching 6th avenue he had slackened to 12 miles an hour. He admits that he was exceeding the speed limit but he says Hodgson was going faster than he, about 20 miles an hour. One Oaks who was with McLeod says that Hodgson was going 10 or 12 miles an hour. "He seemed to going like the mischief. He flashed past us."

In view of this evidence I think I may safely conclude that Hodgson was going over 10 miles an hour. In these days when a chauffeur mentions 10 miles an hour as his rate of speed we may not unfairly, I think, assume that he is being careful not to admit a breach of the law. He admits a speed of 14 or 15 miles an hour on the avenue. If that is so, and in view of his own and the other evidence, I am convinced that he was going at an unreasonable speed across Centre street. At that place I think 10 miles an hour, even if not prohibited by the statute, is

an unreasonable speed and a person who goes at that rate when he must know the possibility of other cars coming at as great a rate the other way is guilty himself of negligence. I think the defendant's account of the relative positions of the cars is the more credible in itself in view of the exact place of the accident, and it is besides corroborated by two other witnesses. But even taking Hodgson's own evidence as correct it is obvious that he could see southward on Centre street as far as the middle of the block quite a few feet before he reached Centre street at all. If he then saw a car going as fast as he says McLeod's car was going and yet kept on at the rate he acknowledges, then in my opinion he was negligent in doing so. It is quite possible, indeed probable, that McLeod was going faster than Hodgson but that is not the decisive factor. I can find nothing to justify me in saying that the ultimate negligence rested in McLeod more than in Hodgson. They were both going too fast across a certain spot. They collided. I cannot say that it was really the negligence of one any more than of the other which caused the accident. It is true McLeod's car hit the plaintiffs' but it would have been an extraordinary coincidence if the right front wheel of McLeod's car had struck exactly the left front wheel of the plaintiff's or if the most extreme front right hand corner of the one had exactly hit the extreme front left hand corner of the other.

The result is the action should be dismissed also as against defendant James W. McLeod.

With regard to costs, the result of my conclusions on the rights of the parties would be to give the defendant Hugh S. McLeod his costs against the plaintiff although with regard to James W. McLeod, he should, I think, bear his own costs. Strictly, this would be the proper result as to costs. But the two defendants did not sever in their defence, they were represented by the same counsel at the trial and the practical effect would be to make the plaintiff pay the costs of the defendant James W. McLeod. In the circumstances I think that would be unjust. It would be much nearer the fair result to let the father bear the son's costs. There will, therefore, be no costs of the action to any party.

*Action dismissed.*

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## PETERSON v. BITULITHIC & CONTRACTING CO.

*Manitoba Court of King's Bench. Trial before Mathers, C.J.K.B. November 20, 1912.*

1. HIGHWAYS (§ III—114)—STATUTORY AUTHORITY TO WIDEN STREETS, SCOPE OF—CONSTRUCTION OF STATUTE, EXPRESS AND IMPLIED—SPECIAL SURVEY ACT (MAN.).

A statutory provision, authorizing municipal corporations "to fix the location or width of roads or highways and to establish boundary lines the positions of which (owing to obliteration of the original monuments defining the same on the ground) have become doubtful or difficult of being ascertained," is not in its terms or by implication wide enough to authorize the expropriation of land for the purpose of widening a road.

[Sec. 3, Special Survey Act, R.S.M. 1902, ch. 158, as amended by sec. 1, 10 Edw. VII. (Man.) ch. 62, construed.]

2. STATUTES (§ II A—96)—CONSTRUCTION OF STATUTES—LEGISLATIVE INTENT—PERSONAL RIGHTS, HOW GUARDED BY PRESUMPTIONS—SPECIAL SURVEY ACT (MAN.).

In construing a statutory provision, it is presumed that the legislature does not desire to confiscate the property or to encroach on the rights of persons, and it is therefore expected, that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt, especially where the objects of the Act do not obviously imply such an intention.

[Special Survey Act, R.S.M. 1902, ch. 158, sec. 3, considered.]

3. STATUTES (§ II B—112)—CONSTRUCTION OF STATUTES—DEPRIVATION OF PERSONAL RIGHTS WITHOUT COMPENSATION.

A statute should not be construed as interfering with or injuring persons' rights without compensation, unless a court is so obliged to construe it.

[Maxwell on Statutes, 4th ed., p. 427, applied; Special Survey Act, R.S.M. 1902, ch. 158, considered.]

4. STATUTES (§ II B—118)—CONSTRUCTION OF STATUTES—MUNICIPAL POWER TO EXPROPRIATE ADJOINING LANDS IN WIDENING STREETS, HOW LIMITED.

Where a statute authorizing municipalities to widen streets does not expressly or by necessary implication provide to that end for expropriating the lands of adjoining owners, and contains no provisions for awarding compensation upon such expropriation, the Act will be construed strictly in favour of vested rights of adjoining owners, especially where another class of statute confers upon municipalities the powers of expropriation necessary for such purpose.

5. INJUNCTION (§ I E—48)—RIGHT TO REMEDY—DAMAGES AND INJUNCTION—ENCROACHMENT.

A municipal corporation which exceeds its powers by infringing the property rights of an adjoining owner in widening a street, will be enjoined and held in damages.

Statement

ACTION for injunction and for damages for trespass already committed.

Judgment was given the plaintiffs for the injunction prayed for and for damages.

*H. M. Hannesson*, and *W. B. Towers*, for plaintiff.

*H. P. Blackwood*, and *A. Bernier*, for Bitulithic Co.

*I. Campbell*, K.C., and *A. E. Dilts*, for municipality of St. Vital.

MATHERS, C.J.K.B.:—In this action, the question at issue is the width of St. Mary's road, where the same crosses lot 106 of the parish of St. Boniface.

The plaintiff Peterson is the owner of a strip 45 feet wide of this lot, fronting on the above mentioned road. He bought this land in 1909, from his co-plaintiff Guay, and went into possession on the 1st of September, in that year. In June of the following year he enclosed this 45 foot strip by a fence which, at the front, was built along a line parallel to and 33 feet distant from the centre line of the road.

The contention of the defendants is that this road is 99 feet wide and extends for 49½ feet on each side of the centre line and that the plaintiff has consequently inclosed a portion of the highway 16½ feet wide across the front of his land.

In May last the defendant company was constructing a bitulithic pavement upon St. Mary's road under a contract from the defendant municipality. For the purpose of this work the company removed the fence which the plaintiff had placed along the said road 33 feet from the centre line and commenced to grade a road on this 16½ feet in dispute; but were stopped by an interim injunction.

This action is to have the injunction made perpetual and for damages for the trespass already committed.

The plaintiff was in possession and occupation, and was entitled to hold it against the defendants, unless they had a better right to the possession than he had, the onus of shewing which is on them.

The defendants plead that St. Mary's road is 99 feet wide opposite lot 106 St. Boniface, and they specially rely on a survey made under the provisions of the Special Survey Act, ch. 158, R.S.M., as establishing the width of this road as 99 feet.

Apart from the proceedings taken under this Act, the defendants have, in my opinion, failed to shew that they have any right to interfere with the plaintiff's possession, and they must stand or fall upon the right acquired by such proceedings.

The special survey relied upon was made in the beginning of this present year, and the plan thereof was filed in the land titles office as No. 1871, on the 30th July last.

By this special survey, St. Mary's road is shewn of a uniform width of 99 feet, for which purpose 16½ feet in perpendicular depth is taken off the front of the land occupied by the plaintiff.

It was not contended that the Act, as it stood before the amendment of 1910, gave power to compulsorily take land for the purpose of widening a highway. By that amendment a special survey may be ordered "for the purpose of fixing the

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location or width of any road or highway." It is contended by the defendants that these words in the statute authorize the taking of a portion of the plaintiff's land.

Section 5 of the Act makes provision for a notice to the parties affected by the special survey. The notice must state that the plan has been filed, and also set forth the object of the special survey. In this case a notice was published in the Manitoba *Gazette* on the 4th of May, 1912. This notice says that a special survey has been made:

> for the purpose of correcting errors in prior surveys of the above described portion of the said city and for the purpose of defining and establishing the location of boundaries of property within the same.

That notice conveys no intimation of any intention of going further than correcting errors in prior surveys. It gives no intimation of an intention of taking land not already included in a street or highway for the purpose of establishing a new width or new boundaries to the highway. No objections were filed pursuant to the notice and in due course an order-in-council was passed by the Lieutenant-Governor-in-council approving of the plan, and a notice was subsequently published of the order-in-council.

Section 15 of the Act says, amongst other things, that such notice:—

> when so published shall be conclusive evidence of the order-in-council and of the regularity of all proceedings leading up to the passage of such order-in-council, and of the approval of the survey and plan and, except in so far as the order-in-council may be set aside or varied under the provisions of this Act such order-in-council shall not be set aside on any ground whatever, and such survey and plan shall be thenceforth held to be approved, and shall be final and binding upon all parties whatsoever.

This provision cures irregularities leading up to the order-in-council, but is an entire failure to state the purpose of the special survey in the notice published under section 5 an irregularity? Its purpose is to let those whose rights or interests may be affected by the survey know what is meant to be accomplished by it, and to afford them an opportunity of stating their objections, if any, before it is approved. The notice published gave no intimation of the real purpose of the survey, viz., to establish an entirely new width to St. Mary's road, and for that purpose to expropriate the necessary land, but, on the contrary, stated the purpose in a manner calculated to mislead a property owner into the belief that errors in prior surveys were alone to be corrected. In my opinion this defect in the notice is a good deal more than an irregularity and is not cured by section 15.

But I think the plaintiff must succeed on another ground also. In my opinion the Special Survey Act does not authorize the expropriation of land for the purpose of widening a road.

It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach on the rights of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: Maxwell on Statutes 427.

The only reference to compensation in the Special Survey Act is in sec. 13, which provides that the Court of King's Bench or the Court of Appeal might, on an appeal from the Attorney-General, award compensation, but by sub-section (*a*) of that section it is provided that no evidence or other matter shall on such appeal be adduced or heard other than such as was before the Attorney-General.

Section 12 provides for a hearing by the Attorney-General, who is empowered to dispose of the same in such manner as he shall deem just and equitable. But apparently he is under no obligation to award compensation, no matter how much property has been taken.

If the intention of the Legislature were that the property of citizens should be taken under the provisions of this Act, one would expect to find special provision not only for awarding compensation to those injured, but some method provided for the assessment of such compensation. As no such provisions are to be found in the Act, and as the wording of the Act does not make it clear that such was the legislative intention, I must conclude that it was not intended by this Act to expropriate land for the purpose of widening the road. I am supported in this conclusion by the fact that the Municipal Act contains ample provision for widening highways and if necessary expropriating land for that purpose, and assessing the compensation to be in such case awarded.

There will be judgment for the plaintiff for the injunction prayed and for damages, which I assess at $50 and costs of suit.

*Judgment for plaintiff.*

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**GREEN, SWIFT & CO.** (plaintiffs, appellants) **v. GILBERT G. LAWRENCE** (defendant, respondent).

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*The Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. June 4, 1912.*

1. APPEAL (§ VII L 3—508)—FINDINGS OF TRIAL JUDGE—REVERSAL—TRIAL WITHOUT JURY.

It is the duty of an appellate court to reverse the decision of a trial judge on a question of fact upon a trial without a jury, "if the evidence coerces the judgment" of the appellate court to do so.

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2. EVIDENCE (§ II E 7—191) — ONUS — FRAUDULENT CONVEYANCE — SUSPICIOUS CIRCUMSTANCES.

Where a transfer of property made by a debtor is attacked by his creditors as fraudulent and intended to defeat or delay the creditors, and the transaction is shewn to be surrounded by suspicious circumstances, it will not be sustained on the uncorroborated evidence of the parties to the transaction; the onus is on them to disprove the fraud, as to which a presumption has been raised against the parties to the transaction. (*Per* Brodeur, J.)

Statement

APPEAL from the judgment of the Supreme Court of Alberta dismissing plaintiff's action.

The appeal was allowed.

*C. H. Grant*, for the appellants *ex parte*.

The respondent was not present nor represented by counsel.

Fitzpatrick, C.J.

FITZPATRICK, C.J., agreed that the appeal should be allowed with costs.

Davies, J.

DAVIES, J., concurs with Anglin, J.

Idington, J.

IDINGTON, J.:—A brother of respondent started in Strathcona in the end of 1906, or January, 1907, a gents' furnishing business. The respondent had come to the same place a year or two previously and worked as a journeyman blacksmith for some time, and later acquired, and jointly with another carried on, during the times here in question the business of a blacksmith.

Whilst so respectively engaged the brother acquired equities in several pieces of real estate.

In the end of August or the beginning of September, 1908, the brother sold out to one Forsythe and one Essery, his business for $1,000 cash and four promissory notes of $500 each, and a transfer of two lots in Strathcona estimated at $2,000.

These transactions took place on the 2nd of September, 1908. The notes except one non-negotiable were immediately transferred to the respondent. The real estate part of consideration was first directly transferred by Forsythe, one of the purchasers of the business, to respondent. The creditors had a meeting with him in the office of the solicitor for appellant with a view to induce him to surrender what he had then got of the proceeds of the sale of the business. He refused to do so and got his solicitor to draw up a second transfer to one Lavell who was to hold it for him. Then he left for the east, having first borrowed $200 from the bank.

The appellant on behalf of themselves and other creditors brought an action against him, Lavell, and the brother to recover said notes and real estate for their benefit, charging they had been fraudulently transferred.

The respondent put up no defence; but Lavell, his trustee, or alleging himself his trustee, defended as such and the Court duly declared these several transfers to and for respondent fraudulent and void.

The brother had received in April, 1907, from two men who were joint purchasers from one Mrs. Bonter, the land now in question, and at the time of his selling out and making above fraudulent dispositions of his property he had fully paid up the balance of price he assumed on taking it over and was entitled to the conveyance of said land.

No doubt before, and at all events ever since *Seton* v. *Slade*, 7 Ves. 265, [32 English Reports 108] where Lord Eldon in speaking of vendors' and purchasers' legal position, laid it down that

> from the execution of the contract, the estate is in equity the property of the vendee descendible and devisable as such,

that rule has been observed.

Such being the position of matters the brother, or respondent with his connivance, induced Bonter, acting under power of attorney from his wife, to convey to the respondent instead of to himself by a deed dated the 3rd September, 1908, the land now in question. But the respondent delayed its registration until the 26th January, 1909, though the affidavit of execution had been made on the same day as the deed bears for its date. The deed he says was handed him by his brother.

The brother fled from the country shortly after and on the 15th of September respondent, as already stated, left for the east.

Bonter, who executed this deed for his wife, had died before the trial. There is nothing to shew how he came to make this to respondent. There never had been any transfer by the brother to the respondent, nor the slightest written evidence suggesting it except receipts I am about to refer to.

The respondent had been in communication with the brother in the States from time to time ever since, but burnt the letters he received from the brother. He was forced to admit on the trial that he had one note and perhaps others for accounts due the brother which he had been collecting. It is stated, but not proven, that searches were made for the debtor's books and papers but none could be found, and respondent has not seen fit or been able to throw any light on them. The brother was no doubt insolvent at the time of said transfers as the learned trial Judge finds.

On the foregoing facts including the legal presumption I have adverted to relative to the ownership of the property immediately before and at the time of the transfer to respondent I think the onus of proving how he got the transfer in question rested upon him. He, as it were, steeped to the neck in fraud by the various other devices he joined in to help his brother to defeat his creditors, undertakes this task all alone. Let us hear his story, consider it, and measure if we can how great a strain it puts on human credulity.

He alleges his brother a day or two before the 2nd of June, 1907, told him that he could not very well carry this property

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taken for debt, due by the men assigning to him, and that the price was $1,500 of which a thousand dollars then remained unpaid. He took a day or two to consider it and on that date told his brother he would take it. Then and there in his blacksmith shop he says he paid his brother a hundred dollars and got a receipt as follows:—

June 2nd, 1907.

Received from G. G. Lawrence One Hundred Dollars, payment on Bonter lot.

$100. (Sgd.)

H. F. Lawrence.

On six different occasions after that he made payments on account of this purchase and got on each occasion a receipt for the payment.

He says they were written by his brother with a fountain pen on forms which he carried in his pocket. I believe the fountain pen part of the story. The ink is the same and as the money got was paid at different places, not identified except as to the first and last payments, it would hardly be likely to get the same ink all the time except from a fountain pen. The payments extended over fourteen months and a half, but this fountain pen was clearly replenished from the same bottle, and what more does anyone want? Some people have been suspicious enough to believe that on the clear face of them, though handled by a blacksmith and having the same identical single wrinkle across all, but otherwise smooth as the daintiest could wish, that they must have been written all at one time. No need to doubt the fountain pen part of the story. But the written verbiage in the body of each of six of them is identical except as to amount. They were on printed forms the brother is said to have carried with him. G. G. Lawrence never varies the words "payment on Bonter lot" in said six receipts. This shews how the first impression of the sale was so stamped on the writer's mind over a period of ten and a half months as never to vary any more than the ink in the fountain pen. And when the seventh and last came to be written, the 20th of August, 1908, for five hundred dollars, it only varied in this regard by the words "in full."

Why did he not get the deed on that date? Why did he wait till the 3rd of September?

Now previously to and concurrently with all these payments on account of this lot, he swears he was lending his brother money till at the time he absconded the advances amounted, with interest, to $1,529.10. Six advances in all, two in November, 1906, of $15 each; one February, 1907, $60.70; on the 23rd of April, 1907, $600; on the 2nd of August, 1908, $600; and on the 18th of August, 1908, $100; and for interest on these up to the 31st December, 1908, in accordance with agreement, $138.40.

He never received a single receipt for any of these loans from the man who always carried on his person the fountain pen and the book of receipt forms.

Then in his affidavit proving this claim for money lent, he refers to the notes transferred to him by his brother as above set forth as security for these advances. How did he fail to prove his advances? Surely it was not for want of willingness to swear to them. Yet he seems to have failed somehow.

The bank account of the brother has been examined in vain for confirmation of the respondent's story. The respondent swears he invariably paid in cash. The deposits made by the brother on or after the dates of the cash of the larger payments, on being traced disclose that they were so composed of cheques and small sums as not in any way to correspond with the alleged payments of the respondent. The inference is rather damaging to the respondent's story.

The respondent got married in October, 1907, and at some time during a period not exactly fixed thereafter kept an account in the Dominion Bank which is not produced but he admits was not used for such moneys as in question here or in relation to the loans above referred to, and says it was only for domestic purposes. He kept another account from the 10th of February, 1908, in the Canadian Bank of Commerce, which he admits was first started as a savings bank account, but immediately afterwards changed to a general current account. It was continued till the 2nd of August, 1908, on the deposit side and on the debit side till the 8th of October, 1908, but no sum drawn therefrom was used in relation to this business. Indeed the aggregate of all deposits therein was only $197.80. Why so amidst abundance? The respondent to answer this resorts to the common subterfuge of parents professing to have paid what their financial appearances would indicate they would be unlikely to possess, by alleging he kept this money out of which he made the loans to his brother and paid him on account of the purchase in question as well as other advances in relation to small real estate purchases, in a trunk in a room he hired or used. He admits the lock on the door was a common mortice lock. Such confiding trust as to keep, as he swears he did, in such a place the large sums he claims—reaching at one time close to $3,200—is somewhat rare.

During the time he kept a bank account in the Bank of Commerce, he paid his brother on the 22nd of April, 1908, the sum of $200 on this purchase, on the 2nd of August, 1908, the sum of $600, by way of loan, on the 18th of August, 1908, the sum of $600 by way of loan, and on the 20th of August, 1908, the sum of $500, being the first payment on this purchase.

His only explanation in answer to his own counsel for preferring the trunk to the bank is:—

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Q. How was it that you didn't use the bank? A. Well, I never went much on the bank, and I wasn't—I didn't know much about running a bank account.

Surely for a man who kept a current account for himself in one bank, and another for or by his wife in another, this is rather an impotent answer which some people must be excused for doubting or disbelieving. When the large sums paid out in August, 1906, were pressed upon him as remarkable, he answered: "Well, I might have borrowed that." But when asked from whom, his answer was "Different ones," and no further does he venture on that. He neither recalls names of lenders nor calls them as corroborators. Evidently he was surprised himself to find he was so flush of cash. He elsewhere tells of borrowing smaller sums in connection, I infer, with other ventures in real estate in a small way, and paying 8% therefor and on such small balances as incurred in purchases of small lots that one is surprised thereat in view of his facility for responding to his brother's calls. These incidents coupled with an analysis of his story, convince me he never had the money he professes to have advanced at the time he alleges he made them.

The house on the property in question was insured by the brother in his own name to the amount of $1,000 for twelve months from the 26th of September, 1907, represented by him to be occupied by a tenant. The brother represented then he was the sole owner of the property insured.

He had, according to respondent's story, been already paid $525 and could only have an interest of $475 in the whole property. Of course respondent is not responsible for the brother's representations or misrepresentations. But his conduct in relation to that later on is most cogent evidence against him. The house was burnt down on the 25th of November, 1907, and he saw the fire, yet is satisfied to give the lamest sort of excuse an owner of a burning house could give for not finding out more about it. He says he started for it but could not find out where it was. The conversation he relates taking place next morning is suggestive indeed, but rather than from what is said by the absence of any reference to respondent's loss or concern in the fire and failure to look for an account of this insurance, as well as the clear nonchalance he then evinced. And as to the insurance he says:—

Q. And you knew at the time the house was burned down that it was insured? A. He told me he had it insured and Bonter had it insured, and he didn't think either one would get the money.

Q. And that is all the enquiry that you made about it? A. Yes, sir.

Moreover he swears he never knew till his solicitor told him a few days before this evidence was given herein, that the brother had got the insurance as in fact he did to the sum of $905.

There is proven to have been a deposit made by the brother in his bank account of $905, by way of cheque on the 20th of February, 1908. This was not followed up in detail by the

evidence adduced by appellant. The learned trial Judge intimated later on he was satisfied the brother got the insurance and the matter of going further was dropped.

I infer this was not only the insurance money that was then deposited, but also that it sheds light on the brother's way of conducting his business in regard to his banking account, and thus renders the absence from the same account of moneys the respondent professes to have paid, a matter of surprise for those who can be surprised by anything herein. Again, is it credible that as between brothers so confiding in each other as these two did, that the brother would have sought to overreach the poor respondent by such a method as this transaction evinces if there is any truth in the respondent's story? Assuming in law such insurance might exist and be taken by the brother, let us hope for the credit of human nature it would not happen between these men.

I am not speaking of the possibilities of rascality in a man insuring a house in which he has an interest of only $475 per $1,000. We must, to make the story of respondent true, believe not only that such was the rascally conduct of the brother, but also that he exacted from the respondent, his loving brother, after succeeding in the rascality, the balance of $975 due on the purchase money and leaving him a lot worth only six hundred dollars as the respondent swears, in his affidavit on registering the deed now in question five months after having paid the sum of $500 to cover the balance of the purchase money.

There never was, says the receipts already dealt with, a scrap of a pen passed between these men to shew there was a dealing of any kind between them as to this lot. Nor did the respondent ever enter the transaction or his alleged payments on account of it any place, although he admits he kept books in his business and had some entries at home, which however he did not produce, relative to the loans he alleged.

He tells of a number of dealings in or about the same year he had in the way of buying real estate and he admits in every other case they were reduced to writing, but says this one was between brothers. And he adds, of course he had the receipts; but not one of them shews the price or the land save "on Bonter lot." Indeed it is one of the marvellous things in these receipts that by no chance did another description get entered there or any of the terms or price appear. And in this connection I may observe that one receipt has in the written part the sum of two hundred and twenty-five dollars and in figures at the foot "$125."

The reason he assigns for taking these receipts is:—

> Q. And when you bought from your brother you got receipts for money you paid him? A. I had reasons for getting receipts.
>
> Q. Why? A. There might be some trouble between him and Bonter.

How this could help him passes ordinary understanding if

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the receipts were given on their dates. But if they were all manufactured on the eve of the brother's flight and as a means of inducing Mrs. Bonter to let the deed go to him instead of to the brother as his contract calls for, I can clearly understand his meaning. It seems an unconscious half confession such as people mixed in shady transactions often evince in the witness-box.

This brings us to consider the terms which respondent says were the bargain.

> Q. And what was it? What was this bargain? Harvey F. Lawrence was your brother? A. Yes, sir. Well, my bargain was to buy it for $1,500 and pay him—make the payments just as I got the money.

Another place he swears there was not to be interest charged. Yet the brother had to pay interest at 8% per annum, on the balance of $1,000 due Mrs. Bonter when he became the assignee of the original contract and the taxes.

We are not told that respondent was assessed or who got the rents. Indeed there seems a strange omission in this evidence not having been sought out by appellant and presented. The respondent no doubt should have mentioned these matters if any bargain had been made regarding them for he states the bargain above.

The extraordinary thing happens more than once in course of these events related by this man that loans are made when one would have expected the money to have been applied to the fulfilment of the purchase if in truth there were a purchase, and the advances of sums beyond the likelihood of what such a man as respondent would have lying idle in a trunk. If he had the means he would have us believe available, it is inconceivable why they were not applied long before they were.

But if the whole story is not enough to damn the credit of him relating it, surely the plain patent false swearing we are presented with by a comparison of the evidence he gave in his examination for discovery relative to the note or notes he got from his brother to collect, and the statement in his affidavit proving his claims with that he is forced to admit on the trial hereof, should end all trust in such a story.

It is not the ordinary case of a man making a slip about something respecting which he has been taken unaware and might have forgotten. He was not only caught with the notes that became the subject of the suit I have referred to, but he had at least one other note he expressly admits his brother must have left with him, as well as other claims I have no doubt he held, but equivocated as to. These in his possession, he swears in the affidavit he knew of no other property in this country than what he specifies (being that the creditors are suing him and his trustee for) and omits all reference to these things he was collecting for his brother. The transaction involved in his

trying to defeat the creditors was disreputable in the extreme. No honest man could have engaged in it. To hide, however trifling, comparatively speaking, these small notes or accounts were, and send the proceeds to the absconding debtor and cover his dealing up by false swearing, stamps the character of the man these creditors have had so long a struggle to reach, and shews him so unutterably unworthy of credit, that it seems idle, when the onus of proof is upon him, to consider such a story as he relates as for a single moment entitled to credit.

And with every respect for the Courts below, I must add that had the onus of proof rested, as assumed below and often exists, in such cases on the creditors at the initial stage, and they had, as frequently has to be done, put him accused of fraud in the witness-box, he should have been condemned on his own story, forming clearly only part of a general scheme to defraud the creditors; and is condemned, I submit, not only by the law as it has (to which exception is taken below) been expounded and enforced by Judges in Ontario abhorrent of fraud, but everywhere else where such cases are to be found and the law is properly administered.

In England such cases as this cannot be found in the reports because, I venture to submit, impossible to receive countenance there.

The usual test has everywhere been to consider what honest, prudent men would probably do in making purchases such as attacked, and compare that with the conduct of those whose conduct is charged with having been fraudulent in its design. And when the natural circumstances are found such as would not be expected from those honest and prudent in the like case, to require some corroboration to rebut suspicions thus aroused. The man who will deliberately enter into a fraudulent scheme to defeat creditors will generally be ready to perjure himself to complete his fraud. This man has faltered in his course, and has not thought it worth while to contest here the creditors' claims in question.

I think this appeal should be allowed with costs here and in the Courts below, and the relief given the creditors as prayed for.

Duff, J.

DUFF, J.:—I think there ought to be a new trial in view of the fact that the question on which the trial Judge has passed was almost exclusively a question of credibility, and that his view has been concurred in by two at least of the members of the full Court. I am not prepared to hold that this Court ought to go further and give judgment for the plaintiffs. On the other hand, the case is exceptional and in some respects extraordinary, and the result, when all the circumstances are considered, must be regarded as most unsatisfactory. I am convinced by the learned trial Judge's reasons for judgment that the significance

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of many of the facts disclosed by the evidence was not appreciated by him. In particular, I think he failed to appreciate the full effect of the connection of the respondent and his solicitor with the transaction which had already been set aside, and which was almost contemporaneous with the execution of the deed impeached in these proceedings. I refrain from further comment upon the evidence.

I may add that I do not accede to the contention that in Alberta there is any rule of law applicable to such actions as this requiring transactions between relatives, which may be attended by suspicious circumstances, to be supported by independent evidence, *i.e.*, by evidence drawn from some source other than the testimony of the parties themselves. There is no such rule in the law of England; and only the Alberta Legislature has authority to introduce such a rule into the law of that province. It is a question of fact in each case for the Judge or the jury, as the case may be (subject, of course, to the superintending jurisdiction of the Courts of Appeal), whether or not the presumption of fraud arising from the circumstances (including, of course, the relationship of the parties) or from the statute has been overborne by the testimony or other evidence produced in defence of the transaction impugned. As a general rule, the determination of that question by the tribunal before which the witnesses have appeared will be conclusive, except in cases when there has been some error in principle or those (of which this appears to be one) in which the Court of Appeal sees convincing reasons for thinking there has been a miscarriage by reason of the evidence being misunderstood or because the attention of the tribunal has not been directed to facts having an important bearing upon the issue.

Anglin, J.

ANGLIN, J.:—Probably because he shrank from finding the defendant guilty of perjury and of supporting his false story by using documents which he knew to be fabricated, the trial Judge, "with some reluctance," dismissed this action—but without costs.

On appeal, two of the learned Judges composing the Court *en banc* (Harvey, C.J., and Stuart, J.) could not see their way to reject the story which the trial Judge had thus "believed" (?). Mr. Justice Scott, on the other hand, found no difficulty in treating the defendant's evidence as utterly incredible, and he would have directed judgment for the plaintiffs. Mr. Justice Beck, although of the opinion that the defendant had knowingly made use of fabricated receipts to corroborate his testimony, thought it would be more satisfactory that there should be a new trial in order to obtain, if possible, the evidence of the defendant's absconding brother, and because the trial Judge had not given sufficient weight to the rule requiring corroboration of the evidence of a defendant who seeks to uphold a suspicious transfer

in his favour which is attacked as fraudulent as against the creditors of the transferor.

While I agree that the learned trial Judge would appear not to have attached sufficient importance to this rule and to have overlooked the very significant circumstance that another transaction between the defendant and his brother, practically contemporaneous with that now in question, had already been set aside as fraudulent as against the creditors of the absconder, and while the evidence of Harvey Lawrence might, if that were possible, make still more clear that which is already painfully apparent, namely, that the story told by the defendant is quite unworthy of belief, I am, with respect, unable to find in these facts sufficient ground for ordering a new trial of this action instead of directing judgment for the plaintiff.

Upon a mere statement of it, the impeached transaction is suspicious. The defendant was bound to establish its honesty and validity. The only evidence adduced for that purpose is utterly incredible. Not merely for want of corroboration of the evidence of the defendant offered in support of it, but because it is in fact not supported by any evidence which can be accepted, the defence fails. No good purpose can be served by a new trial. However loath we may be to reverse the decision of a trial Judge on the question of fact, "it is our duty to do so if the evidence coerces our judgment so to do": *The "Gairloch,"* [1899] 2 Ir. 1, 13; *Coghlan* v. *Cumberland*, [1898] 1 Chan. 704.

I would allow this appeal and direct judgment for the plaintiff, with costs throughout.

Brodeur, J.

BRODEUR, J.:—This action is to set aside as fraudulent a conveyance of a lot of land in Edmonton.

It is alleged that the brother of the respondent, Harvey F. Lawrence, was the equitable owner of that property, and that, on the 3rd of September, 1908, when he was insolvent, he had the transfer made in favour of the respondent.

The respondent pleads that when his brother became the equitable owner of the lot in question, in the month of April, 1907, he almost immediately sold his interest to him, and that he paid him the price agreed upon.

The evidence shews that Harvey F. Lawrence was insolvent at the time the transfer was made on the 3rd of September, 1908. It is also established that at the same time he sold his business that he was paid by notes and property, which he transferred to the respondent, and that the transfer of those notes and of that property having been attacked by the appellants, was set aside by the Court as fraudulent.

The respondent was the only witness produced to prove the facts alleged in his defence. He was unable to bring any written evidence of the alleged agreement with his brother, with the exception of some receipts, which, instead of fortifying his contention, shew conclusively that they were all made at one time.

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When asked where he took the money to pay his brother, he stated that he kept that money in his trunk in his boarding-house, and that he had kept in that way during that time a sum of nearly $3,000.

He certainly was not a man of means, though he was doing fairly well as blacksmith.

It is rather extraordinary that he should keep in his trunk such large sums of money, when it is proved that he had a bank account in the branch of the Bank of Commerce.

The amounts which he deposited in that bank from February to August, 1908, did not reach in all the sum of $200, and he never had any balance exceeding $60.

We have in evidence the bank account of his brother, and no trace of the money which the respondent claims having given to him can be found in the deposits which he made between April, 1907, and September, 1908.

The trial Judge reluctantly dismissed the action, though he found that the receipts produced created a suspicion of fraud. The facts brought in evidence all tended to disprove the story of the respondent.

It is evident for me that the alleged sale by his brother to him of his interest in the property did not take place, that no money was paid, and that the transfer of the 3rd of September, 1908, was fraudulent.

All the circumstances of the case create the presumption that the transfer was made in the respondent's name for the purpose of defrauding his creditors: Alberta Assignment Act 1907, ch. 6, sec. 39.

It is one of those cases where the uncorroborated evidence of the parties is insufficient to prevent the deed being set aside. The following precedents: *Merchants Bank* v. *Clarke*, 18 Grant 594; *Rice* v. *Bryant* (1880), 4 A.R. (Ont.) 542; *Morton* v. *Nihan* 5 A.R. (Ont.) 20; *Rice* v. *Rice*, 31 O.R. 59; *Gowans* v. *Chevrier*, 7 Man. L.R. 62; *Merchants Bank* v. *Hoover*, 5 W.L.R. 516, declare that where a transaction is attacked as fraudulent, and it is shewn to be surrounded by suspicious circumstances, it will not be sustained on the uncorroborated testimony of the parties to the transaction.

The respondent was at one time ready to resiliate the contract and to sign the necessary document to that effect. He said he refused "because he was not sure whether there were any creditors or not."

What a lucid explanation, when he knew that his brother had disappeared and that a warrant had issued against him for having defrauded his creditors.

The appeal should be allowed with costs.

*Appeal allowed.*

## Re BASSANO.

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*Alberta Supreme Court, Walsh, J. November 15, 1912.*

1. LAND TITLES (§ VII—70)—MUNICIPAL BY-LAW—RESOLUTION—STREET CLOSING.

Where a municipal corporation, instead of proceeding by way of by-law, attempts to close a highway by mere resolutions of the council, and applies under the Land Titles Act (Alta.) for an order for the registration thereof as a by-law, the application will be refused.

[Sub-sec. 7, sec. 26, Land Titles Act, 6 Edw. VII. (Man.) ch. 24, as enacted by sec. 19, ch. 5, Alberta Statutes 1907, construed.]

2. HIGHWAYS (§ V A—245)—BY LAW CLOSING PUBLIC HIGHWAYS—STATUTORY AUTHORITY, COMPLIANCE WITH—ULTRA VIRES—CONSTRUCTION OF STATUTE.

A municipal by-law to close a public highway, the passage of which is authorized by statute, is *ultra vires*, unless passed in compliance with the provisions of the statute, including such requirements as notice to the owners of lands abutting on the highway in question and public notice by advertisement.

[The Town Act, 2-3 Geo. V. (Alta.) ch. 2, sec. 163, sub-sec. 17, construed.]

3. MUNICIPAL CORPORATIONS (§ II C 2—55)—BY-LAWS — RESOLUTIONS — CLOSING HIGHWAYS AND STREETS.

When a by-law is prescribed by the statute as the method by which a municipal corporation may exercise the power of closing a highway, such power can only be exercised in that way and effect cannot be given to a mere resolution of the municipal council.

Statement

AN application made on behalf of the town of Bassano, under sub-sec. 7 of sec. 26 of the Land Titles Act, as enacted by sec. 19 of ch. 5 of the Alberta Statutes for 1907, for an order for the registration of certain so-called by-laws of the town, closing certain streets in the municipality.

The application was refused.

*G. A. Walker*, for the motion.

Walsh, J.

WALSH, J.:—What are presented to me as the by-laws to be registered are not by-laws at all but are merely resolutions of the council and even they do not purport to enact that the streets in question shall be closed. There are three of these resolutions. The first one simply consents to the closing of some of these streets, the second one merely instructs the secretary to correspond with the Canadian Pacific Railway Company respecting the proposed closing of another street upon the company agreeing to provide a proper subway and the third strikes out from the second resolution the provision respecting a subway.

The power of a town to close a public highway is conferred by sub-sec. 17 of sec. 163 of the Towns Act which authorizes the passing of a by-law for that purpose. This sub-section contains many provisions, which must be complied with before the by-law can be passed, for notice to the owners of lands abutting

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on the highway and public notice by advertisement. When a by-law is prescribed by the statute as the method for exercising the power thus given to the corporation such power can only be exercised in that way and effect cannot be given to a mere resolution especially when, as in this case, the wording of the resolution is quite inadequate to effect the closing of the streets.

The section of the Land Titles Act above referred to only authorizes the registration of a by-law.

The motion must be refused.

*Application refused.*

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## WICKENS v. McCONKEY.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington Duff, and Anglin, JJ. June 4, 1912.*

1. EVIDENCE (§ XI K—831)—DEFAMATION—PRIOR SLANDER OF PLAINTIFF BY DEFENDANT.

Evidence of a slander spoken to a witness, but not complained of in the statement of claim, is not admissible to prove a subsequent slander which is complained of in the action. (Decision of Supreme Court of Alberta affirmed on appeal without opinion.)

2. EVIDENCE (§ XII K—983)—DEFAMATION—EXACT WORDS OF SLANDER.

In an action for slander the witnesses must be able to swear to the exact words of the defendant, and not merely to the substance or effect of them. (Decision of Supreme Court of Alberta affirmed on appeal without opinion.)

3. LIBEL AND SLANDER (§ II F—85)—PUBLICATION — QUESTION OF FACT.

The question as to whether a slander has been published or not is one of fact, and where the trial takes place without a jury, the trial judge's finding will not be reversed on appeal unless the appellate court has a "firm conviction of error." (Decision of Supreme Court of Alberta affirmed on appeal without opinion.)

Statement

APPEAL by the plaintiff G. W. Wickens from the decision of the Supreme Court of Alberta, whereby the judgment of Mr. Justice Beck, dismissing the action, had been affirmed.

The appeal was dismissed.

The action had been brought originally by G. W. Wickens and his brother, J. A. Wickens, for damages for slander in respect of certain alleged statements, charged to have been made by the defendant, accusing the plaintiff of complicity in the burning of certain hay. An order had been made by Mr. Justice Beck, of the Supreme Court of Alberta, requiring plaintiffs to elect to proceed separately and to amend the statement of claim accordingly, and the plaintiffs thereupon elected to proceed with the action of the plaintiff G. W. Wickens, and the statement of claim was amended by making him the sole plaintiff.

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The defendant pleaded a general denial, and further denied that the damage alleged resulted from the speaking and publication of the words complained of. By leave of the trial Judge, the defendant amended his defence by adding further pleas, that, if any words were spoken and published, as alleged by the plaintiff, which the defendant denies, the same were spoken without malice and in the belief that they were true, and on privileged occasions and under such circumstances as to make them privileged occasions; and, in the alternative, the defendant also set up that, so far as any words complained of were spoken and so far as they consist of expressions of opinion, they were fair comments on the facts, which were and are matters of public interest, as well as affecting the personal interest of the defendant, and that the said words were spoken and published, if at all, in good faith.

The action was tried at a special sittings of the Supreme Court of Alberta at Macleod, Mr. Justice Beck presiding, without a jury. His reasons for judgment were as follows:—

Beck, J.

BECK, J.:—The evidence, after a careful consideration, does not satisfy me that any one of the four slanders charged have been proved. A slight modification of the words alleged in paragraphs 3 and 4 would leave them applicable to John Wickens only, not to the plaintiff. Witnesses, speaking of conversations of the most casual kind, after a year and a half or a year, are apt not to be exact. The statement alleged in paragraph 5 regarding "breaking even," I think, did not refer to the fire. The slanders alleged in paragraphs 3 and 6 would, taking all the surrounding circumstances—that they were made pending a criminal inquiry, etc.—would, even if established, be privileged. See *McCann* v. *Prenevreau*, 10 O.R. 573.

The action will be dismissed with costs.

The reasons for judgment of the Supreme Court of Alberta, delivered by Mr. Justice Stuart, in which Harvey, C.J., and Scott and Simmons, JJ., concurred, were as follows:—

Stuart, J.

STUART, J.:—The plaintiff complains of five separate slanders, or, rather, of the repetition of the same slander on four separate occasions. No evidence was adduced in support of the first statement complained of.

The second complaint is that the defendant said, in the presence of one William Carr, "The Wickenses hired Lemon to burn the hay, and we are going to put him down to-night," and the innuendo is that the plaintiff and his brother, J. A. Wickens, were criminally connected with the setting fire to certain hay belonging to the defendant.

The evidence in support of this complaint consisted of that of William Carr alone. He was asked by counsel, "What was the effect of that conversation?" and he answered:—

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A. The effect was he merely said the case was in their hands and that Wickenses had hired Lemon to burn the hay and that they were going to put him down that night.

Again he was asked by the Court:—

Q. He stated what? A. That the Wickenses had hired Lemon to burn the hay and they were going to put him down that night.

Again, in cross-examination, he said:—

Q. Now, you say that he said what to you? A. Mr. McConkey said that they had the trial in their own hands and Wickenses had hired Lemon to burn the hay and they were going to put him down that night.

Q. Are you sure of those words? A. Yes, sir; Mr. Walker was present at the time.

Q. If I tell you that Mr. Walker, who is one of the witnesses for Mr. Wickens, swears that he did not hear this conversation, will it shake your ideas at all? A. Well, I say I heard it or I could not repeat it, because it was spoken to me on the sidewalk.

And again:—

Q. You were confined to this thing—that McConkey said in the presence of Walker that the Wickenses hired Lemon and that they were going to send him down to-night? A. I remember he spoke those words himself.

The evidence of Walker, which had previously been taken on commission, does not refer to this matter at all.

The third complaint, as set forth in paragraph 4 of the statement of claim, is that the defendant said to one Leonard Beaton, "The Wickenses had something to do with it," and this innuendo is that he meant thereby that the plaintiff and his brother were criminally connected with the said fire. The evidence in support of this complaint consisted of that of Beaton alone.

He was asked by plaintiff's counsel:—

Q. What did McConkey say? A. That Wickens was implicated in the burning of the hay. But of that I cannot give the exact words.

Q. That was the effect of what he said? A. That was the effect of the conversation.

Q. That who were implicated? A. The Wickenses.

Q. What would be the effect of those conversations—the general effect? A. He led me to believe that the Wickenses were implicated in the burning of the hay.

And, referring to the stories that were going round, the witness said:—

A. The feeling, I believe, that was left from the stories was that the Wickens was implicated in it.

Q. That is outside of McConkey altogether? A. That is about all I can tell you.

Q. That is outside of McConkey altogether? A. Well, and then him at different conversations telling me.

The fourth complaint is that the defendant said, in conversation with one O. H. Turner and one William Dann:—

I have come out about even; Walker squared with me and Walker broke even with George Wickens on an account which he dared not collect. If Powers had worked the way I did, there would have been someone else in the coop besides Lemon.

And the innuendo was

that Walker had compensated the defendant in respect of the loss sustained by the defendant on account of the said fire, and that Walker, in return, had been released from a debt owing by the said Walker to the plaintiff, for the reason that the plaintiff dared not compel the said Walker to pay the said debt for fear the said Walker would divulge information in connection with the said fire which would implicate the plaintiff in criminal proceedings, and meaning that if one Powers, who had an interest with the defendant in the hay that was burned as aforesaid, had used as much diligence in prosecuting the investigation in regard to the burning of the hay as the defendant did, the plaintiff would have been criminally liable and would have been placed in custody.

In support of this charge the evidence of William Dann and of O. H. Turner was adduced. Dann stated:—

Q. Just tell us what you remember? A. I remember him (McConkey) saying he had come out about even—that he had squared with Walker and Walker had broke even with the Wickenses.

Q. That who had squared up with Walker? A. McConkey.

Q. Do you remember anything further of that conversation? A. I remember he said that if Powers had worked the same as he had, they would have had more in the coop besides Lemon, and from the way they were talking and the conversation, I took it to be the Wickenses.

And on cross-examination he said:—

Q. And from that day to this you remembered, word for word, this casual conversation about perfect strangers? A. I got acquainted with them afterwards and I can remember them. If the words were not the same as that, it was the same meaning.

The witness Turner also swore that he had heard the defendant use the words sworn to by Dann. Turner, however, related other more definite statements which he heard the defendant make on another occasion, but these other statements are not complained of in the statement of claim.

The fifth complaint is that the defendant said to one "Chaffie," "Jack Wickens hired Lemon to burn the hay. The old man furnished the candles." The innuendo was that the plaintiff's brother, Jack Wickens, had procured Lemon to set fire to the defendant's hay, that the words, the "old man," referred to the plaintiff, and that plaintiff had committed an indictable offence by furnishing the candles for the purpose of burning the hay.

The evidence in support of this consisted of that of Chaffie alone. Chaffie stated:—

A. Well, I think he told me on that occasion that they were responsible for burning the hay.

Q. That who were responsible? A. The Wickenses.

Q. Do you remember any words which he used? Who were responsi-

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ble? Do you remember what words he used? A. I think he said Jack hired Mr. Lemons to burn the hay.

Q. And what else? A. I don't know—and the old man furnished the candles.

Q. Who did you understand was the old man? A. Mr. George Wickens.

Q. What was the impression he left in your mind as to who he accused for the burning of the hay? A. He left me to think that the Wickenses were responsible for the burning of the hay.

The witness repeated, in cross-examination, the "he (defendant) told me that the old man furnished the candles." Again he was asked:—

Q. The trial was on the 5th or 6th and this was in the beginning of September, and he told you that the evidence was against Jack Wickens, but there was nothing against George? Now, what about it? A. He referred to the Wickens.

Evidence was given, apparently without objection, by one Brooks that the defendant had said the same thing to him on the same day as defendant had spoken to Chaffie. But Brooks was not present at the conversation with Chaffie, and the statement of claim does not complain of any slander spoken in the presence of Brooks.

The defendant denied directly the use of the language imputed to him by these various witnesses.

[The Court here quoted the reasons of judgment given by the trial Judge.]

With regard to the alleged slander in the presence of Carr, it is obvious that the learned trial Judge took the correct view. The whole evidence shews that there was more talk about Jack Wickens than about his brother, the plaintiff. Carr did not swear to the use of any Christian name. The surname Wickens ends in an "s." He might easily misunderstand the singular for the plural in such a case, and it would be unsafe to let the case turn upon the use of the article "the" before the name, especially after the lapse of such a period of time.

The same remarks apply to the evidence of Beaton and the same result would follow. In both these cases the witnesses swore only to the substance or effect of the defendant's words. This is insufficient: 18 Halsbury 644.

The fourth complaint in regard to what was said to Dann and Turner depends entirely on an innuendo. The more direct slander to which Turner swears is not complained of in the statement of claim. While it may possibly be admissible as evidence to shew malice and aggravate damages, I think it is inadmissible merely as proof of the utterance of the subsequent slander. Neither can it be used in support of the innuendo, because it is clear from Turner's evidence that it was spoken on an entirely different occasion. Turner says it was spoken immediately after the fire, which occurred in May, 1908, while the slander com-

plained of was in April, 1909. With regard to the innuendo itself, I have much doubt whether the words are capable at all of the meaning which it is endeavoured to attach to them. The innuendo built up in the pleading is an exceedingly elaborate one, and consists of quite a number of links, which it requires some slight ingenuity to follow.

With regard to the fifth complaint, it is to be observed that Brooks does not corroborate Chaffie, but swears to another statement and another occasion altogether. The evidence of Brooks was clearly inadmissible in proof of the utterance of the slander to Chaffie. Even, again, if Chaffie's evidence is accepted, we have an innuendo to consider. This, of course, is not so difficult a one to build up as in the Turner case, and if we were satisfied that the defendant spoke the words to Chaffie, the further step might with safety be taken. But the learned trial Judge was not convinced by Chaffie's evidence alone in face of the defendant's denial, and I should hesitate to say that of two witnesses, of whom I have seen neither, that one should be believed whose evidence failed to convince the trial Judge.

Upon the whole case, while, no doubt, there was much evidence, bulking it together, which the defendant had to meet, yet I have not been able to convince myself that the trial Judge was clearly wrong in the decision he arrived at. Possibly I might have decided the other way had I heard the evidence, but I have not that firm conviction of error which alone would, I think, justify a Court of Appeal in reversing a finding of fact made by the trial Judge.

This being so, it is unnecessary to discuss the question of privilege, and the appeal will be dismissed with costs.

The plaintiff appealed to the Supreme Court of Canada.

*Wallace Nesbitt*, K.C., and *C. C. McCaul*, K.C., for appellant.

*J. Craig Brokovski*, for respondent.

FITZPATRICK, C.J., DAVIES, IDINGTON, and DUFF, JJ., were of opinion that the appeal should be dismissed with costs.

Fitzpatrick, C.J.
Davies, J.
Idington, J.
Duff, J.

ANGLIN, J.:—By his statement that the plaintiff had not proved any one of the four slanders charged, the learned trial Judge intended, as I understand him, to express his opinion that publication had not been established. Neither in the argument presented for the appellant at bar nor in my perusal of the record and factums have I found anything which satisfies me that this conclusion of the learned Judge, affirmed in appeal, was erroneous. It follows that the appeal fails and should be dismissed with costs.

Anglin, J.

*Appeal dismissed.*

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Oct. 26.

## REX v. DAVIS.

*Alberta Supreme Court, Walsh, J. October 26, 1912.*

1. INDICTMENT, INFORMATION AND COMPLAINT (§ I—2)—VERIFICATION BY OATH—AMENDMENT OF INFORMATION—FAILURE TO RE-SWEAR—SUBSTITUTION OF NAME OF ACCUSED.

A conviction for an offence against the Liquor License Ordinance cannot be sustained under an information and warrant describing the accused as "Big Boy of Calgary, Alberta," where, before the accused pleaded to it, the information was amended, without being re-sworn to, by striking out the words "Big Boy" and substituting therefor the name of the accused, William Davis, and where his objection to the jurisdiction of the police magistrate to try him on the ground that no sworn information had been laid against him, was overruled and the trial proceeded with.

[*Regina* v. *McNutt*, 3 Can. Cr. Cas. 184, and *Re Conklin*, 31 U.C.Q.B. 160, 165, specially referred to; *Rex* v. *Crawford*, 6 D.L.R. 380, distinguished.]

2. HABEAS CORPUS (§ I C—12)—JURISDICTION OF POLICE MAGISTRATE—ILLEGAL PROCEEDINGS—ABSENCE OF A SWORN INFORMATION.

An accused person in an application on the return of a summons for a *habeas corpus*, may avail himself of an objection to the jurisdiction of a police magistrate to try him for an offence against the Liquor License Ordinance, on the ground that no sworn information had been lodged against him and that he was therefore improperly brought before the magistrate, under a warrant of arrest, where his objection before the magistrate was overruled, the trial proceeded with, and the accused found guilty.

[*Re Baptiste Paul* (No. 2), 7 D.L.R. 25, followed; *Regina* v. *McNutt*, 3 Can. Crim. Cas. 184, 186, referred to.]

Statement

APPLICATION, on the return of a summons for a writ of *habeas corpus* with *certiorari* in aid, to quash the conviction of the prisoner for a breach of the Liquor License Ordinance, and for his discharge from custody without the actual issue of the writ.

The prisoner was discharged from custody.

*J. McK. Cameron*, for the prisoner.

*Stanley L. Jones*, for the Crown.

Walsh, J.

WALSH, J.:—Davis is a prisoner in close custody in the lock-up of the city of Calgary under a warrant of commitment issued by the police magistrate following his conviction for a breach of the Liquor License Ordinance. On the return of a summons for a writ of *habeas corpus* and a *certiorari* in aid he applies for an order quashing this conviction without the actual issue of the writ of *certiorari* and for his discharge from custody without the actual issue of the writ of *habeas corpus*. This application rests upon several grounds, but I have only considered one of them as it is, I think, sufficient to entitle him to his liberty.

Delmar Hodgkins laid an information before a justice of the peace against "Big Boy of Calgary, Alberta" charging him with an offence against the Liquor License Ordinance upon which this justice issued his warrant to apprehend "Big Boy."

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This warrant was executed by the informant Hodgkins by the arrest under it of the prisoner. Before the accused pleaded to this charge the information was amended by Hodgkins who struck out from it the words "Big Boy" and substituted therefor the words "William Davis" and the information thus amended was not re-sworn. Counsel for the accused called the attention of the magistrate to this and objected to the police magistrate's jurisdiction to try this charge on the ground *inter alia*, that as the information had been altered and not re-sworn there was no valid information upon which the police magistrate could act and he moved for the discharge of the accused. These objections were overruled by the police magistrate who proceeded to a trial of the accused and finding him guilty, imposed upon him a fine of $100 and costs or two months' imprisonment. It is under a warrant issued upon this conviction that the applicant is now in custody.

The warrant under which the accused was arrested could only have been issued under an information in writing and under oath. See section 654 of the Code, which, by section 711, is made applicable to summary convictions. The only sworn information is that charging Big Boy with the offence named in it. There is no sworn information of any kind against William Davis. And yet it is William Davis who is convicted of the offence which is sworn in the information to have been committed by Big Boy. In short, there is a sworn information against and a warrant to apprehend Big Boy under which a conviction is made against William Davis. And being before the magistrate under a warrant which could only have been issued on a sworn information charging him with having committed the offence therein specified, I think that in the absence of such information, he was there improperly. It may be that "Big Boy" is but an alias for "William Davis," but of this there is no evidence before me. Even if such is the case, I do not see how that would mend matters. There is authority for the proposition that an information which has been amended must be re-sworn in order to retain its validity, at any rate where a sworn information in writing is a prerequisite to the jurisdiction of the magistrate. See *Regina* v. *McNutt*, 3 Can. Cr. Cases 184, and remarks of Wilson, J., in *Re Conklin*, 31 U.C.Q.B. 160 at 166. *A fortiori* it seems to me that when in such a case there is no sworn information at all against the accused, a conviction against him is bad. The case of *Rex* v. *Crawford*, 6 D.L.R. 380, decided by our Court *en banc* is easily distinguishable from this case. That was a case of a summary trial and the judgment of the Court was rested partly upon that fact and partly upon the ground that in that case an information was not necessary at all.

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The accused was, therefore, in my opinion, improperly before the magistrate. There remains then for consideration only the question which my brother Simmons decided in one way: *Re Baptiste Paul* (No. 1), 7 D.L.R. 24, and which my brother Beck in the same matter decided in the other way, *Re Baptiste Paul* (No. 2), 7 D.L.R. 25, namely, whether or not the accused being, although improperly brought there, before a magistrate otherwise having jurisdiction over him in respect of this offence can insist upon the objection that he then unavailingly made against the right of such magistrate to try him. There are many authorities in support of the two conflicting views of this question none of which is I think binding on me so that I am free, as were my learned brothers, to follow the line of decisions that most appeals to me. I adopt the view of my brother Beck as it is to my mind more in consonance with reason and justice. If during a sittings of this Court a man came into the Court room bringing with him another by force and stated to the Judge that this other owed him an amount which was within the jurisdiction of the Court and asked him to award judgment in his favour for the same and the alleged debtor protested that the Court could not in that summary manner and without the issue of the proper process determine the question of liability, it could not be supposed for a moment that judgment could be then and there given against him. There is a certain procedure established by our civil practice which must be followed before the Court can by its judgment give effect to the rights of litigants. Why should any rule less strict be applied to the practice of Courts in matters involving the liberty of the subject when this practice is as clear cut and well defined as that of our civil Courts? All that a man can do who was in the prisoner's plight is to protest and if that protest is based upon proper grounds effect should be given to it by this Court if the magistrate disregards it. As Chief Justice Graham says in *Regina* v. *McNutt*, 3 Can. Cr. Cas. 184, at 186:—

> Having stated an objection and having caused that objection to be noted, I cannot see what further a man under arrest can do. He cannot leave the Court room; he cannot apply to have *certiorari* before judgment and he ought not to be obliged to take the chances of his point and sit mute, allowing other defences to go by abstaining from cross-examining witness.

The order will go for the discharge of the prisoner.

*Prisoner discharged.*

## Re GRAND TRUNK PACIFIC DEVELOPMENT CO., Ltd.

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Oct. 11.

*Saskatchewan Supreme Court, Lamont, J., in Chambers. October 11, 1912.*

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—RIGHT OF VENDOR TO FILE A CAVEAT — WHAT INTEREST SUFFICIENT TO SUSTAIN.

In order that the seller of land may file a caveat against it under sec. 125 of the Sask. Land Titles Act, the interest claimed by him must be derived through the document on which the caveat is founded, and must be an interest different from that held by him as owner of the land; and a right acquired through a restrictive covenant on the part of the purchaser of the land, contained in a contract of sale, is not sufficient to sustain a caveat.

[But see Annotation to this case.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—RESTRICTIONS IN CONTRACT FOR SALE—RIGHT OF SELLER TO FILE CAVEAT.

The seller of land does not acquire the right to lodge and continue a caveat against it under sec. 125 of the Sask. Land Titles Act, by a condition inserted by him in the contract for the sale of the land prohibiting the purchaser from erecting any buildings thereon other than a church, since such condition amounts only to the retention by the vendor of an interest already possessed by him, and did not confer upon him any new or different interest in the land, which is essential to sustain the filing of a caveat.

[But see Annotation to this case.]

3. BUILDINGS (§ II—18)—RESTRICTION IN DEED AS TO USE OF BUILDINGS.

A clause in an agreement of sale of vacant land that "the purchaser" will use the property for the erection of a church and buildings in connection therewith, and for no other purpose does not disclose an intention to bind subsequent purchasers and mortgagees to the restriction, and a caveat under the Land Titles Act, R.S.S. 1909, in respect thereof should therefore, be discharged, even if such constituted an interest in land under the statute.

[But see Annotation to this case.]

Statement

AN application on behalf of the Grand Trunk Pacific Development Company, Limited, to continue a caveat placed against lots 23, 24, and 25 in block 4 in the townsite of Nokomis.

The application was dismissed.

*H. F. Thomson*, for the company.

*F. W. Turnbull*, for the trustees of the Presbyterian Church, Nokomis.

Lamont, J.

LAMONT, J.:—On the 29th March, 1909, by an agreement in writing, the company sold the lots to D. J. Jamieson, J. W. Richardson, and K. W. Reekie, trustees of the Presbyterian Church, Nokomis, for the sum of $200, payable $66.74 cash, $66.74 on the 24th May, 1909, and the balance on the 24th November of the same year. The agreement sets out that, in consideration of the covenants, conditions, and stipulations contained therein and the payments to be made as therein specified, the performance of each and every of the said covenants as well as the said payments, the company agreed to sell to the purchasers the said lots on the above-mentioned terms. The agreement also contained the following provisions:—

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That he (the purchaser) will use the property for the erection of a church and buildings in connection therewith and for no other purpose.

If the purchaser, or his legal representatives or assigns, shall pay the several sums of money aforesaid punctually at the several times above fixed and shall in like manner strictly and literally perform all and singular the said conditions, then he, his heirs and assigns approved as herein provided, upon request at the office of the land commissioner of the company, at the city of Winnipeg, and the surrender of this contract, shall be entitled to a deed or transfer conveying the said premises in fee simple freed and discharged from all incumbrances, but subject to the reservations, limitations, provisoes, and conditions expressed in the original grant from the Crown, and subject to the reservation of mines, minerals, coal, or valuable stones in or under the said land.

After entering into the contract, the company caused to be registered against the lots a caveat, in which they claimed an interest under the agreement for sale with the trustees, "for the purpose of preventing the purchasers from using the property or any building thereon for any other purpose than that of a church." The purchasers erected a church upon the property, and paid the instalments of purchase money as they became due under the agreement, and received a transfer from the company in fee simple, but subject to the reservation, limitations, provisoes and conditions expressed in the original grant from the Crown, and subject to the caveat. The transfer was registered, and a certificate of title issued to the trustees, but it was also subject to the caveat. The trustees then caused the registrar of land titles to send a notice to the company to the effect that the caveat would lapse at the expiration of thirty days unless the company should, within that time, file an order of a Judge continuing the caveat.

The question to be determined on this application is, has the company a right to have its caveat continued?

The right to lodge a caveat against land in this province is given by sec. 125 of the Land Titles Act, R.S.S. 1909, ch. 41, which reads as follows:—

Any person claiming to be interested in any land under any will, settlement or trust deed or under any instrument of transfer or transmission or under any unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

This section, in my opinion, means that, to be entitled to lodge a caveat in respect of certain lands, the caveator must derive the interest which he claims through the document on which his caveat is founded. If he acquires no interest under the document, the document will not form a foundation for the lodging of a caveat. In this case the caveat is founded upon the agreement between the company and the trustees. That agreement does not give the company any interest in those lots which it did not have before. At the time the agreement was signed, the company had the entire interest in the lots by virtue of being the registered owner thereof. A company, having an entire interest in land, and desiring to sell a portion of that interest and retain the balance, may adopt one of two courses. It may, upon making a sale of the land, reserve to itself an interest therein. This it may do by limiting its grant to a portion only of the interest which it owned in the property, retaining the balance. In this case, however, the interest retained belongs to the company, not by virtue of the agreement by which it reserves its interest, but by virtue of it being the owner of the whole property and not having parted with the interest reserved. It acquires no interest in the land under the agreement for sale. Or the company may, on making a sale, convey the entire interest in the property and obtain from the purchaser a re-grant of the interest it desires to hold. In such a case, the re-grant, provided it amounted to an interest in the land, would, if in proper form, be registrable, and, if not registrable, would be a sufficient instrument of transfer upon which to found a caveat under the above section. In the agreement upon which the company has founded its caveat, there is no re-grant or re-transfer to the company of any interest in the lots by the trustees. There is nothing but a covenant on the part of the trustees to use the lots for the erection of a church, and for no other purpose. A covenant may, under certain circumstances, operate as a grant; but, before it can be given that effect, it must clearly evince an intention on the part of the covenantor to confer on the covenantee a right to affect the land in the manner claimed. What the company is really trying to do in this case is, by means of a perpetual caveat, to affect all subsequent purchasers and mortgagees of these lots with notice of the restrictive covenant of the trustees. The agreement does not disclose any intention on the part of the trustees to confer that right on the company, even if that could be considered an interest in land under the section, which I doubt. It, therefore, does not confer upon the company any interest in those lots which would be properly the subject of a caveat.

The application will be dismissed with costs, and the caveat discharged.

*Application dismissed.*

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Annotation

Building restrictions in contract.

**Annotation—Buildings (§ II—18)—Restrictions in contract of sale as to user of land.**

The judgment above reported deals with two questions upon which there appear to be no precedents exactly in point. Dealing, however, with the general principles applicable to the construction of contracts and to the interpretation of statutes, there is much to be said against the view taken by Lamont, J., in *Re Grand Trunk Pacific Development Co.*, reported above.

First, as to the building restriction contained in the contract, the general tenor of the agreement as set out in the opinion itself, indicates an intention that the property itself shall not be used for any purposes other than for a church, and not merely that the parties named as purchasers would not otherwise use the land until they conveyed it to some one else.

The express mention of "assigns" seems to have little significance in restrictive covenants of this character, limiting the method of user of the land, when the claim is raised directly by the contracting party in whose favour the restriction was imposed, and the party against whom enforcement is sought is either the other party to the contract or his assignee of the contract or of the title thereunder, taking with notice of the restriction.

An assignee of a freehold interest is only bound to observe restrictive covenants of which he has actual or constructive notice at the time of the assignment, and this obligation is only an equitable one: *Julk* v. *Moxhay* (1848), 2 Ph. 774; *Formby* v. *Barker*, [1903] 2 Ch. 539, C.A. The latter case depended on the subsequent owner taking with notice of the covenant. Lord Cottenham, L.C., said: "It is said that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

Other cases base the right of enforcement as against transferees upon the theory that a restrictive covenant creates an equitable interest in the land of the nature of a negative easement: *London and S.W. R. Co.* v. *Gomm*, 20 Ch. D. 562; and that it binds a subsequent legal owner unless he is protected as a purchaser for value without notice: *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Osborne* v. *Bradley*, [1903] 2 Ch. 446; *Re Nisbet and Potts*, [1906] 1 Ch. 386; *Wilkes* v. *Spooner*, [1911] 2 K.B. 473, 80 L.J. K.B. 1107; see also as to a restrictive covenant to erect buildings only as approved by vendor's surveyor: *Reading Industrial Co-operative Society* v. *Palmer*, [1912] 2 Ch. 42, 81 L.J. Ch. 454.

Where the vendor of freehold mentions to the purchaser that the property is subject to the same conditions as the adjoining property, the purchaser is not thereby fixed with constructive notice of restrictive covenants of which he was not aware: *Hone* v. *Gakstatter*, 53 Sol. Jo. 286.

The conveyance of a house contained a covenant on the part of the purchaser not to use or occupy the same for the purpose of any trade or manufacture or for any other purpose than a private residence. The assignee of the purchaser, who carried on a day-school for girls on premises about half a mile distant from the house, proposed to use the house as a

Annotation (*continued*)—Buildings (§ II—18)—Restrictions in contract of sale as to user of land.

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Annotation

Building restrictions in contract.

residence for herself and certain relatives, and that four of the governesses and such of the pupils as might be sent to stay with her with the object of their attending the school should also live there. It was held that the proposed user of the house would be a breach of the covenant: *Hobson* v. *Tulloch*, [1898] 1 Ch. 424, 67 L.J. Ch. 205; 78 L.T. 224; 14 Times L.R. 241.

A class of rights may be created by grant or covenant which are so far "interests" in the land in equity, that breach of them by the covenantor himself will be restrained by injunction at the instance of the covenantee himself, but are so far merely personal and collateral contracts that the assignee of the covenantor will not be bound, even though he purchase the land with notice of the existence of the covenant: *Formby* v. *Barker*, [1903] 2 Ch. 539, 551; and see *Powell* v. *Hemsley*, [1909] 2 Ch. 252, 78 L.J. Ch. 741, as to breach by the lessee of the purchaser.

A negative or restrictive covenant imposed upon the user of land will not, if it be a covenant in gross, be enforced by injunction against an owner, who was not a party to the deed containing the covenant. In 1868, F. sold to a company all his land at a certain place, and the company covenanted for themselves, their successors and assigns, with F., his heirs, executors and administrators, not to build a beerhouse or shop on a particular portion of the land.

After F.'s death the company sold to B. this particular portion with notice of the covenant; but B. nevertheless began to erect a shop. Thereupon the plaintiff, the sole devisee under F.'s will, and his personal representative, claimed an injunction to restrain him from so building. It was held that her remedy was by an action for damages, which (*semble*) would be only nominal; and that an injunction could not be granted: *Formby* v. *Barker*, [1903] 2 Ch. 539, 72 L.J. Ch. 716, 51 W.R. 646, 89 L.T. 249 C.A.

Even where a grant in the nature of an easement includes not only the particular privilege or right as incidental to a specified property, but a more extensive right, a personal privilege, irrespective of the land granted, such personal privilege could not be granted or assigned over by the original licensee since there is not known to the law such an interest in land as an easement in gross: *Purdom* v. *Robinson*, 30 Can. S.C.R. 64; *Ackroyd* v. *Smith*, 10 C.B. 164.

As to the other question raised in *Re Grand Trunk Pacific Development Co.*, above reported, it is to be observed that the statute in question, R.S.S. 1909, ch. 41, sec. 125, as to the person entitled to file a caveat in order to give notice of the claim on the record of the title, does not say that the caveator's claim must be founded upon an "interest" in lands in the technical sense in which the word "interest" is frequently used in Land Titles Acts passed in furtherance of the Torrens system of title registration. The caveator is to be a person "interested" in the land, and this difference of phraseology may include claims which would not be included as "interests in land" in the technical sense; and yet the person may in the words of the statute, be "interested under any will, settlement or trust deed, or under any instrument of transfer or transmission or under any unregistered instrument," etc. If the contract itself is an "unregistered instru-

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Annotation

Building restrictions in contract.

Annotation (*continued*)—Buildings (§ II—18)—Restrictions in contract of sale as to user of land.

ment" under the Act, is the vendor who imposes in it a building restriction in his own favour interested in the land *under* such contract? It is submitted that he is so interested. The word "under" may be construed in that connection as having the same significance as the phrase "by virtue of" which is defined in the Century Dictionary as meaning "by or through the authority of": See Words and Phrases Judicially Defined, *verb.* "Under."

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B.C.

S. C.

1912

Nov. 21.

## CASKIE v. MINISTER OF LANDS, B.C.

*British Columbia Supreme Court, Gregory, J. November* 21, 1912.

1. APPEAL (§III F—95)—LIMITATION OF TIME FOR APPEALING—CLAIM TO CROWN LANDS—LAND ACT (B.C.).

The right of appeal by way of petition against the decision of the Minister of Lands (B.C.), refusing an application for purchase of Crown Lands is not preserved by the filing of a petition in a district registry within the statutory period of thirty days when no service of that petition is made on the Minister of Lands, but a fresh petition is filed too late in the principal registry and the latter petition is served on the Minister.

[Land Act, R.S.B.C. 1911, ch. 129, sec. 163, considered.]

2. APPEAL (§ III F—95)—TIME FOR COMPLETING APPEAL—PETITION UNDER LAND ACT (B.C.)—DEPARTMENTAL DECISION REFUSING CLAIM.

The time for taking an appeal from the decision of the Minister of Lands (B.C.), refusing an application to purchase Crown Lands is to be computed from the date of the official rejection of the claim and not from a prior date when the district commissioner gave notice to the applicant that the Lands Department had instructed him not to accept applications for the land until further advised.

Statement

PETITION by way of appeal by Angus Caskie from the decision of the Minister of Lands refusing his application to purchase lot 9293, Kootenay district, and also refusing to cancel a new record of pre-emption issued to A. G. Watson, for the same land, the original pre-emption record having been cancelled by the assistant, or local commissioner for the district, on the grounds of non-compliance with the requirements of the Land Act, on the application of the said Andrew Caskie, whose chief complaint was that the pre-emptor, Watson, had not "resided" on the land pre-empted. There was ample evidence before the assistant commissioner that the man had done a great deal of work on the land in the way of clearing and cultivation, and had also erected dwellings, and stable thereon, but he, for some considerable period of the time slept in the house of his brother, on the adjoining pre-emption, about a quarter to half a mile from his line. The reason submitted for this was that his father was very advanced in years and his brother was a hopeless, bed-ridden cripple, and to both of them the pre-emptor

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was the only attendant and nurse. On the cancellation of the pre-emption record, the petitioner herein applied to the Minister of Lands for permission to purchase the land in question, but the Minister, having under consideration the application of the pre-emptor for a review of the proceedings before the assistant commissioner, telegraphed and wrote to the assistant commissioner on the 9th of July, 1912, not to accept any applications for the land until further advised, and on the 26th of July, definitely refused the application of the petitioner, on which date the assistant commissioner returned the application and money of the petitioner.

On the 22nd of August Caskie filed his petition from this decision in the Nelson registry of the Supreme Court. He did not serve either the Minister or the assistant commissioner with a copy of this petition. On the 3rd of September, the agents of the petitioner's solicitor filed a petition in the Victoria registry of the Supreme Court, and the Minister was duly served with a copy thereof.

The petition was refused.

*Maclean*, K.C., for the petitioner.

*Bass*, and *Bullock-Webster*, for the Minister of Lands.

Gregory, J.

GREGORY, J.:—Mr. Bass, in opposing the petition, raises five grounds, viz.: (1) the petitioner is not a person affected by the commissioner's decision (sec. 49); (2) he has not complied with the provisions of sec. 34 of the Land Act; (3) he should shew that he is not disqualified from purchasing under sec. 49 of the Land Act; (4) the appeal is on a point of fact and not of law (sec. 163); (5) the appeal is out of time (sec. 163).

His last point is the only one which I think is sound, because it does not appear to me that the appeal is out of order. This, of course, depends upon the date of the commissioner's decision and the date on which the appeal is taken. Mr. Bass thinks that the decision appealed from is contained in the letter of the 9th of July, from the district commissioner advising the petitioner's solicitor that he had received instructions from the department not to accept applications for the land in question until further advised. He, however, retained the application and cheque accompanying it until the 26th of July, when he wrote returning both and advising the solicitor that the department had sanctioned the issue of a new record to Watson. This is, I think, the appealable act, and the one which the petitioner has appealed from. It is dated the 26th of July.

The evidence before me is that the petition was filed in the registry office at Victoria on the 3rd of September, 1912, and served upon the commissioner (Minister) on the same day, thus more than one month after the rendering the decision, and so too late.

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Mr. Maclean, for the petitioner, stated that the petition was filed in Nelson on the 22nd of August, 1912. That may or may not have been a different petition. Evidently the petition served upon the Minister of Lands was the petition filed at Victoria, and the one which, I think, must govern.

The prayer of the petition will, therefore, have to be refused, with costs.

*Petition refused.*

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N.S.

S. C. 1912

Oct. 21.

## WHYNOT v. McGINTY.

*Nova Scotia Supreme Court, Russell, J. October 21, 1912.*

1. BILLS OF SALE (§ III—40)—AFTER-ACQUIRED PROPERTY — EQUITABLE TITLE.

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained bona fide and without notice.

[*Reeves* v. *Barlow*, 12 Q.B.D. 436, commented on; *Holroyd* v. *Marshall*, 10 H.L.C. 191, applied.]

2. BILLS OF SALE (§ III—40)—AFTER-ACQUIRED PROPERTY—BILLS OF SALE ACT (N.S.).

The Bills of Sale Act, R.S.N.S. 1900, ch. 142, does not by registration protect the grantee as to property to be acquired by the grantor after the making of the bill of sale and which the latter thereby purports to transfer in advance of his obtaining title thereto.

[*Thomas* v. *Kelly*, 13 A.C. 519, referred to.]

Statement

TRIAL of action for conversion of chattels.

*McLean*, K.C., and *Margeson*, for plaintiff.

*Hall* and *Purney*, for defendants.

Russell, J.

RUSSELL, J.:—The plaintiff claims to be the purchaser of a cow which the defendant took possession of under a bill of sale. The cow in question was not the property of the defendant when the bill of sale was made, but the instrument contained the usual clause making the security cover after-acquired property. As I understand the law, the defendant's title to the after-acquired property is a creation of equity only, although there are statements in the decision of the Court of Appeal, *per* Bowen, L.J., in *Reeves* v. *Barlow*, 12 Q.B.D. 436, which might be cited to shew that such a transaction conferred a legal title. I do not, however, understand that these expressions were intended to overthrow the well established doctrine as understood ever since the case of *Holroyd* v. *Marshall*, 10 H.L.C. 191.

The defendant's title being in equity merely has to give way to a legal title obtained *bonâ fide* and without notice. Actual notice of the bill of sale there was none, and the case of *Joseph* v. *Lyons*, 15 Q.B.D. 286, seems to negative the idea of a constructive notice arising from the filing of the bill of sale. Suspicion is thrown upon the *bona fides* of the alleged sale, but

there is nothing that I can act upon. The plaintiff swears that he bought the cow for $25, and gave credit on a board bill for the amount. I have my own suspicions, but they are not strong enough to warrant me in finding that there was no sale in the absence of any evidence to impeach its validity. I think the cow was worth $40 for which amount the plaintiff must have judgment with costs.

It is further contended that the Bills of Sale Act does not refer to after-acquired property, for which *Thomas* v. *Kelly*, in 13 A.C. 519, is cited. I think this contention is correct, but it is not necessary to the success of the plaintiff.

*Judgment for plaintiff.*

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## MAHOMED v. ANCHOR FIRE & MARINE INSURANCE CO.

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*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. INSURANCE (§ III E 1—75) — FIRE INSURANCE — APPLICATION SIGNED WITHOUT READING WHEN FILLED IN BY ANOTHER PERSON—EFFECT OF.

If an applicant for a fire insurance policy chooses to sign, without reading, the application filled in by some other person, and acquiesces in that form of application, he must be treated as having adopted it. (*Per* Irving, J.A., dismissing appeal in an equally divided court.)

[*Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516, applied.]

2. INSURANCE (§ III E 1—75)—FIRE INSURANCE — APPLICATION — APPRAISEMENT — WHEN A LIMITED SUB-AGENT OF INSURER PRESUMED TO BE AGENT OF INSURED.

Upon an application for a fire insurance policy, where an agent of the proposed insurer sends to the applicant a sub-agent, whose functions are limited to getting the application signed and the amounts apportioned as to value and risk, and where the insurer's sub-agent, upon the suggestion of the applicant, appraises the property, makes the apportionment and inserts same in the application, which thus completed is signed and adopted by the applicant; the insurer is not bound by the knowledge of the sub-agent as to such appraisement, but, as to it, the sub-agent is presumed to be the agent of the applicant. (*Per* Irving, J.A., dismissing appeal in an equally divided court.)

[*Biggar* v. *Rock Life*, [1902] 1 K.B. 516, applied; *Bawden* v. *London, Edinburgh, and Glasgow Ins. Co.*, [1892] 2 Q.B.D. 534, distinguished.]

3. INSURANCE (§ III E 1—75)—FIRE INSURANCE — APPLICATION — APPRAISEMENT BY LIMITED SUB-AGENT — APPLICATION SIGNED BY APPLICANT—WHEN "ADOPTED."

Upon an application for a fire insurance policy, where the insurer's agent sends a sub-agent, having limited authority, to the applicant to get the application signed and the amounts apportioned as to value and risk, and where, instead of having the necessary appraisement made by the applicant, the sub-agent, at the applicant's request, makes it himself and inserts it into the application, and where the applicant then without reading it signs the application; this was an adoption of the application by the applicant. (*Per* Galliher, J.A., dismissing appeal in an equally divided court.)

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APPEAL by plaintiff from judgment of Murphy, J., setting aside the verdict of the jury rendered in his favour and dismissing the action.

The appeal was dismissed by an equally divided Court.

*Craig*, for appellant.

*J. A. Russell*, for respondent.

MACDONALD, C.J.B.C.:—The defendants' head office is at Calgary in the Province of Alberta. They appointed L. B. Freeze their general agent for British Columbia, and supplied him with blank forms of their policy signed by the president and manager. He solicited insurance from the plaintiff's husband, who was acting on her behalf. The husband told Freeze that she would take insurance to the extent of $1,800 on her stock of merchandise, furniture and fixtures, and $300 on the contents of a stable, and suggested to Freeze that he should inspect the goods and effects and ascertain whether he would insure them for these amounts. Freeze made the inspection, and filled up a form of proposal—the form supplied by the defendants—in which he described the merchandise and household effects as being contained in a one storey dwelling house and store. He stated the value of all the goods including the contents of the stable to be $3,000, and apportioned the insurance as follows: to stock of merchandise and meats, $1,300; to store fixtures and furniture, $200; to household furniture, $300; and to contents of stable, $300. He admits that the proposal was not read over by him to the plaintiff or her husband when they signed it. They are Italians, and it is apparent that they left the matter entirely in the hands of Freeze, as the insurer. On the day on which the proposal was signed, Freeze issued the policy. Some months afterwards a fire occurred and the goods were partially destroyed and damaged. The defendants' appraiser fixed the loss at $940.05. This action was brought for that sum. The defendants resisted on the following grounds: that in the signed proposal the building was erroneously described as a one storey building, whereas part of it was two storeys in height; that it was erroneously described as a store and dwelling, whereas it was a store and lodging house; that the value of the goods was over-stated, and that a chattel mortgage was not disclosed. There were also set up as defences that the action was not commenced within six months next after the loss or damage occurred, and that the proofs of loss were insufficient. I do not think there is any substance in the last mentioned defence. Nor is the action out of time. While it was not brought within the six months specified in variation No. 29, it was brought within the year specified by the statutory condition. The variation of the statutory conditions in this policy are not set forth in accordance with the provisions of the B.C. Fire Insurance Act,

but purport to be in accordance with an Ontario Act. They are, therefore, to be disregarded, and as far as this policy is concerned, the rights of the parties depend upon the statutory conditions only: *Citizens Insurance Co. of Canada* v. *Parsons* (1881), 7 A.C. 96, 119; *Green* v. *Manitoba Assurance Co.* (1901), 13 Man. L.R. 395. The verdict effectually disposed of the chattel mortgage.

The only question left, the substantial one in this appeal, is, are defendants estopped by reason of the acts and knowledge of Freeze from setting up the alleged misrepresentations, and over-valuation (if any) contained in the proposal? So far as the facts are concerned, the jury, upon sufficient evidence, have found them in favour of the plaintiff. It may be doubted that the stock of meats and groceries, to which $1,300 was apportioned, were ever of that value, though there is no positive evidence of this, but it is certain that the store fixtures and household furniture were of much greater value than the sums apportioned to them. No question arises as to the contents of the stable, so that that item may be eliminated from the case. In answer to the question, what was the value of the property proposed to be insured on the date of the application for insurance, the jury answered that they could not accurately state it. They, however, found that the value was placed on it by Freeze, and that the apportionment was made by him, that from his inspection of the property he knew or ought to have known that it was a store and lodging-house, and that neither the plaintiff nor her husband misrepresented the value of the property. The learned trial Judge nonsuited the plaintiff, basing his judgment largely on No. 20 of the statutory conditions which provides that no condition of the policy should be deemed to be waived except in writing signed by an agent of the company. With respect, I am unable to see the applicability of this condition to the facts of this case. The first condition is the one relied upon by defendants, and they contend that that cannot be waived except in writing. That condition provides that false description or misrepresentation shall avoid the policy. But this is not a condition subsequent. There was in my view of the case no attempt to waive condition No. 1. The situation and value of the goods, and the character of the house were known to and described by Freeze. He described and insured goods which he himself saw contained in a house which he himself saw, at a valuation which he himself made, and the question is not whether there was a waiver of any condition of the policy, but whether the company is not now estopped from contending that the facts are otherwise than as known to and stated by Freeze. The question is not a new one, but it is undoubtedly a very important one. By their mode of doing business insurance

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companies are forced to rely very largely on the statements made in proposals for insurance as a protection against the carelessness and dishonesty of their agents. On the other hand, applicants for insurance, who, in a great many cases as we know, are not accustomed to business of this nature, look to the agent to put the proposal and all matters connected with it in proper form. They sign documents which are submitted to them, relying upon the superior knowledge and judgment and good faith of the insurance company as represented by their agents. This is particularly so in the case of persons of the plaintiff's class, calling in life, and foreign birth and language.

It was urged upon us, relying upon *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516, that the plaintiff was bound to know what she signed. Wright, J., in that case approved in a general way of *New York Life Insurance Co.* v. *Fletcher* (1885), 117 U.S.R. 519, where that doctrine was asserted. But it is apparent from the reasons given in each of these cases that the Courts did not intend to lay down a doctrine applicable to all cases, but only to the facts and circumstances of the cases before them. Unquestionably no such doctrine has been adopted in any Court in respect of ordinary contracts. Circumstances of education, station in life, ignorance of the kind of business in hand, confidence in the other party, absence of advice, and many others may be considered. And I am confident that there is no difference in this respect between such contracts and contracts of insurance; and no conditions contained in the proposal or in the policy can affect the question if under the circumstances of the particular case the party was not bound to know what he signed. If he were not so bound how could anything contained in the document, call them conditions, warranties or representations, affect the matter, for *ex hypothesi* he knows nothing of them. That the applicant for insurance is not in all cases bound to know what he signs was decided in the case of *Bawden* v. *London, Edinburgh and Glasgow Assce. Co.*, [1892] 2 Q.B.D. 534, and in several other cases referred to in argument.

Reverting to the case of *New York Life Insurance Co.* v. *Fletcher* (1885), 117 U.S.R. 519, it is apparent that there is no conflict between that and the *Bawden* case. In the former, reference is made with approval to *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, where the same Court adopted a statement of the law contained in the American leading cases as follows—

> By the interested or officious zeal of the agents employed by the insurance companies, in the wish to outbid each other and procure customers, they not infrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an

assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.

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And in the reasons for judgment it was further stated that the reason for this (estoppel of the company) is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant who procured the plaintiff s signature thereto.

To the like effect is the judgment of the same Court in *Insurance Co.* v. *Mahone*, 21 Wall. 152.

The case at bar appears to me to be a stronger one in favour of the plaintiff than either of these. The agent Freeze, the scope of whose authority was, at least, as wide as that of any of the agents in the cases referred to, considered, and I have no doubt quite honestly, that this building could be properly described as a one-storey building. He considered that it could be properly described as a store and dwelling; and his evidence is that the rate would be the same for a store and dwelling as for a store and lodging-house. He chose to employ his own language to describe both.

With regard to the alleged over-valuation, there is no evidence of it, and the onus was upon the defendant. The jury found that they could not state the value at the time of insurance. It has, therefore, not been proven that there was an over-valuation of the whole of the goods and effects in question. The apportionment of the insurance to the different classes of goods was the act of the agent, and, to my mind, it makes no difference whether Freeze did it himself or had it done by one of his employees. The plaintiff asked for an insurance upon the whole without making any segregation save as to the contents of the stable, and the jury have found that no misrepresentation was made by either the plaintiff or her husband.

Under these circumstances, I have no hesitation in coming to the conclusion that the learned trial Judge was wrong in nonsuiting the plaintiff; and would therefore allow the appeal and direct that judgment be entered for the plaintiff for the amount claimed, namely, $940.05.

IRVING, J.A.:—I would affirm the judgment and dismiss the action on the ground that there was over-valuation of the merchandise which was valued at $1,300. The other matters were rated as follows: Frame building, $200; other goods, $300; and stable, $300; in all, $3,000. The plaintiffs admit that they asked for $3,000, but contend that as they did not themselves fix the sum of $1,300, for the merchandise, they are not responsible for the merchandise being over-valued.

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In *Biggar* v. *Rock Life Assurance*, [1902] 1 K.B. 516, it was held that if a person in the position of the plaintiff chooses to sign without reading it, a proposal form which somebody (say the company's agent) has filled in, and if he acquiesces in that form being sent as signed by him, he must be treated as having adopted it. Business could not be carried on if that were not the law.

The learned trial Judge left to the jury these questions: Did Freeze apportion the insurance to be carried on the different classes of property?

Did Freeze place the value set out in the application on the property?

To both these questions the jury answered yes. With every deference these questions should not have been left to the jury at all. There was no evidence upon which the jury could find any but one answer to both questions, and that was "no." The witnesses to the facts upon which these two answers are based, were Freeze, the plaintiff and her husband. These are all the plaintiff's witnesses. Freeze says (p. 37):—

> I took part of the application for insurance from Mahomed himself. He told me what he wanted—$2,000, or $2,100 (p. 38). I wrote the application out in the street and then I took it to the office. Afterwards I sent Howden to Mahomed's store to get it signed, and the amounts apportioned, *i.e.*, the amounts to go on the stock and on the furniture, and on the house, etc. It (the application) was brought back signed by the plaintiff and Mahomed and was lying on my desk when I saw it. The total value was then written on it. Also, the other amounts to be insured, viz., groceries, $1,300; office furniture, $200; house furniture, $300; and stable, $300. I went down there (p. 34) just before the policy was issued. He had not got his stuff in there at all. He had some meat and other things downstairs. I don't think the upstairs had anything at all.

Mahomed says (p. 83):—

> Freeze was not at my store when the application was signed—just "the once," *i.e.*, just the one (Howden), the other agent again.

Mrs. Mahomed says (p. 111):—

> I signed the application in my store. Nobody was there except my husband "and the agent." "Just the agent."

This must mean Howden, it cannot mean Freeze. She continues in answer to the question:—

> Q. Did you read it at the time you signed it? A. No, I did not read it at all.
>
> Q. Did you hear any talk about how much insurance there should be, did you hear your husband talk with the agent about that, as to how much insurance there should be? A. Yes.
>
> Q. What was said? A. He asked me how much and my husband told him to look it all over and to judge how much he thought it was to make the insurance.

Q. Look it all over and see how much he thought it was worth and put that much in? A. Yes.

Q. What happened after that. Did they talk about those insurance matters? A. He fixed the insurance and I signed my name to it, and he went to the office and after he went to the office and the next day he brought the policy, etc.

At p. 83, Mahomed makes a statement that gives the impression that it was to Freeze he said you make the apportionment, etc., but when we read the testimony of the plaintiff herself and Freeze, when she had called, we see that he speaks inaccurately. He said (p. 83) Freeze was there again and got everything, and made the rates to me, and he said:—

I will send my man down (*i.e.*, Howden without doubt)—

and he (*i.e.*, Howden) said:—

How do you want to get the insurance put down? etc.

Mahomed could not have asked Freeze to make the valuation (1) because according to Freeze the stock was not there (p. 34) and Mahomed's statement at p. 82 agrees with this—

He came there again and we had a little groceries.

(2) Because according to Mrs. Mahomed this conversation took place between her husband and Howden in her presence at the time of signing the application. (3) Again, Mahomed says (p. 102), in answer to the question: Did you tell Mr. Freeze what any of the groceries or things were worth? he (Freeze) said:—

You had better figure the cost what you think all the effects would cost.

No witnesses were called for the defence, and nothing can be clearer on the plaintiff's testimony than this, that the apportionment was made at the interview between Mr. and Mrs. Mahomed and Howden at the time of the signing the application, and that Freeze was not present on that occasion. There was no evidence to justify the finding of the jury that Freeze either apportioned the insurance to the several items, or that he placed the total valuation at $3,000. In fact it was not suggested. We are, therefore, not troubled with the finding of the jury that Freeze had a knowledge of the true facts or that he misled the plaintiff.

Howden, it seems, from the plaintiff's own testimony, did exactly what he was instructed to do. He asked her how much the insurance should be, and she, instead of figuring up the cost of the different things, said "examine for yourself." Assume that nothing more was said, and that Howden made the examination and came to the conclusion that the merchandise would stand being insured at $1,300, and the true amount was about one-half that sum, would it not be the duty of the assured to say

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"You have made a mistake?" Would not the assured infringe the first statutory condition? In my opinion she would.

If she, after asking Howden for his opinion, or for a suggestion, chooses to sign the application without looking at it, she adopts him as her agent, and is bound by his misrepresentations. For these reasons, I think the principles laid down in *Biggar* v. *Rock Life*, [1902] 1 K.B. 516, apply.

Are the company bound by Howden's knowledge assuming that he had knowledge? I should think not, as he was an agent only to get the proposal signed and the amounts apportioned. The apportionment was to be made by the plaintiff. Her application was to be the basis of the contract. She had the only means of truly stating what the value was. The case differs from *Bawden* v. *The London, Edinburgh & Glasgow Assce. Co.*, [1892] 2 Q.B. 534, because Howden was sent up for a certain limited purpose.

Martin, J.A. (dissenting).

MARTIN, J.A.:—With every respect for the view taken of this case by the learned trial Judge, the judgment he directed to be entered cannot stand, certainly not for the reason he bases it on, viz.: condition 20, relating to waiver, as to which it is only necessary to say that during the argument we unanimously ruled that it was not a question of waiver and that waiver had nothing to do with misrepresentation. Were it not for this opinion of the learned trial Judge he considers that the case would have been brought within the principle of the decision of the Court of Appeal in *Bawden* v. *London, etc., Assce. Co.*, [1892] 2 Q.B. 534. I think that on the finding of the jury on the various points clearly explained to them in the charge, on every one of which there was ample evidence for them to find either way, that this case must be governed by the *Bawden* case, and the other authorities in Canada to the same effect which were cited to us.

We were referred by defendant's counsel to a decision of Mr. Justice Wright, delivered on Nov. 27, 1901, in *Biggar* v. *Rock Life Assce. Co.*, [1902] 1 K.B. 516, but the learned Judge distinguishes the case before him from the *Bawden* case, because the agent "invented the answers to the question" and therefore he could not be considered the agent of the company. The learned Judge relies upon an American authority in regard to which all I need say is that he himself on p. 525 expresses a doubt as to its "doctrines" being "applied to their full extent." Moreover, in the following year, 20th Jan., 1902, the same learned Judge decided *Hough* v. *Guardian, etc., Assce. Co.*, 18 Times L.R. 273, which is in harmony with the *Bawden* case.

With respect to the objection taken to the incompleteness of the proofs of loss, I am clearly of the opinion that in view of the correspondence between the company and the plaintiff's solicitors the company is not entitled to press that defence.

Finally, as to the lack of notice under condition 13*a*, that is a matter which can and should in the circumstances be cured under the remedial provisions of sec. 2 of the Fire Insurance Policy Act as interpreted by *Lewis et al.* trading as the *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1910), 44 Can. S.C.R. 41.

The appeal should, in my opinion, be allowed.

GALLIHER, J.A.:—In my view of the case, there is only one point I need consider, viz.: the over-valuation of the stock in trade as apportioned in the insurance. Were the jury justified in finding that Freeze made the valuation and the apportionment?

A perusal of the evidence discloses the following facts: Freeze, who was called as a witness for the plaintiff, says he did not make the apportionment; that he sent a man named Howden from his office to the plaintiff's premises to make the apportionment and have the application signed, and when the application was presented to him for signature the figures were filled in and it was signed by the plaintiff and Thomas Mahomed, her husband. Thomas Mahomed says, at p. 83 of the appeal book:—

> Q. Before I leave that Mr. Mahomed, at the time these two men were there, Freeze and the agent, and went over the premises like you have been telling, was that before that paper was signed or after? A. Before that paper was signed. One time he came himself and got everything.
>
> Q. Who? A. Freeze. He was there again and got everything and made the rates to me and he said—"I will send my man down to you," and he said—"How do you want the insurance put down." And I asked him—"You had better look yourself," and he said—"Will $1,800 be enough for the stock and the rooming house and dining room, and the kitchen?" And I said "That is alright, I think that is enough."

There may be some confusion as to who is meant by "he" as it appears in connection with the words "he said how do you want the insurance put down," etc., but I think it is made clear from the evidence which precedes it when in reply to Mr. Craig, Mahomed says, at the bottom of p. 82 and the top of p. 83, that the application was signed at a time when Freeze was not there, but the other one, meaning Howden, and in view of this, I think it must also be concluded that the person spoken of as the "agent" by the plaintiff in her evidence (A.B. 111) is Howden. The evidence follows:—

> Q. Did you read it at the time you signed it? A. No, I did not read it at all.
>
> Q. Did you hear any talk about how much insurance there should be, did you hear your husband talk with the agent about that, as to how much insurance there should be? A. Yes.

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Q. What was said? A. He asked me how much and my husband told him to look it all over and to judge how much he thought it was to make the insurance.

Q. Look it all over and see how much he thought it was worth and put that much in? A. Yes.

Q. What happened after that? Did they talk about those insurance matters? A. He fixed the insurance and I signed my name to it.

If I am correct in this view of the evidence, there is no evidence upon which the jury could find that Freeze made the apportionment personally, in fact quite the contrary.

In this view, then, we have the fact that Freeze sent Howden down for two purposes to make the apportionment, and have the application signed, and we find both the plaintiff and her husband discussing with him the very question which Freeze says he, Howden, was sent to settle.

Now, both the plaintiff and her husband say that they did not make the apportionment, and the jury are entitled to believe that, but they did not say directly that Freeze did, nor in my opinion is there evidence upon which a jury could reasonably so find; so that the strongest light in which the plaintiff's case can be put is that it was made by Howden. Howden appears to have worked this one day in the office with which Freeze was connected; however, he was sent down by Freeze to make the apportionment, and we will assume that he filled in the figures after consultation with the plaintiff and her husband, as they describe it in their evidence. The plaintiff and her husband then signed the application, a part of which was a declaration that the values, etc., set out in the application were just and true. This was then taken to the agent Freeze, and by him forwarded to the company, and Freeze for the company, issued the policy which he had power to do without reference to the company.

Admittedly the stock in trade was insured for twice its value, so that the policy is vitiated under clause 1 of the conditions unless the company are estopped by the act of their agent.

A number of cases have been cited to us in support of this contention, but to hold the company estopped under the circumstances of this case would, to my mind, be going further than has yet been done. It is not reasonable to suppose that Howden was sent there to merely fill in the figures on his own responsibility. If that were so, Freeze who, according to the evidence for the plaintiff, had inspected the premises and their contents, would have filled them in himself, and Howden would simply have had to obtain the signatures; but supposing Howden did fill in the figures after the conversation detailed at pp. 83 and 111, and without insisting on plaintiff's naming the values herself, can the plaintiff by saying, You go on and make the valuations, and then warranting their truth to the company as well

as the general agent who issued the policy, successfully urge that she did not adopt Howden's valuation as hers. It seems to me to hold so, under the circumstances of this case, would be to open the door wide for the practice of fraud.

I would dismiss the appeal.

*Appeal dismissed by an equally divided Court.*

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## Re THE MARRIAGE LAW OF CANADA.



(Reference by the Governor-General in Council to the Supreme Court of Canada of Certain Questions concerning Marriage.)

*Judicial Committee of the Privy Council, Viscount Haldane, L.C., Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw, and Chief Baron Palles. July 29, 1912.*

1. CONSTITUTIONAL LAW (§ II A—160)—POWERS OF DOMINION PARLIAMENT —MARRIAGE LAWS.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive legislative authority over "Marriage and Divorce" and upon the Legislature of each Province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," the Parliament of Canada has no power to amend the Marriage Act, R.S.C. 1906, ch. 105, by adding thereto either the whole or any of the provisions of a section, providing that every ceremony or form of marriage, theretofore or thereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony; and that the rights and duties as married people of the respective persons married as aforesaid and of the children of such marriage shall be absolute and complete, and that no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

[*Re Marriage Laws*, 6 D.L.R. 588, 46 Can. S.C.R. 132, affirmed on appeal.]

2. MARRIAGE (§ I—2)—POWERS OF PROVINCIAL LEGISLATURE TO MAKE LAWS RESPECTING THE SOLEMNIZATION OF MARRIAGE.

Section 92 of the B.N.A. Act which enacts that the Legislature of each province may exclusively make laws relating to matters within an enumerated class, among them being "property and civil rights," "solemnization of marriage," and "generally matters of a local or private nature in the province," operates by way of an exception to the powers conferred by sub-sec. 16 of sec. 91 of the B.N.A. Act as regards "marriage,' and the Provincial Legislatures therefore have jurisdiction to enact conditions as to solemnization which may affect the validity of the marriage contract.

3. STATUTES (§ II A—104)—CONSTRUCTION—MEANING OF WORDS—"THE SOLEMNIZATION OF MARRIAGE"—B.N.A. ACT, SEC. 92.

The words, "the solemnization of marriage in the province" as used in sub-sec. 12, sec. 92, of the B.N.A. Act, *primâ facie*, import all that was ordinarily meant by solemnization in the systems of law in force in the various provinces of Canada at the time of the passing of the Act, including conditions which affect the validity of the marriage.

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4. STATUTES (§ II A—103)—CONSTRUCTION — MEANING OF "SOLEMNIZATION OF MARRIAGE"—LIMITATION OF WORDS "MARRIAGE AND DIVORCE."

The rule as to giving to the words of a statute their plain and ordinary meaning, when applied with due regard to the law existing in Canada at the time of the passing of the British North America Act, gives to the words "solemnization of marriage" as contained in subjects which a provincial legislature has jurisdiction under sub-sec. 12 of sec. 92, of the B.N.A. Act, an effect in the nature of a limitation upon the words "marriage and divorce" as contained in sub-sec. 26, sec. 91, of the said Act as regards the constitutional power of the Parliament of Canada to legislate upon the subject of marriage.

5. CONSTITUTIONAL LAW (§ II A—160)—SOLEMNIZATION OF MARRIAGE — PROVINCIAL JURISDICTION.

The powers conferred by sub-sec. 26, sec. 91, of the B.N.A. Act upon the Parliament of the Dominion of Canada to make laws, in respect to "marriage and divorce" are limited by the provisions of sub-sec. 12, of sec. 92, of the said Act, which confers exclusive jurisdiction upon the legislatures of each province to make laws relating to "the solemnization of marriage in the province."

Statement

THIS was an appeal, by special leave, on behalf of the Dominion Government of Canada from the answers given by the Supreme Court to a series of questions submitted to them by the Governor-General in Council under the authority of section 60 of the Supreme Court Act (*Re Marriage Laws*, 6 D.L.R. 588, 46 Can. S.C.R. 132).

*Wallace Nesbitt*, K.C. (of the Canadian Bar), *Lafleur*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, appeared in support of affirmative answers to questions 1 and 3 and of negative answers to sub-secs. A and B of question 2.

*Mignault*, K.C. (of the Canadian Bar), and *Hellmuth*, K.C. (of the Canadian Bar), represented the other side.

*R. C. Smith*, K.C. (of the Canadian Bar), and *Geoffrion*, K.C. (of the Canadian Bar), for the Attorney-General of Quebec.

*F. Arnoldi*, K.C. (of the Canadian Bar), for the Attorney-General of Ontario, supported the enactment of a general marriage law for the whole of Canada and adopted so much of the argument as was consistent with that view.

The questions submitted to the Supreme Court were as follows:—

1. (*a*) Has the Parliament of Canada authority to enact in the whole or in part Bill No. 3 of the first session of the 12th Parliament of Canada, intituled "An Act to amend the Marriage Act"?

The Bill provides as follows:—1. The Marriage Act, ch. 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid

marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony. (2) The rights and duties, as married people, of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

(*b*) If the provisions of the said Bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

2. Does the law of the province of Quebec render null and void unless contracted before a Roman Catholic priest a marriage that would otherwise be legally binding, which takes place in such province (*a*) between persons who are both Roman Catholic, or (*b*) between persons one of whom only is a Roman Catholic?

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages, whether (*a*) heretofore solemnized, or (*b*) hereinafter to be solemnized, shall be legal and binding?

The answers of the Justices of the Supreme Court were in substance to the following effect:—1. As to the first question, the Chief Justice, Mr. Justice Davies, Mr. Justice Duff, and Mr. Justice Anglin were of opinion that the proposed legislation was *ultra vires* of the Parliament of Canada. 2. As to the second question, all the Judges concurred in holding that the law of Quebec did not render null and void unless contracted by a Roman Catholic priest a marriage which took place in that province between persons one of whom only was a Roman Catholic. As to the validity of such marriages between persons who were both Roman Catholics, the Chief Justice asked permission to decline to answer, Sir Louis Davies, Mr. Justice Idington, and Mr. Justice Duff were of opinion they were valid, and Mr. Justice Anglin held they were null and void. 3. As to the third question, all the Judges except Mr. Justice Idington were of opinion that the Parliament had no power to enact such remedial legislation, while Mr. Justice Idington's answer was:—"As to the third question, sub-sec. (*a*), I answer Yes, to be concurred in by the respective Legislatures of provinces concerned; and as to sub-sec. (*b*) I answer Yes, if and when a province fails to provide adequate means of solemnization."

The Dominion Government now obtained special leave to appeal in order that the various questions might be argued before and decided by the Judicial Committee.

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Argument

*Wallace Nesbitt*, K.C., in opening the case, said his submission was that the provinces might do what they thought fit about any solemnization they required in reference to a contract which the Dominion had declared should be a valid contract of marriage, but they could go no further. The Dominion had the sole power of dealing with what should form the essential thing to a contract of marriage. It must have an undivided sovereignty in connexion with a contract which formed the very basis of society. The question for consideration, he thought, was a very simple one, being dependent upon the construction of the sections of the British North America Act, and he maintained that the words "marriage" and "solemnization of marriage" were used in that Act in their natural sense, as they were used in any country professing the Christian religion.

The word "marriage" could not be taken as necessarily including any ceremonial as part of its validity. For 1,500 years marriage had meant a contract made between a man and woman to live together in the relation of husband and wife, and a marriage was binding in its full legal force as if it had been sanctioned by half a dozen religious ceremonies. Marriage was the creation of a contract.

The word could not be said to have a fixed meaning, because under the law of England, since a certain time, in order to create a status of marriage a priest had been necessary; while in Scotland, under the same law, the status was created by mere contract to become man and wife.

*Geoffrey Lawrence* followed on the same side. He said that when the Imperial Parliament assigned to the Canadian Parliament and the provincial Legislatures the two subjects, marriage and solemnization of marriage, for legislation it was impossible to construe those words by reference to the law of England, Scotland, France, or any other country.

LORD SHAW said there must evidently be something attaching to the ceremony of marriage, which must be performed by solemn words. There was a solemnization in one sense, but a public ceremony was not essential.

LORD HALSBURY said it was important for society that there should be some public record of what had taken place, namely, the agreement between the parties.

Mr. *Lawrence* said his submission was that in assigning to the provincial Legislature the solemnization of marriage the constitution of marriage was left with the Dominion Parliament. The Dominion Parliament was entitled to legislate with reference to the marriage, and the provincial Legislatures were only entitled to legislate as to the solemnization without imposing that solemnization as a condition of the validity of the contract.

*Arnoldi*, K.C., for the Province of Ontario, said his instructions were confined to drawing their Lordships' attention to a memorandum from the Province of Ontario which considered that an Act of Parliament which rendered valid, throughout the Dominion, marriages performed in the Provinces by persons legally authorized by such Province, would result in consolidating and perfecting provincial authority throughout Canada, and in this view the passing of such an Act by the Dominion Parliament would enlarge rather than encroach upon provincial jurisdiction.

*Hellmuth*, K.C., in supporting the case for negative answers to questions 1 and 3 and an affirmative answer to question 2, said the Act imposed upon the form of marriage laid down by the provinces certain changes in the provincial law. It took away the liberty enacted with regard to the solemnization of marriage by the provinces. The Act was not striking at ecclesiastical or canon law, but actually striking at the provincial law, the object being to prevent a province from declaring that there shall be a limited authority in a person in regard to the performance of the marriage ceremony. Supposing a Roman Catholic priest was only authorized to perform a marriage ceremony for Roman Catholics and an Anglican clergyman for Anglicans, and so on, and the Dominion stepped in and said it authorized the Anglican or Roman Catholic to read his service over people of a different faith? The object was that marriage should be really solemn, that it should be in the religion of those who were about to contract. It was going a long way to say that that interfered with the capacity to contract. If the other argument was correct a Jew or a follower of Confucius could marry a Jew or a Roman Catholic according to the Jewish rituals, because the person who performed the ceremony would have a right to perform it. If their Lordships were to decide that it was within the power of the Dominion to do what the Bill proposed it would not necessarily follow that the Bill would pass.

LORD ATKINSON:—You agree that this Bill is designed to effect something, and you are agreed what it is designed to effect?

*Hellmuth*, K.C. said it was designed to give an absolute authority where there was now only a limited authority with regard to the official who could celebrate.

*R. C. Smith*, on behalf of the Province of Quebec, said the whole object of the inquiry was to obtain a definition as to the respective powers of the Dominion and the provinces. The construction put upon the Bill would have the effect that a Quaker who was competent to celebrate the marriage of Quakers would have also the power to celebrate the marriage of everybody, whether Quakers or not.

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*Geoffrion*, KC., argued that the matter really in the hands of the Federal Government was marriage *minus* solemnization. The Bill purported to say that an officer who was given by Quebec law a limited authority to perform the marriage ceremony should have a universal authority to do so.

*Nesbitt*, K.C., who replied on behalf of the Dominion, maintained that no province had the right to declare, in face of Dominion legislation, that if a certain ritual had not been complied with by the parties, although they had gone through the ceremony of marriage prescribed by Parliament, the marriage should not be treated, in another province, as a valid marriage. The proposed legislation presupposed a ceremony, authorized by the province, by a competent officer according to a ritual which the parties had voluntarily submitted themselves to. The question before their Lordships was a vital one, not easy of solution, a question which many persons in Canada were keenly watching, anxious to know whether the design of the Federation of one great growing nation should be set aside and a question affecting the whole basis of society be governed by merely local, isolated, and factional differences.

The following authorities were referred to in the course of the argument.

*Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54; *Reg.* v. *Millis*, 10 Cl. & F. 534; *Beamish* v. *Beamish*, 9 H.L. Cas. 274; *Brook* v. *Brook*, 9 H.L. Cas. 193; *Hodge* v. *The Queen*, 9 App. Cas. 117; 1 Phillimore Ecclesiastical Law, 643-4, 2nd ed.; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96; *Atty.-Gen. for Ontario* v. *Hamilton St. R. Co.*, [1903] A.C. 524; *Atty.-Gen. for Canada* v. *Atty.-Gen. for Ont.*, [1898] A.C. 700; *Atty.-Gen. for Ont.* v. *Atty.-Gen. for Canada*, [1912] A.C. 571; *City of Montreal* v. *Montreal Street R. Co.*, [1912] A.C. 333; *Atty.-Gen. for Ontario* v. *Atty.-Gen. for Canada*, [1896] A.C. 348.

The LORD CHANCELLOR intimated that judgment would be reserved.

LONDON, July 29, 1912. The judgment of the Board was delivered by the Lord Chancellor.

The Lord Chancellor.

The LORD CHANCELLOR (VISCOUNT HALDANE) said the questions to be decided had arisen on an appeal, for which special leave was given, from the answers returned by the Supreme Court of Canada to certain questions submitted by the Government of Canada pursuant to section 60 of the Supreme Court Act.

The questions so submitted were the following:—

(1) (*a*) Has the Parliament of Canada authority to enact in whole or in part Bill No. 3 of the first session of the Twelfth

Parliament of Canada intituled, "An Act to amend the Marriage Act"? (*b*) If the provisions of the said Bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority? (2) Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province, (*a*) between persons who are both Roman Catholics or (*b*) between persons one of whom only is a Roman Catholic. (3) If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages, whether (*a*) heretofore solemnized, or (*b*) hereafter to be solemnized, shall be legal and binding?

The answers of the learned Judges of the Supreme Court were in substance to the following effect: (1) As to the first question the Chief Justice, Mr. Justice Davies, Mr. Justice Duff, and Mr. Justice Anglin were of opinion that the proposed legislation was *ultra vires* of the Parliament of Canada. Mr. Justice Idington differed. (2) As to the second question all the learned Judges concurred in holding that the law of Quebec does not render null and void unless contracted by a Roman Catholic priest a marriage which takes place in that province between persons one of whom only is a Roman Catholic. As to the validity of such marriages between persons who are both Roman Catholics the Chief Justice asked permission to decline to answer, Justices Sir Louis Davies, Idington, and Duff were of opinion that they were valid, and Mr. Justice Anglin held that they were null and void. (3) As to the third question, all the Judges except Mr. Justice Idington were of opinion that the Parliament has no power to enact such remedial legislation.

The decision of these questions, continued his Lordship, turns on the construction to be placed on secs. 91 and 92 of the British North America Act, 1867. Sec. 91 enacts that the Parliament of the Dominion may make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces, and, for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, it declares that, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of the Dominion extends to all matters coming within the classes of subjects enumerated. One of these is marriage and divorce. The section concludes with a declaration that any matter coming within any of the enumerated classes shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces.

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Sec. 92 enacts that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated in this section. Among these is the solemnization of marriage in the province. The enumeration also includes, *inter alia*, property, and civil rights, and generally matters of a merely local or private nature in the province.

In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by sec. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' bar. The other learned counsel contended that the power conferred by sec. 92 to deal with the solemnization of marriage within a province had cut down the effect of the words in sec. 91, and effected a distribution of powers under which the legislature of the province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage.

If the latter view is taken, it is clear how the questions must be answered. For it was agreed between counsel that the Bill referred to in the first question was intended to enable a person with any authority to perform the ceremony to perform it validly whatever the religious faith of those married by him.

On the footing indicated, the Bill would therefore be *ultra vires* of the Dominion Parliament. The third question would also be disposed of, for the Parliament of Canada would, in the events indicated in the question, have no authority. The second question consequently becomes, not only unimportant, but superfluous.

Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of secs. 91 and 92, cover the whole field of validity. They consider that the provision in sec. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province, operates by way of exception to the powers conferred as regards marriage by sec. 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract.

There have doubtless been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity.

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But there are at least as many instances where the contrary doctrine has prevailed. The common law of England and the law of Quebec before confederation are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. *Primâ facie* these words appear to their Lordships to import that the whole of what solemnization ordinarily meant in the systems of law of the Provinces of Canada at the time of confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for.

Both readings of the provision in sec. 92 are in the nature of limitations of the effect of the words in sec. 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural construction of the words "solemnization of marriage," having regard to the law existing in Canada when the British North America Act was passed, should not prevail. This conclusion disposes of the question raised, and their Lordships will humbly advise his Majesty accordingly.

*Declaration that proposed Bill is ultra vires.*

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## SHAW v. MUTUAL LIFE INSURANCE CO. OF N.Y.

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Oct. 7.

*Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. October 7, 1912.*

1. INSURANCE (§ III B—51)—INNOCENT MISTAKE OF AGENT IN CALCULATION—RESCISSION—DELAY IN BRINGING ACTION.

Where an agent of a life insurance company, by an innocent error in calculation made at the time the policy issued, represented the surrender value of the policy to be greater than it really was, which correct amount could have been ascertained by insured by reference to a mortality table, in the absence of fraud or evidence shewing that this representation induced insured to take out the policy, rescission on the part of the insured will not be allowed, especially where many years elapse before action is brought.

[*Shaw* v. *Mutual Life Insurance Co. of New York*, 23 O.L.R. 559, affirmed.]

2. FRAUD AND DECEIT (§ IV—17)—WRONG ESTIMATE OF SURRENDER VALUE NOT A PROMISSORY REPRESENTATION.

A representation by an agent of a life insurance company to the insured made at the time of the issuance of the policy, based on an innocent error in calculation, as to the surrender value of the policy, is not a promissory representation to the insured where the correct amount could have been ascertained by him by reference to a mortality table.

[*Shaw* v. *Mutual Life Insurance Co. of New York*, 23 O.L.R. 559, affirmed.]

3. INSURANCE (§ III D 2—73)—CONSTRUCTION OF POLICY—EFFECT OF PROVISION IN POLICY LIMITING AGENT'S RIGHT TO MAKE PROMISES.

Where a policy of life insurance contains a provision to the effect that the agent has no power to modify the contract of insurance, or

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to bind the company by making any promises or by receiving any representation or information not contained in the application for the policy, a false representation by the agent to the insured made at the time of taking out the policy, even if it amounts to a promissory representation will not bind the insurance company. (Dictum *per* Fitzpatrick, C.J.)

Statement

AN appeal by the plaintiff from the judgment of the Court of Appeal, *Shaw* v. *Mutual Life Insurance Co. of New York*, 23 O.L.R. 559, allowing an appeal from the judgment of Latchford, J., at trial in favour of the plaintiff.

The appeal was dismissed.

*I. F. Hellmuth*, K.C., for appellant, referred to *Smith* v. *Chadwick*, 20 Ch.D. 27; *Smith* v. *Kay*, 7 H.L.C. 750 and *Gordon* v. *Street*, [1899] 2 Q.B. 641.

*W. Nesbit*, K.C., and *F. Arnoldi*, K.C., for respondents, referred to *Horncastle* v. *Equitable Life*, 22 Times L.R. 735.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This action was brought originally to enforce the contracts of insurance evidenced by the two policies; but at the trial, by an amendment, resiliation of the contracts and return of the payments for premiums was asked for. There is no allegation of fraud; the ground or cause of resiliation relied upon is the alleged representation made by the special agent of the company with respect to the surrender value of the policy at the expiration of the 20 year period, when the insured had, besides the protection of the policy in case of death in the interval, three options open to him:—

(*a*) The right to require paid up policy at end of term.

(*b*) The right to surrender at end of term of twenty years.

(*c*) The right to continue the policy as insurance with annuity after twenty years.

He chose to exercise his right to surrender. The surrender clause is in these terms:—

> This policy may be surrendered to the company at the end of the said first period of twenty years and the full reserve computed by the American table of mortality and four per cent. interest and the surplus as defined above will be paid therefor in cash.

This clause does not attempt to fix the surrender value or the amount of the reserve; but postpones the ascertaining of those amounts till the end of the first period of 20 years; it is, in effect, a promise to pay 20 years after the date of the policy, an amount to be ascertained then by a fixed method and on a fixed basis. The misrepresentation alleged consists in a statement made by the agent of the company at the time the policy was taken out to the effect that, calculated according to the terms of the surrender clause, the insured would be entitled to a money payment of $1,013, whereas it is now ascertained that the clause and the other provisions of the policy give the insured a lesser sum of $678.82.

The question is: Does the calculation made, at the time the policy issued, at the request of the insured, by the agent, although admitted now to have been made in error, render the policy voidable?

I hold not. There is nothing in the evidence to satisfy me, and the plaintiff has not said so when examined as a witness, that he was induced to enter into the contract by the error made by the agent in his calculation of the surrender value of the policy at the end of the term of twenty years. On the contrary, I think the fair inference, on all the evidence is, that, if the true surrender value had then been ascertained and given to the insured, he would still have taken the policy. This is not a case of fraud practised by, or on behalf of the company, but an error in calculation made with respect to the benefit to be derived by the insured, assuming the contract to be carried out honestly and in the best of good faith. The company is careful not only to fix the basis upon which the benefit is to be obtained, but also to stipulate against the binding effect of any promise made by the agent such as is now relied upon. The policy has this provision:—

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> Notice to the holder of this policy. No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying the premium, to bind the company by making any promises, or by receiving any representation or information not contained in the application for this policy.

I cannot see how, even assuming it to have been satisfactorily proved, which it is not, that the calculation made by the agent was a promissory representation to the insured, the company can be bound, in view of all the provisions of the policy.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J., concurred with ANGLIN, J.

Idington, J.

IDINGTON, J.:—The appellant made an application to respondent on the 27th September, 1889, for $2,000 insurance on his life upon the 20 pay life ret. prem. plan 20 year distribution; gave his promissory note at one month for the first premium of thirty-three dollars and paid that and nineteen succeeding premiums. He got, two months later, as requested, two policies each for $1,000. He brought thereon this action on the 22nd February, 1910, to recover the sum of $2,026, and by his declaration of the 2nd April, 1910, alleged the issue of said policies, and further that the agent of the respondent had induced him to apply for said policies

> on the distinct representation and assurance that the reserve on each of the said policies computed by the American table of mortality and four per cent. interest was a fixed sum, and that said sum on the expiration of the twenty years during which the premiums were payable would amount to $527.00 on each of the said policies.

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And further:—

8. The said agent as a further inducement represented to the plaintiff that the surplus on each of the said policies at the expiration of twenty years from the date of issue of the said policies would amount to the sum of $486 on each of the said policies.

He alleged also that relying upon the truth of said representations he had paid the premiums for the full period of twenty years which had expired on the second of November, 1909.

At the trial on the 18th May, 1910, he was allowed to amend this declaration by adding a prayer for rescission of the said contracts and a repayment of the premiums so paid and interest from dates of payment.

The learned trial Judge gave this latter form of relief, and allowed the recovery of $1,354.64, but was reversed by the Court of Appeal for Ontario.

Appellant's contention was that the agent had represented that upon the expiry of the twenty years, he would be entitled, as one of four options given, to receive on each policy the sum of $527 out of a reserve fund and $486 out of a surplus fund.

The policies each expressly provided as follows:—

Surrender.—This policy may be surrendered to the company at the end of the first period of twenty years, and the full reserve computed by the American table of mortality, and four per cent. interest, and the surplus as defined above, will be paid therefor in cash.

The alleged representations as to the amount to be expected out of the surplus fund could not be enforced because any verbal representation such as alleged could not legally vary the written policy, and could not in any case be held to have been misrepresentations of fact upon which fraud could be assigned and recovery thereon be based. This claim therefore was disallowed by the learned trial Judge and no further contention has been made as to it.

The questions raised are thus reduced to the sole question of whether or not there was such a fraudulent representation by the agent as to entitle the appellant to claim rescission of the contract and a return of the premiums paid with interest.

The case is peculiar in this that the alleged representations were oral and the appellant does not pretend he can remember and give literally all that was said to him by the agent or agents twenty years ago, but depends on a memorandum in writing made later and speaks by that.

There were two agents concerned in the application. One Belfry first came to canvass appellant, saw him several times at his office and on the street, and later one McNeil representing himself as a special agent came and then both interviewed him. This resulted as stated above in his signing an application, being examined, and giving his note.

On the 6th November following he seems to have written McNeil for some explanation.

We have no copy of this letter and properly speaking no secondary evidence of its contents. He produced and proved a letter in reply from McNeil dated the 11th November, 1889, which refers to this letter of the 6th. The greater part of this reply consists of an explanation of delays, and assuring him that the policy had been issued and gone to Mr. Belfry to whom he had wired to deliver the policy if that had not already been done. The reply then continues as follows:—

> You seem to be in doubt as to the kind of a policy you applied for. In order to make it clear to you I send a slip to shew your plan.
>
> You will observe that the cash value in 20 years is composed of two elements, i.e., the reserve and the surplus.
>
> For particulars see plan.

This plan was a sheet of printed paper in which evidently there had been filled in a number of the masses of figures it contains. A good deal has been said as to its being a thing given the agents to use and as to its want of heading indicating its non-authoritative issue, but in the view I take this is of little consequence.

The appellant says he got this in the same envelope as the letter and that he read it and being satisfied with it placed it for safe keeping with the policies.

He does not pretend to remember more than that he is sure it bore out the representations made him verbally. His evidence is as follows in his examination:—

> I do not pretend now to say that I remember them, but they said there would be a cash surrender value, or an annuity, or other benefits of the policy, that is from memory. I signed an application for $2,000. . . . I was satisfied when I received this slip of paper, because it sets forth the representations made to me verbally by McNeil and Belfry, and I attached it to my policy, kept it with the policy, and have had it for twenty years. At the expiry of that time I expected the representations made in that paper to be made good. Instead of that I have been deceived. . . .
>
> Q. You can't recollect what was said to you before you received that letter? A. No, I do not pretend to recollect the conversation. . . .
>
> Q. And are you prepared to swear here now what the figures were they gave you? A. Yes.

I may observe that the letter of McNeil by no means clearly indicates that the exact amounts involved were what had concerned appellant. On the contrary, it is information regarding the nature of the plan of insurance and not the accuracy of any figures involved that would seem to have been desired.

The learned trial Judge believed him and no attempt is made to discredit him. I assume therefore he is a truthful witness and the inferences I draw must not be taken as indicating the contrary.

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But I must bear in mind that the charge now made is one of fraud, and the nature of the alleged fraud, and ask myself if I can properly say such a charge so founded on that sort of recollection of a conversation, indeed of many conversations, made twenty years ago, is sustained.

It seems to me, as Mr. Justice Magee has observed in the Court of Appeal, that it was quite possible that the item of reserve payable might have been correctly stated by McNeil or Belfry in their conversations, and that when the appellant saw the amount in question stated therein even slightly better than Belfry or McNeil had stated, he put it away, as he says, satisfied. I do not take it he is swearing to an identification of each line, letter and figure as the exact verification of what he could recall.

Therein are set forth the figures for each year of twenty years that would be payable at death, and the figures for each result according to the four options he was entitled to select from in case of surviving the twenty years.

To be quite sure that all or any one of these numerous figures were identical with what he had been told in the conversations that had taken place six weeks or more before is a feat of memory that would be unusual.

Indeed the most any man can say in such a case is just what the appellant does say and that is liable to the honest mistake Mr. Justice Magee suggests as possible, and I think in this case, quite probable.

It is hardly likely that an insurance agent intending to defraud would have selected an item which was based on tables of mortality accessible to anyone choosing to enquire and make the requisite calculation his policy on its face rested on.

The risk of doing it with a gentleman of education and especially of the legal profession liable to have the subject brought to his mind at any moment, and of a young man likely to be canvassed again by others for additional insurance, seems altogether too great to permit of one readily assuming there was fraud involved in the evident mistake.

It evidently was a mistake I think. In this appellant's own case we have furnished an apt illustration of how mistakes will occur.

He seems, in January, 1909, to have anticipated the falling due of these policies. He wrote on the 28th of that month to respondents in Toronto a letter of enquiry setting forth in blank the several options. The figures were "filled in on this letter at the Toronto office" is the note made in the case and this is confirmed by appellant's evidence, I think, as a fact. And a letter is written on the 1st of February, 1909, from that office repeating same information. In reply to this, appellant on the fifth of the same month writes as follows:—

Dear Sirs,—

Re Policies Nos. 378136 and 378138.

When I took out these policies with your company over 20 years ago, I was supplied with a guarantee shewing what the result would be to me if I survived the period. The following are the figures. In view of the figures submitted in yours on the 1st inst., would be glad to know before I take whatever action I deem advisable, whether the options submitted in yours of the 1st inst. are final.

Figures submitted and guaranteed when insurance was effected.

20 year investment policy $1000.00, age 27, rate $33.00 per $1000.00.

1. Surrender policy for cash, reserve.....$527.00
surplus..... 486.00

$1,013.00

2. Paid up policy for $1,825.00.
3. Paid up policy for $1,000.00 and cash $486.00.
4. Annuity for life, $81.50.

Yours truly,

J. R. SHAW.

Now it so happens that the very memorandum on which he relies in writing this letter, and in this case, makes it plain that as to the surrender policy for cash, the reserve item was guaranteed, but the surplus item was only estimated and based on past experience. I am quite sure no one would be justified in suggesting fraud in this mistaken representation by appellant of what he was guaranteed. But this is more than mere illustration, it is an apt test of the appellant's powers of accurate observation as well as recollection. I do not think it would be safe, resting entirely thereon as we must, to maintain this appeal.

I may observe that the sum of $93, is but a fractional part of the entire obligation the respondents by this form of policy undertook with and towards the appellant. His life was insured for twenty years, and then after the respondent had carried that, he had the option of selecting and calling upon it for further benefits. It is not a correct appreciation of the bargain and benefits to be had thereunder to compare the $93 with what he was entitled to on the basis of one of two items of a single option to be made after he had meantime enjoyed twenty years insurance of $1,000 and various sums increasing yearly up to $1,627. And when he selected this first option of surrender to say it was the proportion of that sum of $93 to a total of $434, is surely delusive. To appreciate accurately the materiality of this $93 in its relation to the whole contract, we ought at least to know what it would have cost to carry such an insurance on such a life for twenty years.

This question only becomes material when we come to consider the question of whether or not the appellant was in fact induced by this mistake to do anything; and if found a fraudulent mistake to enable, or see if it would enable, the Court to

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indemnify him without robbing the respondent of the value of the contract so far as executed.

He does not venture to swear that he was induced thereby to enter into this contract. Nor do I wish to lay down as law that in a case of fraud it is always necessary to swear to the inducement. It may be inferred from the nature of the transaction and the substantial materiality of what has been misrepresented, when regard is had to the entire contract and the relative value of the part or thing so misrepresented bears to the whole transaction.

Can anyone safely infer, in this case at this distance of time and on such defective evidence of the material facts which should be known, as a fact that, if the appellant had seen in this memorandum the true figures $434, instead of $535, he would have withdrawn from the contract.

I cannot so infer. To do so would imply on his part an accuracy of observation and of calculation and taste for making same, he evidently had not, or he would have seen and tested the tables of mortality for himself, or, in this case have seen to it that he had duly estimated the value of twenty years insurance and deducted that service value from the sum he alternatively claimed in the event of rescission. Assuming, as I do not, that under such circumstances he was entitled to rescission, I need not discuss or pass an opinion, either on that or the question of whether or not his true remedy was not an action on the warranty that misrepresentation generally carries in it.

Whatever rescission means it does not mean that he rescinding is entitled to retain any, much less a large part of what he bargained for, and to get back all he paid with interest as awarded appellant at trial hereof.

Another thing I cannot understand is how the appellant who came to realize on the 5th February, 1909, this mistake, and to sue on the policies a year later, could be permitted to rescind his contract in May, 1910.

If it was a fraud that had, as now is of necessity urged, been committed upon him, he was bound, if electing to rescind on such ground, to have repudiated the contract at once on its discovery, and rescind, or claim rescission then. He should not, and in law I submit could not, take full advantage of being insured for the rest of that year and then later on attempt repudiation.

Every hour of this he was putting respondent, who could not rescind, at a disadvantage. He was not entitled to have attempted such a thing. I tried on the argument to get his counsel to explain how the last paragraph of the statement of claim was at all consistent with this requirement of the law. I am yet without a satisfactory reply.

I assume counsel must have read the judgment of Mr. Justice Meredith who deals with this from the pleading point of view, and had found that the least said the better.

I am unable to understand how the real question of proper repudiation was not raised and argued out on facts so patent as here. Fortunately the other grounds I rest on suffice.

It is usual to claim rescission by the writ in cases of fraud if it be the purpose to repudiate the contract.

This appeal should be dismissed with costs.

Idington, J.

DUFF, J.:—I concur in the result.

Duff, J.

ANGLIN, J.:—After a careful study of the evidence, oral and documentary, I find myself unable to say that it has been satisfactorily established that the appellant was induced upwards of twenty years ago by a material misrepresentation to enter into a contract of insurance of which he now claims rescission on that ground. My brother Idington has indicated reasons why the appellant's evidence is insufficient to sustain his claim and to justify a reversal of the judgment of the Court of Appeal. Apart from the difficulty created by his failure to bring action promptly on discovering the alleged misrepresentation and his omission to pledge his oath that that misrepresentation actually induced him to enter into the contract (which I regard as most important), for lack of satisfactory evidence of the misrepresentation itself, which, in the circumstances of this case, would require to be even more than usually clear and convincing, this action fails.

Anglin, J.

The appeal should be dismissed with costs.

BRODEUR, J.:—I agree that the appeal should be dismissed with costs.

Brodeur, J.

*Appeal dismissed.*

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## PETTIT v. CANADIAN NORTHERN R. CO.



*Manitoba King's Bench. Trial before Prendergast, J. October 23, 1912.*

1. MASTER AND SERVANT (§ II E 5—252)—FELLOW-SERVANTS — WHO ARE — WATCHMAN AT LEVEL CROSSING — TRAIN CREW—COMMON LAW REMEDY.

A person employed by a railway company as a watchman at the crossing of its railway with a street railway at level is a fellow-servant with the crew of a train passing over the crossing; and, if he is killed in consequence of the negligence of the train crew, his widow cannot recover damages at common law against the railway company.

[*Waller* v. *South Eastern R. Co.*, 2 H. & C. 102; *Morgan* v. *Vale of Neath R. Co.*, L.R. 1. Q.B. 149; and *Lovell* v. *Howell*, v. C.P.D. 161, followed.]

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2. MASTER AND SERVANT (§ II A 4—109)—LIABILITY OF RAILWAY COMPANY FOR DEATH OF EMPLOYEE—BREACH OF STATUTORY DUTY—FAILURE TO RING BELL—FREIGHT TRAIN RUNNING BACKWARDS—R.S.C. 1906, CH. 37, SEC. 276.

Section 276 of the Railway Act, R.S.C. 1906, ch. 37, is for the protection of employees of the railway company as well as of the public, and the widow and administratrix of a watchman employed by the company at a level crossing of the railway with a street railway, who is killed in an accident caused by a breach of that section by the running of a freight train backwards over the crossing without any person on the end car to give proper warning of its approach, resulting in a collision with a street car crossing the tracks, may recover damages against the company under that section.

[*McMullin* v. *N.S. Steel and Coal Co.*, 7 Can. Ry. Cas. 198, 39 Can. S.C.R. 593, and *Lamond* v. *G.T.R. Co.*, 7 Can. Ry. Cas. 401, 16 O.L.R. 365, followed.]

3. DEATH (§ III—20)—WHO LIABLE FOR CAUSING—SEVERAL TORTFEASORS CONTRIBUTING TO INJURY — RIGHT OF WIDOW OF THE RAILWAY EMPLOYEE TO RECOVER.

Even if it were shewn that a street railway company, as well as a railway company, might also be liable for the consequences of an accident which resulted in the death of one of the railway's employees because of the negligence of the motorman, an employee of the street railway company, that would not prevent the recovery of full damages from the railway company.

["*The Bernina*," 13 A.C. 1, and *Burrows* v. *The March Gas and Coke Co.*, L.R. 5 Ex. 67, followed.]

Statement

THE plaintiff is the administratrix of the estate of John Pettit, her deceased husband, and brings this action for her own benefit under the Act respecting compensation to families of persons killed by accident, alleging that the death of the said John Pettit was caused by the defendant company's negligence.

Judgment was given for the plaintiff for $5,000.

*W. H. Trueman*, for the plaintiff.

*O. H. Clarke*, K.C., for the defendants.

Prendergast, J.

PRENDERGAST, J.:—That part of Main street in the city of Winnipeg, where the accident happened, runs north and south, and at its southern end, communicates with and opens on to a bridge, called the Norwood bridge, which spans the Red river.

The defendants own and operate a line of railway which intersects and crosses said Main street almost on the line of junction of the latter with the said bridge, and the track of the railway at this crossing is level with the street.

The Winnipeg Electric Railway Company own and operate a street car line which runs along said Main street and over said bridge, and the track of this line, which is also level with the street, intersects the defendants' line where the latter crosses Main street as aforesaid.

The southern end of Main street, which, as stated, abuts on to the bridge and is crossed by the defendants' line, is higher than the main portion of said street, being taken up by what was called "the incline," which begins 62 feet north of the bridge on

the street level and rises gradually till it reaches the bridge at the latter's top level, thus doing service as a bridge approach.

On June 22nd, 1911, the date of the accident, John Pettit was in the employ of the defendants, as watchman appointed by them pursuant to an order made by the Board of Railway Commissioners on October 16th, 1905, under section 269 of the Railway Act, ordering

> that the said crossing (the crossing above referred to) be protected by stationing at such crossing a watchman or watchmen, . . . the said watchman or watchmen to be employed by the Canadian Northern Railway Company, who shall provide such shelter as may be necessary for him or them. . . .

This shelter had been provided for in the shape of a signal box or shanty, which is a small building about 7 feet square, standing 18 feet east from the street car track and about 8 feet north from that of the defendants.

It is shewn that the fatality happened a short time before midnight on the date stated, and that it was caused, at the intersection above described, by the colliding of a street car moving southerly, with the end car of a freight train of the defendants moving backward and easterly, whereby the street car was thrown easterly off the track, and toppled over on Pettit, who was then about 2 feet from the defendants' line, injuring him to such extent that as a consequence he died the next day.

The plaintiff contends that the accident was due to the negligence of the crew operating the freight train, and claims both at common law and under the Railway Act.

I will dispose at once of the claim at law, which does not require any further inquiry of fact than is above set out.

I do not think the plaintiff can succeed on this branch of his case, for the reason that he and the train crew were discharging duties under common employment at the time of the accident. The distinction urged that the duties of the crew in operating the train were different from those of Pettit, who was watching at the crossing, does not seem sufficient to negative the character of common employment. They were all employed in a general way in connection with the service of the running of trains, and, moreover, besides the application and use of the propelling power, it was also the crew's duty to give from the train all reasonable and proper signals or warnings to the public, the very duty which Pettit had also to perform on the level of the crossing.

In *Missouri, K. & T. R. Co.* v. *Goss*, 72 S.W.R. 94, the action seems to have been under the statute only and so cannot support the distinction advanced. To what extent the Courts have gone in refusing to accept such distinctions as fundamental was shewn in *Waller* v. *South Eastern R.*, 2 H. & C. 102; *Morgan* v. *Vale*

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*of Neath R. Co.*, L.R. 1 Q.B. 149, and *Lovell* v. *Howell*, 1 C.P.D. 161.

Dawburn, in his work on Employers' Liability, 4th ed., p. 5, after stating that there are two essential ingredients in common employment—a common work and a common master—adds significantly:—

> What constitutes a common work and common master often involves points of the greatest nicety. As regards common work, I cannot find a case of different occupation which has been held to constitute a good answer to the defence of common employment.

This seems to me to be fatal to this branch of the plaintiff's case.

I should say, however, that, were the plaintiff not precluded, in my opinion, for the reasons stated, from setting up a common law liability, I should find in his favour on the facts, as will appear hereafter.

I now come to the case under the statute.

It was urged for the defence that the sections of the Railway Act on which the plaintiff relies are meant for the protection of the public and not of employees. In *McMullin* v. *N.S. Steel & Coal Co.*, 39 Can. S.C.R. 593, it was held that section 251 of the Railway Act of Nova Scotia, which is similar to section 276 of the Dominion Act, is for the protection of servants of the company standing on or crossing the tracks as well as of other persons. And in *Lamond* v. *G.T.R. Co.*, 16 O.L.R. 365, which is directly in point, as the person injured was a watchman as in this case, the Court held that

> although the deceased was an employee of the defendants and it was his duty to protect persons crossing the tracks from the cars, he had a right to rely, as far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section (section 276 of the Railway Act) being complied with.

The plaintiff may then avail herself of the statute.

Now, what are the facts? The evidence shews that the night in question was a very dark night. There was, however, an electric light near the foot of the incline, and another near the crossing. The distance from the crossing at which a car without lights on the defendants' tracks could be seen was variously estimated at from 40 to 200 feet.

It was Pettit's custom, as his duty required, to be on the look-out and whenever a train or street car was in sight, to keep himself in the vicinity of the crossing, generally opposite the signal box, and perhaps more frequently somewhat to the south thereof. To a street car he would signal a clear road by producing a white light at night or a white flag in the day time, or give the stop order by producing a red light or red flag, also according to the time of day. C.N.R. trains having the right of way, there was apparently no occasion to give them the pass signal;

but one of the train crew stated that it was his custom when coming near the bridge to whistle to the flagman, who would then come out with a red lantern and give him the pass order by waving it in a circle.

There were eleven witnesses for the plaintiff, all apparently reputable and most of them of the best standing in the community where they live, who seem to have been in a position to judge and know, and whose evidence is to the effect that when the train was approaching the bridge they neither saw the train itself or any man or light on it, nor did they hear any bell, whistle or other warning of any kind.

Walter Leslie, Miss Leslie and Miss Agnes Kasler were going over from Winnipeg to Norwood; they were familiar with the crossing, and knew that there might be danger there at all times. Mr. Leslie says that he would always be on the alert at the crossing. That night when crossing the C.N.R. tracks, they neither saw any light nor heard any sound revealing an approaching train, although Mr. Leslie said that he always looks both ways before crossing and Miss Leslie says she actually looked in the very direction of the train; and they had proceeded further only one minute, having covered less than 100 feet in the meantime, when the crash told them of the catastrophe.

Then, there are the conductor of the street car, and Mr. and Mrs. Treleaven and Miss Averal, who were passengers thereon. The conductor saw the train only when within 12 feet from it. Mr. and Mrs. Treleaven were so seated as to have a clear view of the track westward. The first says that he was naturally looking in front, and the latter says, "I was looking towards the track for there was my life and I felt sure the track was clear," and the car was struck before they had realized that anything was coming. Miss Averal just caught sight of a box car coming in the dark when it was 8 or 10 feet away, and would call an untruth any assertion that there was a light on that car.

There was also on the incline quite close to the street railway and about 37 feet from the C.N.R. track, a party of four waiting for a car to proceed to Norwood. The first car to come, which was the one in question, however, passed without stopping as they expected, which naturally caused them to follow it by sight as it went by. The collision occurred almost at once. These witnesses are John Gibson, William Knutson, Miss Kate McKenzie and Miss May Ross. The first is positive and the three others are moreover vehement in their declaration that they were in a position to hear and see, that they heard no sound of bell or whistle and that there was neither man nor light on the end box car.

On the evidence of those eleven witnesses I come to the conclusion that there was no warning given. If the bell was rung

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at all as stated by one witness for the defence, it was not rung when near the bridge, or the sound of it at all events did not constitute a warning whatever may have been the cause, as it was not observed by intelligent people careful for their lives, who were apprehensive of danger and were listening for just such warning. The same may be said about a light on the last car. I may say that the testimony of Dowdle and Wilkinson does not commend itself to me at all; but it is sufficient that the evidence should shew, that, if there was such a light there, it was of such a nature or in such condition or held or placed in such position that it could not be seen by people watching for such signal, and that it was consequently useless as a warning.

The evidence also shews that Pettit was there in the proper place at the proper time, active and vigilant in the discharge of his duties as a watchman. It is established that, after looking in all directions, and in circumstances which shew his unapprehensiveness of danger, he deliberately gave the white lamp proceed signal to the car which was at the foot of the incline; and that almost at once after the car had started he (Pettit), shewing signs of distress, moved about, quickly moving his lamp in a manner which was not understood at the time, but which subsequent events shewed he meant as a danger signal and reverse order.

It seems to me that there is no other conclusion to reach but that it was at the same moment, although he had just been looking westerly as well as in other directions, that he first caught sight of the train backing up on to the crossing.

Dowdle, who claims he was on the end car with a lamp, says that, as he was approaching the bridge, he whistled out with his fingers to Pettit, and that the latter came forward with a red lantern and gave him the proceed signal by waving the same in a circle. I absolutely disbelieve this. This man's manner of giving evidence, and his general behaviour were not at all satisfactory to me. But the main consideration is that his contention is altogether inadmissible in the light of that part of the evidence with respect to Pettit's signalling the street car, which was so firmly and abundantly established—unless it be held that Pettit was suddenly stricken with insanity or seized with a murderous impulse, which there is surely no ground for assuming.

There were eleven witnesses who, at different phases, but most of them simultaneously and throughout, followed Pettit's course of action, and their evidence covers the full range of possible events in such a way as to leave no room for admitting such signalling as Dowdle says was given to him. The nearest approach to corroboration of Dowdle's testimony was by Miss Kasler, who says that when she passed the crossing with Mr. and

Miss Leslie, Pettit was there, having in his left hand a red lamp and a white lamp.

What appears to have happened is this: Pettit, having looked from the west side of the bridge in the direction of the C.N.R. track as Miss Kasler said he did, and found everything in order on that side, as he thought, proceeded towards the shanty, where he probably put on the ground the red light. He then gave to the street car the white pass signal. Then, becoming suddenly aware of the approach of the train, he tried by waving the white light right and left to reverse his pass order to the car. What followed exactly must be greatly a matter of surmise. He probably conceived at that moment the idea of signalling to the train as well. It was probably with that end in view that he rushed towards the signal house as he was seen to do. There he probably grasped the red light and had perhaps begun to wave it, possibly in an agitated and disordered manner, when the collision took place and the car was pushed over and fell on him, smashing at the same time the red lamp, which was later found at that spot. There is no reason to believe that Dowdle, wherever he may have been then, could have seen any waving of the red light by Pettit, except at the moment, at the place and in the manner just stated.

With respect to the defendants' contention that, inasmuch as the street car only slowed up and did not exactly stop at the foot of the incline as it should have done under the Railway Commissioners' order, the street railway company were the cause or one of the causes of the accident, I would say that, even if they were a factor in the event, the case would come within the decision in "*The Bernina*," 13 A.C. 1, and *Burrows* v. *The March Gas & Coke Co.*, L.R. 5 Ex. 67.

In my opinion the plaintiff is entitled to recover under the statute, and I assess the damages at $5,000.

There will be judgment for the plaintiff for the amount stated with costs.

*Judgment for plaintiff.*

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## REX v. McNUTT.

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*Nova Scotia Supreme Court, Graham, E.J., Meagher, Russell, Drysdale, and Ritchie, JJ. November* 18, 1912.

1. INTOXICATING LIQUORS (§ III K—94)—SECOND AND SUBSEQUENT OFFENCES—N.S. TEMPERANCE ACT 1910, CH. 2, SEC. 44.

Where on the trial for an offence against the provisions of the Nova Scotia Temperance Act, the prosecutor in answer to a question as to whether the accused had been convicted of keeping intoxicating liquor for sale during the last year, replied in the affirmative, this question and answer before adjudication of the principal charge does not con-

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stitute an enquiry by the magistrate "concerning such subsequent offence," in contravention of the Nova Scotia Temperance Act 1910, ch. 2, sec. 44, and a motion for the discharge of the prisoner on *habeas corpus* will be refused.

2. STATUTES (§ II B—111)—DIRECTORY PROVISIONS—NOVA SCOTIA TEMPERANCE ACT 1910, CH. 2, SEC. 44.

The provisions of the Nova Scotia Temperance Act 1910, ch. 2, sec. 44, respecting proceedings for offences against Part I. of the Act in case of previous conviction or convictions are applicable to the procedure only and as such are directory and not imperative.

Statement

MOTION before the Supreme Court for the discharge of the defendant on *habeas corpus*.

The application was refused.

On the 31st October, 1912, defendant was convicted before L. G. Crowe, Esq., stipendiary magistrate in and for the town of Truro, for unlawfullly keeping intoxicating liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, John W. Waller being the informant.

The Nova Scotia Temperance Act, 1910, ch. 2, sec. 44, with respect to proceedings upon any information for committing an offence against the provisions of Part I., in case of a previous conviction or convictions being charged enacts that:—

(a) The magistrate shall in the first instance enquire concerning such subsequent offence only, and if the accused is found guilty thereof he shall then, and not before, enquire concerning such previous conviction, etc.

It appearing to said magistrate that said defendant was previously, to wit, on the 2nd day of May, 1912, convicted of a like offence, the magistrate adjudged the offence first mentioned to be an offence committed subsequent to the last mentioned offence and for said subsequent offence ordered the defendant to be imprisoned in the common gaol of the county of Colchester for the term of three months. A motion for the discharge of the defendant on *habeas corpus* was made before the Chief Justice at Chambers and having been refused was now renewed before the full Court. The facts are fully stated in the following opinion of Russell, J.

*J. J. Power*, K.C., in support of appeal:—The magistrate presiding at the trial made enquiries in reference to a previous conviction of the accused contrary to the statute: N.S. Acts, 1910, ch. 2, sec. 44; *R.* v. *Nurse*, 8 Can. Cr. Cas. 173, 7 O.L.R. 718; N.S. Acts, 1911, ch. 33, sec. 14; *R.* v. *Oddie*, 2 Dennison's Cr. Cas. 264; *R.* v. *Gibson*, 18 Q.B.D. 537; *R.* v. *Allen*, 44 Can. S.C.R. 331; *Charnock* v. *Merchant*, [1900] 1 Q.B. 474; *R.* v. *Salter*, 20 N.S.R. 206; *R.* v. *Johnston*, 11 Can. Cr. Cas. 12; *R.* v. Wallace (not reported).

*J. L. Ralston*, contra:—The sections of the statute referred to are only in relation to procedure. The old statute provided

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that after the justice had enquired into the subsequent offence he could ask the accused whether he had been previously convicted; the new statute leaves that out and says that after convicting of the subsequent offence he shall enquire as to the previous offence. The old statute might be construed as forbidding the giving of evidence as to the previous conviction, whereas the new statute is plainly only a direction as to the procedure to be adopted.

The evidence was properly admitted by the magistrate: Phipson on Evidence, 5th ed., p. 57; *R.* v. *Bauld*, 6 Cr. App. R. 30; *Hales* v. *Kerr*, [1908] 2 K.B. 601; *R.* v. *Wyatt*, [1904] 1 K.B. 188. If the evidence of previous conviction was relevant the accused could be cross-examined in relation to the charge: Phipson, 5th ed., p. 434.

*Power*, K.C., replied.

Graham, E.J.

GRAHAM, E.J., concurred in judgment of Russell, J.

Meagher, J.

MEAGHER, J.:—I agree with the distinction pointed out by Mr. Ralston, for the Crown, between the earlier and the later statute on the subject; but I cannot accept the argument for the defendant that the magistrate lost jurisdiction by reason of what took place on the trial before him. If I did, I should be overruling *The Queen* v. *Stevens*, 31 N.S.R. 124, which had the support of five Judges of the Court, which I am not prepared to do.

Finally, I do not consider that what took place was an enquiry by the magistrate at all. I mean the enquiry he is specially directed to make if the defendant is convicted of the subsequent offence. It was an enquiry by counsel as to the defendant for the purpose of discrediting her as a witness, and during the argument I saw his right to do so, at least, to the limited extent adopted here, which has not been abridged by the provision under review.

In any aspect the question and answer, at the most, elicited illegal evidence only, to which the magistrate could not give effect.

Russell, J.

RUSSELL, J.:—The facts respecting the conviction of the defendant in this case are fully set out in the decision of the learned Chief Justice, which is as follows:—

> This application under the Liberty of the Subject Act is for the discharge of the prisoner from custody on the ground of an illegal conviction for keeping liquor for sale in violation of the Nova Scotia Liquor License Act, 1911.
>
> It appears from the affidavits that the prosecutor Waller a police constable was called as a witness, and asked by the prosecuting counsel whether the accused had been convicted of keeping intoxicating liquor for sale during the last year, and he replied that she had. No special conviction was mentioned nor were any particulars given of any such conviction.

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The statute provides, sec. 44, as follows:—

The proceedings upon any information for committing an offence against the provisions of Part I., in case of a previous conviction being charged, shall be as follows:—

(a) The magistrate shall in the first instance inquire concerning such subsequent offence only, and if accused is found guilty thereof, he shall then, and not before, inquire concerning such previous conviction or convictions as alleged in the information.

(b) Any such previous conviction shall be provable by the production of a certificate under the hand of the committing magistrate, without proof of his signature or official character, or by any other satisfactory evidence.

Now it is quite plain from all the evidence before me that the magistrate did not first inquire into the previous conviction of the accused, but did so after he had convicted her of the subsequent offence as the law directs, unless it should be held that the question asked and answered by the witness Waller can be treated and regarded as a contravention of the Act. It seems very clear that the words of the section 44 are imperative, and that if, as a matter of fact, the magistrate did enter on the inquiry as to the previous offence before determining the subsequent offence, he was wrong and acted without jurisdiction, and the prisoner should be discharged: see *Rex* v. *Nurse*, 8 Can Cr. Cas. 176.

It was suggested by counsel for prosecutor that the evidence of Waller was not given nor received as evidence of previous conviction, but as evidence to prove the intent of the accused in having liquor on her premises, but I think this point was well answered that it was unnecessary as the Act makes the mere keeping an offence until the contrary is proved.

I am, however, of opinion, after carefully considering the whole matter, that Waller's evidence cannot be regarded as evidence of the previous conviction as required by the Act, and was not so offered or intended.

There is no evidence shewing any particular convictions of the accused, nor of the conviction specified in the summons. I take it that what the magistrate is forbidden to do is to enter into any inquiry of "such conviction or convictions as are alleged in the information." There is nothing to shew that Waller's evidence had any reference to this particular conviction. When the magistrate has convicted on the subsequent offence, then he must have legal evidence of the former conviction. None such was offered or given in the first instance by Waller.

For these reasons alone the motion for the prisoner's discharge must be refused.

Since writing the foregoing, I have been referred by Mr. Power to a decision of Russell, J., in *The King* v. *Passerini* (not yet reported).

I agree generally with the learned Judge in that case, but on turning to the printed case I find that the prosecutor was permitted by the magistrate to give full evidence as to the date, amounts and other particulars of the previous conviction as he states it: On the said 17th November, the first day of the said trial, and before the close of the case for the prosecution on the subsequent offence, the informant being

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on the stand, I allowed him to testify to previous convictions of the defendant, giving the dates and identifying the defendant.

This was in direct violation of the Act, but as I think nothing of the kind took place in this trial, I do not think the conviction can be quashed.

One way of testing the question in this case suggests itself. Assume that there was no other evidence offered to previous conviction except that given by Waller, was there lawfully sufficient evidence on which she could have been convicted of a second offence? I am quite sure there was not, especially as the law requires evidence of the previous conviction as stated in the warrant.

I have examined *Dealtry's Case*, 7 Can. Cr. Cas. 443, but cannot see that it helps the defendant here.

The case of *Rex* v. *Passerini* (not reported) is distinguishable from the present in one respect, apart from that referred to in the decision of the learned Chief Justice. The statute then in force explicitly stated that the defendant should not "be asked" whether he had been previously convicted. These words are not in the statute now in force. All that is now forbidden is that the magistrate should "enquire concerning such previous conviction or convictions as alleged in the information." It is sufficient for the present purpose to say that the magistrate made no such enquiry and, therefore, there was nothing done that was in contravention of the statute. It would be going beyond anything decided in the case of *Rex* v. *Passerini* to say that the mere fact that a relevant, though unnecessary question put by the prosecutor to shew the intent with which the liquor was kept, amounted to an enquiry by the magistrate which by the terms of the statute he is forbidden to enter upon until after the defendant has been found guilty of the offence charged in the information.

At the same time I feel bound to say that, even under the terms of the former statute, if a case had been before the Court in which the charge was that of keeping for sale and evidence were given, although unnecessary, to prove the intent with which the liquor was kept, I should not now consider that the conviction was invalidated by the admission of such evidence. In other words, my impression is that Passerini was a very fortunate and possibly too fortunate prisoner.

DRYSDALE, and RITCHIE, JJ., concurred with Meagher, J.

Drysdale, J.
Ritchie, J.

*Application refused.*

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Nov. 23.

## McBRIDE v. RUSK.

*Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ.*
*November 23, 1912.*

APPEAL (§ VII L 3—508)—REVIEW OF FACTS—PRIMA FACIE CASE—TRIAL WITHOUT JURY.

Where no reasons for judgment were given by the trial Judge appealed from, and it did not appear on the record in appeal therefrom that the trial Judge had discredited the plaintiff's testimony, the judgment dismissing the action at the close of the plaintiff's case will be set aside and a new trial ordered if it appears to the appellate Court that the plaintiff had made out a *prima facie* case which, on such ruling, the defendants desired to answer by calling witnesses.

Statement

APPEAL by plaintiff from judgment dismissing plaintiff's action.

The appeal was allowed and a new trial ordered.

*W. F. Dunn*, for appellant.

*W. B. Willoughby*, for respondent Watson.

*H. C. Pope*, for the other defendants.

Newlands, J.

NEWLANDS, J.:—This is an action on a promissory note. The defendants deny that they made the note in question, and that it was presented for payment, it being made payable at the Molson's Bank, Simcoe, Ont. At the trial the signatures of the defendants were proved by putting in questions and answers from their examinations for discovery admitting same. The plaintiff gave evidence that the note was presented for payment, and the learned trial Judge allowed him to be recalled after the close of the plaintiff's case to prove that the note was so presented for payment before action brought, which he did. The learned trial Judge then dismissed the action. As there are no reasons given for this judgment, it is impossible for us to tell on what grounds the action was dismissed, whether because he disbelieved the plaintiff's evidence or because he did not think the plaintiff had made out a case. As the learned trial Judge has not said that he disbelieved the plaintiff's evidence, I see no reason why this Court should disbelieve it, and unless we reject the plaintiff's evidence, he has certainly made out a case. I think the judgment of the learned trial Judge should be set aside, with costs.

As the defendants wished to give evidence, I think there should be a new trial, and that the costs of the first trial should abide the event.

Lamont, J.
Brown, J.

LAMONT, and BROWN, JJ., concurred.

*Appeal allowed and new trial granted.*

## FARRELL v. FITCH.

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Nov. 5.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. MINES AND MINERALS (§ I B—10)—MINERAL CLAIM—RAILWAY AID ACT (B.C.)—MINERS' LOCATION, WHEN NOT EXCEPTED FROM GRANT TO RAILWAYS.

A mineral claim of a free miner under location at the date of the grant of a land subsidy in the Province of British Columbia to a railway company pursuant to the Railway Aid Act, 1890, is not excepted under that Act from the grant to the railway company, as lands "alienated by the Crown," where the locator by his default (in not performing certain conditions) loses his right to a grant of the land as well as its minerals.

[Secs. 10, 13, Railway Aid Act, ch. 40, B.C. Statutes, 1890, referred to.]

2. MINES AND MINERALS (§ I A—5)—MINERAL CLAIMS—GRANT UNDER RAILWAY AID ACT (B.C.) EMBRACES MINERAL CLAIMS, WHEN—CONSTRUCTION OF ACT.

The legislative intent of the Railway Aid Act (B.C.) was, that the interest of the Crown in lands (already located as mineral claims), which are comprised in a greater block of lands granted as a subsidy to a railway company under the Act, may pass to the railway company, subject to existing and future rights of the persons who prior to the subsidy had made such locations.

[Railway Aid Act, B.C. Statutes, 1890, ch. 40, construed; *Osborne v. Morgan* (1888), 13 A.C. 227; *Nelson and Fort Sheppard R. Co. v. Jerry* (1897), 5 B.C.R. 396; *Re Demers*, 1 B.C.R., pt. 2, 334; *Staffordshire Banking Co. v. Emmott*, L.R. 2 Ex. 208, referred to.]

Statement

APPEAL by the plaintiffs from the judgment of Clement, J., in an action for trespass to mineral claim located after the grant of a railway subsidy by the Province of British Columbia to the defendants under the provisions of the Railway Act, B.C., 1890.

The appeal was dismissed.

*C. Wilson*, K.C., for appellant.

*McMullen*, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff claims damages for trespass to mineral claims which were located after the grant of a land subsidy by the province to the defendants, or their predecessors in title, pursuant to the Railway Aid Act, 1890, and amending Acts. The plaintiff contends that the ground covered by her said mineral claims was at the time of the grant aforesaid under location, and held of record as mineral claims and that these expired after the said grant was made, and thereupon the land reverted to the Crown and again became waste lands open to location as mineral claims, and were relocated thereafter, and are held now by her as mineral claims located upon waste lands of the Crown. She bases this contention upon sec. 10 of the said Railway Aid Act, which excepts

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from the grant "any lands held by grant, lease, agreement for sale, or other alienation by the Crown, Indian reserves or settlements, military or naval reserves, or lakes or lands in which any person other than the Crown shall have a vested interest." That section does not specifically mention mineral claims, although at that time mining was one of the principal industries of the province. If section 10 stood alone, it might be proper to infer that mineral claims fell within the exceptions. The interest of a free miner in his mineral claim was defined by the Mineral Act then in force, and practically the same definition has been continued ever since, as being a chattel interest equivalent to a lease. At that time it carried with it a right on the performance of certain conditions subsequent to a grant in fee of the land as well as of the minerals. As sec. 10 is, in my opinion, to be interpreted by the aid of section 13 of the same Act, I do not feel called upon to express an opinion as to whether or not, had sec. 10 stood alone, it would be proper to hold that mineral claims fell within it. I am of opinion that said sec. 13 clearly enough indicates that mineral claims were intentionally omitted from sec. 10. Sec. 13 provides that the Lieutenant-Governor-in-council may grant to the railway company the right for a period of twenty-five years to exact a percentage not exceeding 5% of the gold and silver extracted from ores which may be found upon any of the lands granted. So far the section does not cast any light upon sec. 10, but what follows in my opinion does. I quote:—

> But such percentage shall not apply to mines (in any of the lands granted) which may have been acquired before and are held by mining companies or individuals at the time of the filing by the railway company of its map or plan under the Railway Act, nor shall such percentage apply so long as such mines (in any of the lands granted) are held by such mining companies or individuals or their lawful successors in title.

This section was repealed the following year, but the repeal does not, I think, affect the significance of the section as shewing the intention of the legislature at the time sec. 10 was passed. To my mind it shews that lands in the blocks granted, upon which were located mineral claims, included in the broader term "mines," were intended to pass to the railway company, subject to the rights of the holders of such mines, which were expressly reserved by the Act. The words inserted in brackets in the above quotation, from sec. 13 are mine. They do not add to, but simply repeat the antecedent words in the first part of the section, which are in my opinion clearly to be inferred. The inference which I draw from the last part of the section recited is that on the expiry of the title of those holding such mines at the time of filing the railway plan, the railway company might be authorised to exact a percentage in the same way

as it might be authorised to exact a percentage from ores extracted from the lands mentioned in the first part of sec. 13. I think the legislature has clearly indicated that it intended that the interest of the Crown in lands covered by mineral claims, or mines, should pass to the railway company subject to existing and future rights of free miners.

Having come to this conclusion, it is unnecessary for me to consider any other phase of the case. No matter what the status of the original claims was, whether they were in existence before the filing of the map or plan or not, as to which there is no evidence in the case, they expired after the grant which was made in October, 1901, and the title which the plaintiff now claims is a title to mineral claims which, if I am correct in my view, were located upon occupied lands, namely, upon the lands of the defendant company. If that be so, she is not entitled to succeed in this action. The relief she claims in this action is not founded upon the ownership of mineral claims so located; she does not pretend that she has complied with the provisions of the Mineral Act in respect of such locations.

Macdonald, C.J.A.

It follows that the appeal should be dismissed.

IRVING, J.A.:—I think this appeal must be dismissed.

Irving, J.A.

Mr. Wilson relies on his certificate of work, and argues that on the pleadings in this case it is not open to the defendants to attack the plaintiff's title. The statement of defence contains (1) a denial of the plaintiff's property in the land; and (2) a claim that the land is the property of the railway company.

The first of these defences disputes the plaintiff's possession and his title. The second disputes the plaintiff's title by asserting a title in the defendant under Crown grant of 3rd October, 1901, and by implication asserts a right of possession in the defendant as owner.

It is admitted (p. 110) that the lands in question are contained within the limits of the grant to the railway company. The defendant railway company has a status by virtue of its grant under ch. 40, B.C. stats., 1890, to attack the plaintiff's title. The grant from the Crown is entirely different from the miner's right mentioned in *Osborne* v. *Morgan* (1888), 13 App. Cas. 227. Having regard to that difference, the pleadings in my opinion are sufficient to enable the defendants to shew the location was faulty under sec. 29. *Nelson and Fort Sheppard R. Co.* v. *Jerry* (1897), 5 B.C.R. 396, was relied on as an authority for the proposition that the defendants had no status to attack the plaintiff's location. With all respect, I cannot find that laid down in the judgment of the Court of Appeal in that case, nor, in my opinion, can the grant to the plaintiff be construed by reference to the decisions in the *Nelson and Fort Sheppard Railway* v. *Jerry*, 5 B.C.R. 396. The plaintiffs there,

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the railway company, made their selection on 23rd March, 1893, their Crown grant issued 8th March, 1895, and there was excepted therefrom all lands alienated, or held as mineral claims, prior to the date of selection. The defendants located the Paris Belle on 24th December, 1894, and the location was illegal and void, but the defence was this: the Paris Belle covered a previous good location on the Zenith, located 15th June, 1892, and certain additional land. As to the Zenith, it was set up that as it was a good location made prior to 23rd March, 1892, and never abandoned, it did not fall within the terms of the company's Crown grant. This defence as to the Zenith, viz., that it had not been abandoned, succeeded, and it was also pointed out that on the authority of *Re Demers*, 1 B.C.R. pt. 2, 334, had it been abandoned after 23rd March, 1893, it would not become the company's property, but would have reverted to the Crown. In dealing with the Zenith ground it was not suggested that the plaintiffs had no status to attack the defendants' title. As to the additional area, *i.e.*, outside of the Zenith boundaries, the defence was that under the Railway Subsidy Act and the terms of the plaintiff's Crown grant, the land was open to free miners, and that the defendants had lawfully located their claim on 24th December, 1894.

The reply was the location was bad, because (1) no rock in place had been discovered; and (2) no compensation had been made to the company.

The rejoinder of the defendants set up that the plaintiffs were estopped from attacking the defendants' title because they (the defendants) had, on 8th November, 1895, obtained a certificate of improvements. The full Court held that, although the location was illegal and void, the failure of the plaintiffs to protest on 8th November, 1895 (after writ issued) estopped the company from questioning the defendants' title, on the principle laid down by Channel, B., in *Staffordshire Banking Co.* v. *Emmott*, L.R. 2 Ex. 208. McCreight, J., in giving judgment says expressly:—

> Both the railway company and the licensees of the Crown have rights under the Act and Crown grant. The free miner can enter, locate, record and in due course obtain a certificate of improvements, etc., and the railway company must have a right to see these privileges are not abused by the miner to their detriment.

The plaintiffs in the case at bar have not obtained a certificate. The Nelson & Fort Sheppard Subsidy Act, 1892, ch. 38, sec. 5, confined the company to "unoccupied Crown land," and specially excepts "lands held as mineral claims." The Railway Aid Act, 1890, ch. 40, sec. 10, does not except lands from the grant simply because they are occupied. The Act of 1892 uses wider words of exemption than does the Act of 1890,

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Again, as was to be expected from the different terms in the two Acts, the language of the exceptions in the Crown grant in this case is different from that used in the other case—the exception there expressly included "all lands alienated by the Crown or held as mineral claims" but here those words are not used.

How can it be said that lands improperly located are "alienated" by the Crown, particularly in view of sec. 18, which protects the free miner's rights, subject to compliance with the mineral Acts? The word "alienated" indicates a recognition by the Crown of the rights of the locators of the claims. There is no such recognition in this case. It is to be noted that the contention that the Zenith had not been properly located was not established in *Nelson* v. *Jerry* (1897), 5 B.C.R. 396. Order 19, rules 13 & 14.

Martin, and Galliher, JJ.A., concurred with judgment of Macdonald, C.J.B.C.

Martin, J.A.
Galliher, J.A.

*Appeal dismissed.*

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## McKERRAL v. THE CITY OF EDMONTON.

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*Alberta Supreme Court. Trial before Simmons, J. November 22, 1912.*

1. Death (§ II B—13)—Action in damages—Who may maintain—Parent — Personal representative—Lord Campbell's Act.

Where the parent of a deceased child, whose death was alleged to have been caused by certain wrongful acts (which would not be grounds for an action at common law) is given a certain right of action therefor by statute, and where the statutory provision requires any such action to be brought by and in the name of the executor or administrator of the deceased child; an action of that class instituted by the parent as such, instead of as such executor or administrator, cannot be maintained.

[*Monaghan* v. *Horn*, 7 Can. S.C.R. 409, followed; Lord Campbell's Act, 9 & 10 Vict. ch. 93; N.W.T. Ordinances 1911 (Alta.), ch. 48, sec. 3; *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88, referred to.]

2. Death (§ II B—13)—Action in damages — Parent — Personal representative — Amendment operating to defeat statute—Limitation of time.

Where the death of a child is alleged to have been caused by the wrongful act, neglect, or default of the defendant, and where compensation in damages for negligence causing death is given by statute to certain relatives for their financial loss but with a provision that the action for same shall be brought by the executor or administrator of the deceased child suing in a representative capacity, and where the action is limited by the Act to a certain period after the death, and an action was brought before the expiry of the limitation period, by the parent as such, a motion on his behalf after the limitation period had expired, to amend by suing in the alternative as the personal representative of the deceased child will not be granted, as its allowance would operate to defeat the statute.

[N.W.T. Ordinances, 1911 (Alta.) ch. 48, sec. 3, referred to.]

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Statement

THE plaintiff's 4½ year old son was killed by being run over by a street car belonging to and operated by the defendants on their line of railway in Strathcona. The plaintiff sues as the father of his child, claiming damages. At the opening of the trial plaintiff asked leave to amend by suing in the alternative as the personal representative of the child. The accident occurred in July, 1910, and the right to sue as personal representative of the deceased child is given by those parts of Lord Campbell's Act which are re-enacted by ch. 48, Consolidated Ordinances N.W.T. 1911. Sec. 3 of this ordinance provides that the action must be brought by the executor or administrator of deceased. Sec. 4 enacts that the action must be brought within twelve months after the death of the deceased.

The action was dismissed.

*L. A. Giroux*, for plaintiff.

*J. C. F. Bown*, for defendant.

Simmons, J.

SIMMONS, J.:—Lord Esher, M.R., in *Weldon* v. *Neal*, 19 Q.B.D. 394, enunciates the principle applicable under such circumstances, namely, that even though not barred at date of writ, if such an amendment were allowed after the expiry of the date in which it would become barred would be to allow the party to take advantage of the former writ to defeat the statute. On the principle above laid down the amendment cannot, at this stage, be entertained as it would, if allowed, revive a cause of action, which, in the meantime, has become barred by the statute. The plaintiff, is, therefore, confined to his common law action. He has not defined the nature of his claim for damages and makes no claim for funeral expenses or medical attendance and offered no evidence of such and his claim would therefore be confined to one of loss of service of his child.

The maxim *actio personalis moritur cum persona* has long been recognized as the law in England.

In *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88, the plaintiff claimed in damages for loss of services and burial expenses against the defendant who, by negligent driving caused the death of plaintiff's daughter. The plaintiff claimed damages at common law and also as personal representatives by virtue of Lord Campbell's Act.

Pigott, B., and Kelly, C.B., both held that the law as laid down by Lord Ellenborough in 1808, in *Baker* v. *Bolton*, 1 Camp. 493, namely, that the death of a human being could not be complained of as a civil injury, was still the law in England. Pigott, B., relied strongly on the preamble of Lord Campbell's Act, as clear recognition that such was recognized by Parliament as the law at the time of the enactment 9 & 10 Vict. ch. 93, and that the language is not confined to cases to which the

maxim *actio personalis moritur cum persona* applies, but is perfectly general. The preamble to Lord Campbell's Act recites:—

> Whereas no action at law is now maintainable against a person, who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him.

The remedy under this act is confined to the wife, husband, parent and child only of deceased. The Act manifestly refused to sanction, by legislation, many other claims such as those arising out of the relations of master and servant where special damages arise out of the death of one of the parties.

Bramwell, B., dissented strongly against the opinions of the majority of the Court. He concludes a very exhaustive review of the English and American cases with the following expression of opinion:—

> But in this case it seems to me that the principle the plaintiff relies on is broad, plain and clear—viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should shew a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in English law. I find neither. With the exception of *Baker* v. *Bolton*, 1 Camp. 493, there is no semblance of an authority on this side of the Atlantic, and the cases on the other side are merely founded on that one, and some vague notion of merger in a felony.

The question came before Lord Alverstone, C.J., Sir Gorell Barnes, B., and Farwell, L.J., in the Court of Appeal in England in 1906, in *Clark* v. *London General Omnibus Company, Limited*, [1906] 2 K.B. 648. The Court took the view in this case that they must decide between the reasoning of the majority of the Court in *Osborn* v. *Gillett*, L.R. 8, Ex. 88, or the arguments of Bramwell, B., in his dissenting judgment in that case. The Court were unanimous in their opinion that no common law action could be maintained by the parent or master for injuries causing the immediate death of his child or servant; and that also that a parent can not recover, either at common law or under Lord Campbell's Act, for funeral expenses under like circumstances.

In *Monaghan* v. *Horn*, 7 Can. S.C.R. 409, Taschereau, dissenting from the majority of the Court, in an able judgment supports the view taken by Bramwell in *Osborn* v. *Gillett*, L.R. 8 Ex. 88. The learned Justice argues that the wrongful action of the defendant having terminated the contract of service by causing the death of the servant or child, it is inconsistent to assert that the death having terminated the contract therefore no action lies. The learned jurist says:—

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To say that the cause which terminates the contract of service must terminate the master's or father's claim for compensation, is to say that the claim for compensation would cease before having existed, for as I view it, it is the termination of the contract that creates the action against the wrongdoer.

In the same case Gwynne, J., took the view that the common law action would exist between the time of injury and death of the person injured as during that period the contract of service might still continue but that the death of the injured person terminated the contract of service, and consequently, terminated any cause of action arising thereunder.

The majority of the Court (Taschereau, and Fournier, JJ., dissenting) held that the claimant had no *locus standi*, not having brought her action as the personal representative of the child.

That then, is the law of England and in Canada and the plaintiff's action fails as he has not sued as the personal representative of his deceased child.

Action dismissed with costs.

*Action dismissed.*

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Nov. 25.

## McCUTCHEON LUMBER CO. v. MINITONAS.
(Decision No. 2.)

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 25, 1912.*

TAXES (§ III E—142)—RECOVERY BY DISTRAINT—VALIDATING STATUTE.

A tax validation statute may apply to a pending action calling in question the validity of the tax assessment; and where it declares that the assessment was valid and binding notwithstanding any defect or irregularity in the proceedings taken, and that the validity thereof shall not be questioned in any action on account of any defect or irregularity in said proceedings, or on account of non-compliance with any statutory provisions, the statute must be construed as retroactive and as including cases as to which litigation was pending at the time it was passed.

[10 Edw. VII. (Man.) ch. 38, construed; *McCutcheon Lumber Co. v. Minitonas*, 2 D.L.R. 117, affirmed on different grounds.]

Statement

APPEAL by plaintiffs from a decision of Prendergast, J., *McCutcheon Lumber Co. v. Minitonas*, 2 D.L.R. 117.

The appeal was dismissed.

*J. B. Coyne*, and *J. Galloway*, for plaintiffs.

*C. P. Wilson*, K.C., and *W. C. Hamilton*, for defendants.

Howell, C.J.M.
Richards, J.A.

HOWELL, C.J.M., and RICHARDS, J.A., concurred in the judgment of Haggart, J.A.

Perdue, J.A.

PERDUE, J.A.:—The plaintiffs were the owners of certain personal property consisting of an engine, boiler and mill machinery, sleighs and wagons, all of which was within the limits of

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the defendant municipality. The municipality assessed this property for taxes for the years 1905 to 1908 inclusive. The taxes not having been paid, the municipality distrained upon the property for the amount claimed to be due, the defendant Campbell acting as the bailiff or agent of the municipality in making the distress. The plaintiffs then commenced this action alleging that there were no taxes due by reason of the non-fulfilment by the council of the municipality, of the requirements of the statutes in regard to the assessment of the property and the imposition and collection of taxes. Breaches of the statutory requirement in each and every one of the years abovementioned were alleged to have been made, the effect of which was, it was claimed, that there were no taxes due upon the property in respect of which the distress could be lawfully made. The plaintiffs asked for a declaration that there were no taxes due or in arrear from the plaintiffs to the defendant municipality, an injunction to restrain the sale, and damages for illegal distress.

The suit was commenced on 13th February, 1909, and while it was pending and before it was brought on for trial, the Legislature of the Province passed an Act, 10 Edw. VII. ch. 38, entitled, "An Act respecting the Rural Municipality of Minitonas." The preamble of this Act which is a public one, recites that doubts had arisen as to the legality of the assessments made by the council of the municipality in the years 1901 to 1909, inclusive, and of the by-laws striking the rates and making the levies for these years, and respecting the ability of the municipality "to enforce payment of the taxes now appearing in the books of the municipality" as charged against lands, goods and chattels on account of provisions of the Municipal Act and the Assessment Act, relating to assessing, rating, levying and charging of taxes not having been strictly complied with, and that it was expedient to set such doubts at rest and to legalize and validate such assessments, by-laws, levies and taxes. The Act then goes on to declare that:—

> Notwithstanding any defect or irregularity in the proceedings taken in the making of such assessments or passing such by-laws or of assessing, rating, levying and charging of said taxes or in the proceedings prior or subsequent thereto, the said assessments, by-laws, levies and taxes are hereby declared to have been and to be sufficient, valid, effectual and binding as if all such proceedings had been fully and completely carried out according to all the provisions of the Municipal Act, and the Assessment Act, but no further or otherwise, the intention of this Act being only to cure all defects in the proceedings aforesaid, and the validity and legality of said assessments and by-laws, levies and taxes shall not be questioned in any action, suit or proceeding in any Court on account of any defect or irregularity in said proceedings or on account of any provisions of the

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Municipal Act, or the Assessment Act not having been complied with in the making of said assessments or the passing of said by-laws or in the assessing, rating, levying and charging of said taxes or in the proceedings prior or subsequent thereto.

Counsel for the defendant municipality did not seriously attempt to combat the objections urged against the proceedings leading up to the levy of taxes in each year. The municipality relied upon, and the argument was almost wholly directed to, the effect of the above Act as validating and confirming the assessment and taxation for the years in question.

Counsel for the plaintiff relied upon the view taken by the Supreme Court of Canada in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, and *Whelan* v. *Ryan*, 20 Can. S.C.R. 65, and since followed in many cases, as to the strictness of construction to be placed upon legislation having for its object the remedying of defects in assessing and levying taxes, caused by non-compliance with the imperative provisions of the statute under which the assessment and levy were made. The above cases and those which followed them in our Courts related to sales of land for taxes in which the contest arose between the original owner, or some one claiming through him, and the party who purchased at the sale for taxes. In *Whelan* v. *Ryan*, 20 Can. S.C.R. 65, in order to prevent what it regarded as confiscation of the land-owner's rights, the Court placed a very strict, if not strained, construction upon an enactment which was intended to validate the assessments and levies upon which the tax sale was based. Whether the Courts would have applied the same strictness of construction, in order to relieve a ratepayer of the municipality whose personal property had been seized or sold for taxes levied against it may be open to question.

The present case is a contest, not between the owner and the tax purchaser, but between the municipality and a ratepayer who is seeking to avoid the payment of taxes. The result of the plaintiff's success in this case would be that a considerable sum of money, forming part of the taxes relied upon by the municipality to provide a revenue for its ordinary purposes, would be lost and a heavier burden would be laid upon the other ratepayers in order to raise money to make good the deficiency. The plain object of the legislation was to cure all defects in the various steps to be taken by the municipality in assessing the property, imposing the taxes and enforcing payment of them. Both the preamble and the enacting part shew that this was the clear intention of the Act, and the effect of the enactment is expressed in words, the meaning of which is unequivocal and cannot be explained away. In order to make its purpose and effect unmistakeably clear the Act declares that the validity and legality of the assessments, by-laws, levies, and taxes shall not be questioned in any action, suit or pro-

ceeding in any Court, on account of defect or irregularity, or on account of non-compliance with any of the provisions of the Municipal Act or the Assessment Act.

The decision of the Privy Council in *Toronto* v. *Russell*, [1908] A.C. 493, is particularly applicable to the present case. There an action was brought by the owner of land against the municipality to set aside a sale for taxes, on the ground of a defect in the description of the land in the assessment roll and of failure to give notice of the sale. An Act of the Ontario Legislature (3 Edw. VII. ch. 86, sec. 8) had been passed which declared that all sales of land within the city for arrears of taxes during a period which covered the sale in question, were validated and confirmed, notwithstanding any irregularity in the assessment or other proceedings for imposition of any taxes so in arrear, or any failure to comply with the requirements of the Assessment Acts in regard to the manner in which any assessment roll or collector's roll of the city had been prepared. It was held that the insertion of an insufficient or inaccurate description of the land in the assessment roll was a failure to comply with the requirements of the Assessment Acts which required a description to be inserted which was neither inaccurate nor insufficient; but that this defect, if it existed, came within the very words of the statute and was cured by it. It was further held that since the main and obvious purpose and object of the Legislature in passing the Act there under consideration, was to validate sales for arrears of taxes, where the requirements of the statutes had not been observed, and to quiet the titles of those who had purchased, the Act should, where its words permitted, be construed so as to effect that purpose and attain that object.

Applying the principles laid down in *Toronto* v. *Russell*, [1908] A.C. 493, I think it is clear that this Court must hold that all the defects and failures on the part of the defendant municipality to comply with the requirements of the statutes in connection with the assessment and imposition of taxes in this case were cured by the Act.

No exception of pending litigation is made in the Act. It was strongly urged that the Act should be construed as if it contained such exception, that there was not a clear intention expressed that it should apply to the present case and that, therefore, this case was impliedly excepted.

In determining whether a statute applies to pending litigation or not, Lord Denman, delivering the judgment of the Court, enunciated the following rule:—

> We are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of the litigant parties to each other: *Hitchcock* v. *Way*, 6 A. & E. 943, 951.

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Jessel, M.R., expressed the rule in the following language:—

> It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights: *Re Joseph Suche and Co.*, 1 Ch.D. 48, 50.

See also *Re Athlumney*, [1898] 2 Q.B. 547, 552, and cases collected in Beal, Cardinal Rules 421-424. But if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable: *Attorney-General* v. *Hertford*, 3 Ex. 670; *Attorney-General* v. *Theobald*, 24 Q.B.D. 557, 559.

The Act in question in this case declares the assessments, etc., to have been, and to be, sufficient, valid, effectual and binding and enacts that the validity and legality of the assessments, etc., shall not be questioned in any action, suit or proceeding in any Court on account of any defect or irregularity in said proceedings, etc. If the plaintiff's property had actually been sold for taxes and the action had been brought to set aside or to claim damages for an illegal sale, I think that the Act being declaratory of the validity of the assessment and other proceedings would have been construed to be retroactive in its effect, and the intention to make it applicable to all actions or suits, including those then pending, to have been sufficiently clearly expressed. But the present action is not to set aside a sale. An injunction had been obtained restraining a sale, and it is now sought to have the injunction made perpetual and to have it declared that there were no taxes due or owing by the plaintiffs to the municipality. Even if the municipality had no right to distrain and sell at the time the action was commenced, the effect of the Act is to give it the right now to take such proceedings. The grounds upon which the interlocutory injunction was granted have disappeared and the plaintiffs cannot, in view of the Act, shew any grounds upon which an injunction could be issued restraining the municipality from proceeding in future to collect the taxes by distress or otherwise.

The Court cannot now find that there were no taxes due or owing by the plaintiff to the municipality, when the Legislature has declared that there were taxes legally imposed, the validity of which cannot be questioned by the Court.

The evidence shews that in one of the years the municipality, at the request of the plaintiffs, made an abatement of one half of the taxes because of a fire that had occurred. It is said that the plaintiffs through their agent, by reason of this, promised to pay the balance. In the view I have taken as to the main contention it is not necessary to deal with this last point.

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The plaintiffs had strong grounds to support their contention when the suit was commenced. Grave defects appeared in the assessments or other tax proceedings in each of the years mentioned. Were it not for the Act the proceedings could not, I think, have been upheld. The Legislature intervened on behalf of the municipality and enabled it to win the suit.

I think the trial Judge should, in awarding the costs, have taken into account the fact that the plaintiffs had good grounds for instituting proceedings in the first place and have given them costs up to the time the Act came into force. There has, however, been no leave given to appeal on the question of costs, and no ground has been stated which would give this Court the right to interfere with the trial Judge's disposition of the costs. In order to do justice to the plaintiffs in the matter of costs, so far as it lies in the power of this Court, I think that, in dismissing this appeal, no costs of the appeal should be given to the defendants.

Cameron, J.A.

CAMERON, J.A.:—A perusal of ch. 38, 10 Edw. VII. being "An Act respecting the Rural Municipality of Minitonas," leads me to the belief that it has the effect of curing the various defects relied upon by the plaintiff as nullifying the proceedings of the defendant municipality in making the assessments and imposing the taxes in question. The Act is of a curative and remedial character and will be given a liberal construction. The administration of the country is largely carried on through the medium of the municipalities, as instrumentalities of government, and for educational and governmental purposes generally, money must be raised by taxation. Defects may easily occur in the proceedings necessary to assess property and levy taxes, particularly in municipalities recently organized and the Legislature frequently and properly rectifies these errors. That legislation is not to be regarded as vicious, but, on the contrary, as meritorious and beneficial. And the action of the person, properly liable to taxation in common with others, who undertakes to resist or escape from payment of his share of taxes, and thrust the burden of them on his fellow-citizens, is not to be unduly favoured by the Court. These principles are to be gathered from the recent case of *Toronto* v. *Russell*, [1908] A.C. 493, and, apart from the question of authority, they commend themselves as founded on sound reasoning and on a due regard for the public interest.

Such being the nature of the Act, to be gathered from its provisions, it must affect a matter which is in litigation such as this before us. And in addition to this, I think the very wording of the statute is such as to make it retroactive to the same extent as if that had been said in express terms. It seems to me impossible to read this Act without coming to the conclu-

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sion that it was the intention of the Legislature to make the taxes, as they appear on the books of the municipality, lawfully due and payable, and to declare that whatever was necessary to make them so lawfully due, should be deemed to have been done, from the beginning, and that no question arising out of these matters should be raised in any Court. That being clear there must be an end of the case, and I concur in dismissing the appeal.

HAGGART, J.A.:—The question is, does ch. 38 of 10 Edw. VII. of the statutes of Manitoba enable the defendant municipality to collect by distress, under the Assessment Act, the taxes which are the subject-matter of this suit?

The plaintiffs say that inasmuch as the Act creates legal rights and imposes legal obligations which did not before exist, it should receive a strict interpretation, that it should not be construed retrospectively, and that, having been passed after the commencement of the action, the presumption is that it does not apply to pending suits.

The defendants contend that it is a remedial Act, a curative statute, and ought to receive a wide and generous construction.

Lord Blackburn, in *Caledonian R. Co.* v. *North British Railway Co.*, 6 A.C. 114, 126, in discussing the interpretation of statutes, says:—

> The matter turns upon the construction of an Act of Parliament, which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect to which it was framed, and the object as appearing from the instrument, and taking all those together we are to see what is the intention appearing from the language when used with reference to such facts and with such an object.

The preamble clearly sets forth the existing conditions requiring the legislation It recites the doubts as to the legality of the assessments, and of the by-laws striking the rates and making the levies, and respecting the ability of the municipality to enforce payment of the taxes now appearing upon the books, on account of certain provisions of the Municipal Act and the Assessment Act relating to the assessing, rating, levying and charging of said taxes not having been strictly complied with; and the operative or enacting clause enacts that the

> assessments, by-laws, levies and taxes are hereby declared to have been and to be sufficient, valid, effectual and binding as if all such proceedings had been fully and completely carried out. . . . and the validity and leganty of said assessments and by-laws, levies, and taxes shall not be questioned in any action, etc.

In 1908, the manager of the plaintiffs, on account of the mill being burned, applied for a reduction in the amount of taxes, and the council passed a resolution allowing the same,

and the manager agreed to pay the reduced bill. Does not this look like a waiver of an irregularity in the assessment?

The Legislature, when passing the Act, must have had in view the subject-matter of this litigation, and must have intended to establish the liability of the plaintiffs for the arrears of taxes, and I think the wording of the statute is wide enough to effect that object, and in express terms the plaintiffs and defendants are relatively placed in the position they would have been in if the council and their officers had to the letter complied with the provisions of the Municipal Act and the Assessment Act.

Here there is no confiscation, no forfeiture, no sale or deed to declare valid or void, as was the case in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420; *Ryan* v. *Whalen*, 20 Can. S.C.R. 65, and the other cases relied upon by the plaintiffs. The declaration that the assessments, etc., have been, and are to be, sufficient makes the statute retroactive, and from the context and surrounding circumstances, it is apparent that the Legislature had in view the circumstances that gave rise to this suit.

The appeal should be dismissed.

*Appeal dismissed.*

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## STANDALL v. STANDALL.



*Manitoba King's Bench, Mathers, C.J.K.B. November 28, 1912.*

1. Motions and orders (§ I—2)—Lapsed motion no bar to fresh motion on same material—Alimony.

Where notice of motion for interim alimony is given, and affidavits pro. and con. are filed, but the motion lapses, a second application, even a year later, is not irregular because for the same relief and on the same material as the former application, no judicial decision having been rendered on the earlier motion.

[*Smith* v. *Edmunds*, 10 Man. L.R. 240; *Sayer* v. *O'Flynn*, 5 W.L.R. 524; *Payne* v. *Newberry* (No. 2), 13 P.R. 392; *Dombey* v. *Playfair*, [1897] 1 Q.B. 368, referred to.]

2. Divorce and separation (§ V B—50)—Interim alimony — Desertion with offer to resume cohabitation, when bar.

Upon a motion for interim alimony resisted by the defendant upon the ground that he had offered to resume cohabitation with the plaintiff, such an offer where cruelty and desertion were set up in the statement of claim is not a bar to the application, although, in the absence of the allegation of cruelty, it would be otherwise.

[*Snider* v. *Snider*, 11 P.R. 140; *Theakstone* v. *Theakstone*, 10 O.L.R. 386, referred to; see also *Karch* v. *Karch* (No. 1), 3 D.L.R. 658.]

3. Divorce and separation (§ V B—50)—Interim alimony — Tests of fair and reasonable amount as interim alimony.

Upon an application by plaintiff for interim alimony, the court will consider the following questions: (*a*) dilatory course of plaintiff in going to trial; (*b*) her own earning capacity; (*c*) her sources of income from her adult children; but on the other hand will take into consideration the expense to which the applicant is put in supporting the five dependent children.

[*Karch* v. *Karch*, 3 D.L.R. 658, 21 O.W.R. 883, referred to.]

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4. DIVORCE AND SEPARATION (§ V B—52)—INTERIM ALIMONY—COUNSEL FEE NOT ALLOWED, WHEN.

Upon an application for interim alimony counsel fees will not be included unless it is affirmatively shewn that the employment of counsel was necessary.

[*Cowie* v. *Cowie*, 17 O.L.R. 44; K.B. Practice Rule 942 (Man.), referred to.]

5. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY — INABILITY OF DEFENDANT TO PAY, EFFECT OF.

Interim alimony will not be ordered if it appears that the defendant has no ability to pay.

[*Pherrill* v. *Pherrill*, 6 O.L.R. 642, applied.]

Statement

THIS is an appeal from an order of the referee made the 31st October, 1912, ordering the defendant to pay $90, on or before the 9th day of November, as and for arrears of interim alimony from the 1st day of October, and to pay the sum of $15 per week thereafter up to the trial of this action; also to pay on or before the 8th November, the sum of $75, as and for interim disbursements.

The order appealed from was varied.

*E. L. Howell*, for the plaintiff.

*H. A. Bergman*, for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—The action was begun on the 6th October, 1911, and the defence was filed on the 4th November following. On the 7th November, 1911, the plaintiff served a notice of motion for interim alimony and interim disbursements. In support of that motion an affidavit of the plaintiff was filed and on the 15th November, an affidavit of the defendant was filed in opposition thereto, and on the 2nd December, the defendant's affidavit was answered by an affidavit of the eldest daughter. Nothing further was done with that motion and no order was made upon it.

In October of this present year a new notice of motion for the same relief was served. No new material was filed, but the plaintiff was cross-examined upon her previous affidavit, and the examination was used against her without objection. On this latter application the learned referee made the order appealed from.

The first ground of appeal raised is that the order was made upon a second application for the same relief. In support of this objection, *Smith* v. *Edmunds*, 10 Man. L.R. 240, and *Sayer* v. *O'Flynn*, 5 W.L.R. 524, were relied upon. The reason for the rule that a second application will not be entertained after the dismissal of a previous application for the same purpose, is that the party has already got a judicial decision against him on the case he submits: *Payne* v. *Newberry* (No. 2), 13 P.R. 392; *Dombey* v. *Playfair*, [1897] 1 Q.B. 368. As no order was made on the previous application it is no bar to the present motion. That ground of appeal, therefore, fails.

The plaintiff, in her statement of claim, alleges cruelty and desertion. The defendant, by his defence and by his affidavit offers to resume cohabitation with the plaintiff. Such an offer, in the absence of an allegation of cruelty, would be an answer to the application: *Snider* v. *Snider*, 11 P.R. 140; but in view of the allegations of cruelty in the statement of claim, the defendant's offer is no bar to the plaintiff's right to interim alimony: *Theakstone* v. *Theakstone*, 10 O.L.R. 386.

It is almost a year since this action has been at issue. It might have been brought down to trial at any time during that period. There is no reason, if the plaintiff so desires, why it should not be tried before the end of the year. During all that time the plaintiff has been able to support herself. She obtains her meals in the house of the defendant and she is earning $11 per week as a dressmaker. She is strong and healthy and able to continue to earn her own living. The housekeeping at the home is conducted by one of the daughters, who is 20 years of age. One of the sons is in employment and pays $5 per week as board, and they have a boarder who pays $4 per week.

It appears, however, that the burden of supporting the dependent children, of whom there are five, largely falls upon the plaintiff. In view of such cases as *Karch* v. *Karch*, 3 D.L.R. 658, 21 O.W.R. 883, I see no reason to differ from the conclusion arrived at by the referee as to the right of the plaintiff to an order for alimony if the defendant is able to pay it.

As to the amount ordered I might have something to say; but in view of the conclusion I have arrived at upon another point it does not become necessary to deal with that question.

It seems to me that no case was made for ordering $75 as interim disbursements. The material is entirely silent as to what the actual disbursements are. Apart from counsel fees they should not exceed $25. An amount to cover counsel fees should not be ordered in view of rule 942, unless it appears that the employment of counsel is necessary: *Cowie* v. *Cowie*, 17 O.L.R. 44.

Interim alimony will not be ordered if it appears that the defendant has no ability to pay. Upon this appeal an affidavit was, by leave, filed by the defendant upon which he was cross-examined. This new material shews that since his affidavit, sworn to on the 15th November, 1911, two judgments have been recovered against him, one for $193, and one for $800, and that he has been examined as a judgment debtor. The house in which the family reside in the city of Winnipeg has been sold for taxes, amounting to about $150, and he is unable to redeem it. None of the properties which he owns bring in sufficient revenue to meet payments in connection with mortgages thereon

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and taxes. He has no money and no income whatever, except his daily wages as a tailor. I feel strongly convinced that if the order of the learned referee is permitted to stand, the defendant will be unable to comply with it. I think, under the circumstances, the order for interim alimony cannot stand: *Pherrill* v. *Pherrill*, 6 O.L.R. 642.

There will be some disbursements necessary in bringing this action down to trial. These I think the defendant should pay. I will, therefore, vary the order of the referee by disallowing that part of it which directs payment of alimony and reduce the amount to be paid for disbursements to $25 without costs.

*Order varied.*

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**Re MOOSECANA SUBDIVISION, and GRAND TRUNK PACIFIC BRANCH LINES.**

*Saskatchewan Supreme Court, Newlands, J., in Chambers.*
*November* 18, 1912.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—41)—RAILWAY EXPROPRIATION PROCEEDINGS—FILING CAVEAT.

The plan filed by a railway company pursuant to the Railway Act (Can.) as a preliminary to expropriation proceedings for a right-of-way, is an instrument under which the railway company claim to be interested in the property within sec. 125 of the Land Titles Act, R.S.S. 1909, ch. 41, and although itself not registerable under that statute, it will support the registration of a caveat by the company.

[As to caveats generally under the Torrens land title system, see Annotation to this case.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—42)—CONTINUATION OF CAVEAT —TERMS.

A caveat under the Land Titles Act (Sask.) by a railway company in respect of their location plan for a right-of-way filed under the Railway Act (Can.) will be continued only upon the company proceeding under the Railway Act with the expropriation of the lands.

Statement

THE Grand Trunk Pacific Branch Lines, on the 15th day of July, A.D. 1911, deposited their location plan in the land titles office at Moose Jaw pursuant to sec. 160 of the Railway Act and claimed the right to register a caveat by virtue of such plan and did so register a caveat.

The registrar of the land titles office, Moose Jaw, at the request of the registered owner mailed a notice to the caveator (the company) stating that its caveat would lapse at the expiration of thirty days unless continued by an order of the Judge.

The company applied for an order to continue their caveat.

An order was made continuing the caveat.

*W. E. Knowles* (Moose Jaw), for the Grand Trunk Pacific Branch Lines Company.

*W. H. B. Spotton* (Moose Jaw), for the registered owner and the Erratt Company, Limited, purchasers under an agreement for sale.

Newlands, J.:—Re caveat registered by the G.T.P. R. Co. against certain lots and blocks in the Mooseeana subdivision of the city of Moose Jaw being part of sec. 3-17-26 W. 2nd.

The G.T.P. R. Co. claim the right to register the above-mentioned caveat from the fact that they have filed a plan, profile and book of reference of the location of a part of their railway line across the above-mentioned property under the provisions of sec. 160 of the Railway Act. The filing of the plan, etc., gives them the right to take, without the consent of the owner a piece of land 100 ft. in breadth across the same for right-of-way. See sec. 177 of that Act. Sec. 125 of the Land Titles Act gives any person claiming to be interested under any instrument of transfer or transmission or under any unregistered instrument the right to file a caveat. Sub-sec. 11 of sec. 2 of that Act defines an instrument as meaning, amongst other things, a map or plan.

The plan in question is, therefore, an instrument, and, as the filing of it gives the railway company right to take certain land for the right-of-way without the consent of the owner, it confers upon them an interest in such land, and as they get such interest through an instrument that is not, and cannot be registered in the technical sense in which the word is used in the Land Titles Act, they can, I think, under sec. 125, register a caveat. To maintain the caveat, however, they must proceed under the provisions of the Railway Act to get the title of the lands described therein, and, as it was admitted by counsel that they have done so in this case, the order will be for the continuance of the above-mentioned caveat.

As this is the first time an application of this kind has been made, there will be no costs.

*Order continuing caveat.*

Annotation.

Land titles—Caveats

**Annotation—Land titles (Torrens system) (§ IV—41)—Caveats— Parties entitled to file caveats—"Caveatable interests."**

In cases where no mention of beneficial rights of others is made on the face of the register, the proprietor of land under the Torrens system possesses special facilities for disposing of the property, and so defeating these beneficial rights; the remedy by injunction is then peculiarly applicable, and an expeditious and inexpensive method of obtaining the advantages afforded by the ordinary injunction forms an essential part of the system: *In re Martin*, [1900] S.A.R. 69, *sub nom. McEacharn* v. *Colton*, [1902] A.C. 104; *Davis* v. *Wekey* (1870), 1 V.R. 1; *Broadfoot* v. *Foxwell* (1896), 7 Q.L.J. 4. This method consists in the entry of a caveat on the register, by which the proprietor is prevented from effecting any change in, or

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Annotation

Land titles—Caveats

**Annotation** (*continued*) — **Land titles (Torrens system) (§ IV—41) — Caveats—Parties entitled to file caveats—"Caveatable interests."**

encumbrance on, the proprietorship. Such caveats are usually spoken of as "caveats against dealings," as distinguished from "caveats against applications"—i.e., original applications to bring land under the system: Hogg's Australian Torrens System, p. 1029.

Caveats against dealings embrace what are termed, in the English Land Transfer Acts, "cautions," "inhibitions," and "restrictions": Land Transfer Act (Imp.) 1875, secs. 53, 57, 58.

Hogg (Australian Torrens System, 1039), says: "The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system, see *McEacharn* v. *Colton*, [1902] A.C. at 107, suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the Courts. See *In re Kauri Timber Co.* (1889), 7 N.Z.R. at 462. At the same time it must be remembered that, given the caveator's interest, a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the Courts."

A caveat is an "instrument" within the meaning of the Land Titles Act of Saskatchewan, and when properly lodged prevents the acquisition or bettering or increasing of any interest in the land legal or equitable, adverse to or in derogation of the claim of the caveator, at all events as it exists at the time the caveat is lodged: Sask. Land Titles Act, R.S.S. 1909, ch. 41, secs. 2 (former 2), 125 (former 136), and 128 (former 139), considered; *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, affirming same case *sub nom. Alexander* v. *Gesman*, 4 S.L.R. 111, which reversed *Alexander* v. *Gesman*, 3 S.L.R. 331.

A caveat which describes the lands against which it is filed with reasonable certainty which enables the registrar to identify the land, but omits to give the number of the certificate of title as required in the statutory form is a sufficient compliance with the Land Titles Act, R.S.S. 1909, ch. 41, sec. 126, which is intended for the guidance of registrars and should be construed as directory only: *McKillop* v. *Alexander*, 1 D.L.R. 586; *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, on appeal, *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282.

A caveat filed under sec. 133 of the Real Property Act, R.S.M. 1902, ch. 148, must accurately set forth the title, estate or interest in the land claimed by the caveator, and a petition filed by the caveator after notice served upon him by the caveatee, under sec. 131 of the Act, requiring the caveator to take proceedings upon his caveat, must be one asserting substantially the same title, estate or interest as that stated in the caveat or it will be dismissed: *Re Cass and Canada Traders*, 20 Man. R. 139, 15 W.L.R. 194; *McArthur* v. *Glass*, 6 Man.R. 224; *McKay* v. *Nanton*, 7 Man.R. 250, and *Martin* v. *Morden*, 9 Man.R. 565, followed.

Priority is not acquired by the filing of a caveat by one who became interested in land under an agreement for its purchase after an execution had been lodged and registered against it in the land titles office: *Re Price*, 4 D.L.R. 407; *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, distinguished.

The intention of sec. 132 of the Manitoba Real Property Act, R.S.M. 1902, ch. 148, is that a transfer or other dealing with land may be put

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Annotation

Land titles—Caveats

**Annotation (*continued*) — Land titles (Torrens system) (§ IV—41) — Caveats—Parties entitled to file caveats—"Caveatable interests."**

through by the district registrar subject to any existing caveat filed after the first certificate of title has been issued, and in such case the rights of the caveator, whatever they may be, are preserved, but no additional force should be given to the claim set out in the caveat, by making a new certificate of title "subject" to it: *Pearson* v. *O'Brien*, 4 D.L.R. 413.

A caveat based on a prima facie valid document will not be vacated on a summary application to a Judge in Chambers where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party; the application might be entertained if the facts were undisputed and the issue rested on the interpretation or validity of the written document on which the caveat is founded: *McGreevy* v. *Murray*, 1 D.L.R. 285.

As an application for the continuance of a caveat under sec. 130 of the Land Titles Act, R.S.S. 1909, ch. 41, is neither an action nor a proposed action, therefore power to grant an order for that purpose cannot be delegated by the Judges of the Supreme Court to Local Masters, as it does not come within the authority conferred upon the former to make rules delegating their powers to Local Masters in respect to action brought or proposed to be brought in their respective districts: *Re a Caveat*, 3 D.L.R. 590.

A caveat will lapse where the caveator, after proper lapsing notice had been given the caveator by the registrar, obtained a void order under sec. 130 of the Land Titles Act, R.S.S. 1909, ch. 41, from a Judge of the District Court acting as a Local Master, which he was without jurisdiction to grant, extending for more than thirty days the time for the lapsing of the caveat. But a caveat will not lapse where the notice given for that purpose by the registrar to the caveator recited that it was sent out under the provisions of sec. 141 of the Land Titles Act, which, however, did not relate to caveats, since the notice was not such as was required by sec. 130 of the Act in order to terminate a caveat: *Re a Caveat*, 3 D.L.R. 590.

The appellants in *Re Ebbing*, 2 S.L.R. 167, secured a mortgage from one Ebbing on certain lands, and applied to the registrar to register a caveat against such land, claiming an interest therein under such mortgage. At the time of such application grant from the Crown for such land had not been received, and the appellants produced no evidence that such grant had issued or that the mortgagor was entitled to mortgage such land. The registrar refused to register such caveat, and the appellants appealed from his decision. The Court held that, as the registrar could not accept and register the mortgage under which the caveator claimed until the Crown grant was received by him or until he was satisfied by affidavit in form K. to the Land Titles Act that the mortgagor was entitled to create the mortgage, neither could he accept and register a caveat claiming under such a mortgage in the absence of the Crown grant or evidence of the right of the mortgagor to create such mortgage: *Re Ebbing*, 2 S.L.R. 167; *Gaar-Scott* v. *Guigere*, 2 S.L.R. 374.

The Land Titles Act (Sask.) preserves to the Court jurisdiction to deal with questions of fraud and with other equities that may arise affecting land, and which would properly be cognizable on the equity side of the Court: *Turner* v. *Clark*, 2 Sask. R. 200.

Hogg (Australian Torrens System, 1039) says: One useful function

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Land titles—Caveats

**Annotation (*continued*) — Land titles (Torrens system) (§ IV—41) — Caveats—Parties entitled to file caveats—"Caveatable interests."**

of a caveat is to afford notice, to persons who propose to deal with the proprietor, that the ordinary legal rights of the proprietor are—temporarily or altogether—restricted: *In re Wildash* (1877), Queensland L.R., pt. II, p. 47; *In re Scanlan* (1887), 3 Queensland L.J. 43. The mere fact of the caveat being entered on the register is not, however, necessarily notice to all the world of the restrictions imposed on the proprietor of the land: *In re Wildash*, Queensland L.R., pt. II, p. 47; *Queensland Trustees* v. *Registrar-General* (1893), 5 Queensland L.J. at 51. A caveat is sometimes spoken of as though it were an instrument which, by priority of registration, secured priority of interest; but the proper view seems to be that a caveat is worthless unless there is in existence at the time of its entry on the register, an enforceable right of some kind relating to the land; and that, on any such right coming to an end, the caveat becomes of no effect: See *Butler* v. *Saddle Hill G.M. Co.* (1884), 2 N.Z.S.C. 296; *Kissling* v. *Mitchelson* (1881), 3 N.Z.C.A. 261. Nevertheless, the proprietor of the estate or interest in respect of which the caveat was lodged is entitled, on its ceasing to have any vitality, to have it removed as being in the nature of a blot on his title: *In re Beauchamp* (1867), 1 Q.S.C.R. 161; *In re Thomson* (1886), 5 N.Z.S.C. 52; *Taylor* v. *Land Mortgage Bank* (1886), 12 V.L.R. 748; and see *Ex parte Cameron* (1894), 15 N.S.W. 139; Hogg's Australian Torrens System, p. 1040.

The lodging of a caveat has been held to be a sufficient intervention within the rule laid down in *Cohen* v. *Mitchell* (1890), 25 Q.B.D. 262, so as to prevent a purchaser from a bankrupt or insolvent acquiring rights in the property against the official assignee: *In re Palmateer* (1890), 16 V.L.R. 793; Hogg's Australian Torrens System, p. 1040.

Under sec. 136 of the Land Titles Act (Sask.) a *cestui que trust* claiming a beneficial interest of any sort may lodge a caveat whether the declaration is in writing or not: *Re Wark*, 2 Sask. R. 431.

Sec. 49, sub-sec. 8, of the Land Registry Act (B.C.) does not require that the *lis pendens* (or other evidence) of a caveator shall be filed during the currency of the caveat; it is effective if filed before the caveat; the words "have filed" are to be construed as meaning "have on file": *Croft* v. *Whiting*, 14 W.L.R. 634.

A plan, of record in the Winnipeg land titles office, set forth a subdivision of a tract of land, including parcels numbered 1 to 9. The caveators agreed to buy from the N. I. company parcels 5 and 9; and by their caveat, against parcels 4 and 8, claimed "an estate or interest as purchasers under a certain agreement for sale," describing it. Parcels 4 and 8 stood in the name of the C. T. company the caveatees. By the petition of the caveators, under schedule L. to the Real Property Act, they set up representations made to them by M., who was alleged to control the property, personally and as a member of the N. I. company, that parcels 4 and 8 were set apart for a public street; that the caveators had bought on the faith of such representation; and that they were entitled to a way of necessity over parcels 4 and 8. Sec. 133 of the Act required that the caveat shall state the nature of the title, estate, interest, or lien under which the claim is made. It was held that the caveat did not comply with the requirements of sec. 133, and the petition should be dismissed. As the matters set forth in the petition were distinct from the claim set up in the

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Land titles—Caveats

**Annotation** (*continued*) — **Land titles (Torrens system) (§ IV—41) — Caveats—Parties entitled to file caveats—"Caveatable interests."**

caveat, sec. 140 of the Act would not affect the filing of a certificate of *lis pendens* in respect of an action brought by the caveators against the caveatees to enforce the right claimed in the petition: *Re Cass and Canada Traders*, 20 Man. R. 139, 15 W.L.R. 194 (Man.); *McArthur* v. *Glass*, 6 Man. L.R. 224, followed.

The appellant, the Gaar Scott Company, filed two caveats against the respondent Guigere's land, one under a mortgage which was shewn to have been given in respect of Crown lands before the issue of the patent, and the other a judgment recovered against the respondent under the name of Gear as to land of which the respondent was registered as owner under the name Guigere. The respondent served a notice requiring the withdrawal of the caveats, and a summons was taken out by the appellants to continue them. On the hearing the Judge in Chambers dismissed the summons, without giving any time for bringing an action to maintain the rights. If there is any bona fide question of law or equity to be decided as to the right of the caveator to the estate or interest claimed under the caveat, such question should be disposed of in an action, and the caveat should be continued for a sufficient time to allow an action to be brought in which to decide such question: *Gaar Scott Co.* v. *Guigere*, 2 S.L.R. 374.

A caveat may be filed under a judgment against land of which the debtor was the registered owner under another name, as the land may properly be said to be registered in the name of "some other person," and being so registered the judgment creditors had a right to file a caveat. The question of whether or not the land was the homestead of the respondent and not liable to be charged by the appellants' judgment was not such a question as should properly be determined in summary proceedings under the Land Titles Act: *Gaar Scott Company* v. *Guigere*, 2 Sask. R. 374.

While a caveator upon an equity of redemption in respect of an agreement by the mortgagor to give a second mortgage on demand for the price of goods sold to him, may not give the caveator a status to rank in respect of surplus proceeds of sale under the first mortgage, he is at liberty to take legal proceedings to establish his claim thereon, and an application by other parties for distribution of the fund may be postponed for a reasonable time to permit an action to be brought by the caveator: *Re Fisher*, 4 S.L.R. 374, 378; *Gilbert* v. *Ullerich*, 4 S.L.R. 56. A caveat is only a notice, not an encumbrance: *Gilbert* v. *Ullerich*, 4 S.L.R. 56, 17 W.L.R. 157.

Where a caveatee alleges as a ground for discharging a caveat that he signed the instrument under which the caveator claims under mistake and by reason of misrepresentation, the Judge should not deal with such a matter summarily on originating summons under Land Titles Act, 6 Edw. VII. (Alta.) 1906, ch. 24, sec. 91, but should direct further proceedings by action or otherwise under sec. 92: *Sawyer-Massey Co.* v. *Dennis*, 1 A.L.R. 125.

A caveat registered in respect of an option for the purchase of land which was executed on the Lord's Day, contrary to C.O. (N.W.T.) 1898, ch. 91, sec. 3, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, may be vacated and set aside: *Fallis* v. *Dalthaser*, 4 D.L.R. 705.

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Land titles—Caveats

**Annotation (*continued*) — Land titles (Torrens system) (§ IV—41) — Caveats—Parties entitled to file caveats—"Caveatable interests."**

Sec. 97 of the Alberta Land Titles Act, 6 Edw. VII. ch. 24, dealing with registration by way of caveat, applies only as between persons claiming under the same root of title, and, for this purpose, each fresh certificate of title constitutes a new root of title: *Arnot* v. *Peterson*, 4 D.L.R. 861.

One who first acquires the right to purchase land and files a caveat in the land titles office, is entitled to priority in Alberta over a person claiming to be a subsequent purchaser: *Edgar* v. *Caskey*, 4 D.L.R. 460.

The decision in the latter case was, however, reversed on other grounds affecting the merits: *Edgar* v. *Caskey* (No. 2), 7 D.L.R. 45.

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Nov. 14.

## SWANSON v. McARTHUR et al.

*Manitoba King's Bench, Mathers, C.J.K.B. November* 14, 1912.

1. MOTIONS AND ORDERS (§ II—6)—EX PARTE ORDER—ORDER ON NOTICE TO ONE PARTY ONLY—RESCISSION.

Where an extra-provincial corporation, made a co-defendant with an individual, obtains an order setting aside the service of process upon it on the ground of want of jurisdiction, and notice of the application was served on the plaintiff only and not upon the individual defendant, the order is as to the latter an *ex parte* order and is subject to rescission as such.

[*Re Doyle and Henderson*, 12 P.R. 38, referred to.]

2. MOTIONS AND ORDERS (§ II—6)—EX PARTE ORDERS—TIME FOR MOTION TO RESCIND.

An *ex parte* order of a referee may be rescinded by himself under Manitoba K.B. rule 438 if it appears, on the motion made to rescind, that such *ex parte* order was improperly made, and this notwithstanding that the application to rescind was not made within the four-day limitation of that rule, if it appears that the interests of the objecting party were not affected (Man. K.B. rule 342).

Statement

AN appeal by one of the defendants from order of a referee. The appeal was dismissed.

*W. H. Trueman*, for plaintiff.

*W. C. Hamilton*, for defendant.

*D. H. Laird*, for Eastern Construction Co.

Mathers, C.J.

MATHERS, C.J.K.B.:—In December, 1909, plaintiff began an action against the defendant McArthur and the Eastern Construction Co. McArthur resides in the Province of Manitoba, but the Construction Company is an Ontario corporation, with head offices at the city of Ottawa in that province.

McArthur had a contract for the construction of a large portion of the National Transcontinental Railway, and he sublet a portion of the work to the plaintiff. Subsequently he assigned, it is alleged, his contract for the work so sublet to his co-defendant.

The action is brought to recover from McArthur for work done under such sub-contract, but the statement of claim also contains this clause:—

The plaintiff undertook and performed the said work, including variations ordered by the said engineer, and in addition thereto, at the request of the defendants, work on said line from station 1186 to station 1200, at the rates and prices provided for in said agreement, and the whole of said work was completed on December 7, 1908.

The plaintiff claims for the whole work against McArthur, but claims for the work done between stations 1186 and 1200 as against the Construction Company, if it should be considered that such work was done at the request of the company, and for that company alone. In the prayer a claim is made against McArthur, and in the alternative, against the Construction Company.

McArthur, on the 11th February, 1910, filed a statement of defence, in which, amongst other things, he claims relief over against his co-defendant, the Construction Company.

The Construction Company having been served, moved to set aside the service and to strike their names out of the statement of claim on the ground that they were not proper parties to the action and were not subject to the jurisdiction of the Court, and on the 1st of March, 1910, an order was made by the referee in the terms asked for.

Notice of this application had been served on the plaintiff, but not upon McArthur. Subsequently, when the order was served upon McArthur, he moved to rescind it, and on the 10th June, 1910, an order was made by the referee rescinding his former order. From this latter order the Construction Company appeal.

On the statement of claim as framed the Construction Company was, in my opinion, a proper party to the action, and therefore there was jurisdiction to serve them with a statement of claim out of Manitoba under sub-sec. (g) of rule 201.

The Construction Company, however, contend that the referee had no jurisdiction to rescind his own order. If the order is not to be regarded as an *ex parte* order, I think that contention would be correct: *Re Doyle* v. *Henderson*, 12 P.R. 38.

An *ex parte* order may be set aside upon an application made within four days from the time of its coming to the notice of the party affected, under rule 438. As to the defendant McArthur, this order was, in my opinion, an *ex parte* order, and the referee had jurisdiction to rescind it under this last mentioned rule.

It is said, however, that the application was not made within the four days prescribed, and that no order was made extending the time. Under rule 342:—

> It shall not be necessary to give effect to any objection on the ground of irregularity if it shall appear that the interests of the party objecting are not and will not be affected by such irregularity.

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This objection was apparently taken before the learned referee, and he did not give effect to it, no doubt upon the ground that the interests of the objecting party were not affected. I think the referee was right in so dealing with the objection.

The appeal will, therefore, be dismissed with costs in the cause to the defendant McArthur in any event.

*Appeal dismissed.*

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Nov. 23.

## HAVNER v. WEYL.

**(Decision No. 2.)**

*Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ. November 23, 1912.*

1. PRINCIPAL AND AGENT (§ II A—8)—AGENT'S AUTHORITY TO SECURE PURCHASER FOR LAND—RIGHT TO CONCLUDE AGREEMENT FOR SALE—SPECIFIC PERFORMANCE.

One who enters into possession of land under an agreement for its purchase made by an agent of the owner, which was not satisfactory to the latter, cannot obtain specific performance of the agreement where the agent had authority only to secure a purchaser and not to enter into a contract for the sale of the property.

[*Havner* v. *Weyl*, 5 D.L.R. 141, affirmed.]

Statement

AN appeal by the plaintiffs from judgment dismissing action, *Havner* v. *Weyl*, 5 D.L.R. 141.

The appeal was dismissed.

*J. A. Allan*, for appellants.
*M. V. Bigelow*, for respondents.

Haultain, C.J.

HAULTAIN, C.J.:—This is an action for the specific performance of an alleged agreement for the sale of land accompanied by alleged acts of part performance.

The agreement is claimed to have been made between the plaintiffs and one H. Westergaard, as the agent of the defendant. The transaction was brought about as the result of certain correspondence between the defendant and Westergaard, which will be more particularly referred to.

A large amount of correspondence which took place before the 21st April, 1911, need not be referred to, as it contains in effect nothing but repeated requests from the defendant to Westergaard to sell the land in question for him at the best possible price and repeated and consistent refusals by Westergaard to assume the responsibility imposed by what he terms in a letter to the defendant "your *carte blanche* power of attorney."

For the purposes of this action the correspondence, in my opinion, begins with the following letter from Westergaard to the defendant:—

Macoun, Sask., April 21, 1911.

Mr. Chas. G. Weyl,
Minneiska, Minn.

Dear Sir,—I have your reply to my wire of to-day, telling me to close deal at best price obtainable at your expense, but this is a responsibility I do not care to assume. When I wired you this forenoon I had what I thought a prospective buyer, a man who was looking for a piece of land at a snap and took him out to look over the place. We found, however, that the place is in a deplorable condition, completely covered with weeds, and that in order to get any benefit out of the land at any time it would have to be summer fallowed, as seeding it for a crop this year is out of the question. Another drawback is the fact that there are no men around there who are able to rent the land and work it in any kind of decent shape. Downing cannot handle it, nor Weed, and there is no one else there or around. To summer fallow it would mean a cash outlay of $400, and in another year an owner would be up against the same proposition of finding a man to work it, in order to get any returns from it, and this, as I have explained, is a difficult matter. The surrounding country, as you know, is poorly settled, and this makes it so hard to do anything with the land. Some of the men who had land there is sold out this spring, among them George Wetmore, who had the south-east of 30-5-9, with 126 acres broken, considerable summer fallowed, and buildings in which he lived. He sold for $1,600 cash, and it is a good quarter. Last week George Mudge, who had the land clear, sold the S.W. of 10-6-9 for $1,400 cash, so you see from that what land in that neighbourhood brings. It is a pity that it is so, but that fact remains. For some reasons prospective buyers don't like that locality, partly, I presume, because there are so much vacant land between there and town. I had expected a more definite reply to my wire, as I was not able to close any deal on what you said, and I don't see why you should leave a matter of some importance to you, to me, a stranger, who might have taken advantage of your *carte blanche* power of attorney, so to speak; as mentioned before, I would not assume the responsibility. I pressed this party for an offer that I could submit to you, and the very best he would do was $1,600 cash, as it will require considerable cash to put the land in shape. Added to this is the fact that unless something is done to the land soon, the municipality will have the weeds cut and the expense charged up against the land, as its present condition is a detriment to the whole neighbourhood. I have personally bought land within seven miles of town for $8 an acre, improved, and recently bought another quarter for $1,400, but I am not in the market now, haven't got the cash.

Have you the title to this land, and is it clear, or is there a mortgage on it? I did not think it necessary to waste any more money on telegrams, as the matter could not be explained in a few words, but you can let me know on receipt of this letter what you want to do. If there is to be a deal, it will have to be done right away, as this party is likely to be able to pick up something at any time, and he was not over-anxious even at the price offered, he is looking for only one quarter. I showed him one-half section two and a half miles from

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town, 255 acres under cultivation, that the owner was seeding to-day, which he offered at $20 an acre with half crop, but it required a little more money than this party had to invest at the present time. I also spoke to the young man I had reference to in my letter, he did not care to consider it, as he finds it very difficult to interest people in that direction, and he knows the condition of the land. He referred to the considerable outlay of money that would be necessary, and by the way, he is the party that bought the two quarters referred to for $1,600 and $1,400 respectively. He don't list land, but buys it outright, and being on the ground and familiar with practically the entire district and knowing the condition of the prospective sellers, are able to buy at prices that may seem small.

I will make no suggestions as to what you ought to do. I have explained at some length the conditions prevailing, and you will have to make up your mind accordingly. What I have stated are the facts, and to me personally it makes no difference what you decide to do, but as you showed your confidence in me, I want to retain it by stating the case clearly.

Yours truly,

H. WESTERGAARD.

Following this letter, the subjoined correspondence took place between Westergaard and the defendant:—

Minneiska, Minn., April 24th, 1911.

Mr. H. Westergaard,
Macoun, Sask.

Dear Sir,—Your very courteous letter of the 21st received to-day. I am very sorry the land is in such condition. You know I had put so much confidence in Mr. Urquhart, a lifelong friend, and depended on his judgment, which was short in regard to Mr. Weed.

As it is now,, I will consider it a great personal favour to sell the land at figures you mention, sixteen hundred, and I will make out the papers as soon as I know the name of the buyer.

In regard to my wire, it was to read "at my expense, wire result."

I think it best to sell the land at once and the figures or price above mentioned will be satisfactory. The Toronto General Trusts Co. has mortgage of five hundred dollars on place. Originally there was eight hundred dollars of a mortgage, and of this I paid three hundred, so it leaves five hundred still unpaid. The interest is due December 1st and is all paid. Taxes also paid. I appreciate the trouble you have gone to more than I can express. All I can add is, close the deal and I will appreciate the favour.

Very respectfully,

S.E. 34-5-9. CHAS. G. WEYL.

April 26th, 1911.

Chas. G. Weyl,
Minneiska, Minn.

Party referred to buying other land, will take it myself, sixteen hundred, five hundred cash, six hundred November on my note bearing six per cent. interest, assume mortgage five hundred.

H. WESTERGAARD.

Macoun, Sask., April 28th, 1911.

Mr. Chas. G. Weyl,
Minneiska, Minn.

Dear Sir,—Since sending you the telegram the other night, in which I stated I would personally purchase from you the S.E. of 34-5-9 W. 2nd for $1,600, I have found a party who is willing to pay cash, and as I was not particularly anxious to take it myself, even on the terms stated, I enclose a transfer for the land, which please sign as indicated and return to me at your earliest convenience, so that the deal can be settled and the money forwarded to you. Please also send me the tax receipts and the receipts showing payment made on account of the mortgage to the Toronto General Trusts Corp. on which there remains unpaid $500 according to your letter. Please be very particular to see that the transfer is executed properly and have the notary initial all changes, such as from Province to State, as indicated in pencil. A deposit has been made by the purchasers to bind the deal, and I agreed to furnish the transfer without delay, as they have made arrangements to have the land summer fallowed, which will mean a cash outlay for them of about $400, and they naturally don't want to have the matter drag along.

I have no doubt you will prefer this deal to the other, as you will receive your full equity at once, instead of part cash and the balance in the fall.

Yesterday a farm adjoining the town site, with over 100 acres in crop, with buildings and improvements valued at $2,500, sold for $4,100, crop and all.

Yours truly,

H. WESTERGAARD.

From this correspondence, and according to the evidence of both Westergaard and the plaintiff McGregor, it appears that on the 26th April, after the telegram of the same day had been sent, Westergaard entered into a verbal arrangement with the plaintiff McGregor for the sale to the plaintiffs of the land in question for the sum of $1,800, not $1,600, as stated by Westergaard in his letter to the defendant notifying him of the transaction. The next day (the 27th) the plaintiffs handed Westergaard a draft for $1,283.78, being the amount of the purchase money less $512.62 due for principal and interest on the mortgage to the Toronto General Trusts Corporation. This draft was drawn by McGregor on his firm at Marengo, Iowa. This draft was not accepted by Westergaard as cash, as he states in his evidence as follows:—

> I referred to the draft as a deposit in my letter until we had actually received a remittance for the money. It was a draft drawn by McGregor on his firm, which was not the actual money. It was not placed to my credit until we (the Northern Crown Bank) had a remittance for the draft.

Westergaard is the manager or agent of the Northern Crown Bank at Macoun, Sask.

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The several bank drafts put in at the trial shew that the proceeds of the first draft could not have been actually credited to Westergaard at the bank at Macoun until late in the first week in May at the earliest. The date of the actual receipt of the proceeds of this draft might be significant if it were necessary to consider the effect of the alleged acts of part performance which were begun on the 27th April and could only have been continued as such up to the 7th or 8th of May, when the plaintiff McGregor admits he was informed of the defendant's refusal to recognize the transaction.

The transfer sent by Westergaard to the defendant for his execution states the consideration to be $1,600, and contains the following memorandum of incumbrances:—

> Incumbrances: Mortgage in favour of Toronto General Trusts Corporation.

The defendant not having acknowledged the receipt of Westergaard's letter enclosing the transfer, Westergaard sent him the following telegram:—

May 5th, 1911.

Chas. G. Weyl,
Minneiska, Minn.
Awaiting return signed transfer sent you last Friday. Wire reply.
H. WESTERGAARD.

To this the defendant sent the following reply:—

Minneiska, Minn., May 7th, 1911.

Mr. H. Westergaard,
Macoun, Sask.

Dear Sir,—At the time the transfer was received the only man in this place that could properly fill it out was sick. A few days later I began taking stock and could not leave town to get the transfer filled out.

We are now moving the stock from this store, and when that is completed I can get away for a few days. I received your message to return the transfer which accompanies this, also payment for your message, and if this isn't sufficient please let me know. At the time I received your first message I was under the impression that the sale would be sixteen hundred net, as I had written some time ago I thought the land ought to be worth $18 or $20 per acre. That place has cost me just $2,300, and to sell for $1,100 would be a big drop. I sincerely hope this has not put you to any inconvenience, and thanking you for the many favours, I remain,

Very respectfully,
CHAS. G. WEYL.

Except for a letter from Westergaard to the defendant on the 10th May, protesting against his refusal to ratify the deal, no further correspondence, apparently, took place, and this action was begun on the 12th December, 1911.

On these facts I have no hesitation in coming to the conclusion that the judgment of Mr. Justice Newlands was correct,

and that the appeal should be dismissed. Westergaard was only authorized to accept a specific offer communicated by his letter of the 21st April. This was an offer by a man named Ewers, and Westergaard, in his evidence at the trial, stated that Ewers was the man referred to in both his letter and telegram of the 21st April and his telegram of the 26th April. Ewers' offer having been withdrawn, Westergaard made an offer on his own behalf by his telegram of the 26th April. On the same day upon which he made this offer, and without waiting for a reply he made the alleged arrangement with the plaintiffs. Mr. Bigelow contended in his factum and argument that if any sale was made to the plaintiffs it was made by Westergaard on his own behalf. In this connection the following portions of Westergaard's evidence at the trial may be quoted:—

(141) Q. So that statement, "I am about to purchase," was not correct? You had no intention of purchasing—none whatever? A. No, sir.

(151) Q. You never honestly believed that you were the owner of the land? A. Not that I was the owner. I believed that my offer would be accepted.

(152) Q. For how long did you believe that? A. Until I had a reply from Mr. Weyl—the time elapsing from the date of my telegram until I had a letter from Weyl, in which he declined to sign the transfer.

In addition to this Westergaard filed a caveat against the land in question on the 17th May, 1912, in which he stated under oath that he claimed to be an equitable owner of an estate in fee simple in the lands in question under an agreement for sale by the defendant to him embodied in the correspondence above referred to.

In any event Westergaard was either selling to the plaintiffs on his own behalf without any right or as agent for the defendant without any authority.

If it were necessary I should be prepared to find on the evidence that no part performance with the knowledge, authority or acquiescence of the defendant has been proved.

The appeal should be dismissed with costs.

*Appeal dismissed.*

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## CLUFF v. BROWN.

*New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, and Barry, JJ. April 19, 1912.*

1. COURTS (§ I A—2)—JURISDICTION OF JUDGE TO ENTERTAIN MOTION FOR A FOREIGN COMMISSION.

A Judge has jurisdiction to entertain a motion for a foreign commission to take testimony, notwithstanding that the original summons had been made by the registrar of the court and that the application should therefore have been first made to the registrar.

2. APPEAL (§ VII H—340)—INTERLOCUTORY ORDER FOR A FOREIGN COMMISSION—IRREGULAR APPLICATION.

Where a motion for a foreign commission is first made to a Judge instead of to the registrar of the Court under N. B. rules, order 30, rule 5, and the commission has been issued, an appeal from the order will not be entertained merely on the ground that the applicant should have been ordered to pay the costs of the irregular application.

Statement

APPEAL from an order made by McKeown, J., directing that a commission be issued to examine a witness at Montreal.

*W. P. Jones*, K.C., for plaintiff, respondent.
*A. B. Connell*, K.C., for defendant, appellant.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—An order for directions was made in this case by the Registrar on the 13th November last. Later an application was made to McKeown, J., for an order for a commission to examine a witness in Montreal. On hearing the summons, objection was made to the Judge acting, as the original summons had been made by the Registrar and this application must, therefore, be made to him by way of notice as provided by rule 5, order 30. The Judge, however, made the order and the commission issued. This motion is made to set aside the order and commission.

The practice adopted in England as to this rule is thus stated, in discussion of the practice under this order 30, in the Annual Practice 1912, at p. 460, in the paragraph, "notice for subsequent directions":—

> If either party issues an ordinary summons for any interlocutory purpose before judgment instead of proceeding by notice under rule 5, it is irregular, and may be dismissed with costs, or if entertained, the costs will be given against the party issuing it.

According to this rule, therefore, McKeown, J., should either have declined to act and dismissed the application with costs, or if he made the order he should have done so at the applicant's expense. As to the Judge's jurisdiction to entertain the motion and make the order, we entertain no doubt. Having made the order and the commission having issued, we are not prepared to interfere simply because the party was not compelled to pay costs. The express language of the rule leaves no doubt as to its

intention and object, and this Court should see that all applications for directions provided for by the rule should be made and disposed of under the original summons by a three days' notice as the rule directs. There are considerations of convenience as well as expense, having no bearing whatever on the question of jurisdiction, that render the rule valuable in practice and make its observance desirable in the interests of suitors.

Order 70, rule 1, gives the Court almost unlimited scope in dealing with questions of practice such as this: See per Kay, J., in *Reynolds* v. *Coleman*, 36 Ch.D. 453 at 458. As to this present motion we think it should be disposed of in the same way as was done in *D'Israeli Asbestos* v. *Isaacs*, 40 N.B.R. 431, 10 E.L.R. 147, in which a point similar in principle to that involved here came up for discussion.

This motion will be dismissed without costs.

*Motion dismissed.*

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## STRAYER v. HITCHCOCK.



*Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. November 23, 1912.*

1. BROKERS (§ II B—12)—REAL ESTATE AGENT'S COMMISSION—REQUISITES OF LIABILITY.

In order to entitle a real estate agent to commission, he must have been the "efficient cause" of the sale; it is not enough that there was an introduction and that such introduction was a *causa sine qua non*.

[*Burchell* v. *Gowrie*, [1910] A.C. 614, *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, followed; *Boyle* v. *Grassick*, 6 Terr. L.R. 232, *Miller* v. *Radford*, 19 Times L.R. 575, referred to.]

Statement

APPEAL by the plaintiff from the judgment of the Judge of the District Court of the district of Moose Jaw, in an action to recover commission on the sale of certain lands.

The appeal was allowed, and judgment entered for the plaintiff.

*N. R. Craig*, for appellant.
*J. F. Frame*, for respondent.

Newlands, J.

NEWLANDS, J.:—I agree that this appeal should be allowed. When the defendant said he would give the plaintiff a commission of one dollar per acre if he sold the land, he did not, in my opinion, give the plaintiff authority to make a sale of the land. The interpretation which, I think, should be put upon his language is, that if the land was sold to Patterson he would give him $1 per acre. The land was subsequently sold to Patterson, and partly as a result of the plaintiff's efforts. The

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defendant, I think, subsequently admitted liability by paying the plaintiff $100, as this payment is not in any other way accounted for.

LAMONT, J.:—I concur in judgment of Brown, J.

BROWN, J.:—This is an appeal from a judgment of the District Court Judge for the judicial district of Moose Jaw in an action for the recovery of commission on the sale of land. The property sold was a half section situate near Drinkwater in this province, and the plaintiff was engaged in farming and to some extent in real estate business at that time. The plaintiff, knowing that the defendant owned the land in question and that the same was for sale, on the 16th of January, 1911, shewed the land to a prospective buyer of his, one James Patterson. After inspecting the land, Patterson and he arranged to go to Moose Jaw the next day and see the defendant, who owned the land and who resided there. This they did, but Patterson was not as yet made aware of the name of the owner. The following is Patterson's version, as given at the trial, of what took place up to this time:—

Brown, J.

Q. You are a farmer, residing at Drinkwater, Mr. Patterson? A. Yes, sir.

Q. And you are the man that has been spoken about this morning as having bought this half section of land from Mr. Hitchcock? A. Yes, sir.

Q. When did you first know about this half section of land being for sale? A. About the 16th of June, if I remember right.

Q. How did you learn of it? A. Mr. Strayer rode down to my place and drove over there and shewed me the land.

Q. Did you know the owner of the land? A. No, sir, I did not.

Q. You went over and examined it? A. Yes.

Q. Was any arrangement made between you and Mr. Strayer? A. None, no, sir.

Q. I don't mean with reference to the purchase; any arrangement as to doing anything further than looking at the land? A. No, not while we were looking at the land, but on the way home he said we would go to Moose Jaw next day.

Q. Were you going with him? A. Yes, sir.

Q. For what purpose? A. For to try and buy the land.

Q. Did you know at the time who the owner was? A. No, I did not.

Q. The real estate men keep that to themselves, I suppose, until after deals are closed? A. Well, I guess they do.

Q. Well, you came to Moose Jaw, you and Mr. Strayer? A. Yes. He intended to drive his horse, but instead of that I drove my team.

There is some dispute as to what took place after the parties arrived at Moose Jaw. The trial Judge in his judgment says: "I find all the issues of fact in favour of the defendant." This very summary disposition of the facts does not tend to lessen

at all the difficulties of an appellate Court. Ordinarily this would mean that all the issues of fact as set out in the pleadings were found favourably to the defendant. It is evident, however, that such was not the learned Judge's intention here, because by his pleadings the defendant denies that any sale whatever was made to Patterson—a fact which at the trial all parties admitted. I am of opinion that what the Judge meant was that where there was any conflict between the versions of the parties as to what took place, he accepted the defendant's version rather than that of the plaintiff. Accepting, therefore, the defendant's version as being the correct one, we find that before noon on the 17th of June the plaintiff and Patterson came to the defendant's office, and upon the plaintiff wanting to know the defendant's price of the land in question, to use the defendant's own language, we find the following took place:—

> I was very busy that day, and I quoted him a price on the land, and terms, and then they went out and came back again and made an appointment for the afternoon, after dinner, and when they were going out Mr. Strayer stepped back and told me who he was, and he says: "If I sell this land, will you give me a commission?" And I says, "What do you want?" And he says, "A dollar an acre." And I says yes, I would. They went out and they came back later on and we further discussed the buying of the land, and it finally wound up by Mr. Patterson refusing to buy the land, that the price was too high. They left the office, and I never saw Mr. Strayer until after the land was sold.

The plaintiff and Patterson left the defendant's office and went home together. Patterson had evidently not given up his idea of purchasing the farm, for on the following day he, with his wife, made a further inspection of the farm. Upon being asked as to why he went, he said in his evidence:—

> A. Well, I was interested in the land and wanted to buy it if I could buy it for what I thought it was worth.
>
> Q. So you took your wife with you? A. Yes.
>
> Q. And did she get interested in it? A. Yes, she wanted me to buy it even at that price, and I thought it ought to be about $55 an acre—that is what I thought the price of it was.
>
> Q. Did you ever go and look at the land again? A. Yes, I rode over on horseback again.
>
> Q. So you were still interested in it? A. Yes, I was.
>
> Q. Could not get it out of your mind? A. Well, I kind of wanted it, but it was a little bit high.

The plaintiff did not cease in his endeavour to influence Patterson to buy the farm, for we find that subsequently, and in the same month, he saw Patterson, still urging him to buy the farm. The following is his evidence on that point:—

> A. I simply told him I would like to see him get this place because it was close to town, and farms close to town are hard to get, not many

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for sale. I told him if he could make the deal for the place he would like it.

Q. That was in the month of June? A. That was June.

Q. And as far as you are concerned there was nothing more to do with this property or the selling of it? A. I did not have any further conversation with Mr. Patterson after the month of June until he bought the property from Mr. Hitchcock.

Early in August Patterson came to Moose Jaw to see the defendant in reference to the farm, the following being his evidence on that point:—

A. I came up to see about working it down, and to see if he had made any different price on it, but we did not say anything at all; I did not to him, nor he to me. We did not say anything that I can remember of about buying; we talked about working the land down, and he was to meet me.

Q. Did you make any bargain as to working the land down? A. No, not in his office. Mr. Hitchcock was to meet me on Saturday, at two in the afternoon on his farm down there. We made a bargain to work the land down at a dollar an acre.

HIS HONOUR: What do you mean by "working the land down"? A. Double discing.

MR. CRAIG: Did that deal ever go through? A. No; we drove out over the land; he talked to sell it to me; he talked of discing, and I said, "Double discing?" and he said, "Disc it crossways," and I said, "If this was my farm I would double-disc it," and he said, "Let me sell it to you and disc it any way you want."

Q. And you talked about buying? A. Yes; he told me to think it over and let him know on Monday, and I did so, and bought it.

The defendant's evidence in this connection is as follows:—

. . . They left my office and I never saw Mr. Strayer until after the land was sold, and I did not see Mr. Patterson until the second occasion when he came up into my office and I did not recognize him. He told me who he was, and he said he wanted to get some work on the land of discing it, and I told him I had not seen the land since it was ploughed up, but I would go down and meet him on the following Saturday for the purpose of looking over the land and have it disced. I did go down on the Saturday and met him there in the afternoon. We drove over the land together in his wagon and came back to the house, where I had my car waiting, and we discussed nothing at that time but working the land. Just before leaving—I don't know whether I mentioned the fact that he should buy it or he asked me if I would not sell it, but, however, the conversation was opened up between us, and I quoted him a price on it and told him he had better think it over and talk it over with his wife and let me know on Monday whether he was going to work the land or going to buy it. On the Monday morning he appeared in my office in Moose Jaw and bought the land.

About the 22nd of August the plaintiff saw the defendant with reference to his commission on the sale of the land, when the following conversation took place, that is, as given by the plaintiff, but its correctness is not disputed by the defendant:—

A. I asked him about my commission on the sale of the land by him to Mr. Patterson, and he said that he had entirely forgotten me in the transaction when he closed the deal with Mr. Patterson, and I recalled our conversation that I had previous to the time that I took Mr. Patterson in that first day, and he admitted it all, but he said he had completely forgotten me at the time he made the sale to Mr. Patterson, my having anything to do with the deal. After a little further conversation I told him I thought I was entitled to all my commission because I had brought him a man who had bought the farm. He said he would like a little time to think it over. He seemed to be fair, and I asked him how much time. He said he would like a few days, and I told him I would make it a week, but I would want to hear from him, and that I thought I had earned my commission.

This, as it appears to me, briefly gives a statement of the facts in accordance with the findings of the trial Judge, and in the most favourable light from the defendant's point of view. The trial Judge, in finding against the plaintiff's claim, was evidently of the opinion that the plaintiff's bargain was to sell the land. He says:—

I have no doubt whatever that the plaintiff, when he saw the defendant at his office, wanted to know what commission the defendant would allow him if the plaintiff sold the land. The plaintiff already had a purchaser for the land, and knew that the purchaser was in the city, and this fact seems to me to corroborate the defendant's version of the contract, that the plaintiff's contract was to sell the land, not to find a purchaser for it.

The language used under the circumstances did not, in my judgment, require or authorize the plaintiff to sell the land; that is, the plaintiff was not authorized to execute or enter into a contract of sale on behalf of the defendant. It was rather, in effect: "If your man Patterson will buy this land on my terms I will allow you a commission of one dollar per acre." See *Boyle* v. *Grassick*, 6 Terr. L.R. 232, 2 W.L.R. 284. On this contract is the plaintiff entitled to his commission? The test is, Was the plaintiff "an efficient cause of the sale"? *Burchell* v. *Gowrie et al.*, [1910] A.C. 614; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395. A mere introduction is not enough. It is not even sufficient to shew that the introduction was a *causa sine qua non*: *Miller* v. *Radford*, 19 Times L.R. 575; *Wilkinson* v. *Martin*, 8 C. and P. 1. In this case, however, there was much more than an introduction. The plaintiff had shewn Patterson the land and influenced him to buy, and had brought him into touch with the owner. It is true this was not done in pursuance of any contract, because the plaintiff has not as yet even seen the defendant. It was rather in anticipation of a contract. It no doubt influenced the defendant in agreeing to pay a commission and made more valuable the services which the plaintiff subsequently rendered pursuant to the contract. The plaintiff, after making the contract with the defendant, brought Patterson, his

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intending purchaser, to the defendant's office again, when Patterson and the defendant had an opportunity of discussing, and did discuss, the terms of sale, and the plaintiff subsequently continued to urge Patterson to purchase the property. It is to my mind clear that Patterson did not abandon the idea of purchasing. He says so himself. The very next day he went to see the land again, because, as he says, I was interested in the land and wanted to buy it, if I could buy it for what I thought it was worth. And when he subsequently went to Moose Jaw to see the defendant about discing, he still, according to his evidence, had the idea of purchasing the land in his mind. Moreover the defendant, in his interview with the plaintiff in August, after the sale had taken place, did not repudiate the plaintiff's claim for a commission; he simply stated that he had forgotten the plaintiff in the transaction. There certainly was not such a length of time intervening as to justify him in forgetting. The defendant further admitted liability by paying $100 on account. I am of opinion that the plaintiff was, within the meaning of the authorities, an efficient cause of the sale, and that he is entitled to his commission of one dollar per acre. There are three hundred and thirteen acres in the land sold, and the plaintiff has already received $100 on account. The appeal should be allowed with costs, the judgment of the Court below reversed, and judgment entered for the plaintiff in the Court below for $213, and his costs of action.

*Appeal allowed.*

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ALTA.

S. C.
1912

## UNION BANK v. MacCULLOUGH.

*Alberta Supreme Court, Walsh, J. May 21, 1912.*

1. BILLS AND NOTES (§ IV—80)—PROMISSORY NOTE—PRESENTATION—EFFECT OF NON-PRESENTATION AS TO (*a*) LIABILITY; (*b*) COSTS.

Presentation of a promissory note is not necessary to hold the maker, and the holder may sue the maker, without presenting it, but if it appears that there were funds available at the place of payment the costs may be awarded against the plaintiff in an action on the note.

[*Freeman* v. *Canadian Guardian Life Ins. Co.*, 17 O.L.R. 296, followed; Bills of Exchange Act, R.S.C. (1906) ch. 119, sec. 183; *Robertson* v. *North-west Register Co.*, 13 W.L.R. 613; *Jones* v. *England*, 5 W.L.R. 83, referred to.]

2. BILLS AND NOTES (§ IV—80)—PROMISSORY NOTE—PRESENTMENT—WHEN PAYABLE AT CERTAIN BANK, DUTY IMPOSED THEREON.

Where a promissory note matures payable at a branch bank, which is then the holder thereof, its only duty is to hold the note at the place of payment ready for surrender to the maker upon payment, or to charge it to his account if there is to his credit at such branch bank enough money to pay it.

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3. BILLS AND NOTES (§ VI B—158)—ORAL AGREEMENT TO RENEW—ENDORSEE A PARTY.

An agreement set up by the maker of a promissory note that both the original payee and the plaintiff endorsee had agreed before the note was given to grant a renewal thereof at maturity, but not evidenced by any writing, does not disclose a defence entitling the defendant to proceed to trial, where the plaintiffs claim has been verified in the manner required for summary judgment.

4. EVIDENCE (§ VI F—544*a*)—PROMISSORY NOTE—VERBAL AGREEMENT (BEFORE NOTE MADE) TO RENEW SAME.

An alleged oral agreement made prior to the making of a promissory note by which the payee and the proposed endorsee were to renew it at maturity for a further fixed period, cannot be shewn in contradiction of the effect of the note itself so as to extend the time for payment.

Statement

APPLICATION by the plaintiff for an order striking out the defence and appearance and for summary judgment on the ground that there is no defence to the action.

The application was granted.

*DeRoussy*, for plaintiff.

*J. Black*, for defendant.

Walsh, J.

WALSH, J.:—Two possible defences are suggested by the defendant. One is that the plaintiff has not proved that the note was presented for payment. The note is payable "at the Union Bank, Didsbury," that being the branch of the bank at which it was negotiated by the payee Morgan. The affidavit of the manager of the Didsbury branch on this point is that "the said note was duly presented for payment." The defendant's affidavit states that he does not remember where the note was made payable, but it was never presented to him personally for payment and he has no knowledge of any presentation having been made.

My view of sub-sec. 2 of sec. 183 of the Bills of Exchange Act is that presentation is not necessary to hold the maker of a note. I am not aware of any decision of our own Court on the question, but conflicting judgments have been given in some of the other provinces. In Ontario, Mr. Justice Riddell held in *Freeman* v. *Canadian Guardian*, 17 O.L.R. 296, that presentation was not necessary and in Manitoba Mr. Justice Cameron held the same way in *Robertson* v. *North West Register*, 13 W. L.R. 613, while Mr. Justice Richards in the same case held the other view. Mr. Justice Newlands in *Jones* v. *England*, 5 W. L.R. 83, held that presentation is necessary and there are judgments of the Nova Scotia and British Columbia Courts on the point. I think that the holder of a note may sue the maker without presenting it for payment, but if it appears that there were funds available at the place of payment which would have been applied in payment of it if it had been presented, the Court

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might and doubtless would, award the costs of the action against the plaintiff. This is, in my opinion, the true meaning of the rider to this sub-section. In any event, I should hold upon the material before me that the note was presented for payment. The note was held at maturity at the place where it is payable. I do not know exactly how the bank would present the note to itself for payment. I should think that its only duty would be to hold the note at the place of payment ready for surrender to the defendant upon payment being provided for, or to charge it up to the defendant's account if there was to his credit at this branch enough money to pay it. It surely should not be necessary for one of the clerks to go through the form of presenting it to another of the clerks or the manager and demanding payment of it, and there is no pretence here that there was funds at the Union Bank, Didsbury, for payment of the note.

The other defence is that the note was given to the payee Morgan on the express condition that the same should be renewed at maturity until December, 1912, and that before the note was made, the then manager of the plaintiff's Didsbury branch agreed to grant such renewal. There is no proof or even suggestion that there is any writing evidencing this arrangement, and I do not think that any effect can be given to an agreement of this kind which is wholly verbal.

The order will go striking out the appearance and defence and giving the plaintiff leave to enter up judgment for the amount sued for with interest and costs.

*Application granted.*

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B.C.

C. A. 1912

Nov. 5.

## LOFFMARK v. ADAMS.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. EVIDENCE (§ II B—108)—PRESUMPTIONS—NEGLIGENCE CAUSING DEATH.

In an action for damages for negligence, causing death, the personal representative, suing under Lord Campbell's Act, must shew more than the omission by the defendant employer of a statutable duty to guard the machinery; he must prove also that the fatal accident was occasioned by the neglect of the statutory duty, and where there was no witness of the accident, nor was there any evidence from which an inference could be drawn from the position of the body or otherwise that the neglect of the statutory duty was the cause of death, the action must be dismissed.

[*Canadian Coloured Cotton Mills* v. *Kervin*, 29 Can. S.C.R. 478, applied; *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, and *Swansea Vale* v. *Rice*, [1912] A.C. 239, referred to.]

2. TRIAL (§ II C 8—110)—EVIDENCE CONSISTENT WITH EXISTENCE OR NON-EXISTENCE OF NEGLIGENCE—WITHDRAWAL FROM JURY.

In an action for negligence, where the evidence for the plaintiff is equally consistent with the existence or non-existence of negligence, it is not competent for the judge to leave the case to the jury. (*Per* Irving, J.A.)

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APPEAL by the plaintiff from the judgment of Hunter, C.J. B.C., in an action for damages for negligence.

The appeal was dismissed.

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

*Armour*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I am unable to see any distinction between this case and that of *The Canadian Coloured Cotton Mills Co.* v. *Kervin*, 29 Can. S.C.R. 478. It would be hard to find two cases in which the essential facts are more alike.

It follows that I am bound to dismiss this appeal.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal. Where the evidence is equally consistent with either view, that is, of the existence or non-existence of negligence, it is not competent for the Judge to leave the case to the jury. It was argued that the balance of probability is in favour of the plaintiff's case, but it is well to remember, as the Lord Chancellor pointed out in *Swansea Vale* v. *Rice*, [1912] A.C. 239, that before you can weigh probabilities you must have some foothold or ground in comparing and balancing probabilities at their respective values, and as Meredith, J., pointed out in *Graham* v. *Grand Trunk R. Co.* (1911), 25 O.L.R. 429, jurors are not at liberty to draw on their imagination.

Martin, J.A.

MARTIN, J.A.:—After a careful consideration of the facts in this case as compared with those in *Canadian Coloured Cotton Mills* v. *Kervin** (1899), 29 Can. S.C.R. 478, 25 A.R. 36, 28 O.R. 73, I find myself unable to put the case for the plaintiff at bar upon a stronger ground, seeing that in the *Kervin* case, the jury had negatived the contention that the deceased had disobediently or negligently crossed the trench on two planks, thereby making it impossible for me to distinguish the principle upon which that case was decided from the present.

It follows that the appeal must be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—This case seems on all fours with *Kervin* v. *Canadian Coloured Cotton Mills Co.*, 29 Can. S.C.R. 478, and

*The headnote of the case of *Canadian Coloured Cotton Mills Co.* v. *Kervin*, 29 Can. S.C.R. 478, is as follows:—

K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. In an action by his widow and infant children against the company the negligence charged was want of a fence or guard around the machinery, which caused the death of K., contrary to the provisions of the Workmen's Compensation Act. *Held* (Gwynne, J., dissenting), that whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident.

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although the views expressed in the later case of *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, seem to be somewhat at variance with the judgment in the *Kervin* case, it may be distinguishable on the facts.

The facts and circumstances here are almost identical with the *Kervin* case, and as that case was not cited or referred to in *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, nor so far as I am aware its authority questioned, I feel myself bound by that decision.

The appeal should be dismissed.

*Appeal dismissed.*

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CAN.
EX. C.
1912
Nov. 4.

## PICKELS v. THE KING.

*Exchequer Court of Canada, Audette, J. November 4, 1912.*

1. PLEADING (§ I N—114)—AMENDMENT TO PETITION OF RIGHT—LAND DAMAGES.

Where a petition of right to recover from the Crown compensation for land taken and for resulting damages to property by reason of the erection of ice piers on and opposite the suppliant's land, makes a claim both for the value of the land taken and for damages, an amendment at the close of the case claiming the value of the land taken and offering to waive expropriation proceedings and convey to the Crown the land taken upon a certain sum being paid over to the suppliant as compensation for the land, is unnecessary and will be refused.

2. HARBOURS (§ I—5)—PUBLIC HARBOUR—WHAT AMOUNTS TO.

A place does not necessarily become a "public harbour," within the meaning of section 108 of the B.N.A. Act, 1867, because public moneys had been expended by the Federal government at that place and several government wharves are situated there.

[*Fisheries Case*, [1898] A.C. 700, applied.]

3. COURTS (§ III B—206)—EXCHEQUER COURT OF CANADA—JURISDICTION TO AWARD DAMAGES FOR TAKING OF LAND FOR ICE PIER—THE EXCHEQUER COURT ACT, SECS. 19, 20.

The Exchequer court of Canada has jurisdiction to award damages for the taking of property by the Crown for the purpose of erecting an ice pier on riparian land, by virtue of sub-section (*b*) of section 20 of the Exchequer Court Act (Can.), providing for claims "against the Crown for damage to property injuriously affected by the construction of any public work," and section 19 of the same Act, giving the court jurisdiction where "the land of the subject is in the possession of the Crown."

4. DAMAGES (§ III L 1—231)—TAKING OF PROPERTY FOR ICE PIER—MEASURE OF DAMAGES.

Where the Crown erects an ice pier on land of a riparian owner, the measure of damages, under the EXPROPRIATION Act, R.S.C. 1906, ch. 143, in addition to the value of the land taken, is compensation for injurious affection to the remainder of the property.

5. EMINENT DOMAIN (§ I D 3—69)—DAMAGES UNDER EXPROPRIATION ACT —ERECTION OF ICE PIER FOR HARBOUR—DAMAGE TO VESSEL COLLIDING WITH PIER—NEGLIGENCE IN LAUNCHING.

Where the owner of riparian land upon whose land the Crown erects an ice pier becomes entitled to damages under the Expropriation Act, R.S.C. 1906, ch. 143, for injurious affection to the remainder of his property, he cannot claim as one of the items, damages sustained by reason of a collision of one of his vessels with the pier in question while the vessel was being launched, where it appears from the evidence that due care was not exercised in the launching.

6. WATERS (§ II A—70)—RIGHTS OF RIPARIAN OWNER—DAMAGES FOR TAKING OF PROPERTY FOR ERECTION OF PIER INTERFERING WITH OWNER'S RIGHTS.

A riparian owner, *ex jure naturæ*, is entitled not only to the use of the water for domestic purposes, but to the right of access to and from the river from his property or wharves erected thereon, and if piers are erected on or about his property, and his riparian rights are abridged or taken away, he is entitled to compensation for the injury.

[*Fishmongers' Case*, 1 App. Cas. 662; *Merritt* v. *City of Toronto*, 6 D.L.R. 152, 27 O.L.R. 1, referred to.]

7. DAMAGES (§ III L 1—231)—MEASURE OF COMPENSATION FOR TAKING OF PROPERTY FOR ICE PIER—DAMAGES INHERENT TO LAND.

Where the owner of riparian land becomes entitled, under the Expropriation Act, R.S.C. 1906, ch. 143, to compensation for injurious affection to his property, because of the erection of an ice pier upon his land, the damages that he is entitled to recover are such as are inherent to the land and not to the person or to the business of the owner.

Statement

THE suppliant brought his petition of right to recover from the respondent the sum of $20,000, as compensation for land taken and for damages to his property resulting from the erection of ice piers on and opposite his land and premises. He alleged in his petition of right, that he was, since the 12th December, 1908, the owner and occupier of a certain lot of land and premises situate in the town of Annapolis Royal, fronting upon the Annapolis river, and including the shore between high and low water marks; that he had established and built a shipbuilding plant on the said premises, and carried on there the business of building ships; and further that when he acquired the land he contemplated constructing a wharf on a portion thereof, and using a portion as a lumber yard, shipping lumber therefrom over and from this wharf, and carrying on a general wharf and shipping business. The said lands, he alleged, by reason of their nature, situation and location, are only and solely or chiefly adapted and suitable as a site for a shipbuilding plant, lumber yard and wharf and a business to be carried on in connection therewith.

He further stated in his pleading that between the 1st June, 1910, and the 31st December, 1910, a public work, within the meaning of the Exchequer Court Act, consisting of three ice piers were constructed and erected by the Crown upon the bed and shore of the said Annapolis river in front of his land,

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fronting on the said river—one of the piers being so constructed and erected upon his land between high and low water marks, and two others in front of and in close proximity to his land and premises. And he further alleged that by reason of the construction of the said piers he has subsequently been unable to make use of his shipbuilding plant, or to build or launch vessels there; or to carry on business of a lumber yard, or shipping business, or to erect a wharf on his land which has become, and is rendered wholly unsuitable for many purposes for which it would be adapted, and otherwise used if the said piers had not been constructed, including the purposes of the various businesses already mentioned. He concludes by alleging that his land has become and is very injuriously affected and greatly reduced in value by reason of the construction of the piers.

The Crown, by its plea, denied that the suppliant has suffered any loss or damage, and adds if he has suffered any such loss or damage, no action lies in respect of the same as against the Crown. And the Attorney-General further says, that, if any ice piers were constructed by the Crown, one of the said piers was already erected and the location of the others clearly indicated at the time the suppliant became the purchaser of the land mentioned in his petition of right, and that the land occupied by the said piers had been so taken or appropriated by the Crown in the interest and for the improvement of navigation, and the suppliant's title, if any, was and is subject to the construction and maintenance upon the said land of the said ice piers. And the Attorney-General further says that the petition of right discloses no cause of action against the Crown.

*F. S. Rogers*, K.C., for suppliant.

*J. A. McLean*, K.C., and *H. Ruggles*, for Crown.

Audette, J.

AUDETTE, J.:—The suppliant bought the property in question in this case on the 12th December, 1908, for the admitted sum of $1,050. The boundary of his property (as will appear by the purchase deed filed herein as exhibit 7A) runs down to low water mark on the Annapolis river, and this boundary also appears on the Crown grant given, by the Nova Scotia Government, to his predecessor in title on the 1st March, 1873, which said grant is also filed herein as exhibit No. 1.

The suppliant claims that, as pier No. 1 is built on the foreshore between high and low water marks and that both his purchase deed and the provincial Crown grant of 1873, granted since Confederation to his predecessor in title, give him a fee simple in the said foreshore, he is entitled to compensation for the value of the land or locus upon which the said pier No. 1 is erected. The suppliant's counsel, at the close of his case moved to amend the petition of right by claiming the value of this

land, undertaking at the same time if the sum of $25 be paid for this parcel of land he would waive expropriation proceedings, convey the land and give title to the Crown for the same upon the said compensation money of $25 being paid over to the suppliant. In the view the Court takes of the petition of right as drawn, such amendment is unnecessary, as by the recital part of the same, especially by paragraphs 3 and 6, the suppliant claims both for the value of this land and for damages. The prayer of the petition is very short and general, only asking that the suppliant be "paid $20,000, or such other sum as to this honourable Court shall seem just, with costs." The application for this amendment is refused as unnecessary under the circumstances, and the question as to whether or not the suppliant has good title in the said locus will be considered hereafter.

It is common ground at the Bar and clearly established that pier No. 1 has been erected between high and low water marks to which suppliant's title extends and which is derived from a Crown grant of the Nova Scotia provincial authorities since Confederation. It is contended by the Crown that the *locus* is in a "public harbour," and therefore the property of the Federal Government under the B.N.A. Act, 1867.

What is a public harbour within the meaning of sec. 108 of the B.N.A. Act, 1867? The definition, if definition it can be called as the definition must be clearer than the thing defined, is now to be found in the judgment of the Judicial Committee of the Privy Council, in the case now known as the *Fisheries case*, [1898] A.C. 700, from which the following excerpt is taken, p. 711:—

> With regard to public harbours, their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the province, that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so.
>
> Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green*, 6 Can. S.C.R. 707, where it was held that the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour.
>
> Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It

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appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*, 6 Can. S.C.R. 707, that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

From the perusal of the above it will be found that if the suppliant's property was situate in a public harbour at the time of Confederation, it passed to the Federal Government under the B.N.A. Act, 1867, and that the provincial Crown grant would therefore be *ultra vires*. Under the facts of the present case, can it be found that the land in question formed part of a public harbour at Confederation? The question must be answered in the negative, and the provincial Crown grant must stand, under the circumstances of this case, the evidence adduced being insufficient to rebut it. No reliable evidence to that effect has been adduced. Public moneys were expended at Annapolis by the Federal Government since Confederation and subsequent to the date of the provincial grant, but that would not make it a public harbour at Confederation. See general report of Minister of Public Works, from 30th June, 1867, to 1st July, 1882, p. 214.

The Act to provide for the appointment of harbour masters for certain ports in the provinces of Nova Scotia and New Brunswick (36 Viet. ch. 9) was, in 1873, made applicable to the port of Annapolis, by a proclamation which appears in the Canada Gazette, vol. 8, p. 1107.

It is true Annapolis Royal, which was visited by DeMont as far back as 1604, is the oldest settlement on that part of the coast; but can it be said that there was then at Confederation a public harbour, extending from Digby Gut to Bridgetown, a point about 18 miles up the river from Annapolis, comprising both the Annapolis Basin and the river? It is true that there are four government wharves erected since Confederation between the narrows and Bridgetown; but the fact of any wharf being erected would not make the place a public harbour, not any more than all the wharves on the coast from Belle Isle to Quebec would make that part of the St. Lawrence a public harbour. Some of the witnesses contended that Annapolis harbour extended to the head of the narrows at the west end

of French Basin, others that the harbour ended at the Acadia wharf.

From the nature of the narrows, the topography of the surroundings, and the facts in evidence in the present case, this Court finds that if there is a public harbour proper at Annapolis, it does not extend any further east than to the western boundary of the suppliant's property, or to the eastern end of the Acadia wharf property. Indeed, the river narrows down to a very small width opposite the suppliant's property with a rise and fall of tide of 27 feet in the spring; the current is very swift and strong, and the river is very deep, making it undesirable for anchoring, although physically possible. There were no wharves before Confederation on either side of the river opposite the narrows, and this Court fails to find from the evidence adduced any element that would tend to make the suppliant's property part of a public harbour, under the decision of the *Fisheries* case above cited.

Coming to the question of injurious affection or damage to the suppliant's property, the Court finds that if any damage is proved, he is entitled to recover under sub-sec. (*b*) of sec. 20 of the Exchequer Court Act, which reads as follows:—

> Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

There can be no doubt that the piers in question are public works, within the statutory definition and the decisions of the Courts. The suppliant would further be entitled to recover under sec. 19 of the same Act which gives the Court jurisdiction where "the land of the subject is in the possession of the Crown."

Has the suppliant suffered any damages by the erection of these piers? Has his property decreased in value from the same? The suppliant tells us in his testimony that when he bought in December, 1908, he contemplated using the property as a ship yard, lumber yard with a wharf, and also constructing a marine slip. He said he thought of expending $8,000 to $10,000 on the wharf and $35,000 on the marine slip.

Since the erection of the piers the suppliant launched two vessels of 600 and 300 tons respectively. The first vessel was launched successfully, and the second, although a smaller one, being delayed in the launching, went off only at the ebb tide and collided with one of the piers and thereby suffered damage. It is contended by some experienced witnesses that a vessel should never be launched with the ebb tide and the Court inclines much in sharing that view. Indeed, if a vessel launched with the ebb tide were going aground, it might be a serious matter to haul her off the ground with a falling tide. Then, at this very place, with the ebb tide, the vessel is taken down to

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the piers by the tide itself. However, it was contended, and rightly so, that with an eastern wind it would not be safe to launch a vessel there, as the wind would carry the vessel to the piers. The result of the evidence would go to shew that while the use of this property as a ship yard is still quite available and good, yet more care will have to be exercised in launching vessels, and that is the conclusion arrived at by the Court.

It is also in evidence from the testimony of the witnesses adduced on both sides that the piers would interfere in docking vessels at a wharf constructed on the suppliant's property.

With respect to the marine slip, a deal of conflicting evidence has been adduced as to whether or not it would be advisable to build a marine slip on this property, and as to whether there would be any justification in expending the sum of $35,000 named by suppliant upon such works at Annapolis. The Court has read the petition of right with care, and has intentionally recited at the opening the several grounds upon which the suppliant rests his claim for damages; but has failed to find any mention of a marine slip in his petition of right. Forsooth, the suppliant alleges therein that:

> the said lands and premises by reason of their nature, situation and location, are only and solely or chiefly adapted and suitable as a site for shipbuilding plant, lumber yard and wharf, as aforesaid, and businesses to be carried on in connection therewith.

Was not the idea of this marine slip an afterthought coming to the suppliant's mind since the institution of this action? If so, in view of his evidence, it would only go to the weight of the evidence, because if a marine slip is a practicable and advisable business undertaking at Annapolis, it would perhaps form an element for consideration. However, in the view this Court takes of the question of damages, it becomes in a certain degree unnecessary to consider this matter any further. It must, however, be said that the evidence goes to shew that the piers would interfere with a marine slip, if one were constructed on the suppliant's property.

Indeed, under the *Fishmongers' Case, Lyon* v. *Wardens, etc., Fishmonger Co.*, 1 A.C. 662, and the cases therein referred to, it clearly follows that a riparian owner enjoys rights, *ex jure naturae*, which are quite distinct from those held in common with the rest of the public. Besides the use of the water for domestic purposes, which in a case of salt water is however obviously less valuable, the riparian owner has over and above the rights enjoyed by the public, the right of access to and from the river from his property or wharves erected thereon. And if any piers have been erected on or about his property, that takes away, or at all events alters and abridges the riparian owner's right to the free and lawful application of his property

to any business purposes he sees fit, and he is, therefore, entitled to compensation for this injurious affection: *Fishmongers' Case, Lyon* v. *Wardens, etc., Fishmongers' Co.*, 1 App. Cas. 662; *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612; *Bigaouette* v. *North Shore R. Co.*, 17 Can. S.C.R. 363; *Merritt* v. *City of Toronto*, 6 D.L.R. 152, 27 O.L.R. 1; *Ratté* v. *Booth et al.*, 11 O.R. 491, 14 A.R. (Ont.) 419; *Booth* v. *Ratté*, 15 A.C. 188.

At all events, having found the Crown has taken the piece of land upon which pier No. 1 is erected, the case comes within sub-sec. (*b*), sec. 20 and sec. 19 of the Exchequer Court Act; and as a parcel of land is taken would it not also follow that under the Expropriation Act damages should be paid for injurious affection to the balance of the property owned by the claimant? This property has been injuriously affected and the suppliant is entitled to recover both under the statutory law and the case law above cited.

Coming to the question of quantum of damages, we must bear in mind that the property was bought by the suppliant in December, 1908, for $1,050. The suppliant and witness Whitman contend it was sold at that price in view of the above mentioned prospective improvements which the suppliant was to put upon the property, thus increasing the value of the adjoining property which belonged to the vendor. But there is no such covenant in the deed of sale whereby the purchaser was to improve the property in any manner whatsoever. The suppliant paid the market value of the land at the time. George E. Corbett, an old resident of Annapolis, and a person well versed in commercial undertakings, thinks $1,050 in 1908 for this property was a pretty good price. Another witness Clarence W. Mills, says $1,050 in 1908, is "a fair good price for the property." The suppliant himself at page 35 of his evidence would appear to admit as much. There is also the witness Edward F. Neville who placed a valuation of $1,500 in 1908. Further on in his evidence he named a high figure which he subsequently explained by saying that he named the amount in view of the business the suppliant proposed to start, and the money he was to expend upon the property—and he added he did not take into consideration whether the undertaking would pay.

Witness Corbett bought a deep water property below the town, not quite half a mile from the Acadia pier, on the Annapolis side, with about 1,200 to 1,300 feet frontage, for which he paid between $700 and $730. About three years ago he also sold to the suppliant for $3,000 two wharves with a block of land on a front street, 40 feet on St. George street, running back to the front wharf 90 feet or 100 feet. One wharf is 200 feet long by 30 feet wide, with a large block between; the other

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wharf is 100 feet by 40 feet wide. It is true the wharves were not in good repair, but such a sale will give an idea of the value of the property at Annapolis. Then it was contended by the Crown and is shewn by the evidence, that this question of building the piers on the river to retain the ice in the winter and give a clear port below the narrows, was agitated as far back as 1902—that the matter was mentioned at a meeting of the Board of Trade, and witness Corbett went to Ottawa asking for it. Furthermore, tenders were asked in March, 1908, for these works, and after the contract had been first accepted the contractors refused to proceed with the works and the contract was given to a second firm and the works were finally begun in June, 1909. The demand for tenders was posted in the Annapolis post office. In view of these facts, counsel for the Crown contended, and not without reason, that the suppliant must have been aware of such project of building the piers at the place where they are to-day, at the time he bought in December, 1908. The suppliant, a keen business man who would likely acquaint himself with anything of public interest in Annapolis, denies the knowledge at the time he purchased that the piers were to be erected where they now stand, although the natural inference would be the other way. The claim made by the suppliant in his evidence runs as high as $25,000 with a close follower in the person of the vendor's brother, who acted as agent in the sale of this land. How could a bare piece of land bought in December, 1908, for $1,050 be damaged to the extent of $20,000 or $25,000 in June, 1909 (the time at which the erection of the piers was started) when no improvements were made upon the property and no preparation made for that purpose. Then the damages that are recoverable here are not damages in the nature of loss of business; the damages the suppliant is entitled to recover are damages that are inherent to the land and not to the person or to the suppliant's business. *Richards* v. *The King* (unreported.)

The price paid for this property in December, 1908, appears to have been the fair market price at the time, and the Court is of opinion that under all the circumstances of the case, if the sum of five hundred dollars, inclusive of the twenty-five dollars for the value of the land upon which pier No. 1 has been erected, is paid the suppliant, he will be fairly and liberally compensated for both the land taken and for all damages whatsoever to his property resulting from the construction of the said ice piers.

Therefore, there will be judgment that the suppliant is entitled to recover from His Majesty the King, the sum of five hundred dollars, upon his conveying to the Crown the piece of land, between high and low water marks upon which pier No.

1 is erected, and giving a release of any incumbrance whatsoever which may be upon the same, the whole in satisfaction for all damages past, present and future resulting from the erection of the said ice piers on and opposite the suppliant's property, with interest upon the said sum of five hundred dollars, from the 15th day of June, 1909, and costs.

*Judgment for plaintiff conditional upon making conveyance.*

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## WINNIPEG STEEL GRANARY & CULVERT CO. Ltd. v. CANADA INGOT IRON CULVERT CO. Ltd. et al.

*Manitoba Court of Appeal, Howell, C.J., Richards, Perdue, Cameron and Haggart, JJ.A. November 17, 1912.*

1. LIBEL AND SLANDER (§ II E 5—82)—PRIVILEGED COMMUNICATIONS—CIRCULAR LETTER CALLING ATTENTION TO LETTER SENT OUT BY BUSINESS RIVAL TO MUNICIPALITIES—GRAFT BY PUBLIC OFFICERS.

Where the defendant company, who were engaged in manufacturing and selling certain articles used principally by municipalities, finding their business interests imperilled by the unlawful acts of plaintiff company, their rivals, who had issued a circular and sent it to municipal secretary-treasurers, reeves, and councillors in various provinces, calling their attention to the fact that it was unlawful for the company to pay commissions directly to these officers on any future sales to their municipalities but leaving it to these officers to select local agents to represent the company in making sales to the municipalities, sends out a circular letter to the same officers and to others calling attention to plaintiff's circular and intimating that it would be difficult for an honest rival to compete with one who used such a circular or did the acts which the circular suggests and that hundreds of honourable secretary-treasurers and councillors have spurned the graft, the sending of such circular by defendants is a privileged communication.

[*Hill* v. *Durham*, 79 Hun. (N.Y.) 335, referred to.]

2. EVIDENCE (§ II E 6—181)—PRIVILEGED COMMUNICATION—MALICE—BURDEN OF PROOF.

Where the alleged libel complained of is a privileged communication, the burden is upon the plaintiff to prove express malice.

3. LIBEL AND SLANDER (§ III A—96)—PRIVILEGED COMMUNICATION—ACTUAL MALICE NECESSARY TO CONSTITUTE LIBEL.

If the statement complained of as libel is a privileged communication, then, to make it libellous, there must be actual as distinguished from legal malice.

[*Clark* v. *Molyneux*, 3 Q.B.D. 237, referred to.]

4. EVIDENCE (§ II M—363)—PRIVILEGED COMMUNICATION—EXPRESS MALICE—HOW PROVED.

In an action for libel, where the occasion is privileged, express malice may be proved in two ways: (1) by inference to be drawn from the excessive language of the document itself; and (2) by recklessly stating what was untrue or stating that which defendant knew to be untrue.

5. LIBEL AND SLANDER (§ II E—55)—PRIVILEGED COMMUNICATION—EXCESS OF PRIVILEGE NOT SUFFICIENT TO CONSTITUTE LIBEL—EVIDENCE OF MALICE.

Where in an action for libel, the occasion is privileged, and there is evidence to go to the jury on the question of malice, if the jury

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simply finds that the statement was in excess of the privilege only, there must be judgment for the defendant, since a mere excess of privilege is not necessarily evidence of malice.

6. LIBEL AND SLANDER (§ III A—96)—PRIVILEGED COMMUNICATION—MALICE EXPRESSLY FOUND—NECESSITY FOR.

In an action for libel where the occasion is privileged, in order to justify a verdict for plaintiff the jury must expressly find malice.

7. LIBEL AND SLANDER (§ III C—108)—PRIVILEGED COMMUNICATION—ABSENCE OF MALICE—PRESUMPTION.

Where the occasion is privileged, in an action for libel, the presumption is in favour of the absence of malice.

[*Spill* v. *Maul*, L.R. 4 Ex. 232, referred to.]

8. TRIAL (§ II C 7—105)—LIBEL AND SLANDER—PRIVILEGED COMMUNICATION—QUESTION FOR COURT.

It is a question of fact for the court whether, in an action for libel, a certain communication is privileged.

9. TRIAL (§ II C 7—105)—LIBEL AND SLANDER—PRIVILEGED COMMUNICATION—EXCESSIVE PUBLICATION—QUESTION FOR COURT.

Whether an alleged libellous article is to such an extent excessive that it might be held by the jury to be in excess of the privilege is a question for the trial court.

[*McQuire* v. *Western*, [1903] 2 K.B. 100, referred to.]

10. LIBEL AND SLANDER (§ III C—113)—PRIVILEGED COMMUNICATION—TRUTH—MALICE IMMATERIAL.

Where an alleged libellous statement is true, if it be a privileged communication, there can be no recovery no matter what amount of malice may exist.

11. LIBEL AND SLANDER (§ III C—110)—FAIR COMMENT ON MATTERS OF PUBLIC INTEREST.

Everyone has a right to comment on matters of public interest provided he does so fairly and honestly and such comment, however severe, is not actionable. (*Per* Cameron, J.A.)

[Odgers on Libel and Slander, 5th ed., 194, referred to.]

12. LIBEL AND SLANDER (§ III A—96)—DEMEANOUR OF WITNESS, AS SHEWING MALICE.

In an action for libel, it seems that even the demeanour of a party on the witness stand is an element for consideration on the question of the existence of malice. (*Per* Cameron, J.A.)

[*Thomas* v. *Bradbury*, [1906] 2 K.B. 627, referred to.]

Statement

AN appeal by the defendants from the judgment at trial in favour of the plaintiffs in an action for libel.

The appeal was allowed and a new trial ordered.

*H. Phillipps* and *C. S. A. Rogers*, for plaintiffs.

*C. P. Wilson*, K.C., for defendants.

Howell, C.J.M.

HOWELL, C.J.M.:—The plaintiffs in this case are manufacturers of corrugated steel plate culverts, which are practically only used by and sold to municipalities to be used in the construction of culverts across the highways. The defendants are also manufacturers of the same articles. The plaintiffs had been carrying on this business for some time and in

January, 1912, issued a circular and sent it to municipal secretary-treasurers and reeves and councillors in various parts of this and the adjoining provinces. The circular is in the following language:—

> Agreements are subject to accidents, fire, strikes, or other causes beyond our control.
>
> Winnipeg Steel Granary and Culvert Co., Limited,
> Sheet Metal Manufacturers,
> St. Boniface and Regina.
> St. Boniface, Man., Jan. 27, 1912.
>
> Dear Sirs,—At a recent meeting of our directors it was decided, owing to recent legislation, to renew no contracts direct with any secretary-treasurer or councillor of any municipality.
>
> We are absolutely prohibited from paying any commission direct to you for any future sales made to your municipality, and the law is as emphatic in regard to you not taking any commission.
>
> We are enclosing two contracts. We would ask you to have the same signed by a business associate or friend who is prepared to represent us.
>
> We are leaving to you the selection of this agent which we trust will be satisfactory to you. Have contracts signed, witnessed, and returned to us.
>
> Thanking you for past favours, and wishing you a prosperous New Year.
>
> We are,
> Yours very truly,
> WINNIPEG STEEL GRANARY AND CULVERT CO., LTD.
> W. H. Hamilton.

This circular in some way came to the knowledge of the officers of the defendants and they wrote what might be called a criticism of the circular, attaching to that criticism a copy of the circular, and mailed all this to secretary-treasurers and councillors of municipalities in this and the adjoining provinces. This criticism or document is the subject of this action of libel.

In their criticism of the plaintiffs' circular, they headed it with "Bribery! Bribery!! Bribery!!!" and in their comments they called the attention of the readers to the difficulty that an honest rival would have in competing with one who used such a circular, or did the acts which the circular suggests, and in the course of the alleged libellous document is the following statements:—

> Let it be recorded that hundreds of honourable secretary-treasurers and councillors in Western Canada have spurned the graft. Remember the name of the company.

No one can read the plaintiffs' circular without coming to the irresistible conclusion that in the past the plaintiffs had contracts "direct" with secretary-treasurers and councillors for the sale of goods to the municipalities of which they were offi-

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cers, and paid these officers a commission on such sales, and further, that they proposed to continue that same practice in the future "indirectly"; and to do that indirectly it was in the circular proposed that a friend or business associate of such officer should be the agent and receive the commission.

It certainly looks to me as if the attention of the plaintiffs had been called to section 161 of the Criminal Code, and that they proposed still to act in violation of that Code by hereafter doing it "indirectly."

Quite aside from the Criminal Code, one would think that the plaintiffs might hesitate in sending such a circular as that on the grounds of common honesty. A great deal was said, apparently, at the trial, and a good deal was argued before this Court, that what both parties intended to refer to in this matter, was the Secret Commission Act, 1909; but it seems to me it makes little difference, in my view of the case, what particular statute the parties had in view. The defendants find their business interests imperilled by the unlawful acts of a rival and seek to call the attention of their common customers to the astonishing statements in the plaintiffs' circular.

At the trial, it does not seem clear whether the learned Judge ruled on the question of privilege or not. I have no doubt, as a matter of law, that the defendants, in the conduct of their business, and in the pushing and protection of their trade, had a right to comment to municipalities who might be their customers upon this extraordinary circular of the plaintiffs.

> The defendant is entitled to defend his interests and any communication is privileged which a due regard to his own interest renders necessary: Odgers 273.

This question is fully discussed and taken for granted in *Hill* v. *Durham*, 79 Hun. (N.Y.) 335, and many English cases carry out the principles laid down in Odgers.

I think, at the trial, the learned Judge should have told the jury that the sending of that circular was within the defendants' privilege, and he should have then distinctly told them that it was upon the plaintiffs to prove express malice.

If the occasion is privileged, then, to make it libellous, there must be actual, not legal, malice, "that which is popularly called malice:" *Clark* v. *Molyneux*, 3 Q.B.D. 237, 247.

If the defendants' officer, in the discharge of his duties, stated what was untrue, knowing it to be untrue, that would, of course, be evidence of malice. Express malice may be proved in two ways: (1) by inference to be drawn from the excessive language of the document itself; and (2) by recklessly stating what was untrue, or stating that which he knew to be untrue.

If the occasion is privileged, and there is evidence to go to

the jury on the question of malice, then, if the jury simply find that the statement was in excess of the privilege only, there must be judgment for the defendant. In order to justify a verdict for the plaintiff they must expressly find malice, and a mere excess of privilege is not necessarily evidence of malice.

In other words, the occasion being privileged, the presumption is in favour of the absence of malice, and it is upon the plaintiff to prove actual malice: *Spill* v. *Maul*, L.R. 4 Ex. 232.

It was for the Judge to say whether the occasion was privileged or not, and, as it is for the Judge to say whether a document might be held to be libellous on its face, so it is for him to say whether the alleged libellous article was to such an extent excessive that it might be held by the jury to be in excess of the privilege: *McQuire* v. *Western*, [1903] 2 K.B. 100, 111.

If they so find, it might be evidence of malice so as to defeat the defence of privilege.

At the trial the learned Judge left certain questions to the jury, but intimated to them that they need not answer them unless they chose. Amongst the questions the fourth one was in the following language: "If the defendants' circular was false or malicious, assess the damages?"

That question cannot be a proper statement of the law. If the circular was true and malicious there must be a verdict for the defendants because, if true, the plaintiffs cannot recover, no matter what amount of malice may exist.

I think the jury in this case should have been instructed upon the lines above set out. I think they should clearly have been told that the defendants, in their business interests, were justified in meeting the plaintiffs' peculiar, and I think I might say unlawful, circular, and further they should have been told that, in this case, it was upon the plaintiffs to prove express malice, and that malice is not to be presumed against the defendants when the occasion is privileged, and must be proved either by extrinsic evidence or by inference from the excess of their statements.

I confess, it seems to me that the defendants' statements were not excessive, and that the plaintiffs have no fault to find with the defendants' criticism of their astonishing circular. But, without deciding this question, and without deciding whether the case should have been withdrawn from the jury, I think it is expedient, in this case, to grant a new trial, for the reasons, amongst others, set out in *Clark* v. *Molyneux*, 3 Q.B.D. 237.

The appeal is allowed with costs to be costs in the cause to the defendants in any event of the cause. The judgment is set aside and a new trial granted, the costs of the trial to be costs in the cause.

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CAMERON, J.A.:—Everyone has a right to comment on matters of public interest provided he does so fairly and honestly and such comment, however severe, is not actionable. It has been said that fair and honest criticism on public matters is privileged. See *Henwood* v. *Harrison*, L.R. 7 C.P. 606. This does not mean that the words have been published on a "privileged occasion." "There is, it is true, a close analogy between the two defences of 'fair comment' and 'privilege' yet they are not identical." Odgers on Libel and Slander, at p. 194, referring to Lord Esher's statement in *Merivale* v. *Carson*, 20 Q.B.D. 275 at 280, where the distinction is set out with great clearness.

It has been said that a fair comment on a matter of public interest is no libel. This, however, does not mean that the words were not defamatory: *i.e.*, not injurious to the reputation. If they were not defamatory, of course no action would lie. It is only when the words do tend to injure the reputation that the question arises: Can they be excused as being a fair comment on a matter of public interest? The words may be in themselves libellous, but as soon as they are shewn to be a fair and *bonâ fide* comment on a matter of public interest, they cease to be actionable: Odgers *ib.* "It is precisely where the criticism would otherwise be actionable as a libel that the defence of fair comment comes in." *Per* Lord Loreburn in *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325*n*.

Plaintiffs' counsel takes the ground that even if the defendants' comments on the plaintiffs' circular letter, which comments are the subject of this action, are held to be fair comment upon a matter of public interest, that defence cannot avail the defendants in this case inasmuch as it was alleged and proved that the comments were published maliciously. This is an important question not yet apparently passed upon in any Canadian Court.

It is stated in Odgers that the defence of fair comment will fail if it be not a comment published without malice, p. 196. I refer to the further remarks in Odgers on this subject at p. 224, under the caption—

*The comment must not be published maliciously.*

> For a long time it was doubtful whether malice was in issue when a plea of fair comment was set up. . . . But it has now been clearly laid down in *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K.B. 627, 77 L.J.K.B. 726, 95 L.T. 23, that a plea of fair comment will not avail a defendant who is proved to have acted maliciously. The onus of proving malice is on the plaintiff, and any facts that would go to shew malice were the defence one of ordinary privilege, may be proved to rebut a defence of fair comment (*Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K.B. 403, 75 L.J.K.B. 259, 94 L.T. 258), or it may "be inferred from the terms of the article itself:" *per* Collins, M.R., in

*Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K.B. 627, at p. 637. These cases have established the view which had been less clearly indicated in *McQuire* v. *Western Morning News Co.*, [1903] 2 K.B. 100, 72 L.J.K.B. 612, 51 W.R. 689, 88 L.T. 757; and *Caryll* v. *Daily Mail Publishing Co.* (1904), 90 L.T. 307. If the right to publish a fair comment on a matter of public interest is misused to gratify any indirect motive, the malice thus shewn destroys the defence.

The headnote to the report of *Thomas* v. *Bradbury*, [1906] 2 K.B. 627 states the effect of the decision thus:—

> In an action of libel, where the defence is that the writing complained of is fair comment upon a matter of public interest, evidence that the defendant was actuated by malice towards the plaintiff is admissible upon the ground that comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, and, therefore, proof of malice may take a criticism that is *primâ facie* fair outside the limits of fair comment.

The Master of the Rolls, in delivering the judgment of the Court, said at p. 640:—

> Proof of malice may take a criticism *primâ facie* outside the right of fair comment, just as it takes a communication *primâ facie* privileged outside the privilege.

For if it did not

> an action based on a criticism is wholly outside the ordinary law of libel, of which malice, express or implied, has always been considered to be the gist.

Page 638:—

> It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment.

Page 642. And the opinion was, as stated in the headnote, that evidence of malice actuating the defendant was admissible.

In the discussion of this case, defendants' counsel drew attention to, and emphasized, the word "distorted" used by the Master of the Rolls in his judgment at p. 638, and also at 642, where he states that

> Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it.

But the language used in that case was defamatory: it must have been, or it would not have been held actionable. There can be comment entirely fair and not actionable. There can also be comment which is defamatory and therefore actionable *per se*, except where the defence of fair comment is raised. In Lord Collins' judgment the words "comment distorted by malice," mean, to my mind, "comment defamatory in its nature by owing its expression to malice," or, "defamatory comment dictated by malice," and is so interpreted in the headnote where "actuated" is used. Certainly if the comment were not defa-

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matory, and therefore, not actionable, it would be immaterial whether it were dictated by malice or not.

Bower, in his work on Actionable Defamation, in discussing this subject, says:—

> Just as fraud, if pleaded and proved, annuls every obligation, whatever be the nature of the contract or transaction creating that obligation, so malice, if pleaded and proved, annuls *primâ facie* protection, whatever be the nature of the publication to which that protection is, in the first instance, accorded.

Bower, p. 155. And no distinction in this respect is drawn between the defences of comment or duty and interest.

> That "comment" is as much a case . . . of the genus defeasible immunity as any of the communications usually described as "qualifiedly privileged" is now well settled by *Thomas* v. *Bradbury*, [1906] 2 K.B. 627, if it can be said to have ever been really in doubt: *Ib.* 364.
>
> The *primâ facie* protection accorded to "fair and accurate reports of proceedings," and to fair comment is as much liable to be displaced by proof of an evil motive on the part of the person publishing, as any other kind of defeasible immunity. The former branch of the proposition was not definitely established until 1879, nor the latter until 1906: *Ib.* 413.

In neither case is the immunity absolute. The absolute immunity of fair comment was not even argued by counsel in *Thomas* v. *Bradbury*, [1906] 2 K.B. 627.

The doctrine that the defence of fair comment can be destroyed by evidence that shews malice on the part of the defendant (or, in other words, that the defendant's state of mind had something to do with the case) has not been free from criticism. In the article on Libel and Slander in Halsbury's Laws of England, contributed by Lord Justice Vaughan-Williams and Mr. A. Romer Macklin, vol. 18, at 707, it is said:—

> Assuming that the comment is a comment on a matter of public interest and that it is founded on facts which are not misstated, and is a fair comment in the sense that it is a reasonable inference from these facts, it is not easy to explain satisfactorily why the state of the defendant's mind at the time when he made the comment should affect the defence.

This is an obvious commentary on the doctrine. And yet it may be, on the whole, a wise provision of the law which holds that A., if he be actuated by malice towards B., must refrain from using defamatory language about him. If he does, he does so at his peril, because the plea of "comment" will avail him nothing, and, in these circumstances, a policy of silence and self-restraint is most expedient.

> It has been said that, given the existence of malice, it is for the jury to say whether it has warped the judgment of the critic: that comment distorted by malice cannot be fair on the part of the person who makes it: and that, therefore, evidence of malice actuating the defendant is admissible and should be left to the jury.

In support of this is quoted *Thomas* v. *Bradbury*, [1906] 2 K.B. 627, and in the note, attention is called to the word "actuated" used in the headnote to that case compared with "distorted" as used in the body of the report.

As to the analogy between the defences of qualified privilege and fair comment, it is pointed out in *Plymouth Mutual* v. *Traders Publishing Association*, [1906] 1 K.B. 403, by Vaughan Williams, L.J., referring to *White* v. *Credit Reform*, [1905] 1 K. B. 653, and quoted by Collins, M.R., in *Thomas* v. *Bradbury*, [1906] 2 K.B. 627, 642, that

> in both cases the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other case, whether he published it in the spirit of unfairness.
>
> A statement made on a qualified privileged occasion from feelings of spite or from some other wrongful and indirect motive is an abuse of the privilege and is not protected, though there be no intrinsic evidence of actual malice in the actual words used. So too, it may be said that the existence of malice in the mind of a commentator at the time of the publication of the comment suggests that the comment may not really have been made in the exercise of the right of fair comment on a matter of public interest but to gratify personal spite, or in other words may have been an abuse of the right, though the words used are not intrinsically unfair. In short, the abuse, whether of the right of comment or of a qualified privileged occasion, arising from a wrong state of mind actuating the publication may avoid the defence of fair comment or privilege, though the language used is not intrinsically unfair in the one case nor in excess of the occasion in the other. The analogy, however, is far from close. The burden is on the plaintiff, by proving express malice, to rebut the protection *primâ facie* arising if words are spoken or written on a privileged occasion; whereas, on a defence of fair comment, the burden is on the defendant to shew that the comment is fair, and in so doing to negative the writing or publication of the comment being actuated by an unfair state of mind:

Halsbury's Laws of England, vol. 18, p. 707, sec. 1291.

But the result, in the opinion of the authors, is this:—

> Whatever be the ground, it is clear that on the defence of fair comment or criticism, evidence that the defendant was actuated by malice towards the plaintiff is admissible and that proof of malice may take a comment or criticism that is *primâ facie* fair outside the limits of fair comment: p. 708. See also note (*n*) where reference is made to the passage from the judgment of Fletcher Moulton, L.J., in *Plymouth Mutual* v. *Traders Publishing Association*, [1906] 1 K.B. 403, 418, quoted by Collins, M.R., in *Thomas* v. *Bradbury*, [1906] 2 K.B. 627, 642. 'I am clear that in both cases . . . (privilege and fair comment) . . . the state of mind of the defendant when he published the alleged libel is a matter directly in issue.

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Evidence of malice, therefore, will destroy the defence that the alleged libel is a fair comment on a matter of public interest: Odgers 342. "Any indirect motive, other than a sense of duty, is what the law calls 'malice'": (*per* Lord Campbell, C.J., in *Dickson* v. *Earl of Wilton*, 1 F. & F. 419, 427). The question of malice or no malice is for the jury. But there is always the prior question: Is there any evidence of malice to go to the jury? And this is for the Judge: Odgers 346.

In *Thomas* v. *Bradbury*, [1906] 2 K.B. 627, it was urged for the plaintiff that there was extrinsic evidence of malice (the particulars of which are set out in Lord Collins' judgment at p. 637) and also that the language of the article complained of could be looked at for intrinsic evidence. In this case before us the plaintiffs' counsel dwelt upon certain matters in the evidence which, in his opinion, are such as the jury might consider as going to shew malice.

The evidence of the defendants' president was referred to in several places as indicating an indirect motive. At one place the following question and answer were given:—

Q.—Do you think this company or its officers ought to be in gaol? A.—I think so, yes, emphatically.

And it would seem that even the demeanour of a party in the witness box is an element for consideration (*Thomas* v. *Bradbury*, [1906] 2 K.B. 627, 637). It was also claimed that the wording of the comments was excessive in its imputations of past offences, and of the intention to commit further offences, and that facts are imputed not to be found in the circular. Stress was also laid on the anonymity of the defendants' publication, and on the large circulation given to it, in excess of that given the plaintiffs' circular.

It is argued that the trial Judge should have held, and that this Court now should hold, that the defendants' publication is a comment which is an honest expression of their opinion, and does not go beyond the limits of what may be fairly called criticism; that there was nothing in the publication beyond such a comment; that there was nothing for a jury to consider, and that there should, therefore, be a verdict for the defendants. This was what was done in *McQuire* v. *Western*, [1903] 2 K.B. 100, by the Court of Appeal. But in that case

> it was not suggested that there was any evidence of actual malice, there were no personal imputations, nor could any statement of fact be impugned: p. 108.

But, supposing the trial Judge had declared his intention of so holding on the pleadings, plaintiffs' counsel would, no doubt, have said: "We propose submitting evidence which will shew these defendants cannot take advantage of that position because in their publication they were actuated by actual

malice." Then it would have been impossible, I submit, for the Judge to carry out his proposal to withdraw the case from the jury. He would necessarily have gone on with the trial and submitted the evidence of express malice, if any, to the jury.

I have not felt called upon to consider this case as turning on the defence of privileged communication or publication on a privileged occasion. That ground of defence is not explicitly taken in the pleadings, was not expressly put forward amongst the grounds of appeal and was not definitely pressed up as in argument.

The trial Judge was not directly asked to withdraw the case from the jury on the ground that there was no evidence of malice. No doubt he considered that, in the circumstances, the safer course was to leave the whole case to the jury. But, without determining whether this was or was not the proper course, it does seem to me that the trial Judge should have directed the jury to bear in mind that the criminal law applicable to municipal officers had been in force since the adoption of the Criminal Code, and that, in any event, apart from its being a criminal offence, the taking of remuneration by municipal officers from those having transactions with the municipalities was essentially fraudulent and dishonest, and forbidden by law prior to the enactment of the Code. More than that, I think it should have been made plain to the jury that the fact that anyone of these transactions wherein the officers received a commission was known to one member, or even to all the members, of a council could make absolutely no difference in the criminal, civil or moral liability of the parties to it, if there were such liability. That the true shareholders of a municipal corporation are the ratepayers, and, even if each of these consented individually to a transaction of this kind, that also would not alter, condone or change whatever criminal, civil or moral liability, if any, there might be.

I think, therefore, that there must be a new trial on these grounds, and in view of the possibility of additional evidence. In the event of a new trial, I think the evidence of councillors and others intended to shew that the transactions impugned were known to them should be rigorously excluded as irrelevant to the issue.

RICHARDS, PERDUE, and HAGGART, JJ.A., concurred with HOWELL, C.J.M.

Richards, J.A.
Perdue, J.A.
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*Appeal allowed and new trial ordered.*

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## McMULLEN v. COUGHLAN.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. MASTER AND SERVANT (§ II A 4—70)—DEFECTIVE MACHINERY—MASTER'S KNOWLEDGE OF DEFECT—MACHINE "REPEATING" ON ONE OPERATION.

In an action to recover against a master for injuries received while operating a coping machine, where it appears from the plaintiff's evidence that he was not aware of any defect in the machine and another witness testifies that knowledge of the defect had been brought home to the defendants, such defect being the "tripping" of the machine twice when the operator had worked the "tripper" only once, a verdict by the jury for the plaintiff will not be disturbed on appeal, although it depends solely on the balance of probabilities without definite evidence on either side as to the cause of the repeated operation.

Statement

APPEAL by the defendants from the judgment of Clement, J., after verdict given by a jury, the action being one for damages for personal injuries.

The appeal was dismissed.

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

*Armour*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.:—I think this appeal should be dismissed. The jury found a general verdict, and awarded the plaintiff $500 damages for the loss of the ends of the fingers of one hand, which were cut off in a coping machine which he was operating. The machine in question was used for shearing iron or steel. The head to which the shears were attached moved vertically up and down. When the operator desired it to descend he pressed with his foot what is called a tripper. If he desired it to descend only once he took his foot off the tripper during the descent, otherwise it would after rising descend again.

It was claimed by the plaintiff that this machine would sometimes descend a second time when the tripper was properly released by the operator. It is conceded that if so the machine was abnormal and defective. The evidence for the defence is that the machine was not defective, and that it was practically impossible that it should act thus unless the operator kept his foot too long on the tripper. The plaintiff's injury he claims was received by reason of the cutting head of the machine descending a second time when it should not have done so. He claims that at the time of his injury he was not aware of this defect in the machine. He brings home to the defendants notice of this defect by the witness Blaikie, who says that the machine acted in that way when he was operating it, and that he called the fact to the attention of the defendants' foreman. Another witness who operated the machine very frequently and for a considerable period of time, says that it acted in this way with him many times. While I have a very strong belief that the

plaintiff's accident arose from his inadvertently keeping his foot too long on the tripper, yet in face of the evidence above referred to, I think it was open to the jury to find the verdict they did. The jury were entitled to believe Blaikie and the other witnesses, and if so, they were entitled to come to the conclusion that the machine was defective, and that that fact was brought to the knowledge of the defendants. I do not think the plaintiff need point to the particular defect in the mechanism which produced this peculiar action of the machine, and the jury were entitled to discard if they chose the evidence of the witnesses for the defence, who say it was in perfect condition.

Macdonald, C.J.A.

IRVING, J.A.:—I would dismiss the appeal.

Irving, J.A.

As there was no misdirection I do not think we would be justified in setting the verdict aside: *King* v. *Toronto*, [1908] A.C. 280; in saying this I do not wish to be taken as approving or disapproving of the finding.

MARTIN, J.A.:—This case, the more it is examined, is shewn to turn on a very simple question which if answered affirmatively established the plaintiff's right to recover and removes any objection to the charge. And the question is—is there reasonable evidence to go to the jury in support of the contention that the machine "tripped" a second time voluntarily, without the agency of the plaintiff? The testimony of Blaikie (at pp. 21, 25, 26, 32, 39) is clear that not only had it done so on two occasions when he was in charge of it, but that he had reported this dangerous defect to the defendant's foreman, Lilly. This supports the plaintiff's own account of what happened, at pp. 56-7; otherwise the cause of the accident would be inexplicable. The suggested cause of the second "tripping," an unstable foundation, given by Blaikie (pp. 29, 33, 40) does not sound unreasonable, and moreover the defendant John Coughlan's evidence on discovery shews the machine was a second-hand one when he bought it, "in good condition" as he believed.

Martin, J.A.

The appeal should, in my opinion, be dismissed.

GALLIHER, J.A.:—I would dismiss this appeal.

Galliher, J.A.

I think this case was properly left to the jury: see *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380.

At the close of the plaintiff's case Mr. Taylor moved for dismissal of the action on the ground that there was no evidence of negligence on the part of the plaintiff, citing among other cases *Walsh* v. *Whiteley*, 57 L.J.Q.B. 586, and *Morgan* v. *Hutchins*, 59 L.J.Q.B. 197.

If the evidence of Blaikie, at p. 22 of the appeal book is to be believed, then there is the very evidence which was lacking in

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*Walsh* v. *Whiteley*, 57 L.J.Q.B. 586, as decided by a majority of the Court, Lindley and Lopes, L.JJ., and which brings it within *Morgan* v. *Hutchins*, 59 L.J.Q.B. 197.

In speaking of this machine tripping with him on several occasions when his foot had been taken off the lever, Blaikie says:—

> Q. Did you say anything about this dangerous condition? A. I did to Mr. Lilly.
>
> Q. Who is Mr. Lilly? A. He is foreman of the shop.
>
> Q. What did he say about it? A. He turned around and told me the same thing—to look out—she would trip.

Blaikie does not appear to have been cross-examined upon this. Then the plaintiff says he was never warned by anyone that the machine would trip a second time.

This was all evidence to go to a jury as to the negligence of the defendant's foreman. If the machine tripped a second time without the agency of the person operating it, it argues a defect—in fact the defendant's case is that it could not.

There is then before the jury the evidence of both parties, and whether rightly or wrongly they have found in plaintiff's favour.

No cause can be assigned by either party why it should trip a second time without human agency, so in determining the question the jury no doubt took into consideration the balance of probabilities (which they would be entitled to do) and as these are dependent on pure questions of fact upon which the evidence is contradictory, we would not be justified in setting aside the verdict.

I would not interfere with the scale of costs awarded by the learned trial Judge.

*Appeal dismissed.*

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## BERGKLINT v. WESTERN CANADA POWER CO.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. MASTER AND SERVANT (§ II A 4—75)—SAFE PLACE TO WORK—INSUFFICIENT CLEARING OF INCLINE—COMMON EMPLOYMENT.

An action by a workman in respect of personal injuries caused by a stone rolling down a higher incline on to a ledge of rock upon which the plaintiff was working, fails, where the eminence above the ledge had been cleared to their own satisfaction by the plaintiff himself and the fellow-workmen sent by the superintendent of the works to clear such incline for the purpose of ensuring safety in such operations.

[*McDonald* v. *B.C. Electric R. Co.*, 16 B.C.R. 386, referred to.]

2. MASTER AND SERVANT (§ II B 3—146)—SAFE PLACE TO WORK—DUTY OF SERVANT AS WELL AS MASTER TO ENSURE SAFETY.

The relation of master and servant implies an obligation on the part of the master to provide for the safety of his servant in the

course of his employment to the best of the master's judgment; yet, in that sort of employment where the servant must have known as well as his master, or probably better, whether or not the place was safe, it is the servant's duty to exercise diligence and caution to avoid danger. (*Per* Irving, J.A.)

[*Priestley* v. *Fowler* (1837), 3 M. & W. 1, applied.]

3. MASTER AND SERVANT (§ II A 4—75)—SAFE PLACE TO WORK—ALTERNATIVE METHODS OF PROTECTION—PLACE TO WORK PREPARED BY WORKMAN AND FELLOW-EMPLOYEES.

In an action by a plaintiff workman against his employer for damages for an injury caused while at work on a ledge of rock, where the inference from the plaintiff's own testimony was that the clearing off of the debris on an incline above the ledge, if it had been well and carefully done, was a reasonable and proper measure of protection to the workmen, and where that clearing off was done by the plaintiff himself and his fellow workmen, the defendant employer (unless negligent by knowingly appointing incompetent servants or omitting statutory precautions) escapes liability, under the doctrine of common employment, for the negligence of the fellow workmen although the jury's finding grouped together as the cause of the injury both the negligent clearing and the omission to erect a barrier to deflect falling rock, which latter method was according to the plaintiff's evidence necessary only where the clearing could not be undertaken.

[*McDonald* v. *B. C. Electric R. Co.*, 16 B.C.R. 386, referred to.]

4. MASTER AND SERVANT (§ II B 3—146)—NEGLIGENCE — PERSONAL INJURY—DANGEROUS PLACE TO WORK—VOLENTI NON FIT INJURIA.

The doctrine of "*volenti non fit injuria*" applies to bar a negligence action by an employee for personal injury in respect of the employer's failure to protect the place of work on a hillside from falling stones and debris, where the nature of the risk was known to the employee, who with his fellow-workmen had done the work they thought sufficient to guard the place against the stones and debris, and where the plaintiff was an experienced man at such work. (*Per* Irving, J.A.)

[*Smith* v. *Baker*, [1891] A.C. 325, distinguished.]

Statement

APPEAL by the defendants from the judgment of Clement, J., in an action for damages resulting from injuries caused by a stone which fell and hit the plaintiff while standing on a ledge of rock which was being cleared in order that a steam drill might be placed thereon.

The appeal was allowed and the action dismissed.

*Sir C. H. Tupper*, K.C., for appellant.

*S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.B.C.:—The bulk of the evidence in this case was directed to proving the negligent system of operating aerial trams, but this has been disposed of against the plaintiff by the verdict of the jury. The only question remaining is, was there evidence to support the jury's finding that defendants were negligent "in not sufficiently clearing the face of the incline and by not placing barriers to prevent rolling stones and other debris from causing injury to employees."

Now, it is common ground that the plaintiff and two other workmen were detailed by the foreman to clear away the loose

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or dangerous rocks and debris above the ledge upon which they were to work, and on which the plaintiff was working when the accident happened. These men worked at such clearing for at least four or five hours. I will quote from the plaintiff:—

Q. My question is, did you think at the time when you were clearing it that you had not cleared it sufficiently? A. I do not think so.

And again:—

Q. Your idea, Mr. Bergklint, is in short, that the accident was due to this insufficient clearing at the edge of the hill? A. Yes.

Q. You have told us that you and Maclean and McKinnon did the clearing? A. Yes.

And again:—

Let me put it to you again, Mr. Bergklint, isn't it a fact that you cleared off these loose rocks in order to prevent them tumbling on you when you went to work? A. Yes, sir.

Q. So far as you could see you cleared off all loose rock? A. Yes, sir.

The only qualification of this is where he states that:—

At the edge we cleared off as many stones as we saw, but there were stones higher up the mountain.

Q. There were stones higher up the mountain, and did you tell anyone, or suggest to anyone there was any danger higher up the mountain? A. No.

The plaintiff further says that he had had experience in Sweden in similar work.

Q. Was it not always your custom in working on that class of work, either in Sweden or at the works, to go up above the ledge and clear off the loose stones before you went down on the ledge to work? A. Yes.

The Interpreter:—His answer is that when it was not too much work they cleared off the rock, but if it was too much work they put protection.

Now, in this case the jury have found that the face of the incline was not sufficiently cleared; if this be so, that was the fault of the plaintiff and his fellow-workmen. The jury further say that there was negligence in not placing a barrier: that is the kind of "protection" the plaintiff apparently meant in the answer above quoted. So that the system (if we can use that much abused term in connection with the work in question) usually adopted under circumstances similar to those in question here, was to clear the rocks off above unless that involved too much work or expense. It was only in case that method of clearing was not practicable on account of the amount of work involved that the placing of other protection, such as a barrier, was resorted to. In the face of this evidence, to say nothing of the evidence of witnesses who say that a barrier in this case would be unnecessary and dangerous, I cannot see how the jury

could reasonably find the verdict they did. Some stress was laid upon the fact that the plaintiff did not speak or understand English very well. This undoubtedly would render him less capable of expressing himself both at the trial and when the work of clearing was being done, but on the other hand there is no suggestion that he was under any misapprehension at all with regard to the duties of himself and his fellow-workmen in clearing the incline and making it safe. His own admitted knowledge of such work enables one to safely conclude that he was quite satisfied that the place had been made safe.

It seems to me that this was one of those unfortunate accidents which occur without fault on either side, the risk of which is incidental to an employment which, at best, is hazardous.

It follows that the appeal should be allowed, and the action dismissed.

Irving, J.A.

IRVING, J.A.:—I think this appeal should be allowed.

The plaintiff received his injury from a stone which fell from above and hit him as he was standing on a ledge or shelf of rock which was being cleared in order that a steam drill might be placed thereon.

The plaintiff was working under the immediate orders of one McLean. He, the plaintiff, and another man, McKinnon, were helpers to McLean, and it was McLean's machine they were about to set up on the shelf or ledge. This ledge projected a few feet from the side of the hill, which rose above them some forty or fifty feet. Below them some thirty feet or so was the bottom of the pit.

As a safeguard, McLean, McKinnon, and the plaintiff, had been sent up the hill some hours before the accident took place to clear off the loose stones and debris, so as to make the ledge a safe place for them to work the drill. The three men went up and removed a quantity of stuff from the brow of the hill, and McLean said, "That's enough, we can now go down to the ledge." The plaintiff did not think enough of the loose material had been removed but did not say so, apparently because he did not expect that he himself would be required to work on the ledge for any length of time, the usual practice being for McLean and McKinnon to run the drill together after it was once set up. After they had descended to the ledge, McLean thought more stones should be removed from the face of the hill, and he sent McKinnon up to do this.

The three, McLean, the plaintiff, and McKinnon—possibly McKinnon had not returned—but certainly McLean and the plaintiff, then began clearing the ledge, when a stone and some dirt came down the hill and struck the plaintiff on the head. He fell back into the pit below and was injured.

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In my opinion this evidence which I have taken from his own testimony, disentitles the plaintiff to go to the jury. In the first place, McLean was a fellow-workman, and in the absence of any evidence that the defendants had knowingly entrusted the duty of supervising to an incompetent man, the plaintiff cannot expect to recover. I don't suggest that McLean was guilty of negligence, but it was he who said sufficient has been cleared away. The principle was settled in *Priestley* v. *Fowler* (1837), 3 M. & W. 1, where Lord Abinger, at 6, said:—

> The mere relation of the master and the servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

The latter portion of the quotation is peculiarly applicable to the present case—and this is the second ground for dismissing the action, because the plaintiff was himself a party to the negligent clearing away—if negligent it was. The plaintiff, however, relies on what has been called a negligent system. In *McDonald* v. *B.C. Electric R. Co.*, 16 B.C.R. 386, 18 W.L.R. 284, I refer to a number of cases on the question of system. Too often the jury get the idea that because there is an accident there is a right to damages. If that were so, the Workmen's Compensation Act was unnecessary, but with that idea in their heads they listen to evidence as to how the accident could be prevented. The question here was not, I think, put as fully before them by the learned trial Judge as it ought to have been. What he should have asked them, having regard to the admitted circumstances of the case, was this: "In your opinion was the clearing off of the debris above the place where the men were about to work—if it had been well and carefully done—a reasonable and proper measure of protection to the men?" There

is no doubt that it was, and the Judge seems to have thought so because he ruled there was no case to go to the jury on that point. With deference to the learned trial Judge, that seems to me to be the only question in the case, because the want of care in respect of which the defendants are liable is in connection with that particular piece of work. In this connection the jury's answer shews that they have fixed the company with responsibility for neglecting to sufficiently clear the face of the incline; *and*, not *or*, for not erecting overhead barriers to protect the men.

The jury concede, in effect, that if the face of the incline had been properly cleared, on which being properly done no barriers would be necessary, the accident could not have occurred. I think this establishes what I have already suggested—that the defendants escape under the doctrine of common employment.

In *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326, in discussing the charge there, Lord Colonsay pointed out that the question involved was not one of a defect in the general arrangement or system, for which in certain views the defenders might be regarded as liable, but was one as to the construction of a temporary structure erected by order of Neish, a foreman, for certain working operations then about to be undertaken. This, Lord Colonsay points out, raised a totally different question for the jury, and that was in reference to the liability of the defenders for the fault of Neish, the foreman.

If it was simple misdirection, that would mean a new trial, but I think there was no case to go to the jury on the principle that the negligence, if any there was, was that of McLean.

The doctrine of *volens* was much pressed on behalf of the defendants. *Smith* v. *Baker*, [1891] A.C. 325, 338, was referred to. In that case, wherein a great many matters are dealt with, there was really only one point, and that was, according to Lord Halsbury, 335, whether the plaintiff should have been nonsuited by the County Court Judge because he had admitted in his own evidence that he knew of the danger, or according to Lord Watson, 351, whether the jury were warranted in finding as they did that plaintiff was not *volens*.

The House determined the question in favour of the workmen on the facts of that case. It was argued for the defendants, who admitted a defective system, that the mere fact of a workman continuing to work with a knowledge that there was danger would, in every case, necessarily imply his acceptance of the risk, and justify the Judge in dismissing the case. Lord Watson declined to accede to that suggestion, and said, whether it would or would not have that effect depended (*a*) upon the nature of the risk; (*b*) the workman's connection with it, as

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well as upon other considerations which must vary according to the circumstances of the case.

Now, we know what (*a*) the nature of the risk in this case was, it was danger from stones falling on the men as they worked on the ledge—not unlike the risk in *Smith* v. *Baker*, [1891] A.C. 325—but when we come to consider (*b*) the workman's connection with it, we find no parallel in *Smith* v. *Baker*, [1891] A.C. 325, nor have we (as there was in that case, p. 336-349) an admission of negligence on the part of the defendants. In the circumstances of that case, Lord Watson said the question was one of fact. Lord Herschell, at 360, said:—

> It was, of course, open to the defendants to contend that after the plaintiff's admission as to his knowledge of the dangerous character of the work, the case ought to have been withdrawn from the jury.

Having regard to plaintiff's answers set out at pp. 89 and 90, I think that the case should have been withdrawn from the jury, and the jury's finding—if they found the plaintiff was not *volens*—was against the weight of evidence.

Martin, J.A. (dissenting).

MARTIN, J.A. (dissenting):—I am unfortunate in finding myself unable to take the same view of this case as my learned brothers.

To clear the ground, I shall first say that in view of the evidence of McKinnon, a witness for the defendant company (at p. 194) and the learned Judge's charge on the point, it is hopeless, in my opinion, for the defendant to seek to rely upon the defence of *volens*; nor can I see any escape from the finding of no contributory negligence which, in view of the charge, must be inferred to have been found by the general verdict in favour of the plaintiff. And I am equally satisfied that the damages awarded are not so large that we should be justified in interfering with them.

Then as to the negligence of the defendant company. It is found by the jury to consist in "not sufficiently clearing the face of the incline and putting in place barriers to prevent rolling stones and other debris from causing injury to the employees." This is not a finding of two distinct acts of negligence having, it may be, different legal consequences, but the essence of the meaning is, when the circumstances are properly understood, that the jury considered the only safe way to protect the workmen was to clear away rock, dirt, etc., a reasonable distance back from the brink of the excavation (*i.e.*, "face of the incline") thereby creating a berm and then place a barrier of planks or logs at the brink, so as to omit no reasonable safeguards in a situation which was admittedly dangerous. There is nothing in such a verdict having regard to the evidence and

charge of Mr. Justice Clement that is ambiguous, and as the work was on a large scale and of a long continued nature, the permanent (using the word in a relative sense) or continuous protection of its workmen must, in my opinion, necessarily form part of the system requisite to be established by the company for the safe conduct of such operations. That there was abundant evidence to go to the jury on which they might reasonably reach such a conclusion, is not, in my opinion, open to serious controversy.

But while I see no reason for disturbing the verdict, I think it desirable to add that the application twice made to the learned trial Judge by the defendant's counsel to put questions to the jury should have been acceded to, and I repeat what I said in *Eves* v. *Linton* on June 10th last, and in *Guthrie* v. *Huntting* (1910), 15 B.C.R. 471, on the authorities there cited as to the duty of the trial Judge to do so in negligence cases. If that proper course had been followed in the present case it is altogether probable that the parties would have been saved the expense of this appeal and assuredly this Court would have been spared much additional labour in trying to reach a just conclusion.

Martin, J.A. (dissenting).

GALLIHER, J.A.:—I would allow the appeal.

Galliher, J.A.

The jury have found the accident was due to the negligence of the defendants in not sufficiently clearing the rocks and debris from the face of the incline, and in not placing protecting barriers. I think they might reasonably find from the evidence that the accident was due to a stone or other debris coming from above where the plaintiff was working on the ledge and knocking him down, but the question still remains, whose negligence was that? If it was the negligence of the plaintiff, he cannot succeed. If not due to a defective system, and caused by the negligence of fellow-workmen, he cannot succeed, there being no question of the competency of the foreman.

The facts are that the plaintiff and two other men were sent up on the incline to clear off loose stones, rocks and rubbish above a ledge on which they were to set a drilling outfit. The foreman went up and inquired if everything was cleared off all right before they started barring the loose rocks off the ledge to prepare a level foundation for the drilling machine.

One of the men in the presence of the plaintiff answered yes, and the plaintiff made no comment. It appears this precaution was always taken, but the plaintiff contends that in addition barriers such as planks or logs should have been suspended by ropes above to prevent anything coming down on the workmen, and in not providing these the company's system was defective.

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In the first place, I think it is a misuse of the word "system." It is not a system at all, as I understand the application of that word in connection with the operation of works. For their own protection when a drill was to be moved from ledge to ledge, men were sent up to clear away any loose stuff that might be above, and which might accidentally roll down and injure them. If this cannot be properly classed as a system, and in my opinion it cannot, the failure to erect the logs or barrier is not a defective system, and there is no negligence on the part of the company.

*Appeal allowed*, MARTIN, J.A., *dissenting*.

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## COONEY v. JICKLING.

(Decision No. 2.)

*Manitoba Court of King's Bench, Mathers, C.J.K.B. November 20, 1912.*

1. COSTS (§ II—29)—TAXATION OF COSTS—REVIEW UNDER MANITOBA K.B. RULE 684—NECESSITY OF FILING WRITTEN OBJECTIONS.

Under Manitoba K.B. Rule 684, allowing "any party who may be dissatisfied with the certificate of a taxing officer, as to any item or part of an item which may have been objected to," to apply to a judge in Chambers for an order to review the taxation, written objections are not a pre-requisite to the right of appeal; oral objections being sufficient.

2. COSTS (§ II—29)—TAXATION OF COSTS—COUNTERCLAIM WHERE PLAINTIFF'S CLAIM NOT DENIED—ERRONEOUS TAXATION READJUSTED ON REVIEW.

Where in an action to recover a liquidated sum of money, defendants do not deny the plaintiff's claim, but set up a counterclaim, and the plaintiff instead of entering judgment upon his claim and going to trial on the counterclaim alone, sets the action down for trial on both claims, and judgment is rendered allowing plaintiff's claim with costs and dismissing defendant's counterclaim with costs, the plaintiff is allowed to tax only the costs on the counterclaim, and where costs were taxed on both claims, they will be readjusted on review and sent back to the taxing officer for revision, so that the plaintiff will get only those items which he could properly have taxed in respect of his defence to the counterclaim.

Statement

THIS is an appeal from the taxation of the taxing officer at Morden.

The bills were referred back to make the necessary alterations.

The judgment at trial is reported as *Cooney* v. *Jickling* (No. 1), 6 D.L.R. 145.

*C. H. Locke*, for plaintiff.

*H. E. Swift*, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—The defendants did not deny the plaintiff's claim which was for the recovery of a liquidated sum of money, but they set up a counterclaim. The

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plaintiff did not sign judgment upon his claim, as he might have done and have gone down to trial on the counterclaim alone, but he set the action down for trial on both claims. As there was no dispute as to the plaintiff's claim, the whole trial was occupied with the counterclaim. As a result, judgment was given allowing the plaintiff's claim with costs and dismissing the defendants' counterclaim with costs.

The plaintiff brought in two bills of costs, one upon the claim and another upon the counterclaim, and both bills were taxed, and the defendants appeal.

In the first place the plaintiff contends that no appeal will lie as no written objections were carried in before the taxing officer pursuant to Rules 968 and 969.

These rules correspond with Ontario Rules 1182 and 1183. Ontario Rule 774 provides that a party dissatisfied with the certificate of a taxing officer may apply to a Judge in Chambers to review the taxation as to any item or part of an item which has been objected to, as provided by Rules 1182 and 1183. The Manitoba Rule 684 was evidently copied, in part, from Ontario Rule 774, or its predecessor, Rule 851; but the part thereof confining the appeal to items concerning which written objections were made has been omitted.

Manitoba Rule 684, is as follows:—

> 684. Any party who may be dissatisfied with the certificate of a taxing officer, as to any item or part of an item which may have been objected to, may apply to a Judge in Chambers for an order to review the taxation as to such item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just.

The only limitation placed by this rule on the right of appeal is that the item or part thereof appealed against should have been objected to before the taxing officer. This objection may be oral or in writing.

In my opinion, therefore, the carrying in of written objections is not a pre-requisite to the right of appeal, and the plaintiff's objection fails.

I find that a similar objection was taken in *Middleton* v. *Black* (unreported) before my brother Macdonald, and, after consideration, he decided the point against the objection.

The first objection is that in the bill of costs appertaining to the plaintiff's claim, an order for production and incidental charges were taxed. This the defendants contend should not be, as the plaintiff's claim was admitted and there was no necessity for an order for production. I agree with this contention; but as the plaintiff would have been entitled to obtain an order for production in respect of the counterclaim, and he has not charged for it in that bill, the items may be allowed.

It is next objected that two fees for advising on evidence are

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allowed. This is clearly wrong, as there should be no fee for advising on evidence respecting a claim concerning which there would be no evidence.

A counsel fee of $40 was also taxed for the trial of the plaintiff's claim, and also a counsel fee of $60 on the trial of the counterclaim. As the plaintiff might have signed judgment by default in respect of his own claim, no counsel fee should be taxed in respect to it.

I have spoken to Mr. Walker, the senior taxing officer, and he agrees with this; but says that, in that event, as the trial lasted one day, the counsel fee in respect of the counterclaim should be increased to $75, and I do this.

The next item is, instructions for brief; two instructions for brief and two briefs were taxed. This is an error, there should have been one instruction for brief and one brief.

I have revised the bill in consultation with Mr. Walker, the senior taxing officer, and he agrees with the disposition I have made of it.

The net result is that the plaintiff's taxed bill on his claim should be reduced by $58.90, and the bill on the counterclaim should be increased by $15 making a reduction on the total of the two bills of costs of $43.90. The bills will be referred back to the taxing officer to make these deductions.

The defendants are entitled to the costs of this appeal to be taxed and set off against the plaintiff's taxed costs.

*Bills referred back.*

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SASK.

S. C. 1912

Oct. 26.

## CHEW v. CROCKETT.

**(Decision No. 2.)**

*Saskatchewan Supreme Court, Newlands, J. October 26, 1912.*

1. SALE (§ I B—13)—RE-SALE WHERE PURCHASERS HAVE NOT COMPLIED WITH TERMS—PASSING OF TITLE.

Where, by the terms of an executor's sale settlement was to be made at once and the purchasers of a chattel agreed that they would furnish an acceptable note before the next evening, their failure to do so justifies a re-sale of the chattel by the executor where the title to the chattel did not pass to the purchaser.

2. SALE (§ I B—13)—EXECUTOR'S SALE—PASSING OF TITLE.

Where, by terms of sale of horses at an executor's sale, the purchaser was to furnish an approved note by a certain time, the fact that the executor told the purchaser that if the animals were left on his unoccupied farm they would be at the risk of the buyer, and that by the seller's direction the horses were put into a livery stable by the buyer, does not conclude the seller from claiming that title to the property did not pass where the buyer failed to furnish the note in time.

[*Castle* v. *Playford*, L.R. 7 Ex. 98, referred to.]

ACTION to recover possession of a pair of horses sold by the defendant to the plaintiffs.

The action was dismissed.

An interlocutory application in the same case is reported as *Chew* v. *Crockett* (No. 1), 6 D.L.R. 368.

*J. A. Allan*, for plaintiffs.

*H. F. Thomson*, for defendant.

NEWLANDS, J.:—The defendant, who was the executor of the estate of Henry Crockett, deceased, sold the two horses mentioned in the statement of claim at public auction. The terms of sale were cash or approved joint notes or bankable paper. The plaintiffs bought these horses in at the sale jointly. The defendant refused to accept their joint note and they agreed to get another party to sign same who would be acceptable to the defendant. The defendant and the auctioneer's clerk swear that the security was to be furnished before the next evening, and the plaintiffs swear that no time was fixed. I am inclined to believe the defendant's evidence, because by the terms of sale settlement was to be made at once, and also because it was an executor's sale and was so announced by the auctioneer. Newlands, J.

The plaintiffs not having made settlement before the next evening, the defendant resold the horses and the plaintiffs brought this action to recover the same.

As I have adopted the defendant's story, that the security was to be furnished before the next evening, the plaintiffs cannot recover unless the horses were delivered to the plaintiffs and the property passed to them. On this point they rely upon the fact that the defendant told them that if they left the horses on his farm on the night of the sale they would be at their own risk, as there would be no one there. He afterwards told them to leave them with a livery stable keeper, which they did. Under all the circumstances of the case, I do not think the property was to pass. It is not inconsistent with the defendant's ownership that the plaintiffs should take the risk if the horses were left on an unoccupied farm for a night. See *Castle* v. *Playford*, L.R. 7 Ex. 98; *Martineau* v. *Kitching*, L.R. 7 Q.B. 436.

Judgment will, therefore, be for the defendants with costs.

*Action dismissed.*

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## McCORMICK v. KELLIHER.

(Decision No. 2.)

*British Columbia Supreme Court, Clement, J. June 24, 1912.*

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION LAW—UNSUCCESSFUL NEGLIGENCE ACTION.

Where a plaintiff sues her son's employers for negligence charged as having caused the son's death in the course of the employment and a judgment in her favour in the negligence action is reversed on appeal, the plaintiff may still apply to a Judge of the Supreme Court (B.C.) to fix and allow compensation apart from negligence to which she may be entitled by reason of the fatal injury having been received in the course of the son's employment with the defendant.

[*McCormick* v. *Kelliher*, 4 D.L.R. 657, applied.]

2. COSTS (§ I—2*d*)—SET-OFF — WORKMEN'S COMPENSATION—ALLOWANCE AFTER UNSUCCESSFUL NEGLIGENCE ACTION.

On allowing compensation under the Workmen's Compensation Act (B.C.) it may be directed that the plaintiff receive only such costs as would have been incurred had her claim been limited to statutory proceedings under the latter Act, with a deduction therefrom of the defendant's extra costs occasioned by reason of the plaintiff proceeding by action.

[*Cattermole* v. *Atlantic Transport Co.*, [1902] 1 K.B. 204, 71 L.J K.B. 173, 18 Times L.R. 102, applied.]

Statement

APPLICATION for the assessment of damages under the Workmen's Compensation Act (B.C.) in an action brought under Lord Campbell's Act and upon the common law and the Employers' Liability Act (B.C.) founded on alleged negligence.

A judgment at trial in favour of plaintiff in the negligence action was reversed on appeal; *McCormick* v. *Kelliher*, 4 D.L.R. 657; and the plaintiff thereupon applied to a Judge of the Supreme Court (B.C.) for the statutory compensation under the Workmen's Compensation Act (B.C.) on the ground that the fatal injury was caused in the course of the son's employment with the defendants. An order was thereupon made allowing compensation, but with limited costs, and a set-off to the defendant of extra costs of defence by reason of the plaintiff's proceedings not having been limited to those applicable to the claim under the Workmen's Compensation Act.

*H. S. Wood*, for plaintiff.

*E. A. Lucas*, for defendant.

Clement, J.

CLEMENT, J.:—Acting upon what I take to be the opinion of the majority of the Court of Appeal, I entertain this application. There will be an award in favour of the plaintiffs for $1,500; and as to costs I act upon the view upheld in *Cattermole* v. *Atlantic Transport Co.*, [1902] 1 K.B. 204, 71 L.J.K.B. 173, that I may, if I think the case a proper one in that regard, give the plaintiffs costs, with or without deduction, by awarding them costs as they would have incurred had they limited themselves

to proceedings under the Workmen's Compensation Act, less a deduction of the extra costs occasioned to the defendants by reason of the plaintiffs proceeding by way of action instead of under the Workmen's Compensation Act.

*Order accordingly.*

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## KING LUMBER CO. v. CANADIAN PACIFIC R. CO.

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*British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. PROXIMATE CAUSE (§ II A—17)—SPREAD OF FIRE—SEVERAL CONCURRENT FIRES AS CAUSE.

Where it appears that the loss by fire was occasioned by the concurrence of several fires for only one of which the defendant was liable, a refusal to put to the jury the question of what other fires were burning at the time in that vicinity and which one or more of such fires occasioned or contributed to the burning of the plaintiff's property, will not justify a new trial, where the judge in his instructions to the jury fully covers that point.

2. TRIAL (§ I D—15)—CROSS-EXAMINATION OF WITNESS BY REFERENCE TO DEPOSITION TAKEN ON DISCOVERY—FALSE IMPRESSIONS DRAWN THEREFROM—DISCRETION OF TRIAL JUDGE.

Where a witness is cross-examined by reference to his deposition taken on discovery, it is not permissible to conduct the proceedings in such a way as to give to the jury a false impression of the evidence given by the witness on discovery, and where that is attempted, the trial judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression. (*Per* Irving, J.A.)

Statement

AN appeal by defendants from the judgment of Clement, J., in an action for damages caused by the spread of fire.

The appeal was dismissed, MARTIN, J.A., dissenting.

*Davis*, K.C., and *McMullen*, for appellant.

*S. S. Taylor*, K.C., for respondent.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

There was, in my opinion, evidence sufficient to justify the jury in coming to the conclusion that the fire which caused damage to the plaintiffs was either wholly or in part the combined fire which, according to the evidence of the bridge gang, Sam. McDonald, and the two deWolfes, travelled from the north-west corner of lot 45026, or the hillside fire, which broke out to the east of the pump-house on the 29th or 30th June, and I agree that the questions submitted by the defendants' counsel might very properly have been left to the jury; but having regard to the whole charge of the learned Judge, I am of opinion that the case was properly left to the jury, and that we would not be justified in disturbing the verdict.

A question was raised during the argument as to the practice of cross-examining a witness from the deposition taken on

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discovery. I think that it is not permissible to conduct the proceedings so as to give to the jury a false impression of the evidence given by a witness on discovery. Where that is attempted the trial Judge in his discretion may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression.

MARTIN, J.A. (dissenting):—After a re-consideration of the charge and the evidence relative thereto I can find no escape from the conclusion that there must be a new trial for misdirection.

The objection clearly raised by counsel (on pp. 648-9 of the appeal book) involved an important question which should have been placed before the jury because, quite apart from the point raised as to the "Curzon" fire, there was unquestionably evidence to go to them with respect to the fire on the hillside which was admittedly burning for some hours before it was enveloped in the big fire, nevertheless the question as to how far that fire contributed to the damage, if at all, was definitely withheld from the jury. It may possibly be that the jury might have taken the view that it (the "hillside" fire) was caused by sparks from the big fire and therefore must be deemed to be part of it, but that is a matter they have never passed upon, though to us essential to determine it before damages can be properly assessed and the responsibility therefor placed upon the proper shoulders. The direction to the jury on pp. 654-5, that the question was one of a "preponderating fire," is, with all respect, one that cannot be supported and must inevitably have led the jury to a wrong conclusion. It is not a question of preponderance of size but distribution of liability, and if there were three or more fires contributing to the damage, the "preponderating" one is no more the "real cause" of the damage than the lesser ones. Each is the "real cause" of the damage it creates and the principle is not altered by any difficulty in its application. If my land is damaged by the discharge upon it of combined streams of refuse from two different factories, each of the factories is liable for the damage caused by its own stream though one of them may greatly "preponderate" in volume over the other; and though the cause of the damage to me may be "concurrent" because the two streams have intermingled before discharging upon my land in one flow, yet that does not relieve the authors of the original two streams from their several responsibility for such share of the damage as may be apportioned between them according to the quantum of the refuse discharged.

It may be, in the case at bar, that even if the "hillside" fire were found to be an independent one, the damage occasioned thereby would be very small, but that does not alter the prin-

ciple; indeed, it would only increase my regret that a matter which might so easily have been placed before the jury and disposed of was not so dealt with, thereby avoiding the heavy expense of this appeal and of the lengthy new trial which must be, in my opinion, ordered. The costs of the former one should abide the result of the new, and the respondent will have the costs of this appeal.

GALLIHER, J.A.:—The question of liability only has been tried. On the evidence, I do not think we would be justified in interfering with the finding of the jury.

There remains only the question as to whether there should be a new trial by reason of the fact that the learned trial Judge refused to put certain questions to the jury and also by reason of misdirection.

A series of questions were put to the jury and Mr. Davis, counsel for the defendants, requested that the following questions also be submitted:—

> What, if any, other fires than that fought on July 10th, were burning in the vicinity of Yahk or Curzon, on or prior to July 30th, 1910?
>
> What one or more of such fires occasioned or contributed to the burning of the plaintiff's property?

This the trial Judge refused to do, and instead charged the jury as follows:—

> Now, just a word with reference to the point raised by Mr. Davis. In these cases you have to arrive at what has been called the real cause of the loss. If you find that there was a junction of any of these fires and the evidence does not satisfy you that one or the other was the preponderating fire, so to speak, then you have to answer the first question, either "it began down the valley," "it began at Yahk," or "we do not know where it began," that is, the fire that did the damage, the real cause, the real cause of the catastrophe. For instance, supposing the fire that began on Yahk townsite or near Yahk townsite smouldered there and got in this draw in the hills, if that fire would have died out had it not been for the other overwhelming fire coming from lower down the valley, then you would say that the real cause of the plaintiff's loss was the fire that came from down the valley.
>
> If there was a concurrent cause and you are not able to say which was the preponderating cause, you simply have to say, "we cannot definitely determine what was the origin of the fire that did the damage." It is a difficult point, I quite see. If there were two fires which came together, one of which they are responsible for and the other they are not responsible for, and you are unable to say which was the preponderating fire which caused this loss, then you will simply say you cannot say, and if you cannot say the defendants, of course, win, because the burden is on the plaintiff to lead you to such a state of conviction that you find ultimately in their favour.

This charge really deals with the questions which Mr. Davis asked to be submitted so that unless there is misdirection in

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the manner in which the jury were so charged the defendants are not entitled to a new trial.

Reading the whole of that part of the charge complained of I do not think it is unfavourable to the defendants—portions of it, if they stood alone, might be so construed, but we should read it altogether and so read, in my opinion (and after a perusal of the authorities cited), it does not amount to misdirection.

I would dismiss the appeal.

Galliher, J.A.

*Appeal dismissed*, MARTIN, J.A., *dissenting*.

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## Re THE STEWART RIVER GOLD DREDGING COMPANY, Limited.

*Territorial Court of the Yukon Territory, Macaulay, J. September* 24, 1912.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP IN YUKON TERRITORY—RULES GOVERNING PROCEDURE.

An application for an order to proceed with the winding-up of a company in the Yukon Territory is properly made pursuant to the rules of procedure made by the judges of the Supreme Court of the North-West Territories at a time antecedent to the separation of the Yukon Territory from the North-West Territories, since no rules have been made modifying or replacing these rules.

2. CORPORATIONS AND COMPANIES (§ VII D—380)—FOREIGN CORPORATIONS —COMPANY WINDING-UP IN YUKON TERRITORY.

A foreign corporation doing business in the Yukon Territory under a license of the Dominion Government, is subject to the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, in so far as its assets situate within the Dominion of Canada are concerned.

Statement

THIS is an application for an order to proceed with the winding-up of the company; for an order appointing James George Purden, provisional liquidator of the company, as permanent liquidator of said company, and for an order directing the sale of the assets of said company.

The order asked for was granted.

*C. W. C. Tabor*, for petitioners.

*J. P. Smith*, for company.

Macaulay, J.

MACAULAY, J.:—The application was made before me in Chambers, on the 17th day of August last, pursuant to the rules of procedure made by the Judges of the Supreme Court of the North-West Territories at a time antecedent to the separation of the Yukon Territory from the North-West Territories. No rules having been made modifying or replacing the said rules, these rules are the sole rules pertaining to proceedings under this Act in the Yukon Territory.

The notice of application was duly served, pursuant to an order made by me on the 24th day of July last, upon the parties mentioned in the said order.

The application is supported by an affidavit of Daniel Alexander Matheson, of Dawson, one of the petitioners and a shareholder of the company, stating, among other things, that the company is in a state of insolvency and unable to pay its debts, and that the assets of the company, so far as he is able to ascertain, will not bring sufficient to pay the debts of the company, and that in order to save as much as possible to the company, and realize as much as possible from the assets of the company, it is, in his opinion, advisable that the company be forthwith wound up and the assets thereof sold to the best possible advantage.

On the 30th day of August, 1911, on an application for a winding-up order in this case, before the Honourable Mr. Justice Dugas, the learned Judge made an order for the winding up of the company and in the said order appointed the said James George Purden provisional liquidator, subject to further directions of the Court.

The learned Judge apparently made the order under the provisions of sub-sec. (*e*) of sec. 11 of the Winding-up Act, and such order has not been appealed from as provided by sec. 103 of the said Act.

The company in question was, as shewn in the petition for winding up, incorporated in the State of Arizona in the United States of America. It was, on the 11th day of December, 1908, pursuant to the provisions of 61 Viet. (Can.) ch. 49, licensed to carry on business in the Yukon Territory.

This company is undoubtedly a trading company under sec. 6 of the Winding-up Act, and, under the order of the 30th August, 1911, is in process of being wound up under the provisions of sub-sec. (*b*) of sec. 6.

There is no Winding-up Act in the Yukon Territory, and as this company is a foreign corporation doing business in Canada under a license of the Dominion Government, it is a company, in my opinion, under federal control, and subject to the provisions of the Dominion Winding-up Act, insofar as its assets situate within the Dominion of Canada are concerned.

The learned Judge, in his order of the 30th August, 1911, did not, in so many words, state that the company was insolvent, although in my opinion, on the material before him, he could have so found.

Aside from the question of insolvency, however, I am of opinion, for the reasons above stated, that the company is in the process of being wound up, and is also a company under federal control, and that it is advisable that the order asked for should be granted, and it is therefore granted accordingly.

Costs of all parties should be paid out of the proceeds of the assets of the company.

*Order granted.*

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## Re WILLIAM STAGGS.

(Decision No. 1.)

*Alberta Supreme Court, Stuart, J. November* 23, 1912.

1. HABEAS CORPUS (§ 1 C—18)—EXTRADITION PROCEEDINGS—CONFLICT OF DATES AS TO TIME OF OFFENCE.

Upon an application on habeas corpus for the discharge of a prisoner from custody, where it appears that in extradition proceedings he was committed upon the charge that he did "on or about the 8th day of February, 1912," obtain a promissory note from a certain party by false pretences with intention to cheat and defraud, and where the proceedings were begun by an information which stated that the offence had been committed on "the 8th day of February, 1911," and where throughout all the documents forwarded from the foreign jurisdiction up to the date of the present application the offence is alleged as of "the 8th day of February, 1911"; the warrant of commitment is invalid.

[Extradition Act, R.S.C. 1906, ch. 155. See also *United States* v. *Webber* (No. 1), 5 D.L.R. 863; *Re Webber et al.*, 6 D.L.R. 805.]

2. INDICTMENT, INFORMATION, AND COMPLAINT (§ 2 A—7)—SUFFICIENCY OF ALLEGATIONS—TIME—CONFLICT OF DATES.

Where the accused is committed under a warrant of commitment for extradition based on an information alleging the offence as of a year prior to the date shewn by the commitment, the information is not a sufficient basis for the commitment, and the prisoner will be discharged in a *habeas corpus* proceeding.

3. EXTRADITION (§ I—8)—INTERNATIONAL — REVIEW OF PROCEEDINGS — OMISSION TO READ STATUTORY STATEMENT.

In an extradition proceeding under the Extradition Act, the omission of the extradition judge to read to the accused the statement set forth in sub-sec. 2 of sec. 684 Cr. Code 1906, is not fatal to the proceedings.

[Can. Crim Code, R.S.C. 1906, ch. 146, sec. 684, referred to; see also *United States* v. *Webber* (No. 1), 5 D.L.R. 863; *Re Webber*, 6 D.L.R. 805, concerning criminal procedure requirements.]

4. EXTRADITION (§ I—8)—INTERNATIONAL — REVIEW OF PROCEEDINGS—FOREIGN DEPOSITIONS—ORIGINAL—COPY.

A foreign deposition for use in an extradition proceeding must purport to be certified as the original or a true copy thereof by a judge, magistrate, or officer of the foreign state; and it is not admissible in the extradition proceeding when it appears that the certificate is not given by any such foreign officer competent to certify that the original deposition contains a true record of the evidence given by the deponent.

[Extradition Act, R.S.C. 1906, ch. 155, sec. 17, referred to.]

Statement

AN application for a writ of *habeas corpus* and for the discharge of the prisoner from custody without the actual issuing of the writ.

The prisoner was discharged.

*Cameron*, for the accused.

*James Short*, and *F. S. Selwood*, for the State of Kansas.

Stuart, J.

STUART, J.:—On the 9th of November, 1912, Mr. Justice Simmons, acting as a Judge under the Extradition Act, issued his warrant committing one William Staggs for extradition upon the application of the State of Kansas upon a charge that the

said Staggs, did on or about the 8th day of February, 1912, obtain a certain promissory note from the Welda State Bank in the State of Kansas by false pretences with intention to cheat and defraud the Welda State Bank.

The extradition proceedings were begun by an information under the Extradition Act which stated that the offence had been committed on the 8th day of February, 1911. Strangely enough, throughout all the documents which had been forwarded by the authorities in Kansas to date, 8th of February, 1911, had been inserted. It was not until the oral evidence was taken before Mr. Justice Simmons that it clearly appeared that the cheque which the accused was alleged to have given and which turned out to be worthless and in return for which he had received the note in question was dated and had been in fact given on the 8th of February, 1912, although in the information itself it does appear by the copy of the cheque inserted therein that the date was the 8th of February, 1912.

The accused is now being held for extradition under the warrant of the 9th of November. This is an application for *habeas corpus* and for the discharge of the accused without the actual issue of the writ. I have consulted both my brother Simmons and my brother Walsh, the latter of whom issued the summons for the *habeas corpus* proceedings and they both agree with me that the warrant of commitment which states that the offence was committed on the 8th day of February, 1912, cannot stand upon an information which states that the offence was committed on the 8th of February, 1911. It was suggested and strongly urged upon the argument, and it is, no doubt, the fact, that the date, 8th of February, 1911, was throughout a typographical error. If I had any power to amend, it would probably be a proper case for making an amendment, but I cannot see that I have any authority whatever to make such an amendment in the information. Possibly that amendment might have been made by Mr. Justice Simmons at the hearing, at any rate if the information was re-sworn. However that may be, it is clear that I cannot make it now. That being so, it is impossible for the warrant of commitment to stand; this is quite sufficient to justify an order for the discharge of the accused and he will be discharged accordingly.

A number of other objections were taken to the proceedings, but I shall only refer to two of them. One objection was that the extradition Judge did not, at the close of the hearing of the evidence read to the accused the statements set forth in subsection 2 of section 684 of the Criminal Code, and it was argued that by virtue of section 13 of the Extradition Act which directs that a hearing of an application for extradition shall proceed as nearly as may be in the same manner as if the fugitive was

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brought before a justice of the peace charged with an indictable offence committed in Canada, this statement must necessarily be read to the accused or otherwise the proceedings are defective. As I stated on the argument I am of opinion that this is not fatal to the proceedings. The very wording of the statement shews that the justice of the peace is giving the accused some assurances as to what may or may not happen during the later course of the proceedings against him and during his trial in the Canadian Courts. I cannot see that an extradition commissioner has any right or could be expected to give any assurances as to what would happen on the trial of the accused in Kansas.

Another objection referred to the deposition of one L. A. Davis, which was put in before Mr. Justice Simmons. Davis was the manager of the bank in Oklahoma, upon which bank the cheque, which was alleged to have been worthless, was given, and his evidence was adduced in order to shew that the accused had not any funds to his credit in that bank. It is very clear to me that this deposition was not admissible. It was taken before one W. J. Orme, a notary public, and was taken in the State of Oklahoma. The original deposition was not produced. All that was produced was a copy of it certified to be a true copy by one E. C. Simons, a justice of the peace for a certain county in the State of Kansas, and his certificate states that the copy produced was a true copy of the depositions of Davis on file in his office. I do not think that this is in compliance with section 17 of the Extradition Act. That section says that the deposition must purport to be certified to be the original or true copies by a Judge, magistrate or officer of the foreign state. Now, it is true, that Mr. Simons does certify that the document to which his certificate was attached was a true copy of a deposition which was in his office, but the real effect of his certificate is this: that he certifies that the copy which he sends forward is a true copy of something which purported to be the original of a deposition taken before Orme, the notary public. This, it seems to me, does not give any sufficient authentication of the actual evidence given by Davis. The extradition Judge, it is true, by virtue of section 17 may accept depositions which purport to be certified to be true copies, but my opinion is, that this certificate must be given by some one who is in a position to certify that not only the copies, but the originals of which they are copies do, in fact, contain a true record of the evidence given by the witness. Simons, the justice of the peace, was not in a position to do that. Quite evidently all he had before him was what purported to be a deposition made by Davis before Orme in another state. That was consequently insufficient, and, I think, the deposition of Davis was, therefore, inadmissible.

However, I think Mr. Justice Simmons was possibly justified

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in accepting the evidence of Van Duzer, given before him orally to the effect that he was manager of the Welda State Bank and that the cheque that had been given to him on the Oklahoma bank had been returned with a notarial protest attached in which the statement was made that there were no funds, as sufficient *primâ facie* evidence that there were in fact no funds for the cheque at the time that it was given.

Mr. Justice Simmons tells me that this is the view he took, and my brother Walsh, on a casual statement of the facts seems inclined to agree with that. If there had been nothing further I do not think that I could have set aside the commitment on the ground that there was not sufficient evidence of the false pretence to justify a committal by a magistrate.

It is not necessary to refer to any of the other grounds taken as the prisoner will be discharged in any case.

*Prisoner discharged.*

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**Arthur Newton Christian TREADGOLD v. Peter ROST, Antonio Zucco, Dominico Bragga, Dominico Albini, Augusto Sarto, Tom Laconi, Stipan Lalich, Mike Pavisich, Mike Becih, Joseph Stadlbouer, Mike Menini and Peter Pontalette.**

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*Territorial Court of the Yukon Territory, Macaulay, J. October* 21, 1912.

1. SPECIFIC PERFORMANCE (§ I A—3)—WRITTEN INSTRUMENT NOT CONTAINING ENTIRE AGREEMENT.

Specific performance of a written instrument will not be decreed where it is shewn that this instrument did not contain the whole agreement of the parties, but that it was the intention of the parties at the time of the execution of the instrument that a formal agreement should be later entered into between them.

[*Stowe* v. *Currie*, 21 O.L.R. 486; *Thompson* v. *McPherson*, 3 D.L.R. 269, referred to.]

2. SPECIFIC PERFORMANCE (§ I A—3)—AGREEMENT INDEFINITE OR UNCERTAIN.

Where it appears that the terms of a written agreement are indefinite or uncertain, specific performance will not be decreed.

[*Fenske* v. *Farbacher*, 2 D.L.R. 634, specially referred to; see also Annotation, 2 D.L.R. 636, as to oral contracts generally.]

3. VENDOR AND PURCHASER (§ I B—5)—PART OF PURCHASE PRICE IN STOCK —HOW COMPUTED.

Where, by the terms of an agreement, part of the purchase price of a mine was to be in stock of a company to be formed, a tender of that amount of stock computed at par does not necessarily fulfil the agreement, since the value of the stock depends on the state of the market at that time, and the vendor is entitled to so much of the stock as that part of the purchase price would then buy.

[*McIlquham* v. *Taylor*, [1895] 1 Ch. D. 53, referred to.]

4. VENDOR AND PURCHASER (§ I B—5)—PART PAYMENT IN STOCK OF COMPANY TO BE FORMED—TENDER OF STOCK IN COMPANY FORMED FOR OTHER PURPOSE—ESTOPPEL.

Where, by the terms of an agreement to purchase a mine, part of the purchase price was to be in stock of a company to be formed by

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the purchaser to acquire and work a certain creek or such parts as he may consider advisable, a tender of stock in a company which is formed for another object, is not sufficient, and the vendor will not be compelled to accept such shares, unless he had knowledge of the formation of such company and had by his conduct so acquiesced that he would be precluded from objecting to the same.

5. SPECIFIC PERFORMANCE (§ I A—3)—CONTRACT IN TWO PARTS—PERFORMANCE OF ONE WHERE OTHER IS IMPOSSIBLE.

If two parts of a contract are mutually exclusive, specific performance of one part may be decreed if specific performance of the whole is impossible. But where the two parts are dependent one upon the other, and it is impossible to decree specific performance of the one part, it will be denied as to the entire agreement.

[See Annotation on Specific Performance generally, 1 D.L.R. 354.]

6. SPECIFIC PERFORMANCE (§ I A—11)—PART PAYMENT WHERE IMPOSSIBLE TO GIVE SPECIFIC PERFORMANCE OTHERWISE.

Where the terms of an agreement for the sale of a mine are uncertain, and it further appears that this agreement was not the final agreement but that a more formal agreement was to be drawn up later, the fact that part of the purchase price has been paid by the purchaser, is not such part performance of the contract as would entitle him to specific performance, and he will have to avail himself of another remedy for the recovery of the moneys so paid.

Statement

THIS is an action for specific performance of an agreement in writing alleged to be contained in the following letter, viz:—

MURRAY'S HOTEL,
Dominion Creek, Y.T.
Lower Dominion, 25 Aug., 1909.

A. N. C. Treadgold, Esq.

Dear Sir,—In consideration of your assistance in consolidating my position on Dominion creek, I agree to give you the exclusive right to purchase all my interests on Dominion creek and its hillsides and benches for the price and sum of two hundred thousand dollars, payable as to ten thousand dollars on October first of this year and as to the remainder in stock of a company to be formed by you to acquire and work Dominion creek or such parts of Dominion creek as you may consider advisable. I will give you all the assistance in my power to ascertain the values of all the ground on the creek and to acquire such claims as you may consider desirable, turning over to you all claims which I have acquired or may hereafter acquire with your help at the price paid by me for same. You shall form the company at your discretion as to place and time of incorporation and amount of capital, and my stock shall be issued to me fully paid, and you shall decide when it may be desirable to merge the company in a larger company.

Yours faithfully,
PETER ROST.
By E. PETER ROST.

Witness: ELIZABETH ROST.

Also for a decree ordering and directing the defendant Rost to execute and deliver to the plaintiff a transfer of claims vested in defendant Rost as trustee, for an inquiry and account of all gold and gold dust and gold bearing gravels taken by the several defendants from any of the claims mentioned in the statement of

claim, and payment to the plaintiff of the amount due on such inquiry and account; for an injunction restraining the defendant Rost from selling, mortgaging, transferring or otherwise disposing of, or encumbering said claims and interests, and from interfering with plaintiff's right to renew said claims, or any right of the plaintiff therein in any way; and injunction restraining the defendants from mining or working the said claims, and also for a receiver.

The action was dismissed.

*F. T. Congdon*, K.C., and *Charles Macdonald*, for plaintiff.

*C. W. C. Tabor*, watching brief for Dominion Mining Co., Ltd.

*J. B. Pattullo*, K.C., and *J. P. Smith*, for defendants Rost, Lalich, Pavisich and Becih.

No one appeared on behalf of the other defendants.



MACAULAY, J.:—On the 11th day of May, 1912, an order was granted appointing a receiver as asked, and an interim injunction restraining the defendants, or any of them, from working or mining the said claims, and, on the 20th day of May, 1912, an order was granted continuing the injunction until the trial of this action. The receiver duly filed his report, passed his accounts and paid the balance in his hands, amounting to $4,844.16, into Court, and obtained his discharge.

The plaintiff is a mining promoter who has successfully organized large mining enterprises in this territory, and is still engaged in further organizing and promoting large mining companies to work the gold bearing gravels in this district, is a graduate of Oxford University, England, and is, and has been, a successful mining promoter.

The defendant Rost is a man unable to read or write except for the fact that he has learned to write his own name, but, as I gathered from the evidence, has had an experience of between 30 and 40 years mining in Australia and in this territory, and apart from the fact that he has no education, appears to me to be a shrewd mining man and possessed of more than the ordinary amount of intelligence, and a man who thoroughly understood the business of mining in a practical way.

The defendant Rost depended entirely upon his wife, who seems to have a fair education, to transact any business for him that required to be in writing, and generally to look after his clerical affairs.

Previous to the 25th day of August, 1909, the defendant Rost had acquired a large block of claims on Dominion creek in this territory with a view to obtaining capital to mine the said block of claims on a large scale by dredging or other modern process which would yield much larger profits than if mined by the cruder methods hitherto employed in mining on said creek, and, with the object of engaging capital to so operate his said mining

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ground, on the 10th day of July, 1909, went to the plaintiff's residence in Dawson and in the interview with the plaintiff disclosed to him his plans for working the said ground. At that interview Rost's holdings on Dominion creek were disclosed to the plaintiff, also adjoining properties which would be required to be secured to carry on the mining operations on a large scale, as shewn by six pages of memorandum taken in plaintiff's handwriting and put in as exhibit "A-2" at the trial.

After that interview some correspondence took place with regard to introduction of papers in defendant Rost's possession which would be required to be examined, and, on the 30th day of July, 1909, another interview took place at the plaintiff's home in Dawson between the plaintiff and defendant Rost when four pages of memorandum (exhibit "Z-1") were taken in the plaintiff's handwriting, and at which time both plaintiff and defendant Rost say the terms of an agreement they decided to enter into were settled between them but now both differ as to what those terms were.

It is admitted that at that interview the amount of Rost's indebtedness on his claims was placed at about $60,000.00 and that the amount of money that he and his wife had put into the claims was about $60,000.00. Other things appear in the memorandum also about which the plaintiff and defendant Rost differ, but it is admitted that the question of securing what were known as the Morrison interests was discussed at that meeting, and that the plaintiff was to endeavour to secure those interests to include them in the scheme that was being arranged for carrying on the said mining operations.

The mining claims of the defendant Rost on Caribou creek, a tributary of Dominion creek, were also discussed at this interview and a valuation of $20,000.00 placed upon them, and it is admitted by both parties that those claims of the defendant Rost were to be included in the list of claims which the defendant Rost would be expected to convey under the agreement which was being arranged between him and the plaintiff.

There were some outstanding debts against the claims of the defendant Rost which were pressing for payment, and it is admitted that the plaintiff was to advance the money to meet these payments, but plaintiff and the defendant Rost differ as to the manner in which the money was to be advanced.

On the 25th day of August, 1909, the plaintiff arrived at the home of the defendant Rost on Dominion creek with the above mentioned letter, which he alleges contains the agreement between himself and Rost prepared in his own handwriting, and the said letter, after having been read over to Rost, was signed by him and witnessed by his wife Elizabeth Rost; only the defendant, his wife Elizabeth Rost, and the plaintiff, being present at this interview.

After the signing of that letter the plaintiff took the document away with him, leaving no copy with Rost.

Both Rost and his wife say that they asked the plaintiff what this document was, and why he had not brought an agreement setting out the terms of the arrangement entered into between them. They further say that they stated to the plaintiff at that time that the $60,000.00 indebtedness of Rost was not mentioned in this letter, nor the Caribou claims, nor the mining machinery belonging to Rost, and that, according to the arrangement they had made, all these matters should be mentioned, and that the plaintiff replied that this is only a letter to shew they were dealing together, and that he would return in about three days with a proper agreement.

They further state that they asked him several times for the agreement and the plaintiff said he was very busy and would provide it later; that he wished the defendant Rost to have confidence in him and he would make a rich man of him. This the plaintiff denies and says the letter contains the whole agreement.

The defendant Rost says that the arrangement entered into between the plaintiff and himself prior to the 25th of August, 1909, was that his (Rost's) holdings on Dominion and Caribou creek, and his mining machinery, was to be taken into the scheme arranged between the plaintiff and himself at a valuation of about $260,000, that the plaintiff was to pay his liabilities, amounting to about $60,000.00 at once, and to pay him $60,000.00 in cash, being the amount of money he and his wife had put into the claims, and that, if they formed a company, his interests in that company would represent $140,000.00; that it was estimated that the whole amount of money required to purchase the portions of Dominion creek which they required for their scheme would be about $800,000.00, including the $260,000.00 to be paid for his holdings; and whether they sold the whole to a company or worked the property themselves his interests should be represented by the proportion of $140,000.00 to the total cost of the properties, and that the plaintiff always promised to reduce this agreement to writing. He further says that he was to lend his assistance to acquire further claims, and that he did acquire many claims which, by arrangement, were purchased in his name and paid for by the plaintiff; that he also staked or caused to be staked many claims on the said creek which now stand in his name, and the expenses for staking said claims were paid by the plaintiff, and which said claims were to form a part of the said scheme for working Dominion creek on a large scale, and which claims are the trust claims referred to in this action, and which he still holds in trust under the said agreement.

On or about the 9th day of October, 1909, the plaintiff paid the defendant Rost $10,000.00, and during the same fall and the

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following year, and before the 8th October, 1910, various sums amounting to $9,755.75, and which latter amounts were the claims referred to as the pressing claims of the defendant Rost which the plaintiff had agreed to pay. Rost says that when the payment of $10,000.00 was made the plaintiff told him the formal agreement was being prepared and would be executed, and would be submitted for signing, but that plaintiff left the territory on one of the last boats in the fall of 1909 and did not return until the following summer, and without having the agreement signed as agreed upon.

During the summer or fall of 1910 the defendant Rost was still pressing for an agreement and, on the 28th day of October, 1910, the plaintiff paid Rost $12,500.00 and, on the 15th day of November, 1910, made a further payment to him of $10,000.00. Rost says these were payments made on account of the agreement. The plaintiff says they were advances made to the defendant Rost, who required money, and that it was agreed that such payments were to be charged against the stock coming to defendant under the letter of August 25th, 1909.

On or about the 23rd day of November, 1910, one J. T. Patton, an agent for the plaintiff, prepared an unsigned agreement between the plaintiff and the defendant Rost which, with the typewritten suggested alterations, was put in as exhibit "D-2" at the trial.

The agreement is as follows, and following are the suggested typewritten alterations:—

KNOW ALL MEN BY THESE PRESENTS, that I, Peter Rost, of Dominion Creek, in the Yukon Territory, miner, for and in consideration of the sum of one dollar of lawful money of Canada, now paid to me by Arthur Newton Christian Treadgold, of Dawson, in the said territory, and other good and valuable considerations (the receipt whereof is hereby acknowledged), do hereby agree to sell, assign and transfer to the said Treadgold, on the terms below mentioned, all that certain placer mining property situate on Dominion creek and tributaries thereof, in the Dawson Mining District of the Yukon Territory, and more particularly described in the schedule attached hereto, marked "A" (which is hereby made part and parcel of this agreement), together with all cabins, sluiceboxes, water rights, machinery and other improvements and appurtenances thereto belonging or in anywise appertaining.

The purchase price is two hundred and fifty-eight thousand, one hundred and fifty-five dollars and seventy-five cents ($258,155.75) payable in cash and stock as follows:—The sum of $118,155.75 in cash in manner following, to wit: $42,255.75 at or before the sealing and delivery of these presents (the receipt whereof I hereby acknowledge as follows: $10,000.00 on October 1st, 1909; $12,500.00 on October 28th, 1910; $10,000.00 on November 15th, 1910; and $9,755.75 in sundry amounts at various dates as per my statement hereto attached and marked Schedule "B"); $5,000.00 on December 15th, 1910; $5,000.00 on March 1st, 1911; and $65,900.00 on October 1st, 1911. and on October 1st, 1911, the balance of the purchase price, namely, the sum of $140,000.00 in stock of the Dominion Mining Company, a company to be formed by the said Treadgold for the purpose of mining the said mining property

in conjunction with other placer mining property. And it is provided herein that all payments, whether of cash or of stock, may be made to my credit with the Bank of British North America at Dawson aforesaid.

I hereby covenant that I have a good title to the said mining property and the appurtenances and a good and full right to transfer the same. That I will execute good and sufficient transfers of my said property, conveying the same free and clear of and from all liens, mortgages and other encumbrances, to the said Treadgold, and will place the same in escrow with the said Bank of British North America at Dawson, the said transfers to be delivered to the said Treadgold on payment of the above-mentioned purchase price.

I further covenant with the said Treadgold that should there be any encumbrances against my said property, or any part thereof, the said Treadgold shall have the right to pay off and discharge the same, and to deduct any moneys so paid from the above-mentioned purchase price, and any such payments shall be considered payment to me, *pro tanto*, of the purchase price.

I further covenant and agree that the said Treadgold shall have the right to enter upon the said mining property, either in person or by his representative, for the purpose of examining, prospecting and operating the same.

This agreement and all the covenants therein contained shall enure to the benefit of and be binding on the respective heirs, executors, administrators and assigns of the parties hereto where the context admits of such construction.

In witness whereof I have hereunto set my hand and seal, at Dawson, in the Yukon Territory, the 23rd day of November, 1910.

Signed, sealed and delivered
in the presence of [Seal.]

*Suggested Alterations:—*

1. Rost retains right to work ground during continuance of option and retain profits from such working.

2. Rost to retain all cabins on creek claim No. 27 below upper discovery.

3. Rost to retain all machinery.

4. Time to be made essence of contract as to payments.

5. Rost does not understand as to capitalization formation or object of company from which he is to receive stock and does not understand how he makes his profits therefrom.

The price at which he turns in these properties is the actual cost price to himself.

6. Escrow letter to bank. Terms of——

The plaintiff says Patton was acting for him and, he thinks, also for the defendant Rost. He also says that he was being forced by defendant Rost to enter into a new agreement, as he already had paid $200,000.00 for the Morrison, or Hammon & Sloss interests, and had about $100,000.00 invested in the said trust claims.

The defendant Rost on this occasion employed Mr. C. W. C. Tabor, a solicitor practising his profession at Dawson, to act on his behalf, and Mr. Tabor submitted the above mentioned type-

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written suggestions to be added to the said agreement. The plaintiff refused to sign the agreement with the suggested alterations, and consequently it was never executed by the parties.

The plaintiff tendered a transfer dated November 9th, 1910, to defendant Rost, transferring from Rost to the plaintiff the claims known as the Rost interests, and also a transfer from Rost to the plaintiff dated November 9th, 1910, of the claims known as the Trust claims, which said transfers the defendant Rost refused to execute.

Again, in the month of November, 1911, the plaintiff tendered to the defendant Rost two transfers from defendant Rost to the plaintiff of the above mentioned claims, which transfers the defendant Rost refused to execute; and plaintiff also tendered to defendant Rost 38,000 shares of the par value of $5.00 each in the Dominion Mining Company, Limited, a company formed by plaintiff, in payment of the $190,000.00 mentioned in the said letter of August 25th, 1909, which said shares the defendant Rost refused to accept in payment as aforesaid, and, on the 9th day of May, 1912, the plaintiff launched this action.

The plaintiff, in his evidence given at the trial, says that it was part of the agreement that he should meet the liabilities of the defendant Rost and charge the amount so paid against the purchase price of $200,000.00 mentioned in the letter of August 25th, 1909, and that it was never the intention of the parties that he should pay the defendant Rost's liabilities, amounting to about $60,000.00, in addition to the purchase price of $200,000.00 mentioned in the said letter of August 25th, 1909. The letter itself is silent on this point, and in the absence of any evidence I would have construed the word "interests" to have meant the defendant's rights or equities on Dominion creek, and that the plaintiff was purchasing the same for $200,000.00 whatsoever they might be; and that he was agreeing to assume any liabilities against the said properties.

In his evidence at the trial the plaintiff further says that he had a complete list of Rost's holdings prior to the date of that agreement, but in the said letter the word "interests" is used and not the word "holdings."

The unsigned agreement supports the contention of the defendant Rost that the liabilities, amounting to about $60,000.00, were to be paid in addition to the $200,000.00 mentioned in the said letter, and in this respect the weight of evidence is with the defendant Rost. The plaintiff asserts one thing which the defendant Rost and his wife denies, and the documentary evidence supports the contention of the defendant Rost.

The Caribou claims are not mentioned in the said letter of August 25th, 1909, and both the plaintiff and Rost say the Caribou claims were to be included in the agreement between them. Rost says his mining machinery was to be included also. The

plaintiff says the machinery was not taken into consideration, but the transfers which were after tendered to Rost for execution included, amongst other mining claims, Rost's mining claims on Caribou creek, and also his mining machinery; and the whole weight of evidence, in my opinion, supports the contention of the defendant Rost that the said letter of August 25th, 1909, did not contain the whole of the agreement between the parties, and that it was the intention of the parties at that time that a formal agreement should be entered into between them, and I so find as a fact.

In *Bellamy* v. *Debenham*, L.R. 45 Ch.D. 481, North, J., at 492, says:—

> In *Hussey* v. *Horne-Payne*, 4 A.C. 311, the rule of law is expressed very neatly, though no new rule is there laid down. The contract must be evidenced in writing, signed by the party who is to be charged, and the letters which I have mentioned shew such a contract signed by the party to be charged. But it has always been held to be open to a defendant against whom specific performance is sought, to shew that the written document signed by him did not include all the terms of the actual contract, and that he may do that, either by reference to other correspondence which can fairly be read with the letters which are said to constitute the contract, or by means of parol evidence outside the written document altogether.
>
> The defendant may say that when a contract is found in correspondence, you must look not only at the two or three formal letters which are said in themselves to constitute a contract, but also at the other correspondence. It is clear that that may be done, but for what purpose can it be done? *Hussey* v. *Horne-Payne*, 4 A.C. 311, lays down the law very clearly, and I agree with every word of Mr. Justice Kay's comments upon it in *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs*, 44 Ch.D. 616. In *Hussey* v. *Horne-Payne* there were certain letters which apparently constituted a complete contract, but on looking into the whole correspondence it was found that those letters did not contain all the terms of the contract, because the earlier letters shew that there were other terms then in negotiation, and the later letters also shewed that those terms were still in negotiation and were not concluded. It was clear, therefore, that the letters which were said to constitute the contract did not contain the whole of it, and, that being so, that what was called a contract was not complete, and could not, therefore, be enforced.

Rost says a formal agreement was to be prepared and signed; the letter did not contain the whole agreement.

See *Winn* v. *Bull*, L.R. 7 Ch. D. 29. Jessel, M. R., at 32, says:—

> It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says. It is subject to and is dependent upon a formal agreement being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new

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agreement, the terms of which are not expressed in detail. The result is that I must hold that there is no binding contract in this case, and there must, therefore, be judgment for the defendant.

See also *Stow* v. *Currie*, 21 O.L.R. 486. The agreement is silent as to the rate at which Rost was to take stock. Also as to the time when the payment of stock was to be made, and is insufficient and incomplete in this respect.

See *Thompson* v. *McPherson*, 3 D.L.R. 269; also *House* v. *Brown*, 14 O.L.R. 500. Mr. Justice Anglin in this case, at 505, says:—

> That the want of a definite provision in a contract fixing the amount and dates of payment of deferred instalments of purchase money, renders a contract incomplete and unenforceable where it is contemplated that these matters shall be subject to further negotiations and future settlement between the parties thereunder, is well established.

All the stock of the Dominion Mining Company, Limited, which company the plaintiff states was the company formed for the working of the ground mentioned in the agreement, was issued to the plaintiff, as appears by the evidence, and no provision made for working capital, and plaintiff, in his evidence, says there was no necessity for making such a provision, but where the working capital was to come from was not explained. It is provided in the agreement upon which suit is brought that $190,000.00 of the purchase price is to be paid in stock of a company to be formed by the plaintiff, and the plaintiff did tender to Rost 38,000 shares of the par value of $5.00 each in the Dominion Mining Company, Limited, in payment as aforesaid, which said shares defendant Rost refused to accept.

If $190,000.00 of the purchase price was to be paid in stock then, in my opinion, that could only mean that Rost was to receive $190,000.00 worth of stock, and it would depend on the state of the market as to whether a share would be worth more or less than $5.00. See *Douglas* v. *Baynes*, [1908] A.C. 477. See also *McLaughlin* v. *Whiteside*, 7 Grant 573, and *Bell* v. *Northwood*, 3 Man. L.R. 514, where it is laid down that specific performance will not be decreed where the terms of the contract signed by the parties are uncertain.

See also *Fenske* v. *Farbacher*, 2 D.L.R. 634.

> If an agreement does not contain all the terms of the contract between the parties, it does not satisfy the requirements of sec. 4 of the Statute of Frauds, and specific performance will be refused.

See also *McIlquham* v. *Taylor*, [1895] 1 Ch.D. 53, as to value of shares.

In the alleged agreement of the 25th of August, 1909, it was provided that defendant Rost was to receive $190,000.00 of the purchase price of his property in stock of a company to be formed by the plaintiff to acquire and work Dominion creek or such parts of Dominion creek as plaintiff might deem advisable; and that

the plaintiff should form the company at his discretion as to place and time of incorporation and amount of capital.

The company formed by the plaintiff and known as the Dominion Mining Company, Limited, and the shares of which company were tendered to defendant Rost in payment of $190,000.00 of the purchase money referred to in the said agreement, was a company formed, as shewn by the letters patent (exhibit "I" in this case), with power not only to carry on the business of mining but also to carry on the business of a manufacturer and dealer in logs, lumber, etc., also to carry on the business of a general dealer in merchandise, and of a land and land improvement company, also with power to build, acquire, own, charter, navigate and use steam and other vessels, and generally to carry on the business of a general trading company in any part of Canada or elsewhere.

According to the terms of the letter of August 25th, 1909, Rost was to take stock in a company to be formed by the plaintiff to acquire and work Dominion creek, or such parts of Dominion creek as he might consider it advisable. The Dominion Mining Company, Limited, is not a company formed for that object. True it might carry on mining operations on Dominion creek or it might carry on any of the kinds of business mentioned in its charter in any part of the world.

The state of the law is clearly set out, that defendant Rost could not be compelled to accept shares in such a company in payment of the stock mentioned in the said agreement unless he had knowledge of the formation of such company and had by his conduct so acquiesced that he would now be precluded from objecting to the same. There is absolutely no evidence to shew that Rost had any knowledge of the kind of company the Dominion Mining Company, Limited, was, but, on the other hand, the evidence shews that he had absolutely no knowledge about the formation of the said company.

An attempt was made to fasten knowledge upon him by shewing publication in the Canada Gazette of April 30th, 1910, pp. 3323 and 3324, of notice of application for the formation of the company, and also publication in the Canada Gazette of March 4th, 1911, p. 2881, of notice of application for supplementary letters patent of the said company, which, it was alleged, was notice to the world; but there was nothing in either of the said notices that would convey to the mind of the defendant Rost that the Dominion Mining Company, Limited, was a company such as proposed in the letter of August 25th, 1909, nor would the said notices, or either of them, convey such knowledge to the mind of any reasonable man. Dominion creek, in the Yukon Territory, is not mentioned in either of the notices, nor is the name of the plaintiff mentioned in either of the notices; nor are there any other word or words contained in either of the

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said notices which would convey any such knowledge. Neither is there anything contained in the letters patent themselves, or the supplementary letters patent that would convey any such knowledge, as neither Dominion creek, the Yukon Territory, nor the name of the plaintiff, appear in the letters patent or supplementary letters patent of the said company.

There were no shares in the Dominion Mining Company, Limited, allotted to Rost, but it is argued that when shares were tendered to him he should have objected at that time to the kind of shares tendered or he was bound to accept. Rost refused to accept the shares when tendered, but he had no knowledge, nor had he any means of having any knowledge as to the nature of the shares tendered to him. On this point alone the plaintiff's action must fail.

See *Re Russian (Vykounsky) Iron Works, Stewart's case*, L.R. 1 Ch. App. 574; *Re Cachar Co., Lawrence's case*, L.R. 2 Ch. App. 412; *Downes* v. *Ship*, L.R. 3 E. & I. 343; *Re Russian (Vykounsky) Iron Works, Webster's case*, L.R. 2 Equity 741; *The Silliker Car Co., Ltd.* v. *Donohue*, 44 N.S.R. 315.

The objects of the company formed, as stated in the letters patent, are much more extensive than those stated in the agreement and of an entirely different nature than those contemplated in the agreement; and the above cases are all authorities to shew that the defendant would not be bound to accept shares in such a company unless by his conduct he had so acquiesced that he would be bound to accept the said shares. The evidence shews that he in no way acquiesced, and consequently could not be forced to accept the shares.

It was argued on behalf of the plaintiff that there were two distinct causes of action in the statement of claim in this case, the first cause of action being for specific performance of the agreement to convey Rost's holdings on Dominion creek, and the second cause of action for specific performance of an agreement to convey the claims known as the Trust claims to the plaintiff, and counsel cited: *Hunt* v. *Spencer*, 13 Grant 225; *Green* v. *Low*, 22 Beav. 625; Fry on Specific Performance, 5th ed., par. 865, and a line of cases, to shew that specific performance will be granted one part of a contract if it is impossible to grant specific performance of the whole. This is true, no doubt, if the two parts of the contract are mutually exclusive, one of the other. The Court may then treat them as independent of each other. Here the two parts are dependent one upon the other. The very object of obtaining the Trust claims was to assist in consolidating Rost's position on Dominion creek, as shewn by the evidence. True, the claims which were purchased were paid for with the plaintiff's money, and he also paid the expenses of staking the claims which were staked, but the defendant Rost supplied his time, knowledge and experience in pursuance of the agreement, and both the plaintiff and defendant Rost have an interest in those claims.

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If I ordered them to be conveyed to the plaintiff then the position of the defendant Rost on Dominion creek, in place of being consolidated as agreed by plaintiff when he and Rost entered into an arrangement, would be absolutely lost, as some of the Trust claims are most necessary to him if his holdings are to be worked on a large scale; and had he not entered into this arrangement with the plaintiff he might have acquired those claims by obtaining capital elsewhere.

It was argued by counsel for defendant Rost that the only way he could be put in his original position would be by giving him all the mining properties between upper and lower discovery on Dominion creek for which he was willing to pay; but I cannot see that in this action I am able to grant the request of either the plaintiff or the defendant Rost. They are both interested in the Trust claims and they will have to obtain relief in some other form of action. Neither can I grant damages as asked by the plaintiff. The case of *Lavery* v. *Pursell*, L.R. 39 Ch.D. 508, is an authority on this point. It was there held that there is no jurisdiction to give damages in substitution for or in addition to specific performance where specific performance could not properly be granted.*

The fact that the plaintiff has made payments on account to the defendant Rost is not such a part performance of the contract as would entitle him to specific performance, and he will have to avail himself of another remedy for the recovery of the moneys so paid.

Having held that the plaintiff fails in his action for specific performance then his action must also fail against the laymen. They were working on the property of the defendant Rost, and having held that there was no agreement entered into between the defendant Rost and plaintiff which the law would enforce, Rost was entitled to enter into a lay agreement with his co-defendants, for the working of his mining property.

In any event no notice was served upon the laymen until the month of March last, when all the work was done upon the said properties except the washing of the gold from the gravels extracted from the ground. The defendant laymen proved no damages at the trial other than the share of the moneys coming to them

*Lavery* v. *Pursell*, L.R. 39 Ch.D. 508, is an authority for the proposition that the doctrine of part performance did not extend to enable the Court to award damages on a parol contract which was insufficient, under the Statute of Frauds, although specific performance might be ordered because of such part performance. In that case the holding was that the jurisdiction to give damages in substitution for, or in addition to specific performance, has not been extended to cases where specific performance could not possibly have been directed; and, accordingly, the contract, having, from lapse of time, become at the hearing incapable of specific performance, the equitable doctrine of part performance (as voiding the operation of the Statute of Frauds) did not enable the plaintiff to obtain relief in damages.

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under the lay agreement; consequently no other damages will be allowed to them.

The injunction granted will be dissolved and the moneys in Court paid out to the defendant Rost and his co-defendants the laymen in their proper proportions according to the agreement entered into between them.

The action will be dismissed with costs to be paid by the plaintiff to the defendant Rost, and also the costs of the defendant laymen, together with all costs of and incidental to the application for receiver and injunction.

The letter of August 25th, 1909, should be cancelled as prayed for in the counterclaim of the defendant Rost, but the claim for rectification of the said letter by the defendant Rost having been abandoned by counsel at the trial such claim will be dismissed with costs that were made necessary to the plaintiff by reason of the said claim being asked for in the counterclaim of the defendant Rost, with a set-off as against the costs ordered to be paid by the plaintiff.

*Action dismissed.*

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## ARNOLD v. NATIONAL TRUST COMPANY, Limited.

*Alberta Supreme Court. Trial before Simmons, J. November 21, 1912.*

1. MORTGAGE (§ I B—6)—WHAT CONSTITUTES—EQUITABLE — "ONCE A MORTGAGE ALWAYS A MORTGAGE."

Where an instrument covering certain lands purports to be an absolute assignment and power of attorney but is really given only to secure a loan for which the borrower gives his promissory note, such instrument is merely an equitable mortgage, and under the maxim "once a mortgage always a mortgage" the grantee will be limited strictly to his rights as a mortgagee.

[*London and Globe Finance Corporation* v. *Montgomery*, 18 Times L.R. 661, distinguished; *Samuel* v. *Jarrah*, [1904] A.C. 324, followed.]

2. MORTGAGE (§ I E—24)—CONVERTING SECURITY FOR LOAN INTO PURCHASE—OPTION TO MORTGAGEE TO PURCHASE.

A mortgagee cannot lawfully provide at the same time as the loan is made, for any event or condition on which the equity of redemption shall be discharged and the conveyance become absolute, nor for an option to purchase, although the option price is far in excess of the loan; and this, although it appears that the lender was not willing to lend unless he had both the security and the option and that the lender and borrower were dealing at arms' length.

[*Vernon* v. *Bethel*, (1761), 2 Eden 110, 113; *Noakes* v. *Rice*, [1902] A.C. 24; *Salt* v. *Northampton*, [1892] A.C. 1, followed.]

Statement

ACTION for specific performance of an alleged agreement to sell certain land in respect to two of the lots and an abatement of the price of the third lot.

The action was dismissed.

*G. B. O'Connor*, for plaintiff.

*O. M. Biggar*, for defendant.

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SIMMONS, J.:—The plaintiff is a grain dealer of Shoal Lake, Manitoba, and the defendant Frank C. Field resides at Winnipeg, province of Manitoba. Helen Lillian Field, daughter of the defendant Frank C. Field, died intestate and unmarried in the province of British Columbia, administration of her estate was granted by the Supreme Court of British Columbia to her mother, Rhoda Jane Field. At the time of her death Helen Lillian Field owned lots 21, 28 and 29 in river lot 14 of the Edmonton Settlement of record in plan B, of the city of Edmonton. One Albert French, as attorney for Rhoda Jane Field, sold and transferred to one Laura M. Wilson said lot numbered 21. Subsequently, the defendant Frank C. Field employed Edward B. Fisher, a barrister of Winnipeg, to look after his interest in the Edmonton property as heir at law of his daughter. While negotiations were pending between Mr. Fisher on behalf of the defendant Frank C. Field and Messrs. Davis & Co., of Vancouver, B.C., solicitors of Mrs. Field, the said Frank C. Field instructed Mr. Fisher to get an advance for him on the security of his interest in the Edmonton property and also to get a purchaser for the property. As a result Mr. Fisher got the plaintiff Arnold to advance Frank C. Field $350, and two documents were executed by Field which are as follows:—

Know all men by these presents that I, Frank C. Field, of the city of Winnipeg, in the province of Manitoba, gentleman, in consideration of the sum of three hundred and fifty dollars ($350.00) to me paid by Alfred S. Arnold of the village of Shoal Lake, in the province of Manitoba, grain dealer, do hereby assign, transfer and set over to the said Alfred S. Arnold, his executors, administrators and assigns, absolutely and for his sole use and benefit of my right, title and interest in and to certain property situate, lying and being in the city of Edmonton, in the province of Alberta, and being composed of:—

Lots numbered twenty-one (21) twenty-eight (28), and twenty-nine (29) in block fifteen (15) of river lots twelve (12) and fourteen (14) of the Edmonton settlement in the city of Edmonton as shewn upon map or plan of the said river lots, registered in the land titles office for the North Alberta registration district as plan "D"; with power to perform all things and to take all actions and to make all negotiations in connection with said property, whether for the sale or mortgage of same and with power to take any action by suit or otherwise, or to prosecute any action already instituted and generally to do all matters and things which I myself might do in connection with the sale, mortgage or disposal of the said property, and to give all receipts for moneys paid and to give any option in connection with the sale or for disposal of the said property in the same manner as I might do.

As witness my hand and seal this 1st day of March, A.D. 1911.

Agreement made in duplicate this 1st day of March, A.D. 1911, Between:—

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Frank C. Field, of the city of Winnipeg, in the Province of Manitoba, gentleman, hereinafter called the vendor,

and

Alfred S. Arnold, of the village of Shoal Lake, in the Province of Manitoba, grain dealer, hereinafter called the purchaser of the other part.

Whereas the vendor alleges that he is the owner of lots numbered twenty-one (21), twenty-eight (28) and twenty-nine (29) in block fifteen (15) of river lots twelve (12) and fourteen (14) of the Edmonton settlement in the city of Edmonton, as shewn upon plan or map of said river lots registered in the land titles office for the North Alberta land registration district as plan "D."

Now this agreement witnesseth that the vendor in consideration of the sum of three hundred and fifty dollars ($350.00), the receipt whereof is hereby acknowledged, hereby offers and agrees to sell to the purchaser, his heirs and assigns, the said lots, (or such part thereof as may be required by the purchaser) for the sum of six thousand dollars ($6,000.00) at any time before the fifteenth day of April, A.D. 1911. This offer to be irrevocable until the said last mentioned date. This offer, if accepted before the said date, shall thereupon constitute a binding contract of purchase and sale; all adjustments to be made to date of transfer; the purchaser to examine the title at his own expense, the vendor not to be bound to produce or shew any evidence except such as are in his possession. The purchaser to make objections and requisitions within thirty (30) days after acceptance, and title to be deemed accepted, except as to any objection or requisition made which the vendor is unwilling to remove he may rescind this agreement.

Time shall be of the essence of this contract.

In witness whereof, our hands and seals this 1st day of March, A.D. 1911.

and in addition Field gave the plaintiff a promissory note which is as follows:—

$350.00

Winnipeg, Man., Mar. 1st, 1911.

Six weeks after date, I promise to pay to the order of A. S. Arnold at the Northern Crown Bank here, the sum of three hundred and fifty dollars, value received with interest at 12% per annum.

Frank C. Field.

Before the expiration of the option Field took his legal business away from Mr. Fisher and placed it in the hands of Messrs. Campbell, Pitblado & Co., barristers, Winnipeg, and advised them that he had signed the option in ignorance of its contents. Two days before the expiration of the option Mr. Adcock, an employee of Fisher's, served a member of Campbell, Pitblado & Co.'s firm in their office with a written notice of the acceptance of the option. Field refused to carry out the sale and the plaintiff sued for specific performance of the agreement to sell as to lots 28 and 29 with an abatement of the purchase price for lot 21.

The defendant Field admits the execution of the documents but says he did not read them nor understand them and thought they were solely for the purpose of securing the loan of $350.00.

The defendant Field also sets up that the option to purchase is void as it is a cloud on the equity of redemption of the defendant and should therefore be set aside.

On the allegations of fraud and mistake I found against the defendant Field, and refused to believe his evidence relating to the negotiations and the execution of the documents in so far as they related to mistake and fraud. The negotiations were all carried on by the defendant Field and Mr. Fisher. The defendant Field was hard up and was also anxious to have his interest in the property converted into cash. The instrument, which purports to be an absolute assignment and power of attorney, can not be viewed in any other way than as an equitable mortgage securing an advance of $350.00 for which Field gave his note. The doctrine "once a mortgage always a mortgage," seems to be fatal to the plaintiff's exercise of the option.

It is contended on behalf of the plaintiff that any equity of redemption which the defendant had only arose at the expiration of the time fixed for the option.

*The London & Globe Finance Corporation Limited* v. *Basil Montgomery and others*, 18 Times L.R. 661, is cited in favour of this proposition. In that case the plaintiffs gave the defendants a call on 42,000 Lake View shares at £11 per share in return for a loan of £450,000 by the defendants to the plaintiffs. Lord Alverstone, C.J., held that the plaintiffs must establish two propositions in order to set aside the transaction—first, that the transaction was a mortgage and second that it was a clog on the equity of redemption. Lord Alverstone came to the conclusion the transaction embodied in the documents under consideration could not properly be regarded as a mortgage but was in effect a deposit of certain shares as security for a loan; the security for the loan being the right to take these shares at the price of £11 per share.

To bring the present case within the principle laid down by Lord Alverstone it would be necessary to conclude that the loan of $350.00 was the sole consideration for the option. The option recites that the consideration therefor is the $350.00. What then is the effect of the assignment and the promissory note? Some purpose and effect must surely be given to them. I am unable to attribute any other purpose and any other effect than the absolute pledging of the defendant's interest in these lands to secure the payment of the note.

I am free to admit that the interpretation of the two documents which together represent one transaction is not free from

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difficulties. In *Jarrah Timber and Wood Paving Corporation Limited* v. *Samuel*, [1904] A.C. 323, the Earl of Halsbury says:—

> A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to the principle of equity, the sense and reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

In that case a limited company borrowed money on the security of their debenture stock subject to the lender having the option to purchase the stock at 40 per cent. within twelve months. The loan to become due and payable with interest at 30 days' notice on either side. Within the 12 months and before the company gave notice of their intention to repay the loan, the lender claimed to exercise his option of purchase and the option was held to be void as it was a clog on his equity of redemption. Lord Macnaghten says that:—

> a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

This latter rule, I think, is founded on sentiment rather than principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression and it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult.

In 1761, Northington, L.C., in *Vernon* v. *Bethell* (1761), 2 Eden 110, 113, laid down the rule broadly:—

> That this Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases and, therefore, I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute.

In *Noakes* v. *Rice*, [1902] A.C. 24, and *Salt* v. *Northampton*, [1892] A.C. 1, the same principle is discussed and strictly enforced.

In the case now under consideration it is clear from the evidence that the plaintiff was not willing to advance the loan unless he had both the security and the option. The parties were dealing at arms' length and each got exactly what he wished to bargain for.

Notwithstanding this I am of the opinion that the case can

not be distinguished from *Samuel* v. *Jarrah*, [1904] A.C. 324. The taking of the hypothecation by way of absolute assignment and the promissory note so clearly stamp the transaction with the character of a mortgage that option is not enforceable. The plaintiff's claim for specific performance is therefore dismissed with costs.

The defendant admits that he is ready and willing to repay the loan with interest and on repayment of same with interest the defendant is entitled to have plaintiff's caveat removed from the register.

*Action dismissed.*

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## TOUHEY v. CITY OF MEDICINE HAT.



*Alberta Supreme Court. Trial before Stuart, J. June 26, 1912.*

1. HIGHWAYS (§ IV A 5—154)—DUTY TO KEEP SIDEWALKS "IN REPAIR"—ACCUMULATION OF SNOW AND ICE.

The neglect of a municipality to take any steps to make its sidewalks safe for travel in the winter season when ice and frozen snow accumulated thereon in such a manner as to make the sidewalks dangerous for pedestrians is a breach of a statutory duty to keep the sidewalks "in repair."

[*Taylor* v. *City of Winnipeg*, 12 Man. L.R. 481; *Ringland* v. *Toronto*, 23 U.C.C.P. 93; *Walker* v. *City of Halifax*, 16 N.S.R. 371; *Gordon* v. *Belleville*, 15 O.R. 29, considered; *City of Kingston* v. *Drennan*, 27 Can. S.C.R. 46, distinguished.]

2. NEGLIGENCE (§ II C—98)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF CONDITION OF ICY SIDEWALK.

Contributory negligence is not to be imputed to a plaintiff suing for personal injuries sustained by falling on an icy sidewalk in a city street, merely because the plaintiff had seen the condition of the walk, where the general condition of all the sidewalks in the city was the same and the municipality had made no attempt at improvement for many weeks of the winter season while the dangerous condition subsisted.

[*Bleakley* v. *Prescott*, 12 A.R. 637; *Gordon* v. *Belleville*, 15 O.R. 29, and *Burns* v. *Toronto*, 42 U.C.R. 560, considered.]

3. DAMAGES (§ III I 1—166)—QUANTUM — TESTS — PERSONAL INJURY.

Where damages are allowed for personal injury the following are among the proper tests as to the quantum: (*a*) was the business interrupted thereby a paying or a losing concern; (*b*) amount of doctor and hospital bills; (*c*) amount of personal inconvenience, pain, and suffering.

Statement

THE plaintiff sues the defendant corporation for damages resulting from a fall upon a sidewalk in the city, upon which, as she claims, snow and ice had been allowed to accumulate.

Judgment was given for the plaintiff for $555 and costs.

*G. T. Davidson*, for plaintiff.

*J. J. Mahaffy*, for defendant.

Stuart, J.

STUART, J.:—The action is based upon negligence, which in the present instance is, I suppose, to be treated as a very general

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term, including within its meaning the breach of a statutory duty. Sec. 3, sub-sec. 3 of the statute, ch. 63, of 1906, incorporating the city says:—

> Every public road, street, etc., . . . belonging to the city, including all crossings . . . sidewalks, and other works made or done therein or thereon by the city . . . shall be kept in repair by the city and in default of the city keeping the same in repair, the city besides being subject to any punishment provided by law shall be civilly responsible for all damages sustained by any person by reason of such default.

If properly drawn, the statement of claim should have alleged a default by the city in its obligation to keep the sidewalk in question in repair. The distinction will be made clear from a perusal of the two counts in the claim in *Ringland* v. *Toronto*, 23 U.C.C.P. 93.

The plaintiff's evidence is that between four and five o'clock in the afternoon of February 22nd, 1911, she was walking along Toronto street, that she had her rubbers on, that her husband was with her, though he had not hold of her arm, that the sidewalk was covered with ice, that it was all ice, "kind of up and down, some places high, some low, quite rough like," that she slipped and fell and broke her leg. Upon cross-examination, she said that the other sidewalks in the town were in the same condition.

The physician who was called, said that he noticed nothing abnormal about the street, that it was just in its usual condition and that parts were not as icy as others. The plaintiff's husband said the sidewalk was icy, that where plaintiff fell it was icy, slippy and a little rough, "kind of wavy and rough," that the sidewalk could not be seen, that the walk was icy all along, though there might have been a few bare spots and that he thought it was a little rougher and slippier where she fell.

One Snell, whose shop was on Toronto street, near the spot in question, said that he helped to pick the plaintiff up, that the walk was very icy at the time, that in some places the snow had been shovelled and in some places not, that it had been icy since 19th January, that the sidewalks were never clean between times, that there had been a thaw just before so that the ice was worse, and that there had been some snowing and some thawing.

One Curtis said there was frozen snow there three or four inches thick except in one or two places where they cleared the snow, that as the snow had been trodden down and frozen it produced a rough uneven surface, that he was accustomed in 1911 to walk on the walk in question from four to six times a day and that he did not remember that the walk was ever clear of ice or that the city ever cleaned it off.

The city engineer was called for the defence and stated that the city did not clean the sidewalks in the winter of 1911 and that the general condition was the same all over the city, that the snow was packed on the sidewalks, and that there was nothing out of the ordinary in the condition of the sidewalk at the time in question.

It is clear from this evidence that the city made no attempt to keep the sidewalk free of ice, that the condition of the sidewalk was dangerous to pedestrians, and that it had been in that same condition for some weeks at least and that the officials of the defendants knew of the condition of the walk.

In *Taylor* v. *The City of Winnipeg*, 12 Man. L.R. 481, Killam, J., said:—

> The question seems properly to have been reduced by the late Sir John Thompson in *Walker* v. *The City of Halifax*, 16 N.S.R. 371, to one of reasonableness.

I gather from the report that the Manitoba statute simply imposed an obligation to repair and made no reference to common law negligence. It seems to have been the view of Killam, J., that an obligation to keep in repair means an obligation to keep in reasonable repair and that the Court is entitled to read into the statute the word "reasonable" just as the Supreme Court of the United States read the same word into their statute against combinations in restraint of trade.

The case of *City of Kingston* v. *Drennan*, 27 Can. S.C.R. 46, is not really applicable here because in that case the statute contained a proviso requiring existence of gross negligence in case of lack of repair due to snow and ice.

The rule of "reasonableness" is also applied in *Ringland* v. *Toronto*, 23 U.C.C.P. 93, where Gwynne, J., said:—

> And with reference to these and such like surrounding circumstances (*i.e.*, condition of the weather, etc.), the question must be whether or not the road or sidewalk was in reasonable repair for the use to which it was applied. The question must be always one having relation to what is reasonable, having regard to the surrounding circumstances.

The application of the rule of "reasonable repair" of course tends to render useless any attempt to distinguish between the action for negligence and for breach of the statutory duty to keep in repair because it is obvious that a condition of "reasonable repair" will always be considered as shewing the exercise of reasonable care by the corporation.

*Burns* v. *Toronto*, 42 U.C.R. 560, is a very instructive case. Harrison, C.J., thought the defendants guilty of negligence, but the plaintiff also guilty of contributory negligence in circumstances very similar to those existing here. Wilson, J., relieved the defendants because of absence of notice or knowledge on

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their part of the defective condition, while he also thought the plaintiff guilty of contributory negligence. Armour, J., refused to go so far as to find the plaintiff guilty of contributory negligence and apparently agreed with Wilson, J., as to the absence of knowledge in the defendants.

In *Bleakley* v. *Prescott*, 12 A.R. (Ont.) 637, the defendants were held not guilty of negligence, but the facts were not so strong against the town as in the present case. Hagarty, C.J., said:—

> Unless we hold them to be insurers of the full safety of every person using their sideways I cannot see their liability. I suppose the state of the Prescott sidewalks on that January day was a state common to all the Canadian towns and villages in severe weather. No matter what amount of reasonable diligence may be displayed in trying to clean the sidewalks, the changes in the weather will occasionally put them into that glassy, slippery state.

He remarked also upon the failure of the plaintiff to put something on her feet to prevent slipping. The present plaintiff cannot be charged with this omission. I agree with what was said in *Bleakley* v. *Prescott*, 12 A.R. (Ont.) 637, but in the present case the condition of the sidewalk was much worse and of long standing and unless we are to say that the corporation is entitled to take the position that there is no use in trying because at any moment a storm may come and put the sidewalks in a bad condition, I do not see that that judgment should be here applied. Upon the question of contributory negligence, I agree entirely with what was said by Armour, C.J., in *Gordon* v. *Bellev lle*, 15 O.R. 29:—

> I do not think we ought to enable corporations to evade their plain duty by reading into this enactment a proviso that they are not to be civilly responsible to any person who uses such road, street, bridge and highway knowing that they have neglected their duty and have not kept them in repair. It would lead to this absurdity that the more the corporation neglected the duty, the more the road was out of repair and the longer it continued so, the more it would become known, and the greater would become the number of those requiring to use it who would know its condition and the fewer would become those who would not know its condition, and so the more it was out of repair and the longer it continued so and the greater the neglect of the corporation the less would be its responsibility, for it would be to fewer people.

See also the whole judgment and remarks of Street, J., as well.

Adopting for the purpose of the present case the rule as to reasonableness, I am unable to say that the sidewalk in question was in the circumstances in a reasonable state of repair. I cannot understand how it can be argued that it was unless we are to say that it is reasonable for the corporation to take no

notice whatever of the accumulation of snow and ice on the sidewalks of the town. No evidence was presented by the corporation to shew what expense would be involved so that I am not in a position to consider that element of reasonableness in judging of their default. It was not till the next year, apparently, that the corporation even went so far as to pass the by-law imposing the duty on the adjoining property holders to keep the walks clear, although as stated in one of the cases I have cited, the passing of such a by-law would, in any case, not have relieved the corporation from liability. The sidewalk was clearly in a very dangerous condition and was allowed to remain so for some time and I think the corporation could reasonably be expected to make at least some effort to minimize the dangerous condition. In the present case they made no such effort. In so far as contributory negligence is concerned, the plaintiff did take the precaution of wearing rubbers; and for the reasons given by the Judges in *Gordon* v. *Belleville*, 15 O.R. 29, I do not think that, by the mere fact of walking on the sidewalk provided for the public and upon which she was practically invited to walk, the plaintiff laid herself open to a charge of contributory negligence.

I think, therefore, she is entitled to damages. I do not think she can recover any on account of injury to her business. Upon her own evidence her business was unprofitable and any future improvement is too problematical for me to act upon. Her doctors' and hospital bills amounted to $55. She was using crutches up to December 1st, 1911, that is till a little over nine months after the accident. She stated that she was still in a bad condition but the evidence of her physician prevents any possibility of finding any permanent injury, and there was nothing to shew exactly what she meant by being still in a bad condition. I think, therefore, I must assume a full recovery and that the damages must be confined to a reasonable allowance for the pain and suffering and personal inconvenience endured. In such cases it is impossible to say that any particular sum will fully compensate the plaintiff and the Court should not be induced to give any very large amount for the purpose of attempting to give full compensation. I think $500 is as far as I ought to go in the present case. The husband who was joined for conformity at the trial waived any claim for loss of his wife's services.

There will, therefore, be judgment for $555 and costs.

*Judgment for plaintiff.*

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## REX v. LEY.

*Alberta Supreme Court, Walsh, J. September 3, 1912.*

1. STATUTES (§ II A—104)—CONSTRUCTION OF STATUTE—"GREATER SPEED THAN ONE MILE IN FOUR MINUTES"—MOTOR VEHICLE ACT (ALTA.).

In sec. 20 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, the expression "greater speed than one mile in four minutes" means any speed for any distance less than a mile which if continued would result in a full mile being covered in less than four minutes, the word "speed" as therein used meaning rate of motion, and the words "one mile in four minutes" simply supplying the measure of the same.

[Sec. 20 of Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, construed.]

2. STATUTES (§ II A—100)—CONSTRUCTION OF STATUTES—AMBIGUITY — DETERMINING PRINCIPLE WHERE EITHER OF TWO MEANINGS POSSIBLE.

Upon a question of construction of certain words in a statute, if the words in themselves are susceptible of either of two meanings, the court will adopt the more reasonable construction.

[Sec. 20 Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, construed.]

3. INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—INFORMATION —CHARGING OFFENCE UNDER STATUTE—VARIATION FROM WORDS OF STATUTE.

An information charging, under the Motor Vehicle Act (Alta.), the offence as driving "at a greater speed than fifteen miles per hour" instead of in the words of the statute "at a greater speed than one mile in four minutes," charges the identical offence covered by the words of the statute and is sufficient, although it may be the better practice in such cases to follow the words of the statute itself.

[Sec. 20 Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, referred to.]

Statement

AN information was laid against the defendant, charging him with having driven an automobile along a public street in the city of Calgary "at a greater speed than fifteen miles an hour, contrary to sec. 20 of the Motor Vehicle Act." Upon his appearance before the police magistrate objection was taken that the information disclosed no offence. This objection was overruled and the trial proceeded. The police magistrate found as a fact that the defendant drove his automobile on the occasion in question 110 yards in 10½ seconds and he convicted him.

*J. MacKinley Cameron*, for appellant.

*F. S. Selwood*, for respondent.

Walsh, J.

WALSH, J.:—At the request of counsel for the defendant the magistrate has stated a case under sec. 761 of the Code in which the following questions are submitted for the opinion of the Court:—

1. Did the information disclose an offence under sec. 20 of the Motor Vehicle Act?

2. Does sec. 20 of the Motor Vehicle Act mean that the rate of speed must not exceed fifteen miles per hour for any distance less than a mile?

3. Was there any evidence on which I could have convicted the accused of an offence under sec. 20?

4. Should I have given effect to the objections of the defendants' counsel and dismissed the information?

Sec. 20 above referred to reads as follows:—

No person shall operate a motor vehicle upon any public highway or street where the same passes through any city, town or village, at a greater speed than one mile in four minutes, nor at a greater speed than one mile in six minutes in turning a corner of an intersecting public highway or street in any city, town or village.

(2) If the rate of speed of any motor vehicle shall in any case exceed the limit herein defined, it shall be *primâ facie* evidence that the person operating such motor vehicle is running the same at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the street or highway, or so as to endanger the life or limb of any person or the safety of any property.

(3) Provided also that the Lieutenant-Governor-in-council may make regulations governing the further use of highways in cities, towns and villages by the owners of the motor vehicles.

All of these questions submitted depend for their answer upon the meaning which is to be given to the words "at a greater speed than one mile in four minutes" which appear in this section. The defendant's "argument in brief is that these words mean that a motorist must cover the full distance of one mile before subjecting himself to the penalties of the section and that even then, so long as he occupies four minutes of time in so doing, the speed at which he covers any portion of the mile is immaterial. He says that these words simply limit the time within which one mile may be travelled and that they therefore have no application to a distance short of a mile. Mr. Cameron referred me to a great many authorities which deal with the principles governing the construction of statutes and he was good enough to hand to me after the argument a most excellent précis of the same. If there was in my mind any uncertainty whatever as to the meaning of the words which I have here to interpret, I no doubt would have found these authorities most helpful. But I have not had the slightest difficulty in reaching a conclusion as to what they mean and I am therefore disposing of this case without finding it necessary to refer here to any of them.

I think that the word "speed" as here used means "rate of motion" and the words "one mile in four minutes" simply supply the measure of the same. I interpret "speed" in this way on the authority of the best lexicographers. Webster's fourth definition of the word as a noun is

> act or state of moving swiftly, swiftness, rapidity, dispatch, also rate of motion, velocity, as a high speed, the speed of a horse or vessel, a speed of 20 miles per hour, that is a rate of motion at any given time, that would, if continued, result in travelling 20 miles in an hour.

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The fourth definition in the Century includes "rate of progress or motion." In my opinion, therefore, one who drives in a city, town or village an automobile for a portion of a mile at a speed greater than one mile in four minutes, that is to say at a speed which if continued would result in a full mile being covered in less than four minutes is guilty of a violation of sec. 20. This is the natural and logical construction of the section arrived at without any straining of its language. Mr. Cameron's interpretation of it necessitates a transposition of these words for to mean what he says they do, they should read,

> no person shall operate a motor, etc. for one mile at a greater speed than four minutes.

My interpretation is in consonance with the spirit of the Act which undoubtedly is to give others than motorists some rights in the highways and it leads to no anomalies or incongruities. That the very opposite of this would result from the adoption of the defendant's view is easily capable of illustration. Under it a man who drives his car 1,759 yards in a minute (a feat which from my observation of motoring in Calgary is, I fancy, by no means impossible of performance) and then stops it and proceeds no further would not under the defendant's interpretation of it be guilty of a breach of this section, because the distance travelled by him falls short of a mile, though only by a yard. Neither would he be, if after so stopping his car he keeps it standing for three minutes and then proceeds for he then takes four minutes to cover the mile. In other words, a man who only takes one minute to cover 1759 yards is immune from punishment under this section, whilst one who travels 1,760 yards in three minutes and fifty-nine seconds is subject to its penalties. Unless driven to it, no Court would do the legislature the injustice of holding that it meant to enact any such absurdity. Even if the words are capable of the meaning attributed to them by Mr. Cameron, which I very much doubt, they are certainly open to the construction which I place upon them and I should act upon the well known principle that where one of two constructions is open, the Court should adopt the more reasonable of them. The part of the same section which prohibits

> a greater speed than one mile in six minutes in turning a corner of an intersecting public highway,

can apply only to a corner which is a full mile in length if the defendant's contention is right, and I do not know any spot in Alberta where a man could be occupied for a whole mile in turning a street corner. This prohibition might apply to a mile race track if it was a street corner, which of course it is not. Mr. Selwood pointed out the similarity between these words and the language employed in section 393 (c) of the Railway Act, which prohibits a railway train from passing "in or through any

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thickly peopled portion of any city, town or village at a speed greater than ten miles an hour." This prohibition would be entirely nugatory if Mr. Cameron's construction of the very similar phraseology of the section in question is the right one.

The fact that in other portions of this Act and in the former Act, which is repealed by it and in similar Acts of other provinces, the words "rate of speed" are used, could only help the defendant, if at all, if there was a difference in meaning between "speed" and "rate of speed" which I do not think there is, at least as here used.

The defendant cannot escape conviction on the ground that the information charges the offence as driving at a greater speed than fifteen miles per hour, instead of in the words of the statute. The offence charged is identical with that provided against by the statute for one who drives at a greater speed than one mile in four minutes certainly drives at a greater speed than fifteen miles an hour. There is, however, no reason why the words of the statute should have been departed from. Police officials will find it far easier and much safer to follow the words of a statute which create an offence than to employ language of their own to describe it.

My answers to the questions submitted are; to No. 1, Yes; to No. 2, Yes; to No. 3, Yes; and to No. 4, No.

In accordance with the understanding arrived at on the argument, I make no order as to costs.

*Judgment accordingly.*

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## DAYNES v. B.C. ELECTRIC R. CO.

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*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.*

1. STREET RAILWAYS (§ III B—27*a*)—REAR END COLLISION—FAILURE BY MOTORMAN TO OBSERVE RULES.

Where it appears from plaintiff's own evidence that he was familiar with a rule of the railway company calling for a five minute interval between cars and he, as motorman of a car, failed to observe that rule, which failure on his part caused a collision with a car ahead, a verdict by the jury in his favour will be set aside and the action dismissed on appeal. (*Per* Macdonald, C.J.A., and Galliher, J.A.)

2. WITNESSES (§ II A—32)—REFRESHING RECOLLECTION—REFERENCE TO NOTES MADE AT TIME OF TRANSACTION.

A witness may refresh his recollection from notes made by him at the time of a transaction in question and then make a statement as to the truth of that memorandum. The rule is that the memorandum proposed to be looked at must be made by the witness, or adopted as a correct account by him at or about the time when it was made. (*Per* Irving, J.A.)

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3. WITNESSES (§ II A—32)—REFRESHING RECOLLECTION—NOTES MADE AT TIME OF TRANSACTION—LOSS OF ORIGINAL—ACCURACY OF COPY.

Where the loss of original notes of a certain transaction in question has been proved, and that a transcript thereof has been made on the following day, and that this copy was accurate, and the memory of the witness has been exhausted on the subject, he has a right to refresh his memory by reference to the copy. (*Per* Martin, J.A.)

Statement

APPEAL by defendants from the judgment of Hunter, C.J. B.C., for damages resulting from collision.

The appeal was allowed and the action dismissed.

*L. G. McPhillips*, K.C., for appellant.

*S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The pliantiff admits that he was familiar with Rule 91 of the Standard Rules, which, insofar as need be recited here, reads:—

> Unless some form of block signals is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations. When the view is obscured by curves, fog, storms, or other causes, they must be kept under such control that they may be stopped within the range of vision.

I do not intend to enter into a discussion as to whether or not the system of despatching and operating cars on this inter-urban tramway was a defective one. Under any practical system something must be left to the intelligence and care of those in charge of the trains or cars. If the above rule requiring the rear car to keep five minutes behind the leading one was not observed by defendants' motormen to the knowledge of the defendants, as the plaintiff swears, and if, as he also swears, the customary rule was to keep a distance of about 700 feet behind, he was bound, and the duty was more insistent, because of the near proximity of the car ahead, and the fog, to observe scrupulously the latter part of the rule.

The facts upon which my decision depends are not in dispute. The plaintiff was following the car "Cloverdale," approaching Strathcona station in a dense fog. He knew by certain land marks that he was approaching the station, the horseshoe curve and arc light enabling him to tell exactly where he was. He admits he knew that the Cloverdale would probably stop at that station to let off passengers: he intended to stop his own car there also. The Cloverdale was standing at the station when the plaintiff arrived, with its rear at the far end of the platform, yet the plaintiff came to the station at such speed that he was unable to stop his car though all brakes were in order, before the front of it had reached the far end of the platform and crashed into the rear of the Cloverdale with such force as to telescope the vestibule of his own car and to do considerable damage to the Cloverdale. I think the plaintiff is responsible for what happened, and that the jury could not rea-

sonably, upon the facts in evidence, assuming a negligent system, acquit him of contributory negligence.

I would, therefore, allow the appeal and dismiss the action.

IRVING, J.A.:—The defendants, in my opinion, are at least entitled to a new trial on the ground of non-reception of evidence. The mistake into which the learned Judge fell, I think, was in forgetting the purpose to which the extended notes was to be applied. The practice of refreshing one's memory is an every-day affair, whether for the purpose of giving evidence in Court or merely for the recalling of one's engagements. One looks at the note of the incident and then is able to act or speak with certainty. The note is not the evidence. The testimony of the witness is that having refreshed his memory by looking at the note, he is now able to make a statement.

In *Burton* v. *Plummer* (1834), 2 A. & E. 341, a clerk to a tradesman entered transactions as they occurred into a waste book from his own knowledge. These entries were afterwards copied into a ledger by the master and the clerk checked them off. It was held that the clerk could look at these ledger entries for the purpose of having the facts brought to his mind. In this case the waste book has been destroyed. Erle's argument, which prevailed, was to the effect that the ledger entries were in the nature of an original memorandum made by himself though not with his own hand.

The extended notes, in my opinion, may be regarded as duplicates or quasi-originals of the memorandum taken the day before. The rule is that the memo. proposed to be looked at must have been made by the witness, or adopted as a correct account by him, at or about the time when it was made.

On the merits of the case I think the verdict for the plaintiff cannot stand. He was the author of his own misfortune. The Rules plainly call for a five-minute interval between cars. Mr. Taylor seeks to invoke the rule of statutory construction that the headings govern the rules which are ranged immediately under it. It may well be that headings are inserted for convenience of reference and are not intended to control the interpretation of the clauses which follow: see 9 App. Cas. 369. It does not appear to me that Rule 91 applies to trams run by time tables only. In my opinion, Rules 83, 94, and 91 can very well be read together.

I would set aside the verdict and dismiss the action.

MARTIN, J.A.:—It is, from the view I take of the case, necessary to first consider the application for a new trial based upon the alleged improper rejection of the evidence of McCutcheon. Assuming that evidence to be material, I have no doubt, after examining all the authorities cited to us, and also *The King* v.

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*Inhabitants of St. Martins*, 1 C. & K. 210, and 13 Hals. 595-6, on "Evidence," that it should have been admitted; the loss of the original notes was proved, also the transcript thereof on the following day, and the accuracy thereof, and the memory of the witness had been exhausted on the subject (pp. 115-6): the right to refresh his memory by reference to the "exact copy" had, in my opinion, been established.

It cannot, I think, be successfully contended that the evidence was immaterial. The question asked (p. 114) as to the statement made by the plaintiff respecting the position of the car "Cloverdale" indicates, to my mind, the general object of the evidence which would, for one thing, be adduced to support the contention that the plaintiff was guilty of contributory negligence; or by shewing that he had made conflicting statements, to discredit him in the minds of the jury. What happened was, in the circumstances, really tantamount to the total rejection of the witness before counsel for the defendant had reached a stage where he could be called upon to do more, and in such circumstances his remark that, "I don't think I can ask the witness anything more that would be useful," was quite understandable and appropriate.

There must, I think, be a new trial; the costs of the former one to abide the result of the second; the appellant should have the costs of the appeal.

Galliher, J.A.

GALLIHER, J.A., concurred with MACDONALD, C.J.A.

*Appeal allowed and action dismissed.*

# MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

## CROOKSTON v. MILLER.

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*Alberta, District Court, Lethbridge, Judge Winter. October* 18, 1912.

MUNICIPAL CORPORATIONS (§ II C 3—114*c*)—*Regulation of Pool Rooms—By-law Fixing License Fee—Reasonableness — Quashing Conviction.*]

WINTER, D.C.J.:—The appellant, who is a pool hall proprietor, having been convicted on the 22nd June, 1912, under the provisions of a by-law of the town of Magrath has appealed against the conviction on the ground that the by-law is unreasonable as amounting in fact to a prohibition instead of a regulation of his business. It was admitted for the purposes of this case that the by-law was passed in due form and that the town was empowered under the Municipal Act to pass by-laws for the purpose.

The by-law in question purports to be for the regulating of pool tables and provides for a license fee of $300 for the first table and $200 for every subsequent table. The town has a population roughly speaking of 1,100 inhabitants. The appellant has three tables at his pool room. In respect of these the annual license fees under the by-law would amount to $700. It was proved that with license fees of any such amount there would be no return at all for the appellant after allowing for the money invested in the tables, payment of their upkeep, rent and ordinary incidental expenses.

The rule is, that where the power to legislate on a given subject is conferred and the mode of the exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid, and to the same effect, Biggar's Municipal Manual, 11th ed., at pp. 332 and 333, and the cases there cited.

The precise point raised in this case is to be found in *Re Talbot and City of Peterborough*, 12 O.L.R. 358, which was a motion to quash a by-law purporting to regulate the sale of cigarettes. The annual license fee imposed was $200. This sum was proved to exceed the profits from the annual sales of those

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articles. In giving judgment quashing that by-law MacMahon, J., says:—

> One of the best tests in reaching a conclusion as to whether the sum required to be paid for a license is extravagant and unreasonable, is to consider whether the license fee is disproportionate to the nature and profits of the business and so in fact amounting to a prohibition.

I adopt this test and find that, in view of the very limited population of the town of Magrath, the license fee is unreasonably high and that its imposition is an absolute prohibition of the business of pool rooms. The conviction will be quashed, with costs to the appellant. Ball, for appellant. Palmer, for respondent.

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### Re LETHBRIDGE CHARTER.

*Alberta, District Court, Lethbridge, Judge Winter. August 14, 1912.*

TAXES (§ III F—146)—*Sale—Redemption—Confirmation of Sale—Time to Redeem—N.W.T. C.O. Alberta* (1911), *ch.* 109—*Lethbridge Charter Construction.*]

JUDGE WINTER:—This is an application by a purchaser for confirmation of a sale by the city of Lethbridge of land sold to him for arrears of taxes. The sale took place on the 4th April, 1910, and the transfer, after the expiration of a year from that date, was delivered to the applicant, such transfer being dated 3rd May, 1911. The application for confirmation is made under the provisions of ch. 109 of the Consolidated Ordinances. The owner, who opposes the application, is the registered owner in fee simple of the land under an uncancelled certificate of title.

For the purposes of the case before me it was admitted that the transfer was properly issued to the applicant, and that prior to the hearing of the application for confirmation the full amount of principal with interest and costs was tendered by the registered owner to him and refused, and it was argued that the charter of the city of Lethbridge, which provides for the redemption of land sold under similar circumstances within a year from the date of sale, superseded the provision for redemption in the confirmation ordinance as being inconsistent with that provision. It may be well, in order to elucidate the procedure for confirming a tax sale, to take, by way of example, a simple instance detailing the steps which must be taken by a purchaser of land sold for arrears of taxes from the city before he can become registered as owner. "X" is the registered owner of lands in the city of Lethbridge. These are sold for arrears of taxes to "Z," who, at the expiration of one year from the date of sale, obtains a transfer ("*in the form provided in the Land*

*Titles Act*") to himself from the secretary-treasurer of the city. The effect of this is to vest in "Z" all rights of property which "X" had therein and otherwise confirms the title in "Z." "Z" cannot register his transfer at the land titles office until he has obtained a Judge's order confirming the sale. "Z" therefore obtains a summons under ch. 109 Cons. Ord. from the Judge for an order confirming the sale and on the return of the summons the sale in ordinary course is confirmed and the transfer with the Judge's order of confirmation is then left with the registrar of land titles, who after four weeks registers "Z" as absolute owner.

Neither the Lethbridge charter nor the Land Titles Act provides any machinery for confirming a sale for taxes, yet inasmuch as these two Acts were both passed on the same date, and the former refers in terms to the latter, which latter exacts, as a pre-requisite of registering a transfer of land sold for taxes, that it shall be accompanied by a Judge's confirmation order, it must be accepted that the Legislature, when passing the Lethbridge charter, had in mind the provisions and procedure contained in ch. 109 which is the only enactment in force making provision for the confirmation of sales, and that, according to the accepted rule of interpretation of statutes, these enactments were intended to be read so as not to be repugnant the one to the other but to be reconciled where necessary as far as possible.

It is to be observed that secs. 19 and 20, Title XXX. of the Lethbridge charter, are practically identical in terms with secs. 201 and 202 of the Municipal Ordinance, but I have not yet found any authority which holds that a person could not redeem the land sold under the Municipal Ordinance if he offered to redeem on the terms allowed by the Confirmation Ordinance.

Under the Lethbridge charter an owner of property sold for taxes has no power, so far as the city is concerned, to redeem after a year from the date of the sale, and the city has no power then to accept the redemption money. The redemption money in such case, if paid within that time, would have been the sum paid by the purchaser, with 10 per cent. thereon and any further sums levied against the land which might have been paid by the purchaser. When, however, the purchaser applies for a confirmation order under ch. 109 and the applicant before the hearing tenders to the purchaser, (a) the full amount of the purchase money, (b) any further sums charged against the land and lawfully paid, (c) 20 per cent., and full costs on such tender or payment being made the Confirmation Ordinance gives the owner the right to redeem, and the confirmation order would in these circumstances be refused.

The right to redeem given by the Confirmation Ordinance is not one which the city of Lethbridge could give effect to, but

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the Judge on an application such as the present can do so under that ordinance. The ordinance exacts payment of costs and also a higher rate of interest than is required by the Lethbridge charter as a condition of redemption. It is not inconsistent with the Lethbridge charter but gives the owner a further *locus pœnitentiæ* imposing severer terms as conditions for redemption. It is impossible to read the Confirmation Ordinance without seeing that the Legislature had in mind in drafting that enactment that laws in relation to sales of land for taxes are to provide for the collection of such taxes and not for forfeiture of land in arbitrary fashion.

The owner of the land having in the case before me performed all the preliminaries required by the Confirmation Ordinance, the application to confirm the sale to the applicant is refused. The owner is to be at liberty to redeem the land on payment of the purchase money with 20 per cent. interest calculated to the date of the hearing, $2 costs of the transfer paid by him, and any further sum charged against the land and lawfully paid by him. As the tender of the redemption money was made only after notice of the application of the present proceedings, which were properly instituted by the applicant, had been received by the owner, and this application being in the nature of a test case it will be equitable that each party shall bear his own costs of it. Dunlop, for the applicant. Johnstone, for the owner.

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## SINGER v. MUNDELL.

*Saskatchewan Supreme Court, Judge Farrell, Local Master. February 28, 1912.*

ASSIGNMENTS FOR CREDITORS (§ VIII—66*a*)—*Notice of Contestation of Claim—Failure of Creditor to Bring Action Within Time Limited by Statute—Jurisdiction of Court to Extend Time.*]

JUDGE FARRELL, L.M.:—The defendant is the assignee of one J. D. Gale, under the provisions of the Assignments Act for the general benefit of creditors and the plaintiff filed with the defendant his claim to rank against the estate of the said Gale in his hands. Under instructions from the solicitor of the estate and the said Gale, the defendant as provided by sec. 31 of the Assignments Act served the solicitors of the plaintiff on September, 1911, with notice of contestation.

On November 2, 1911, the plaintiff by his said solicitors applied *ex parte* to the local Master at Moosomin, for an extension of the time in which they might apply for an originating summons to decide the validity of their said claim, and at the

same time applied for the said summons on the same material. I, as local Master, granted both applications, extending the time in which the application for this originating summons could be made to the said 2nd day of November, 1911, and signed the summons the same day. When the matter came on for hearing the defendant appeared by counsel and took the preliminary objection that as the plaintiff had not applied for the said summons within 30 days after the receipt of the said notice of contestation he could not now be heard, that the claim was already barred, that the summons was a nullity and that I had no jurisdiction to deal with the matter. He further contended that the order of November 2, 1911, did not help the matter as the extension of time granted thereby was made after the 30 days had expired, and was therefore too late, and should not have been made. He further objected that I had no jurisdiction to issue this summons or hear the application as the application could only be heard, under the interpretation clause of the Act, by a Judge of the Supreme Court, but afterwards abandoned this objection, so I need not further refer to the matter here. Counsel for the plaintiff contented himself with quoting rule 704, and contended that that rule was applicable to the case in point, and gave authority to apply for and obtain the said extension of time after the time for making the application had expired.

It seems to me from a reading of the governing section of the Assignments Act, namely, sec. 31, that the defendant's objection is well taken.

Here in this case before us, the plaintiff filed his claim against the assignee with the defendant and he on September 28 last, served the plaintiff with notice under the above section contesting his said claim. This having been done, the section provides that the claimant may, within 30 days of the receipt of such notice, or such further time as a Judge may allow, apply for an originating summons to decide the validity of his claim, but it further enacts that "in default of such action being brought within the time aforesaid . . . the claim . . . shall be forever barred." The words, "within the time aforesaid" quite evidently mean, "within the said 30 days, or within the time to which said 30 days may be extended by a Judge." In the case before us here, the 30 days within which the plaintiff could commence his action by originating summons was up on October 28 last, and if on or before that day he had not obtained the required originating summons or any extension of the time in which to so apply for it, his claim to rank in the said estate by the clear terms of the statute was barred forever. As a matter of fact he did neither of these things and in my opinion his right to rank in the estate of the said Gale in the

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hands of the defendant was in the words of the statute "barred forever."

This was the condition of affairs when on November 2, 1911, the plaintiff applied both for an extension of time and for an originating summons. The plaintiff's claim to rank was then gone. There was nothing for me to adjudicate upon, and I had no longer any jurisdiction in the matter, and I should not at that date either have extended the time in which the plaintiff might apply for his said summons, nor have granted the summons. It was contended by counsel for the plaintiff that under rule 704 of the rules of Court I had power to extend the time for the said application even after the time allowed for making the application under the statute had expired, and that the wording of the statute that the said application is to be made "under the practice regarding originating summonses in the Supreme Court" shews that it is the intention that the rules of Court should govern all applications made under sec. 31, including the application for an extension of time, and if so, rule 704 allows the application to be made after the stipulated time had expired.

Rule 704 is identical with the English rule, marginal rule 967, and almost identical with the Ontario rule. If rule 704 is applicable here and I had authority under it to extend the time in which the plaintiff could make his said application, after the said 30 days had expired, the defendant's objection would fail, as I did under these circumstances grant the extension and the plaintiff's summons was issued within the time granted by the extension. However, I am of the opinion that this rule does not give power to extend the time fixed by sec. 31 of the Assignments Act after it has once expired. There is no doubt at all that under this sec. 31, the method of procedure in applying for the necessary originating summons and of conducting this action after the summons is granted must be according to the practice and rules of the Supreme Court. However, the time allowed by this section in which the claimant may bring his action is not a rule of Court, nor fixed by any rule of Court, but is a special statutory enactment, not to be varied by rules of Court, which deal with matters of procedure, unless it can be clearly shewn from the statute itself that it is the intention of the Legislature to make the rules of Court to apply in such cases.

I do not think it can be contended that any such intention has been shewn by the Legislature. The scope of this rule 704 was discussed in *Re Oliver and Scott's Arbitration*, 43 Ch. D. 310. Kekewich, J., says, at 313:—

> I have no doubt about this point. I shall certainly not hold that this Act of Parliament, which limits the time, could be altered other-

wise than by the authority which made the enactment, that is to say, by the Legislature itself.

In *Doyle* v. *Kaufman*, 3 Q.B.D. 7, 340, and *Hewitt* v. *Barr*, [1891] 1 Q.B. 98, the Court refused to extend the time for renewing a writ of summons after the expiration of the 12 months from its date, under this rule, when the claim would, in the absence of such renewal, be barred by the Statute of Limitations. In *Purcell* v. *Kennedy*, 14 Can. S.C.R. 453, the Supreme Court of Canada held that the time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months fixed by the statute unless an order has been obtained on application made within the six months. They held further that an order granted after the expiration of the said six months is an invalid order, and can give no jurisdiction to try the merits of the petition which is then out of Court. It is to be noted in that case, in the dissenting judgment of Gwynne, J., at 500, he builds up his argument on the ground that the statute under discussion there did not declare or enact that election petitions shall stand dismissed or shall be deemed to be out of Court unless the trial shall be commenced within six months from the presentation of the petition; in other words, it appears to be evident that if the statute had so declared he would have agreed with the other Judges. Here the statute distinctly enacts that if the claimant does not bring his action within the time limited it shall be forever barred. In the election case above the statute allowed as in sec. 31 the time to be extended on application to a Judge.

*Purcell* v. *Kennedy, sub nom. Kennedy* v. *Purcell*, 59 L.T. N.S. 279, came before the Judicial Committee of the Privy Council, but on principles of general policy that Court refused leave to appeal to them from the judgment of the Supreme Court.

In *Re Independent Order of Foresters*, 13 W.L.R. 409, the Chief Justice, in refusing to amend a defective notice of appeal, used the following words:—

> I cannot do that, and if I did it would serve no purpose, because the 15 days mentioned in sec. 36 of the Surrogate Courts Act had expired long before the motion came before me on the 16th February. The order was made on the 21st January, the notice of appeal was served on the 5th February, the very last of the 15th days, and I was asked on the 16th February, to make the amendment. That is, practically, I was asked 10 days after a bad notice of appeal was given, and 10 days after the time for giving notice had expired, to make it a good one. I know of no authority which would authorize me to do that.

The question of my jurisdiction to set aside my own order was not raised, but I refer to *Jackson* v. *Canadian Pacific R. Co.*, 7 W.L.R. 828. As the point has arisen partly through my own

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error in granting the plaintiff's *ex parte* application for an extension of time, although I have now no recollection of the circumstances under which I granted the extension, I will award no costs. The plaintiff's summons is, therefore, dismissed without costs, and if necessary, the said order of November 2, 1911, is also set aside without costs. C. V. Truscott, for plaintiff. A. B. Hogg, for defendant.

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## BANK OF MONTREAL v. ROGERS.

*Saskatchewan Supreme Court, Judge McLorg, Local Master. March 25, 1912.*

GARNISHMENT (§ III—68)—*Trial of a Garnishee Issue — Assignment of Land Contract—Rights of Judgment Creditors—Payment of Claim of Assignee—Right to Attach Surplus.*]

JUDGE MCLORG, L.M.:—The plaintiffs on February 6, 1912, recovered judgment against the defendant for five thousand and ninety-five dollars and three cents, and on January 18, 1912, garnisheed both Schumacher and Reutz, and the Farmers Lumber Company. Both the garnishees appeared to the writ of garnishee summons and denied liability, the former suggesting that the Quebec Bank was assignees of an agreement of sale between themselves and the defendant, which is the transaction by which the defendant's monies were sought to be attached, and thereupon under rule 514, the matter comes before the Court.

Mr. Moxon, who appeared on behalf both of the Quebec Bank and the garnishees, Schumacher and Reutz, contended that the procedure was incorrect. I am not sure that I altogether understand this objection. It seems to me that it was quite proper for the garnishees if they had notice of this assignment, as they did have, to bring the attention of the Court to that fact. "The Leader," L.R. 2 Adm. 314. At any rate all the parties are before me now and I think, therefore, that I am in a position to deal with the matter as it stands.

The facts herein are not in dispute. The defendant on July 1, 1911, sold his property to the garnishees Schumacher and Reutz, upon the terms then agreed upon. On the 3rd of September, 1911, this contract was assigned to the Quebec Bank and notice thereof given to the garnishees, on the eighth of the same month. I do not know that it is necessary, in view of the conclusion I have arrived at, to recapitulate the exact terms of the assignment, but the contract in question was transferred

> as a special collateral security fund for the payment of all present or future indebtedness or liability of the undersigned to the bank and the funds shall remain in the hands of the bank until all indebtedness of the undersigned is paid.

It is contended that the assignment is an absolute one and that notwithstanding the fact that the debtor may still have some interest when the claim of the Quebec Bank is paid off, that for this reason the debt is not an attachable one; that no debt arises between the judgment debtor and the garnishees until such time as the bank's claim is satisfied and they have re-assigned the contract of sale to him. A copy of the agreement for sale in question was put in by consent, and no assignment appears endorsed thereon or attached thereto, the bank claiming entirely under the assignment I have already set forth.

Now in this case I think it material to consider by whom these objections are raised. They are not raised by the judgment debtor, but they are raised, as I have stated, by the garnishees and by the Quebec Bank, the assignees of the agreement. I think it was open to the judgment creditors to shew, as they did shew beyond doubt by collateral evidence, that Rogers, the judgment debtor, still has a large interest after providing for the claim of the Quebec Bank. His examination for discovery clearly shews that, and this evidence is not disputed by any of the other parties. That the terms of the deed may be qualified by collateral evidence was laid down in *Barton* v. *The Bank of New South Wales*, 15 A.C. 379. I think I am justified, therefore, in finding under the evidence, as I do find, that there is ample after payment of the assignees' claim, to satisfy the judgment debt if this fund is available for that purpose, and that the assignment is by way of charge only.

I was referred by counsel to a number of cases in which a previous assignment was held to operate as against a subsequent garnishee order. It is unnecessary to recapitulate them here. But I was not referred by counsel to any case in which just exactly the same considerations and facts as obtain here arose. All the former cases proceeded on the simple ground that all the judgment creditors could attach was what the judgment debtor was honestly entitled to, and if in this instance the claim of the Quebec Bank was so large as to swallow up the monies otherwise payable by the garnishees to the judgment debtor, the same rule would necessarily apply. The only case that I can find in point is that of *Hirsch* v. *Coates*, 18 C.B. 757. In that instance the judgment debtor had assigned—previous to the judgment being recovered and consequently previous to the order that was made attaching the debts—all his property in trust for his creditors, and the order subsequently made ordering the garnishee to pay the judgment creditor was set aside but the language used by Jervis, C.J., is as follows:—

> In my judgment the meaning of the statute is this: Where a creditor has obtained a judgment, and there are debts due to his judg-

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ment debtor, he may go before a Judge and obtain an *ex parte* order, under section 61, to attach debts owing or accruing to the judgment debtor, and that order binds those debts, and makes ultimately available to the execution creditor so much as may remain after satisfying all equitable claims thereon. If the debts have been assigned, and the assignment swallows up the whole, then the judgment creditor gets nothing.

The effect of the Judge's order under the English practice is the same, I think, as service of the garnishee summons under our rules. I refer also to the *Re General Horticultural Company, ex parte Whitehouse*, 32 Ch.D. 512, where Chitty, J., holds that the effect of the order *nisi* is to give the judgment creditor execution against debts owing to his debtor, and the doctrine in *Hirsch* v. *Coates*, 18 C.B. 757, is commented on and approved. It seems to me that this case is on very parallel lines to the present one, and that there was at the date of the service of the summons still a debt accruing due to the judgment debtor, and in view of the fact that there is a large surplus in favour of the defendant after the satisfaction of the bank's claim, I cannot see that any real injustice is done them by the order I purpose to make.

It is possible that some inconvenience to them may arise, but only of a trifling character. That is, the money in place of being paid direct by the garnishees to them would be ordered to be paid into Court, to be paid out to them to the extent of their claim and then in satisfaction of the plaintiff's judgment. The question of convenience in matters of this kind was dealt with in *Tapp* v. *Jones*, L.R. 10 Q.B. 591, 593, and I do not think that the small inconvenience that they will suffer should weigh in the scales as against the large amount of the judgment creditor's claim. An order to a certain extent similar, so far as attaching the payments as they fall due, was made in *Smith* v. *Van Buren*, 6 W.L.R. 12.

So far as the claim of the Farmers Lumber Company is concerned, I can see no shadow of reason for entertaining it. The reason that was put forward was that they had a mechanics' lien on the building sold under the agreement of sale above referred to, and this, it appears to me, is no reason at all. The evidence shews clearly that this lien was put on at the suggestion of the judgment debtors to protect themselves, and they still have this security. So far as the garnishees are concerned, it does not seem to me to effect their position either, because under the authority of *Beauchamp & Co.* v. *Messer*, 13 W.L.R. 404, I gather that they would be entitled to set off such sums as they had to pay under this lien against the money otherwise due by them to the judgment debtor. Lynd, for plaintiff. McAughey, for Farmers Lumber Co. Moxon, for Quebec Bank and Schumacher and Reutz.

## BROOKS v. BROOKS.

*Saskatchewan Supreme Court, Judge Farrell, Local Master. February 6, 1912.*

JUDGMENT (§ VII C—282)—*Default of Appearance—Irregularity in Copy of Summons Served on Defendant—Inclusion of Interest—Unliquidated Damages.*]

JUDGE FARRELL, L.M.:—The writ of summons was properly issued on December 19, 1911, under rule 1 of the former rules of practice, then in force, to which was attached the plaintiff's statement of claim under rule 2 of the same rules. This writ and statement of claim were duly served upon the defendant on December 22, 1911, and as the defendant did not appear the plaintiff signed judgment for the claim set out in the statement of claim on January 12, 1912, and his costs and he issued executions under which the sheriff has seized the goods and chattels of the defendant and still continues in the possession of the same. The plaintiff's statement of claim sets out that his claim against the defendant is for work done and services rendered by him for defendant at defendant's request and for money had and received by the defendant from the plaintiff at defendant's request, particulars of which are given as follows:—

| | |
|---|---|
| To wages for two months and 28 days at $40 a month | $117.75 |
| To cash advanced | 834.35 |
| By credit of one horse at | 100.00 |
| | $852.10 |

The plaintiff therefore claims:—

1. The said sum of $852.10 together with interest thereon at five per cent. per annum from this date until payment or judgment.
2. The costs of this action.

The statement of claim is of the same date as writ, viz., the 19th day of December, 1911.

The form of writ issued was a printed form and bore the name of His late Majesty Edward VII. This has been changed in the original writ as issued, to the name of the present sovereign, George V., but in the copy served upon the defendant this correction had not been made, and this copy had the name of Edward VII. instead of George V., otherwise the copy served on the defendant was a true copy of the original writ served thereon.

I will deal with this latter point first, and in view of the conclusion I have come to in respect to the other phase of this motion I will not dwell on it more than to say, that the writ in this case has been properly and regularly issued in every respect according to the rules. The only slip is in the copy served. That, I think, is purely a clerical error by which the defendant

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has been no wise prejudiced, especially as he swears in the affidavit he has filed that he never looked at the copy of the writ served upon him (not even the day it was served) until after his goods were seized under the plaintiff's execution herein. I think the case of *Pleasants* v. *East Dercham Local Board*, 47 L.T.N.S. 439, and *Wesson Brothers* v. *Stalker*, 47 L.T.N.S. 444 of the same volume, sufficiently cover the point and I refuse to set aside the judgment on this ground. As will be noticed the plaintiff in his statement of claim, claims for $852.10 and interest on that sum at five per cent. from date of the statement of claim until payment or judgment. In signing judgment this interest was computed at $2.84, and added to the $852.10 and judgment signed for these two sums and costs. The defendant contends that this claim for interest so computed at $2.84 is unliquidated damages and could not be included in plaintiff's judgment without the same being assessed as provided by rules 123 and 126 and not having done so the judgment must be set aside as bad. It was admitted by plaintiff's counsel in the argument in this action that the plaintiff's judgment here had been signed under our rule 121, but he contended that the judgment had been properly signed under that rule and that rule allowed and provided for the charge for interest made in this case.

Rule 121 is identical with old rule 90 and both are taken from the English rule order 13, rule 3.

From the reading of these rules, it would appear as if the words, "together with legal interest" were wide enough to carry five per cent. interest on the sum claimed from the date of the writ to judgment as has been done by the plaintiff in this case, and probably prior to 1892 would have done so. At any rate claims for interest were before that date allowed as coming within the rule which under a succession of decisions in that year, are now held to be unliquidated demands. The cases I refer to are *Ryley* v. *Master; Sheba Gold Mining Co. Ltd.* v. *Trubshawe*, [1892] 1 Q.B. 674, following *Rodway* v. *Lucas*, 10 Ex. 667, 24 L.J. Ex. 155; *Wilks* v. *Woods*, [1892] 1 Q.B. 684; *London and Universal Bank* v. *Earl of Clancarty*, [1892] 1 Q.B. 689, and *Lawrence & Sons* v. *Willcocks*, at p. 696 of the same volume, and *Gold Ores Reduction Co. Ltd.* v. *Parr*, [1892] 2 Q.B. 14.

These cases clearly shew that no claim for interest under this rule can be allowed which does not arise by contract, express or implied or by statute. As Fry, L.J., one of the Judges in the Court of Appeal, who decided the case of *Wilkes* v. *Wood*, [1892] 1 Q.B. 684, says in his judgment:—

> It is said that the words "with or without interest" justify a special indorsement when there is no contract to pay interest. I think

that is not so, but that the rule refers to cases where both the principal sum due and the demand of interest are liquidated sums, and the latter arises by contract expressed or implied, or by statute.

The cases of *Sheba Gold Mining Co. Ltd.* v. *Trubshawe*, [1892] 1 Q.B. 674, and *Wilks* v. *Wood*, [1892] 1 Q.B. 684, are exactly in point with the case here. In both of these cases the writ was endorsed for a sum certain for goods sold and delivered and then a claim for interest was made from the date of the writ until payment or judgment, and in both cases it was held that the claim for interest was a claim for unliquidated damages. In the case before us there is no pretence that the claim for interest is founded on statute or an express or implied contract to pay interest.

It was objected in the argument that these cases did not apply to the plaintiff's judgment, as they were decisions as to what or what not are specially indorsed writs under English marginal rule 16 and application for judgment under English marginal rule 115 and were not decisions regarding judgments signed under English rule 103. I do not think the objection is well taken. It is true that in this province there is no provision made for specially indorsed writs, or any kind of indorsement on writs for that matter, but in this province the statement of claim is filed and served with the writ, practically the two together taking the place of the specially indorsed writ in the English practice. It is to be noted here that the judgment signed under our rule 121 is, notwithstanding the service of of the statement of claim, signed in default of appearance. Other rules provide for judgment in default of defence. The phraseology of rule 121 is practically the same as the first part of English rule 16 as to special indorsement.

Our rule 121 uses the word "only" which is omitted from English rule 103, so that under our rule judgment can only be signed in cases confined to liquidated demands, no matter what may be done under English rule 103. As Lord Esher, M.R., says in *Wilks* v. *Wood*, [1892] 1 Q.B. 684, p. 686, "the word 'only' in the rule means 'only.'" In my opinion all the cases quoted above are applicable to the case and all other cases coming under our rule 121. However that may be, the question as to what may be claimed for interest in a judgment signed under our rule, has come up for judicial decision in *Ewing* v. *Latimer*, 5 Terr. L.R. 499. There Scott, J., in giving judgment quotes with approval the judgment in *British Columbia Land and Investment Co.* v. *Thain*, 4 B.C.R. 321, where interest claimed under circumstances very much more in favour of the plaintiff than here was held to be unliquidated demands.

I therefore find that the claim for interest here is not founded on contract either express or implied, that it is unliquidated

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damages, that the amount of the same has been wrongfully included in the plaintiff's judgment, and the judgment therefore must be set aside. The application of the defendant to be let in to defend was not opposed on the hearing of this application. The plaintiff's judgment therefore is set aside as well as the executions issued thereon, and the defendant's goods are released from seizure. The defendant is allowed in to defend. The sheriff is protected, and the costs of this application are awarded to the defendant in any event on final taxation on condition that no action be brought against the plaintiff. The terms of this order may be spoken to further if necessary. C. V. Truscott, for plaintiff. A. T. Procter, for defendant.

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**JOHNSON et al. v. HETHERINGTON et al.**

*Saskatchewan Supreme Court, Newlands, J. January 28, 1912.*

JUDGMENT (§ II A—60)—*Conclusiveness of Former Judgment—Res Judicata.*]

NEWLANDS, J.:—This is a stated case, the question submitted for decision being, whether the decision of Mr. Justice Lamont, *Re Hetherington*, 3 S.L.R. 232, in the matter of the sale under execution of the south-west quarter of section 14, township 6, range 22, west of the 1st meridian, that said land was not the homestead of the execution debtor, Hetherington, is *res judicata*.

The question arises the second time because of the claim of a mortgagee who was not a party to the interpleader issue in which the above decision was given, and the parties interested consented to an order to submit this special case for decision before anything further was done in the matter. The claim made by the mortgagee is the same claim as was made by the execution debtor Hetherington, namely, that the land under seizure is the homestead of Hetherington, and therefore exempt from seizure under execution.

The mortgagee claims title through the execution debtor; and if the previous claim had been decided in favour of the execution debtor it would have inured to the benefit of the mortgagee. Under these circumstances there is no question in my mind that this matter is *res judicata*, and that the only way in which it can be brought up again, other than on appeal, is on application by the mortgagee to Lamont, J., to re-hear the case on the ground of the discovery of new evidence which will have a material effect on the issue. Vrooman, for the plaintiffs. Barr, for claimants.

### Re MUNICIPALITY OF BURNABY.

*British Columbia Supreme Court, Clement, J., in Chambers. January 30, 1912.*

ELECTIONS (§ II B 1—31)—*Form and Contents of Ballots—Statutory Requirements as to Uniformity of Form—Irregular Ballots Used—Duty of Returning Officer to Reject—New Election.*]

CLEMENT, J.:—In my opinion, sec. 53 of the Municipal Elections Act prescribing that "one kind or set" of ballot papers "shall be prepared for each ward" establishes uniformity in the form of ballot used as one of the principles of the Act governing municipal elections in this province. Under sec. 78 the returning officer should have rejected the 10 ballots complained of as being "dissimilar to those officially supplied." The clerk of the municipality is the official supplier of ballots under sec. 52 and the 10 ballots complained of were certainly not of one set or kind with the other ballots used and were in fact dissimilar to the ballots prepared or supplied by the clerk. The act of the returning officer in counting these ballots is subject to review on this petition: see sec. 80. The expression "a majority of the votes cast" in sec. 91 must mean, therefore, a majority of the votes legally cast.

The election must be held invalid but without costs as the respondent is not in any way to blame for what has happened nor is the good faith of the returning officer impugned. The order will contain any necessary directions as to the holding of a new election: see sec. 91 (*c*).

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### MONARCH LUMBER CO. v. HEWITT.

*Manitoba King's Bench, Prendergast, J., in Chambers. March 11, 1912.*

PLEADING (§ I S—146)—*Striking Out Reply—Delay in Filing Judicial Discretion of Referee—Amendment of Statement of Claim—Costs.*]

PRENDERGAST, J.:—Appeal by defendant from referee's order dismissing application to strike out reply.

I should not interfere with discretion of the referee in refusing to give effect to objection that reply was filed after time fixed by the Act, or in entertaining objection to substance of reply, although said objection was not set out in notice.

I am of opinion, however, that the reply is bad. It is in no way called for by the statement of defence, which is a mere

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denial, and it contains new matter which constitutes a departure: Odgers, 5th ed., p. 249. This new matter should be set out in the statement of claim, in the alternative or otherwise.

Appeal allowed, reply struck out and plaintiff allowed six days to amend statement of claim if so advised.

I will not interfere with costs allowed by referee.

Costs of this application to be costs in the cause to defendant in any event. Deacon, for appellant. Elliott, for respondent.

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## ARMSTRONG v. McINTYRE.

*Alberta, District Court, Lethbridge, Judge Winter. May 17, 1912.*

MASTER AND SERVANT (§ II A 4—75)—*Workman's Compensation Act—Liability to Person Injured While Removing Coal from Mine—"Undertaker" as Defined by Act—Meaning of "Workman"—Casual Employment.*]

JUDGE WINTER:—The applicant was one of a threshing gang employed by one Greenway to thresh the grain of the respondent. The respondent was to furnish the gang with coal and potatoes. Towards the end of October owing to climatic conditions the threshers were not able to continue their work, and on the evening of October 25, some conversation occurred between the respondent and some of the members of the gang about getting coal from an adjacent mine, and although the evidence on this point is contradictory, I am satisfied that some understanding was come to that those who got the coal would receive some reward for their labour from the respondent. The respondent was at liberty, by arrangement with the owner of the mine, to take out what coal he needed paying at the rate of fifty cents a carload; at this time he wanted about two loads, about six cars, it would take a miner about two hours to obtain these.

On the 26th of October, the respondent drove the applicant and two other members of the threshing gang to the mine, and having entered it the applicant, who had had some two years' experience as a miner, began to pick out some of the coal. The respondent warned him that the part he was working in was not safe and that he should come away and work at another part where there appears to have been some timbering done. The applicant, however, appeared to be confident in the safety of his method of working and got out a carload of coal. When proceeding to pick out the second carload a lump of rock fell on him causing complete paralysis of his legs which condition continues to the present time. It is admitted that the applicant is permanently disabled and under the circumstances above set forth he claims compensation under the Workmen's Compensa-

tion Act. The Act applies only to "employment" by an "undertaker" as defined by sec. 2, sub-sec. 6, which in the case of a mine means the owner or operator of the mine.

The respondent was neither owner nor operator of the mine. In addition, in my view, the applicant did not enter into a contract for service with the respondent so as to bring him within the definition of "workman" given in sec. 2, sub-sec. 8. He and his fellow-threshers were at the time members of the threshing gang of which Greenway was the head and they were all in the latter's employ. I find that the arrangement was that the respondent having indicated to the applicant and to the fellow-threshers who accompanied him, where the coal could be obtained left it to them to obtain the coal and that he was to remunerate them according to the number of carloads produced—that this was a casual arrangement to get a limited quantity of coal for this one occasion, and that the applicant and the fellow-threshers who went with him were independent contractors rather than employees of the respondent. On these grounds my judgment must be for the respondent with costs and the award will be made in these terms. Palmer, for applicant. Hogg, for respondent.

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### HERVE v. DOMINIQUE.

*Alberta Supreme Court. Trial before Walsh, J. May 2, 1912.*

HUSBAND AND WIFE (§ III A—144) — *Husband's right of action for criminal conversation—Measure of compensation—Defendant's failure to testify—Presumption of admission.*]

WALSH, J.:—There are no questions of law involved in the decision of this case and the facts are practically undisputed. There can be no question whatever upon the facts but that this man, Dominique, had broken up a family, which until its unfortunate acquaintance with him, was a happy and contented family. The evidence, not only of the plaintiff himself, but of the neighbours who were in a position to judge, is very clear upon that point. The little family out on the homestead was happy and contented and as the plaintiff puts it, "ambitious to get along." There does not seem to have been a cloud in the family sky so far as the evidence shews until, unfortunately, the plaintiff, with a view to bettering the lot of himself and family, went to the grade of the Alberta Central Railway, where the defendant was either a contractor or a foreman.

The evidence of the actual transactions had between the defendant and the plaintiff's wife whilst they were on the grade and until September when they went to Mountain House is not very specific, but sufficient is shewn by the uncontradicted evi-

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dence of the plaintiff and of some of the witnesses to convince me that the relations between this man and the plaintiff's wife were not what they should have been and were the direct cause of the plaintiff leaving the place where he was living and taking his two children away with him after an ineffectual attempt to induce his wife to go with him. That Dominique had then succeeded in captivating the affections of this woman and was making a plaything of her there, there can be absolutely no doubt. That he followed her to Calgary is established by the evidence of some of the witnesses. One of the witnesses speaks of having gone down on the train with him and of Mrs. Herve having met him at the station and of their having gone away from the station together and of Dominique having given him the address of Mrs. Herve in Calgary and the same witness speaks of having seen them together at the Exhibition in Calgary at a later period.

The statement made by Dominique sworn to by the two Sonnie brothers, that he was going down to Calgary, that she had given him lots of it when she was here and he was going to Calgary to get some more, I think refers to the plaintiff's wife and is practically, in the face of no denial by the defendant, an admission of the fact that improper relations had taken place between them before she left for Calgary and were to be continued there. His admission as to the open living in adultery which took place in September at the Mountain House lasting for some weeks and continued upon her return there at a later period, puts, of course, beyond question the fact that he was living with her as his wife. I think the plaintiff did everything which he could to induce his wife to leave the fascinations of this man. The only wonder to me is that he exercised the patience and the self-control which he did. I think he went as far as, if not farther than, a husband should go to reclaim his erring wife. I am satisfied on all of the evidence on the plaintiff's part and of which there has been no contradiction, that it was through no fault of the plaintiff's that his wife fell or that having fallen she refused to be reclaimed.

The only question for decision in my mind is the amount of damages which the plaintiff is entitled to recover from the defendant. The principle which is applicable in such a case as this is, as I understand it, that damages are awarded, not as a punishment to the defendant, but as a compensation to the plaintiff and it really is a very difficult matter to know what sum of money could adequately compensate the plaintiff for the wrong he has suffered at the hands of this defendant. His home has been broken up; his two little children are in the care of a stranger; his wife has become an outcast from society and I do not think that any sum of money could place him in the position from which he has been driven by the devilish acts of this defendant. Certainly his home can never be restored.

The difficulty I am in is in determining an amount of money which the defendant should pay, which by any process of reasoning could be considered to be anything like an adequate compensation to the plaintiff for the wrong he has suffered. The defendant has appeared in Court. He has taken an active part in the trial except in the matter of giving evidence. He has by his failure to testify practically admitted the truth of everything which has been sworn against him. My wonder is that he has had the nerve to face a trial of this kind in a public Court.

The evidence of his own son shews that his actions around the camp were so scandalous that the son was forced away from it and that the defendant's lawful wife has been practically abandoned by the defendant by reason of this illegitimate love of his. Of course these facts do not affect the plaintiff in any way. They are no reason why the amount of the plaintiff's compensation should be increased, but they are circumstances which shew very clearly the outrageous character and conduct of this conscienceless man. The plaintiff is a man in humble circumstances. He is a labouring man, but the home of the labouring man is just as sacred as the home of a prince. I do not know what verdict a jury would find against him, but my judgment is that he should pay the plaintiff the sum of $3,000 and costs. Payne, for plaintiff. Moore, for defendant.

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## HARNOVIS et al. v. CITY OF CALGARY.

*Alberta Supreme Court. Trial before Beck, J. May 16, 1912.*

STREET RAILWAYS (§ III C—42) — *Duty of motorman — Reversing of power—Injury avoidable notwithstanding contributory negligence — "Last clear chance" — Ultimate negligence.*]

BECK, J.:—I stated at the conclusion of the trial that I was satisfied that there was negligence on the part of the defendant, but that I felt a difficulty in coming to a conclusion on the question of contributory negligence. I think there was negligence on the part of the defendant in the following respects:—

I find that, though the gong may have been sounded upon the entrance upon the decline into the subway on the south side, the ringing of it was not continued and that it was again sounded only when useless because the accident could then not be avoided. I find, too, that either by reason of faulty instruction to the motorman or of his forgetfulness, he was under the impression which was incorrect, that the car, inasmuch as it was running on only one cylinder, could not be reversed; that had he reversed, the accident might have been avoided or at least greatly minimized. I find, too, that the car was running at a rate

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which, had it not been checked in instant anticipation of the accident, would have been at a rate of more than ten miles an hour as it crossed Ninth avenue, a rate, which in view of the obstructions to the view of passengers passing along that avenue, is excessive. There is also the admission of the motorman to the effect that had he not supposed that the plaintiff would turn north so as to run parallel to the car instead of crossing the track, he could have stopped the car in time to avoid the accident. I think he should not have taken it for granted that they would turn north.

As to the question of contributory negligence on the part of the plaintiff. I observe first that the onus of establishing this to the satisfaction of the Court is on the defendant, remembering, however, that if the circumstances established are equally consistent with the negligence of the plaintiff as of that of the defendant being the cause of the accident, the plaintiff fails. In *White* v. *Barry R. Co.*, 15 Times L.R. 474, A. L. Smith, L.J., with whom concurred Rigby and Vaughan-Williams, LL.JJ., is reported as follows:—

> In his opinion it was necessary for the plaintiff to make out a case of negligence against the defendants, and if he succeeded in doing that, it became necessary for the defendants to shew that the plaintiff had by his own negligence contributed to the accident, and, if the jury were satisfied that that was made out, the question arose whether, in spite of that contributory negligence, the defendants, by the exercise of reasonable care, could have done something to avoid the accident. That also was a question for the jury. He did not think that they could say in such a case, that as a matter of law, there must be a nonsuit. It was true that in *Davey* v. *London and S. W. R. Co.*, 12 Q.B.D. 70, the Court did hold in a case somewhat like the present that it was the duty of the Judge to nonsuit the plaintiff because it was apparent that he had been guilty of contributory negligence. Lord Justice Baggallay, however, dissented, and Lord Esher had since expressed a doubt whether the judgment of himself and Lord Justice Bowen was right.

I think there was contributory negligence on the plaintiffs' part. I am not sure that it is made clear by the evidence—perhaps because the *locus in quo* was so well known to the counsel and myself—but the fact is and I suppose it may be taken as admitted —that there are two street car tracks on Second Street East, and that, therefore, the car was running on the east side of the street, that is, the opposite side to that upon which the plaintiffs entered upon it. Under these circumstances, I think the plaintiffs, if they had looked, could and would have seen the car in sufficient time to avoid the accident, and I think they must be held guilty of negligence in not looking.

On the other hand, notwithstanding the plaintiffs' negligence in this respect, I think as I have already said, that, even so, the accident would have been avoided or at least greatly

minimized if the defendant's motorman when he saw that the plaintiffs were not, as he supposed, going to turn so as to parallel the car line but to cross it, had reversed the power on the car which he probably would have done had he understood that it could be done.

I think, therefore, that the plaintiffs are entitled to judgment, and I assess the damages at $120, payable to the plaintiff Hercovisch, and $1,000, payable to the plaintiff Harnovis. There will be no costs. Forsyth, for plaintiffs. Moffatt, for defendant.

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## GARCIS v. WATSON.

*Alberta Supreme Court. Trial before Walsh, J. May 3, 1912.*

SALE (§ III D—40)—*Purchase of Growing Hay—Refusal to Accept Delivery — Opportunity Given Purchaser to Inspect—Passing of Property — Implied Warranty—Judicial Discretion as to Awarding Interest.*]

WALSH, J.:—The real defence to this action is that the hay which the plaintiff cut and appropriated to this contract is not the hay which the defendant bought from him. The only evidence on this point is the evidence of the parties themselves. A day or two before the contract was made they drove out to the land on which the hay was growing. The plaintiff's evidence is that he pointed out to the defendant the land that was his and the hay which was to be cut from it and to form the subject-matter of the contract which they were then negotiating. The defendant denies this. He says that from his examination of the land since then and judging from the position of the stacks of hay which have been cut by the plaintiff and which are now on the land, what the plaintiff shewed him as being the land from which the hay was to be cut lies about a quarter of a mile to the east of the most easterly of these stacks of hay. I have to decide between these two witnesses as to which is correct. They both impressed me as being honest and truthful men. I do not think that either of them would, so far as I can judge by his demeanour in the box wilfully state an untruth. My opinion, however, is that the plaintiff is right in his statement of the facts. The land from which the hay was cut was his; he was familiar with its location from the ownership of it. The defendant was a stranger in the country, having only been in it about three months and having, as he himself says, a very confused idea of the location of the sections and the different parcels of land in that neighbourhood. I think that he has been mistaken, his mistake arising from the natural confusion which a new arrival in this country would be under in

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making, for the first time, an examination of what was practically prairie land. My finding of fact, therefore, upon this question is that the hay which the plaintiff cut was the hay with respect to which he and the defendant contracted.

Mr. Locke has argued that no delivery or offer to deliver the hay has been established and as the plaintiff's action is for the price of goods sold and delivered that was necessary. The evidence is that the plaintiff did notify the defendant that the hay was there ready for him so that there was this offer. After this the defendant negotiated with one McKay for the sale of the hay to him which act was, I think, inconsistent with the plaintiff's ownership. I think, that, under this contract, and in the events which have happened the property in this hay passed to the defendant before the commencement of this action. Then the statement of defence alleges that it was an express or implied condition of the agreement that the hay should be cut, cured and stacked in a good, thorough and workmanlike manner and when stacked it should be good, merchantable upland hay. There certainly was no express contract as to the quality of the hay and I do not think that under the circumstances any such condition could be implied. The defendant examined and inspected this hay before he purchased it. He knew exactly what he was purchasing and I think that he got what he purchased. I do not see how under these circumstances any implied condition as to the quality of the hay could arise. Even, if so, the evidence does not satisfy me that the hay did not answer this requirement. There is no evidence at all as I recollect it, to shew that the hay was either cut or cured or stacked in an improper manner. The only evidence offered by the defendant, as to the condition of the hay is that of Mr. Pillman, who went to it in company with Mr. McKay. Mr. McKay took a handful of hay from each of two of the five stacks. The handful which he took from one stack was described by Pillman as being a coarse, rough hay not suitable for the livery business and hay which he would not take himself but that the handful from the other stack was of a better quality and that he would use it. I cannot see how, under any circumstances, one handful of hay from a 55-ton lot could be taken as a fair sample of the entire 55 tons and that is the length to which Pillman's evidence goes. I think, therefore, that even if the defendant was entitled to rely upon the condition which he says should be implied from this contract, that he has failed to establish a breach of that condition and he, therefore, cannot successfully raise that as a defence to this action.

The evidence of the plaintiff shews that his land from which this hay was to be cut was the south half of section 13: I think,

under the authorities, he had a right to identify the property in that manner and that being identified in this manner the defence of the Statute of Frauds under sec. 6 of the Sale of Goods Ordinance, raised by the defendant cannot prevail. I think, therefore, the defendant must pay for this hay. The plaintiff makes a claim for interest.. I think this is a proper case in which I should exercise the discretion which I have to disallow the claim. It is a case of hardship on the defendant, largely, I must admit, through his own fault. The hay which he has bought and for which, in my judgment stands, he must pay, is now of no value whatever.

The plaintiff made a good bargain and I think the price which the defendant agreed to pay was a good, if not an excessive price, for the hay. He has made more, I think, than a reasonable profit out of it, and I do not think I will implement that profit by adding the interest which he claims on the purchase price.

The judgment, therefore, will be for the plaintiff for $440, being the value of 55 tons of hay at $8 a ton with costs. On the defendant's counterclaim his right to be paid the amount of the promissory note is admitted. The rest of the counterclaim was withdrawn some time before the trial began and the defendant will be entitled to judgment upon his counterclaim for $69, being the amount of the note with interest to date and that amount will be set off against and deducted from the amount of the plaintiff's judgment. I think there should be no costs of the counterclaim. In strictness the defendant would be entitled to his costs of the counterclaim on the small debt scale and the plaintiff would be entitled to set off against them his costs of the counterclaim on the Supreme Court scale. The costs on the small debt scale could not amount to a very large sum, and practically all the costs which the plaintiff has incurred with respect to the other parts of the counterclaim is the delivery of the defence to the same. I think these costs could practically balance one another and there will therefore be no costs of the counterclaim. Murphy, for plaintiff. Locke, for defendant.

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## SHERMAN v. MABLEY.

*Alberta Supreme Court. Trial before Walsh, J. May 2, 1912.*

SALE (§ II A—27) — *Implied Warranty — Purchase of Specified Animals — Burden of Proof of Shewing that Animal Delivered Corresponds with Those Purchased—What Amounts to Acceptance—Refusal to Accept—Notice of.*]

WALSH, J.:—I have carefully considered the conflicting evidence in this rather peculiar case and I must confess that I

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have had a good deal of difficulty in arriving at a satisfactory conclusion respecting it. The plaintiff's case as framed in his pleadings is on a cheque of the defendant for $650 payment of which was stopped by him. The case, however, throughout the trial, was treated as being brought to recover the balance of the purchase price of certain animals sold and delivered by the plaintiff to the defendant; I having intimated that in my opinion that was the proper form of action and having expressed my willingness that the pleadings should be amended accordingly.

The agreement between the parties, as I find it, was that the plaintiff sold to the defendant one specified hog, seventy-one specified sheep and eighteen specified lambs, for $675, of which $25 was paid in cash at the time and the balance of which, $650, was to be paid on the delivery by the plaintiff to the defendant of these animals at the Lacombe stock yards. This agreement was oral but there is practically no dispute between the parties as to its terms. The plaintiff did deliver one hog and eighty-nine sheep and lambs to the Lacombe stock yards, and he says these are the identical animals which formed the subject-matter of this contract. The defendant admits the delivery of one hog and eighty-nine sheep and lambs but he says the sheep and lambs which were delivered were not the sheep and lambs for which he contracted. He says that instead of there being eighteen lambs in the flock delivered there were thirty, making an increase of twelve in the number of lambs and a corresponding shortage, of course, in the number of sheep and it is around this point that this expensive warfare has been waged. I think the onus is upon the plaintiff of proving the delivery of the hog, sheep and lambs contracted for and I do not think he has satisfied that burden. The animals were loaded on the car at Lacombe and shipped to Vermillion. There is no doubt in the world and I find as a fact that on the arrival of this car at Vermillion there were twenty-nine lambs in that flock. A man named Fife had taken one of them from the defendant at Lacombe, bringing the total of the lambs, therefore, up to thirty. I find this on the evidence of the defendant himself, corroborated as it is to some extent by the evidence of his two witnesses, Woods and Rutherford. My finding, therefore, of this issue is that the plaintiff did not deliver to the defendant the identical sheep and lambs which were contracted for.

I do not think that the shipment of these animals to Vermillion under the circumstances constituted an acceptance of them by the defendant which would make him liable to pay for them. They were delivered by the plaintiff at the stock yards after dark. He and the defendant did not meet that day until about eight o'clock in the evening, this being towards the end of Nov-

ember and the plaintiff made a statement to the defendant then which I think the defendant was justified in treating as a representation that the animals which he had left at the stock yards were the identical animals which the defendant had agreed to buy. The defendant had not seen them then that day, but acting on the strength of his representation he gave the plaintiff his cheque for $650 being the balance of the purchase money. After that the defendant went to the stock yards but there was no light in the yards by which the lambs could be distinguished from the sheep. The defendant did not busy himself actively in the loading of the animals, having left that to a friend named Fife and two of the railroad men, none of whom could be treated in any sense as the agents of the defendant for the acceptance of this delivery.

I find that the shipment was made from Lacombe by the defendant in ignorance of the actual composition of the flock and in reliance upon the representations made to him by the plaintiff. His repudiation of the delivery was very prompt. The car arrived at Vermillion on the morning of the second day after the shipment from Lacombe and the discrepancy which existed was made plain to the defendant immediately. He started back from Vermillion on the same day to notify the plaintiff that he would not accept these in performance of the contract and he at once notified him verbally to that effect. He followed this up with a written notice on his return to Vermillion. I find, therefore, that there was no acceptance by the defendant of the sheep and lambs which the plaintiff delivered at Lacombe.

On this finding the defendant is entitled to a judgment dismissing the action. It was agreed, however, yesterday on my suggestion that if my finding should be in favour of the defendant he should retain the sheep and the lambs which have been in his possession ever since and should pay the plaintiff for them the balance of the purchase price, $650, less such sum as I should fix as representing the difference in value between the twelve sheep and the twelve lambs which were substituted for them. I find the average value per head of the sheep which the defendant bought to be $8 and the average value per head of the lambs to be $4.40. I arrive at this by a simple arithmetical calculation. I take the evidence of the defendant which is the only evidence as to the value of the lambs. He states their average weight at 80 pounds and their value at five and one-half cents per pound, making $4.40 per head. There were eighteen lambs in the flock which at $4.40 per head would be $79.20, as representing the value of all of the lambs which the defendant agreed to buy. For the purposes of this calculation I take $650 as the total purchase price, attributing the

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$25 cash paid at the time of the contract to the value of the hog. Deducting from the $650 the sum of $79.20 as representing the value of the lambs the balance of $570.80 is left which, divided amongst seventy-one sheep, makes in round figures $8 per head. The difference, therefore, between the average value of the sheep and the average value of the lambs is $3.60 per head, which, multiplied by twelve, makes $43.20, and deducting this from $650 the balance is $606.80, the amount which the defendant will have to pay the plaintiff. The defendant is entitled to his costs of defence and counterclaim. These will be taxed and the defendant will be entitled to retain the amount of the costs as taxed out of the sum of $606.80 and the payment by him to the plaintiff of the difference will be a full satisfaction of the judgment and a full settlement of all matters in dispute in this action. It is lamentable that this costly litigation should have been indulged in over such a trifling amount, but I think the blame for it should be laid at the door of the plaintiff. The defendant was within his rights in refusing to accept goods differing from those he contracted to buy. I think the offer he made to the plaintiff that he would pay his expenses to Vermillion and return for the purpose of enabling him to satisfy himself with respect to this mistake, if it was found on this examination that the defendant was not right in his statement, was an eminently fair offer and I am rather inclined to think that the plaintiff's refusal to accept it was based to some extent at least on his knowledge that his examination of the animals would only result in establishing the contention of the defendant. Macdonald, for the plaintiff. Murray, for the defendant.

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**CANADIAN PACIFIC R. CO. v. TRUSTS AND GUARANTEE CO. Limited.**

*Alberta Supreme Court, Walsh, J., in Chambers. May 17, 1912.*

PLEADING (§ III C—328a)—*Sufficiency of Plea of Payment —Paying into Court Amount of Plaintiff's Claim with Reservation of Rights—Striking Out as Embarrassing.*]

WALSH, J.:—The plaintiff's claim is for payment of the arrears of purchase money and in default absolute foreclosure under an agreement made between it as vendor and one Sorenson as purchaser, for the purchase from it by Sorenson of certain lands, which agreement was afterwards assigned by Sorenson to the defendant, the assignment containing a covenant by the defendant with the plaintiff for the payment of the purchase money.

The statement of claim contains all of the allegations necessary to entitle the plaintiff to the relief which it asks. There

are but four paragraphs in the statement of defence. Paragraph 1 expressly admits all of the allegations contained in the first fifteen paragraphs of the statement of claim. The defence is silent as to the remaining two paragraphs of the statement of claim, the allegations contained in which are therefore taken to be admitted. Paragraphs two and three of the defence allege that the defendant holds the said assignment as trustee for the original purchaser Sorenson and certain others who have made advances to him and that Sorenson claims to have certain rights of action against the plaintiff arising out of its breach of the said contract. Paragraph 4 brings into Court the full amount of the plaintiff's claim

> with the reservation of all rights under the contract sued on herein of the said Henry Sorenson or all other parties interested under and by virtue of the said contract.

The plaintiff moves under rule 127 to strike out paragraphs 2 and 3 of the statement of defence which I have summarized as above and the reservation which the defendant seeks by paragraph 4 to attach to its payment into Court. Paragraphs 2 and 3 are manifestly pleaded as introductory to and explanatory of this reservation. Standing by themselves they are badly pleaded. Their allegations, even if true, afford no defence to the action and they therefore violate rule 109 which says, in substance, that every pleading shall contain only the material facts on which the party relies for his defence. If the statement of defence contained only those two paragraphs the plaintiff would undoubtedly be entitled to judgment upon the pleadings for the relief claimed by it.

If, however, the condition which the defendant seeks to impose upon its payment into Court remains upon the record it may be that the statements contained in the offending paragraphs should be allowed to be pleaded but in different form from that in which they now appear. Is there then any authority for this attempt on the part of the defendant to make this payment in other than an unqualified, unconditional payment? Provision is made in our practice for but two methods of payment into Court, both of which are to be found in rule 130. One of these is a payment "by way of satisfaction which shall be taken to admit the claim or cause of action in respect of which the payment is made"; the other is with a defence denying liability.

In the absence of any rule permitting a defendant to impose upon his payment into Court any qualifications or restrictions, I do not think that he can do so. The money in this case was paid in by way of satisfaction and by force of the rule the plaintiff's claim and therefore its right to the money is thereby admitted. This reservation is, I think, embarrassing to the

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plaintiff. If it takes the money out of Court it must do so subject to the qualification which it is under by the terms of the pleading with which it is paid in. What difficulty that might subject the plaintiff to in its future dealings with this contract, I cannot say, nor I suppose can the plaintiff foresee.

I think that it is entitled to have its right to this money absolutely and unconditionally determined in this action and it cannot be sure that this has been accomplished if it takes this money out of Court subject to the terms which the defendant seeks to impose upon it. The rights which the defendant seeks by this method to protect from prejudice arise out of facts which should either be pleaded by way of defence to this action or be asserted by way of counterclaim or cross-action. If they fall within the first class they should be now set up as a defence. It would be intolerable that the defendant should admit its liability in this action and then be allowed to sue to recover back from the plaintiff the amount paid in satisfaction of its liability, basing its right to do so upon a state of facts which might have enabled it to defeat the plaintiffs' action. If they fall within the latter class no prejudice can possibly result to the defendant by its unconditional payment of the amount claimed.

I understood Mr. Ross to say that all of these rights with one exception are such as should be made the subject of a counterclaim or of a cross-action. The plaintiffs' motion is entitled to succeed and the order will go striking out paragraphs 2 and 3 of the statement of defence and so much of paragraph 4 as sets up the reservation in question. I think, however, that the defendant should have an opportunity if it so desires to amend its defence by setting up such facts as should be pleaded as a defence or a partial defence to this action and to reduce the amount of its payment into Court accordingly. Unless such amended defence is delivered within seven days from the service of this order upon the defendant's solicitors (pending which the money is to remain in Court) the money may be paid out to the plaintiff upon proof being filed with the clerk of the service of this order and of the defendant's failure to amend. The plaintiff is entitled to the costs of this motion. Walker, for the plaintiff. Ross, for the defendant.

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## GREAT WEST LIFE INSURANCE CO. v. LYTTLE.

*Alberta, District Court, Calgary, Judge Carpenter. May 20, 1912.*

INSURANCE (§ III H—156)—*Premium notes—Liability of maker—Effect of failure to pay—Avoidance of policy—Condition in application—The Insurance Act, R.S.C.* 1906, *ch.* 34, *sec.* 71.]

JUDGE CARPENTER:—This action is on a promissory note given for the first premium on an insurance policy on the life of the defendant, amounting to $231, and interest thereon as set out in the note. The defence as amended at the trial, resolves itself into a plea of partial failure of consideration and the defendant brings into Court the sum of $58.90, being proportionate amount of the premium note and claims that that amount is sufficient to satisfy the plaintiffs' claim.

In the application for the insurance, signed by the defendant, there is a proviso that

> if a note . . . be given for the first or a subsequent premium or any part thereof, and the same be not paid at maturity, such policy shall thereupon become void but the note . . . must nevertheless be paid.

In the policy itself there appears a proviso

> that if default is made in payment of the first or any subsequent premium or any part thereof, or of any note, cheque or other obligation given on account thereof, said policy shall cease and be void, subject, however, to certain rights in respect of policies on which three full years' premiums have been duly paid as herein otherwise provided, but it may be revived on production of evidence satisfactory to the company of continued good health and the payment of overdue premiums with interest thereon at the rate of seven per cent. per annum.

There is no denial on the part of the defendant as to the issue and delivery of the policy, but, as I have said before, the claim is made that the payment of the proportionate amount of the premium up to the time that default was made by the defendant in the payment of the note, which was ninety days after the date thereof, this date corresponding with the date of the application, relieves the defendant of any further liability.

The objection was raised by defendant's counsel that this clause as it appears in the application, comes within the proviso of section 71 of chapter 34, R.S.C., that is the Insurance Act. I must hold, however, that the proviso occurring in the application does not come within the operation of this section.

In the *Manufacturers' Life Insurance Co.* v. *Gordon*, 20 A.R. (Ont.) 309, the facts in regard to the proviso for forfeiture for non-payment and the payment nevertheless of the notes given, are to all intents and purposes identical with the case before me. The application in that case provided that if any note given for the first or any subsequent premium was not paid at maturity, the policy should thereupon become void, but the note must, nevertheless, be paid, while in the policy itself there was a proviso that if within two years from the commencement of the insurance any note given on account of the first or second years' premium should not be paid, the policy should be void and all payments made upon it should be forfeited. It was held that the proviso in regard to the payment of the note did not come

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within the provisions of section 71 of the Insurance Act referred to, but that it was rather

> an agreement in no way affecting the contract, but defining what the rights of the parties should be in respect of the note or notes given for the premium. The effect of the non-payment at maturity is disclosed on a condition which is set out in full on the back of the policy and the only object of this collateral agreement is to avoid all doubt about suing on the note being considered a waiver of the previous forfeiture. *Per* Burton, J.A., p. 328.

As I have said before, the case here cited is indistinguishable from the one now under consideration, and the question as to the right to insist upon the forfeiture and also to recover the note, and whether the assured could have set up any defence on the ground that the policy had lapsed, is dealt with in the judgment of Maclennan, J.A., *Manufacturers' Life Insurance Co.* v. *Gordon*, 20 A.R. (Ont.) 309, at p. 335, where he held that the note was given for valuable consideration, and that the assured was liable to pay the note whether the company chose to insist upon the forfeiture or not. And see also the judgment of Haggarty, C.J.O., in *McGeachie* v. *The North American Life Assurance Co.*, 20 A.R. (Ont.) 187. This case is approved of in the *Manufacturers' Life Insurance Co.* v. *Rowes*, 16 Man. L.R. 540, where it was held that a person who applies for and receives a policy of life insurance, and gives his promissory note for the amount of the first premium, payable in three months, cannot by refusing to pay the note and returning the policy avoid liability for the full amount of the note, although the policy becomes void by reason of such non-payment. In that case, the condition as to the forfeiture for non-payment and payment of the note nevertheless, was incorporated in the policy, but as appears from the case I have before referred to, this distinction is immaterial. For the reasons I have given there will be judgment for the amount of the note, together with interest as therein set out, and costs.

## THISTLETHWAITE v. SHARP.

*Battleford District Court, Saskatchewan, Judge Maclean. March 5, 1912.*

FIXTURES (§ IV—23)—*Building—Landlord and Tenant.*]—Trial of action for possession of a building or for damages for illegally retaining possession thereof.

*A. M. Panton*, for the plaintiff.
*F. R. Conroy*, for the defendant.

MACLEAN, Dist. Judge:—The plaintiff, in the month of October, 1911, rented (for two months) from one Mrs. George H. Stephenson, lot 11 in block 12, plan B-3419, in the town of Norfolk Battleford, with the residence thereon, and occupied the same for a time. During the tenancy, on the 8th November, Mrs. Stephenson conveyed the lot and residence to William M. Sharp, the defendant. When the lot and premises were rented as aforesaid by the plaintiff, permission was given to him to construct a small building which was to form a lean-to connected with the house already erected thereon; and the plaintiff was, at the time, given permission to remove the same when he vacated the place on giving up the tenancy. The building so erected by the plaintiff was, on the 15th November, while he was in occupation of the premises, disconnected and removed a short distance from the other building, preparatory to moving it. The plaintiff moved out on the 18th November; and, although his tenancy had not expired, he allowed the purchaser to take possession.

In this action, the plaintiff claims possession of the said building from the defendant, or, in the alternative, damages for the illegal possession of the same. The question whether the building formed part of the realty or was a chattel was argued at length by counsel for the plaintiff and defendant; but I do not require to decide that point, in view of my present finding. The purchaser, the defendant, knew that the plaintiff was tenant at the time he bought. There is evidence that the defendant was also told that the shack did not belong to the house; and George H. Stephenson, the husband of Mrs. Stephenson, who sold the property, and her agent, notified the defendant on the 5th December as follows:—

> This is to certify that Mr. Thistlethwaite erected the shed to the kitchen at his own expense and which belongs to him. Please allow him to remove same.

The legal authorities that I have examined all decide that possession by the tenant is constructive notice to the purchaser of the terms and conditions of lease. The purchaser, knowing that the plaintiff was a tenant, is bound by all the

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conditions and stipulations agreed to as between Mrs. Stephenson and Mr. Thistlethwaite.

In Preston on Abstracts, 2nd ed., vol. 5, p. 400, it is said that

> possession by a tenant is constructive notice of his lease, and of all the stipulations in his lease and renders it incumbent on a purchaser to take notice of the nature and extent of the interest of a tenant.

In *Hunt* v. *Luck*, [1902] 1 Ch. 428, Vaughan Williams, L.J., says:—

> Speaking for myself . . . I think that the conclusion of Farwell, J., was right. In his judgment he, after quoting the older authorities, said (1): "The rule established by these two cases may be stated thus: (1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights." . . . We have therefore to apply the first of the rules stated by the learned Judge. Now, what does that mean? It means that, if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession. That, I believe, is a true statement of the law. . . .

See also Bell on Landlord and Tenant, 1904 ed., pp. 505-6.

Even if the building in question form part of the realty, the plaintiff can remove it under his contract with the lessor, of which contract the purchaser had legal notice.

In *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, Smith, L.J., says:—

> It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—i.e., part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, but Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the monthly instalments. In our opinion, the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given by contract. But this right was not an easement created by deed, nor was it conveyed by a covenant running with the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right; and the defendant Gorringe is such a purchaser. . . . That a person can agree to fix a chattel to the soil of another so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to retake possession, we do not doubt. . . .

Were I required in this case to decide whether or not this building or lean-to was a fixture, I should be inclined to the view that the intention of the parties should be considered, and that it remained a chattel; but I am not called upon in

this case to give a finding on that point. The plaintiff has the right to move the building in question, and I so find; and an order may go accordingly. If, however, he prefer to allow it to remain on the property—the defendant having refused to give him the right to remove the same and thereby being liable for a wrongful act—he, the plaintiff, can have judgment for the value of the building, if he so desire, which value I fix at $100, the amount the plaintiff testified to in his evidence as being the cost of the building to him. The plaintiff stated that he could have rented the building had he been allowed to remove it; and I allow him two months' rent at $8 per month. I also allow him $15 damages for the illegal possession by the defendant. The plaintiff hired a man to remove the building, and incurred expense owing to the refusal of the defendant to allow its removal. The defendant counterclaims for damages for injury caused to his residence through moving the plaintiff's building or lean-to. The plaintiff, in his pleading, denies all damage. There was conflicting evidence of the amount of damage done; the defendant asserts that the main building was injured, the plaster broken, and the kitchen parted from the stone building. The evidence does not satisfy me on this point. Mr. Streeter, a witness, is positive that the only damage was the splitting of the base board, the corner boards, two or three pieces of the siding, two drops broken, a piece of the cap ripped, and the steps removed. I am prepared to believe that the plaster may have also been injured, as the main building may have been shaken somewhat. Mr. Streeter says that he removed the top rails fastening the lean-to to the main building before he removed the 2 by 4 blocks, the underpinning; but I find from his evidence, on cross-examination, that he says:—

> The shack was nailed far enough to hold. I released all nails first before we moved it; didn't remove all; the rest came loose when we knocked two by fours from underneath.

From this statement I can understand that the main building was somewhat shaken, and that the plaster would be broken in consequence of the disconnecting of the building. The plaintiff and Streeter both swore that $5 would repair all the damage. They do not take into consideration any injury except what was caused to the outside of the buildings; in view, however, of all the evidence, I fix the damage at $25, being the amount which the plaintiff testified the defendant asked from him when the matter of the damage was first spoken of. I allow nothing for the crevice between the buildings, as Streeter has testified that there was a crevice between the kitchen and the stone building before he removed the lean-to; and that he used a gauge or piece of wood to make sure

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whether or not the opening would be enlarged by the disconnecting of the said lean-to. Streeter was the only witness who gave positive evidence on this point; the other witnesses gave opinions only as to the crevice and what caused it. Counsel for the plaintiff hinted, at the trial, that the defendant should not recover on his counterclaim, because the plaintiff was willing to repair any damage; but he could and should have made good the loss, even although possession of the building was refused him. This was a duty to be done, even if he had or had not a legal right to remove the building, and he should not have delayed repairing any damage caused by him. In the plaintiff's reply to the defence he denies all damage, and the defendant was entitled to prove his counterclaim, and is now entitled to recover.

I allow plaintiff the possession of the said building or, in the alternative, its value, which I fix at $100; also $16 for rent and $15 for damages for illegal possession, with costs; the plaintiff must make his choice within 15 days from the date of this judgment. I allow the defendant on his counterclaim the sum of $25, with costs in so far as he succeeds; and the same shall, on taxation, be set off against the plaintiff's claim and costs, and judgment be entered for plaintiff for the balance.

*Judgment for plaintiff.*

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**FISHER v. McLEOD.**

*Saskatchewan Supreme Court, Parker, M.C. September 20, 1912.*

PARTIES (§ III—120)—*Adding Additional Third Parties — Application by Present Third Parties — Joint Liability.*] —Application on behalf of Stobart Sons & Co., Ltd., and Greenshields Western, Ltd., added as third parties, for an order compelling the defendant to add certain other co-contractors as third parties, in addition to themselves.

PARKER, M.C.:—Under and by virtue of an agreement dated the 3rd March, 1908, the defendant purchased from Hamelin Bros. & Co., of which company he was also a shareholder and creditor, all the assets of the company, according to terms more particularly set out in the said agreement. All the creditors of the company joined in the agreement and executed the same. The agreement contains the following clause:—

> It is further understood and agreed that, if action should be brought against the said party of the second part by any shareholder of the company, creditor of the company, or any person on account of or in connection with the said sale to the party of the second part of said assets, the said creditors will indemnify and save harmless the

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said party of the second part against and from all costs or expenses which he may sustain or be put to in connection with any and all such action.

I am of opinion that the liability created by the above clause is a joint liability on the part of the creditors who joined in the agreement, and the two creditors added as third parties are entitled to have their co-contractors joined with them. The defendant McLeod, as far as his relation to the third parties is concerned, is in the position of a plaintiff, and the third parties in their relation to him are in the position of defendants: *Pilley* v. *Robinson*, 20 Q.B.D. 155; *Kendall* v. *Hamilton*, 4 App. Cas. 504.

It was contended by counsel for the defendant that Rule 74 (Sask. Judicature Rules, 1911) applies only to a defendant. Section 2, sub-sec. 8, of the Judicature Act, defines a defendant as follows:—

> "Defendant" shall include every person served with any writ or summons or process or served with notice of or entitled to attend any proceeding.

I am of opinion, therefore, that the applicants in this motion are defendants, within the meaning of this definition. See *Fowler* v. *Knoof*, 36 L.T.R. 219, which is a decision under sub-sec. 3 of sec. 24, of the English Judicature Act, which is identical with sec. 2, sub-sec. 8, of our Judicature Act.

The order will go directing the defendant to join as third parties all the creditors who joined in the agreement. Costs of the motion to the third parties in any event. F. L. Bastedo, for the applicants. E. B. Jonah, for defendant.

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## HICKLE v. CANADIAN PACIFIC R. CO.

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*Alberta Supreme Court. Trial before Stuart, J. November 9, 1912.*

DAMAGES (§ III I 4—190)—*Personal Injuries—Instance of Amount—Actual Suffering—Loss of Earnings.*]—Trial of an action for damages for personal injuries. Judgment was given for the plaintiff for $1,500.00. STUART, J.:—It is exceedingly difficult upon the evidence to say how much damages should be allowed in this case. I have no doubt, of course, that the plaintiff received a rather serious injury and that he suffered considerably as a result of it. I have no doubt either in view of the medical testimony that the accused is still in poorer health than he would have been if the accident had not happened. The doubt in the case arises from the uncertainty as to the permanent or temporary character of his trouble. On the whole the medical testimony leaves a strong impression on my mind that

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the injury is not permanent but that a full recovery is probable. In any case, I think the burden was on the plaintiff to prove a permanent injury and I do not think he did so, although Dr. Graham's evidence, called by the defence, does suggest the possible necessity of a serious operation before a full recovery could be expected. I cannot, however, base my assessment of damages on the basis of a permanent injury because that has not been proven. The plaintiff did no doubt suffer some pecuniary loss from not being able to do as much work on his houses as he would otherwise have done, but even this it is hard to estimate with any degree of certainty. Taking his undoubted actual suffering and discomfort into consideration as well his undoubted present general debility and his undoubted pecuniary loss of some amount, I am of opinion that the sum of $1,500 is not an excessive amount to allow him. It is not a light thing to be deprived of one's good health for over a year and apparently for nearly two years. I hesitate to go beyond the amount named because I think I should then be beginning to approach the area of uncertainty and perhaps of excess.

There will be judgment for $1,500 and costs. I. W. McArdle, for plaintiff. G. A. Walker, for defendant.

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## BATES v. KIRKPATRICK.

(Decision No. 2.)

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 24, 1912.*

[*Bates* v. *Kirkpatrick*, 4 D.L.R. 395, affirmed.]

BANKS (§ VIII—160)—*Statutory security—Chattel mortgage as collateral.*]—Appeal by defendants the Union Bank from the decision of Macdonald, J., 4 D.L.R. 395, 21 W.L.R. 607.

*A. E. Hoskin*, K.C., for the defendants, the Union Bank.
*J. P. Curran*, K.C., for the plaintiff.

The Court dismissed the appeal without calling upon the respondents.

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## COAFFEE v. THOMPSON.

(Decision No. 2.)

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 29, 1912.*

[*Coaffee* v. *Thompson*, 5 D.L.R. 9, affirmed.]

VENDOR AND PURCHASER (§ I C—13*a*)—*Undisclosed building*

*restrictions.*]—Appeal from the decision of Mathers, C.J.K.B., 5 D.L.R. 9, 21 W.L.R. 905.

*J. E. O'Connor*, K.C., and *W. S. Morrisey*, for the plaintiff.
*J. B. Coyne* and *L. J. Earle*, for the defendant.

The Court dismissed the appeal without calling upon the respondent.

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## MIKULASIK v. SCOUTEN.



*Yale County Court, B.C., His Honour Judge Swanson. April 29, 1912.*

FIRES (§ I—6)—*Sparks from a Threshing Engine—Setting Fire to Property on Adjoining Land—Negligence.*]—Trial of action for damages caused by fire from a traction-engine.

*A. D. Macintyre*, for the plaintiff.
*J. R. Archibald*, for the defendant.

JUDGE SWANSON:—I find that the evidence does not disclose any negligence on the part of the defendant.

The plaintiff relies on the doctrine of *Fletcher* v. *Rylands*, L.R. 1 Ex. 265, affirmed *sub nom. Rylands* v. *Fletcher*, L.R. 3 H.L. 330, 37 L.J. Ex. 161, as determining the defendant's liability. The plaintiff contends that the defendant, in using a dangerous machine like a steam traction-engine, must do so at his own peril; and, if he causes injury to others, whether he is guilty of negligence or not, he must be held liable, on the old theory of the man who keeps a wild beast on his premises being responsible in any event for damages caused by the escape of the animal.

I was inclined at the trial to hold that, to fasten liability upon the defendant, negligence must be shewn on his part. My views were based upon the Manitoba cases: *Booth* v. *Moffat*, 11 Man. L.R. 25; *Owens* v. *Burgess*, 11 Man. L.R. 75; *Chaz* v. *Les Cisterciens Reformes*, 12 Man. L.R. 330; also the Upper Canada case, *Dean* v. *McCarty*, 2 U.C.R. 448.

With all respect, it seems to me out of keeping with the modern conditions of industrial life in this country to hold that so beneficial and so commonly used a machine as a traction-engine should be practically placed in the same category as a wild beast, so as to render the owner liable for damages in the event of loss happening, apart from any default or negligence on the owner's part. Had the owner of the traction-engine been an incorporated body with statutory powers to run traction-engines, the owner would have escaped liability, following the reasons set forth by Mr. Justice Blackburn, in *Jones* v. *Festiniog R. Co.* (1868), L.R. 3 Q.B. 733, 37 L.J.Q.B. 214. Mr. Justice

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Blackburn refers to *Fletcher* v. *Rylands*, which had already been decided in the Exchequer Chamber in which he gave judgment, the latter case being affirmed by the House of Lords in 1868: L.R. 3 H.L. 330.

There is apparently a diversity of view as to the application of the doctrine of *Fletcher* v. *Rylands* to the modern conditions of industrial life in Canada amongst the Judges of the different provinces.

Chief Justice Hunter has held in *Crewe* v. *Mottershaw*, 9 B.C.R. 246, that this doctrine is applicable in the case of a question as to liability for loss occasioned by setting out a bush fire for settlement purposes. A similar question is now under advisement by the Court of Appeal of British Columbia in *Derby* v. *Ellison*.

I find, however, that in the case at bar, I am bound by authority directly in point, a decision of the English Court of Appeal in *Powell* v. *Fall* (1880), 3 Q.B.D. 597, 49 L.J.Q.B. 428. The headnote to that case is as follows: "A person who, without negligence, and in accordance with the provisions of the Locomotives Act, 1865, uses a locomotive engine on roads" (which is apparently the same as our traction-engine) "is liable for injuries caused to the property of others."

Two years later reference is made to this case by Mr. Justice Burton in the Ontario Court of Appeal in the case of *Hilliard* v. *Thurston* (1882), 9 A.R. (Ont.) 514. In that case the owner of a steamboat navigating the inland waters of Ontario, without legislative authority, was held liable for loss occasioned to property by fire communicated thereto by the steamer, without proof of actual negligence. Mr. Justice Burton says, at p. 523: "In my view, this case is governed by the principle of *Fletcher* v. *Rylands*. That principle applies, I think, when a person uses a thing of a dangerous character on a public highway and causes injury to another." And again, at p. 524, he says: "This proposition appears, no doubt, somewhat startling, and is an extension of the liability of steamboat owners beyond what it is generally assumed to be, and I find that in many of the American Courts the Judges have refused to extend the principle of *Fletcher* v. *Rylands*, L.R. 1 Ex. 265, and L.R. 3 H.L. 330, to cases of this description, but then in many of the American Courts the case of *Fletcher* v. *Rylands* is denied altogether, whilst with us it is a binding authority." And at pp. 525 and 526, the same learned Judge refers to *Powell* v. *Fall*, 3 Q.B.D. 597, as bearing out this view. No reference is made to either of these cases in the judgment of Chief Justice Spragge, and no reference appears in the printed notes of the argument made at the bar by the learned counsel, Mr. S. H. Blake, Q.C., and Mr. Charles Moss, Q.C. (now Chief Justice of Ontario).

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I do not find any contributory negligence on the part of the plaintiff in allowing straw to remain near the roadway on his own farm in the places where it was thrown out by the separator.

I distinguish on this point the case of *Cairns* v. *Canadian Northern R. Co.*, 10 W.L.R. 39 (Newlands, J.), in which the plaintiff was held guilty of contributory negligence. In the Saskatchewan case, the plaintiff piled baled hay near the defendant railway company's tracks along which engines emitting sparks in the usual course were constantly passing. Sparks from the railway engine fell on the hay, and spread to the plaintiff's warehouse. I do not think there was the least obligation resting on the plaintiff in the case at bar to guard against such an unusual casualty as that which occurred in the present case. I think the plaintiff's claim has been greatly magnified and padded up. The defendant acted somewhat generously to the plaintiff after the accident in providing hay, straw, and a small quantity of lumber. Under the circumstances, I will allow judgment for the plaintiff for $50 and costs.

*Judgment for plaintiff.*

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**LORD** v. **BERGERON** et al.

*Quebec King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.*

CONTRACTS (§ VIII—440)—*Wrongful Interference — Preventing Owner of Chattels from Removing Same—C.C. (Que.), Art.* 1053.]—This was an appeal from a judgment of the Superior Court (Martineau, J.), dismissing appellant's action with costs.

The appellant's action was one for $500 damages against several citizens of Marieville and Rev. Paul Desrochers. He had bought certain furniture and a refrigerator from the Seminary of Ste. Marie de Monnoir; when he went to get these at the Seminary on May 9th, 1910, he was refused permission to remove them by the Rev. Abbé Desrochers, aided and helped by the co-defendants. The Abbé stated he was acting under instructions from his curé, and intimated there would be resistance to any attempt at removal. No overt act, however, was done by either party. The appeal was allowed and several of the co-defendants condemned to pay $50 and costs of appeal.

ARCHAMBEAULT, C.J., and CARROLL, J., dissented.

CROSS, J., rendering judgment for the majority of the Court, after he had reviewed the evidence, said:—

"It is argued for the defendants that they have violated no

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law and committed no offence or quasi-offence; that they uttered no defamatory word and were guilty of no violence. Even without taking into consideration, for the moment, the legal effect of the threatening movement which was made when the plaintiff was about to take away the refrigerator, it appears to me that the words uttered by these three defendants suffice to ground an action under 1053 C.C. If a plaintiff desiring to remove his goods finds confronting him a defendant who says, 'You will not take the goods,' and the plaintiff thereupon answers, 'Well, I will hold you responsible for the loss and outlay which I suffer by your interference,' our law would be but a futile instrument if it would not maintain the claim of such a plaintiff.

"Under other systems of law, there might be more hesitation in attaching responsibility. In England it had no doubt often been decided that mere words, uttered in such circumstances and not in themselves defamatory, would not give rise to a right of action, but I take it that that view does not now prevail there as the opinion appears to have been plainly stated in *Quinn* v. *Leatham*, [1901] A.C. 495, that a 'violation of legal right committed knowingly is a cause of action,' and that 'it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.' Reference may also be had to *Giblan* v. *National Amal. Society, etc.*, [1903] 2 K.B. 600, and to *Wilkinson* v. *Daveston*, [1897] 2 Q.B. 57, in which last mentioned case a defendant was adjudged to pay damages for having said to the plaintiff that her husband had just been killed.

"I therefore consider that the plaintiff established a ground of action against these three defendants." J. Demers, K.C., for appellant. L. Lussier, for respondents.

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### GRAND TRUNK R. CO. v. PARENT.

*Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll and Gervais, JJ. October 31, 1912.*

APPEAL (§ VII L 2—476)—*Review of Verdict—Liability of Railway for Causing Death.*]—This was an action for $15,000 damages suffered by the respondent as the result of the death of her husband who was killed by one of the respondent's trains on February 27th, 1911, near Clark's Island. The trial Judge maintained the action and condemned the appellant to pay $5,000 damages.

CARROLL, J., said that there was evidence of common fault in that the deceased went on the tracks in a severe storm with

his cap pulled down far over his ears, and in that the employee's company did not take any steps to prevent the accident until the train was almost on top of the victim. The Court refused to interfere in the assessment of damages as found by the trial Judge and the appeal stood dismissed. *R. G. DeLorimier*, K.C., for appellant. *A. Plante*, K.C., for respondent.

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### WATTS v. TOLMAN.

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**(Decision No. 2.)**

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ. November 18, 1912.*

[*Watts* v. *Tolman*, 6 D.L.R. 5, affirmed.]

USURY (§ II—25)—*Recovery of excess*—*Money Lenders Act, R.S.C.* 1906, *ch.* 122.]—Appeal from decision of Mathers, C.J.K.B., 6 D.L.R. 5.

*H. F. Tench*, for defendant.

*J. F. Davidson*, for plaintiff.

The Court dismissed the appeal with costs.

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### GOLD MEDAL FURNITURE CO. v. STEPHENSON.

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*Manitoba King's Bench, Metcalfe, J. October 16, 1912.*

COSTS (§ I—2)—*On dismissal—Absence of offering any evidence—Reference.*]—METCALFE, J.:—The defendants having moved for a nonsuit, and judgment being reserved, I subsequently gave judgment allowing the nonsuit as to Tina Stephenson and Margaret Stephenson, and refused the nonsuit as to William Stephenson and J. A. Stephenson. [See *Gold Medal Furniture Co.* v. *Stephenson*, 17 W.L.R. 653.]

Subsequently the case coming on again for hearing, counsel for both defendants stated that he offered no evidence. I see no reason to change my opinion as expressed in my reasons for judgment on the motion for nonsuit.

The parties having agreed that if there was liability, the amount should be ascertained by reference, there will be a reference to the Master to ascertain the amount owing.

Counsel for Margaret Stephenson and Tina Stephenson has applied for leave to tax full costs. I refuse to make such order.

*D. H. Laird* and *F. J. G. McArthur*, for plaintiffs.

*C. P. Fullerton*, K.C., *J. P. Foley* and *F. M. Burbidge*, for defendants.

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## HAM v. CANADIAN NORTHERN R. CO.

(Decision No. 2.)

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Metcalfe, and Haggart, JJ.A. October 16, 1912.*

[*Ham* v. *Canadian Northern R. Co.*, 1 D.L.R. 377, varied.]

DAMAGES (§ III O—306)—*Measure of compensation—Interest on verdict.*]—Appeal from the judgment of Prendergast, J., *Ham* v. *Canadian Northern R. Co.*, 1 D.L.R. 377, 20 W.L.R. 359, in favour of the plaintiff in an action for personal injuries arising from an accident caused by the negligence of the company.

*O. H. Clark*, K.C., for appellant.

*P. C. Locke* and *C. H. Locke*, for respondent.

The Court of Appeal by an oral judgment varied the decision of the trial Judge by disallowing the claim for interest, but otherwise dismissed the appeal without costs.

*Judgment varied.*

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## STEWART v. SAUNDERS.

(Decision No. 2.)

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ. November 25, 1912.*

[*Stewart* v. *Saunders*, 4 D.L.R. 312, affirmed.]

CONTRACTS (§ I E 4—80)—*Parol agreement to furnish part of purchase price—Partnership—Trust.*]—Appeal from decision of Prendergast, J., 4 D.L.R. 312.

*A. B. Hudson*, and *G. W. Jameson*, for plaintiffs.

*J. B. Coyne*, and *E. R. Levinson*, for defendants.

The Court dismissed the appeal.

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## FENSON v. SHORE.

(Decision No. 2.)

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ. November 25, 1912.*

[*Fenson* v. *Shore*, 6 D.L.R. 376, affirmed on appeal.]

JUDGMENT (§ III B—212)—*Judgment Act (Man.)—Certificate of judgment—Prior unregistered equitable title—Contracts.*]—Appeal from decision of Mathers, C.J.K.B., 6 D.L.R. 376.

*W. H. Trueman*, for plaintiff.

*P. C. Locke*, for defendant.

The Court dismissed the appeal.

By arrangement between the parties, no costs were awarded.

## SOMERVELL v. TROTTER.

*Alberta, District Court, Calgary, Judge Winter. April 4, 1912.*

DAMAGES (§ III A 4—76)—*Breach by buyer—Measure of compensation—Attempted cancellation.*]—Action for damages for breach of contract by refusal to accept goods ordered from the plaintiffs by the defendant.

*J. B. Roberts*, for the plaintiffs.

*A. B. McKay*, for the defendant.

JUDGE WINTER:—In November, 1907, the defendant gave an order to a firm called "Stevensons," for a parcel of five dozen pairs of "K." boots, for delivery some time in the spring of 1908. The Stevensons were acting as selling agents for the plaintiffs, though this was unknown to the defendant, who, however, knew that this line of boots was a well-known brand manufactured in England.

In January, 1908, the defendant wrote to the Stevensons cancelling the order. No copy of this letter was produced; the Stevensons deny having received it; but the defendant says that the receipt was acknowledged by them by a letter (which was lost), which letter stated that they (Stevensons) were communicating its contents to their house—or, in other words, to their principals, the plaintiffs.

By the time the notice of cancellation was received by the plaintiffs, they had shipped the goods direct to the defendant. These arrived in Calgary apparently some time in April, 1908, which was approximately the date when they were originally intended to arrive for sale by the defendant.

In April, shortly after the arrival of the goods in Calgary, the defendant had an interview there with one of the Stevensons, and he (the defendant) seems to have assumed that the cancellation of the contract had been mutually accepted. He did not pay the draft of the plaintiffs which was attached to the bill of lading for the goods, and that draft was protested for non-acceptance; but he says that, as a matter of friendship to the Stevensons, he paid the protest fees on the draft, and then seems to have dismissed the matter from his mind, under the impression that the Stevensons would clear the goods at the customs, and sell them on their own account, the consignment being a commodity which could readily be disposed of.

At this point there was evidently a mutual misunderstanding, involving a loss which might easily have been avoided.

The Stevensons state that their understanding was that the defendant was to clear the goods at the customs in Calgary and forward them to Vancouver for sale on his account; while the defendant, as above stated, considered that he had no further interest in the consignment. It should be noticed that

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the goods, having been consigned to the defendant, could have been cleared by him alone or on his order, and that he never gave or offered to give any such order to enable the Stevensons to clear the goods; so that, had the defendant bestowed ordinary commercial reasoning on the subject, he would have appreciated the fact that there was some act required of him to enable the Stevensons to obtain possession of the goods. This supports the view taken by the Stevensons, and the reasonableness of the plaintiffs' claim. As a result of the failure of any person interested in the goods to clear them at the customs, they were, in the usual course of things, sold by the customs authorities, and the plaintiffs then brought the present proceedings.

I find that the defendant entered into the contract for the purchase of the goods with the plaintiffs, "the unknown principals," through the Stevensons, and that he could not cancel that contract without being at least responsible in damages for breach thereof at the time they received notice of cancellation. They had already shipped these goods when notice of cancellation was received by them. The damage they sustained, therefore, is the contract-price, £53.5.4., for which amount judgment is given in favour of the plaintiffs, with interest at the legal rate from the date of the writ, with costs, including those of the commission for taking evidence in British Columbia and the examinations for discovery. The counterclaim is dismissed with costs.

Lest it be forgotten, I note that I understand that there is a sum in the hands of the customs authorities, being the net proceeds of the sale of the consignment, to which the defendant would be entitled on making the proper application.

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### CASE (J. I.) THRESHER MACHINE CO. v. SING.

*Alberta, District Court, Macleod, Judge Crawford. May 8, 1912.*

INTERPLEADER (§ I—10)—*Creditors' Relief Act—Validity of assignment of "future book-debts"—Attachment of debts—Priorities—Threshers' Lien Ordinance.*]—Trial of an interpleader issue.

JUDGE CRAWFORD:—Upon the hearing no evidence was adduced, but I was asked to decide the question at issue upon certain facts which were stated and admitted by counsel. These facts are not in every particular correct, as counsel for both sides admit, but stated simply and shortly they are as follows:—

(1) T. W. Linder, on or about the 18th September, 1909, bought a threshing outfit from the plaintiffs, of whom I shall

speak as the company, and entered into a written contract with the company at the time.

(2) The contract contains the following clause:—

> All moneys or earnings which shall be owing to or earned by the purchaser or work done by him during any season hereafter, either wholly or partly with or by the aid of the said machinery or any part thereof shall until the full price and interest is paid to the extent of the purchase-money hereunder or notes therefor, and all rights the purchaser may acquire under the Threshers' Lien Act, with full power to enforce the same, belong to and are hereby assigned by the purchaser to the company; any amount received by them therefrom, less expenses of collecting the same, to be applied on account of such money or notes.

(3) The company have received from various persons numerous sums of money, as stated in the issue, and there remains owing to them on account of the contract the sum of $1,204.20.

(4) During the year 1911, Linder did some threshing for one John Maloney, and by reason of such threshing Maloney is indebted to Linder in the sum of $298.93.

(5) The defendant sued Linder for payment for work done by the defendant in connection with the threshing outfit, but whether in connection with Maloney's threshing is not made clear, and obtained judgment for his claim for wages, and placed an execution in the sheriff's hands for the purpose of recovering the amount of his judgment.

(6) He at the same time by a garnishee order attached the moneys in the hands of Maloney; and Maloney paid to the sheriff the amount of his indebtedness to Linder.

(7) Nine other wage-earners, as the Court files disclose, took the same proceedings; and apparently this case was brought to test the rights, not only of the defendant, but of the nine other wage-earners.

(8) It is admitted that the wage-earners were in the employment of Linder within one month prior to the time that the moneys in question came into the hands of the sheriff, and that their claims are for wages for less than three months.

(9) The company claim the moneys in the sheriff's hands as belonging to them under their assignment.

There may be some question as to whether the proper parties are before me in this matter; but I do not think it necessary to consider that question, for no objection by counsel was taken upon the hearing or during the argument.

Two propositions of law are well established, which are applicable to this case: first, that the assignment, if valid, takes precedence of and has priority over the garnishee proceedings; secondly, a chose in action is not a chattel so as to come within the provisions of the Bills of Sale Ordinance.

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I do not think that the case cited, *In re A. B. Miller*, 1 Sask. L.R. 91 (*Re Miller and American-Abell Engine and Thresher Co. and Webster*, 7 W.L.R. 839), has any application; for our statute which was then applicable has been repealed, and the new clause which is contained in ch. 5 of the statutes of 1907, reads almost word for word the same as the English statute and the construction to be put upon the English statute and its application to a case like this has been decided beyond all peradventure in the highest tribunal in the Empire. I refer to *Tailby* v. *Official Receiver*, 13 App. Cas. 523.

In the issue before me, counsel for the defendant urged that the moneys in the sheriff's hands should be distributed by him under the Creditors' Relief Act, and that the assignment could not prevail to prevent this, by reason of the fact that there was nothing to indicate whether the gross earnings or the net earnings were assigned by the clause in the contract above set out, and that the gross earnings were not properly assignable. He also contended that it should be shewn what debts were collected.

These contentions did not seem to have been urged by counsel in the case I have mentioned, but some reference is made to them in the judgment of one of the Lords Justices—Lord Fitz-Gerald. At p. 539, he says:—

> What construction is to be put on "future book-debts"? Does it mean the trade debts entered in the traders' books, or does it mean the net residue of these debts after satisfying the claims of those creditors by means of whose property those debts came into existence? Would an account have to be taken as in the case of the trading of a bankrupt after bankruptcy and without certificate, and debts becoming due to him in that second trading, and claimed by the assignee as after-acquired property.

And again, at p. 540, he says:—

> Suppose, too, in the case of future debts, that the mortgagor had obtained bills and notes and other securities from his debtors, how are the rights and liabilities of the parties to be adjusted? Or suppose a trader become bankrupt, his assets consisting largely of recent book-debts, representing his stock in trade out of which they were created. Are these book-debts to go to the holder of the bill of sale, probably some years old, not registered, and of which the real creditors have no notice? I allude only to these possible contingencies as illustrating some of the difficulties that beset the question, and indicating the inexpediency of carrying the law a step further than it has hitherto gone in practice.

These remarks by the learned law Lords, to my mind, indicate clearly that, had he the power, he would have given a judgment dissenting from the other Lords. The other Lords, on the other hand, do not hesitate to hold that an assignment of book-debts to arise in *futuro*, without regard to the question whether they are net or gross earnings and the other questions

raised by Lord FitzGerald, is perfectly valid; and Lord Macnaghten voices the opinion of all in his judgment, which is stated by Lord FitzGerald to be one of great learning and ability and remarkable for its boldness. At p. 543 he says:—

> It has long been settled that future property, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention, an assignment for value in terms present and immediate has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract, when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

In all cases of this kind, it should be borne in mind that there is a distinction between a valid assignment at law and a valid equitable assignment. The clause in our Judicature Act which I have referred to as corresponding to the English Act, defines only what is a good assignment at law. This does not, however, prevent assignments which do not fufil the requirements of the statute from being valid assignments in equity. In all the cases I have read in connection with this question, knowledge of some kind has been shewn to have been brought home to the fund-holder. On the other hand, the money has been paid over by the fund-holder before action was brought, and the action has been one to recover, not from the fund-holder, but from some third party, to whom the fund has been handed. The only evidence before me that Maloney had any notice of the plaintiffs' contract is the fact that he paid the company in October, 1910, and in December, 1910, sums aggregating about $100. He must, therefore, have had some knowledge of their claim; and, if he had, would be fixed with constructive notice of their rights under the assignment. However this may be, and apart altogether from this fact, the lack of notice does not, in my opinion, prevent the assignment from being a perfectly good equitable assignment, by reason of the fact that none of the parties have altered their positions by reason of the lack of notice.

In *William Brandts Sons and Co.* v. *Dunlop Rubber Co.*, [1905] A.C., at p. 461, Lord Macnaghten says:—

> Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficiency in the slightest degree. Where the rules of equity and the rules of common law conflict, the rules of equity are to prevail.

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And again, at p. 462, he says:—

> The language is immaterial, if the meaning is plain. All that is necessary is, that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor.

I find, therefore, that there was a good and valid assignment of this book-debt created by the instrument in writing above described and made between Linder and the company.

Having regard to the decision of Stuart, J., in the case of *American-Abell Engine Co.* v. *Hay*, 9 W.L.R. 594, and to the provisions of the Threshers' Lien Ordinance, the wage-earners can have no lien on this debt.

The moneys that were paid by Linder to the sheriff in the garnishee proceedings were, therefore, paid over to the sheriff improperly, and cannot be deemed to be moneys levied by the sheriff so as to be distributable by him under the provisions of the Creditors' Relief Act. The moneys must, therefore, be paid over by the sheriff to the plaintiff. The costs of this issue and the costs of the sheriff on his application for the interpleader order, if not already paid, must be paid by the defendant.

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### Re TURNER and CAROSELLA.

*Alberta, District Court, Lethbridge, Judge Winter. August* 14, 1912.

TAXES (§ III G—150)—*Enforcement — Sale — Right to redeem — Time for Redemption—Tender — Lethbridge City Charter—Tax Sale Confirmation Ordinance* (1901), *ch.* 12.] —Application by a purchaser, under the Tax Sale Confirmation Ordinance, C.O. 1905, ch. 109, for an order confirming a sale of land by the corporation of the city of Lethbridge for arrears of taxes.

JUDGE WINTER:—The sale took place on the 4th April, 1910; and the transfer, after the expiration of a year from that date, was delivered to the applicant, such transfer being dated the 3rd May, 1911. The application for confirmation is made under the provisions of ch. 109 (ch. 12 of 1901) of the Consolidated Ordinances.

The owner who opposes the application, is the registered owner in fee simple of the land, under an uncancelled certificate of title. For the purposes of the case before me, it was admitted that the transfer was properly issued to the applicant, and that, prior to the hearing of the application for confirmation, the full amount of principal with interest and costs

was tendered by the registered owner to him and refused; and it was argued that the city of Lethbridge charter, which provides for the redemption of land sold under similar circumstances within a year from the date of sale, superseded the provision for redemption in the Confirmation Ordinance, as being inconsistent with that provision (see title I., sec. 7).

It may be well, in order to elucidate the procedure for confirming a tax sale, to take, by way of example, a simple instance, detailing the steps which must be taken by a purchaser of land sold for arrears of taxes from the city before he can become registered as owner. "X." is the registered owner of lands in the city of Lethbridge. These are sold for arrears of taxes to "Z." who, at the expiration of one year from the date of sale, obtains a transfer ("in the form provided in the Land Titles Act") to himself from the secretary-treasurer of the city. The effect of this is to vest in "Z." all rights of property which "X." had therein, and otherwise confirms the title in "Z." (sec. 20). "Z." cannot register his transfer at the land titles office until he has obtained a Judge's order confirming the sale (Land Titles Act, sec. 82). "Z.," therefore, obtains a summons, under C. O. ch. 109, from the Judge, for an order confirming the sale; and, on the return of the summons (no steps to redeem having been taken by the owner), the sale in ordinary course is confirmed, and the transfer with the Judge's order of confirmation is then left with the registrar of land titles, who, after four weeks, registers "Z." as absolute owner (Land Titles Act, sec. 82).

Neither the Lethbridge charter nor the Land Titles Act provides any machinery for confirming a sale for taxes; yet, inasmuch as these two Acts were both passed on the same date, and the former refers in terms to the latter, which latter exacts, as a prerequisite of registering a transfer of land sold for taxes, that it shall be accompanied by a Judge's confirmation order, it must be accepted that the legislature, when passing the Lethbridge charter, had in mind the provisions and procedure contained in ch. 109, which is the only enactment in force making provision for the confirmation of sales; and that, according to the accepted rule of interpretation of statutes, these enactments were intended to be read so as not to be repugnant the one to the other, but to be reconciled where necessary as far as possible.

It is to be observed that secs. 19 and 20, title XXX., of the Lethbridge charter, are practically identical in terms (except as to the grounds on which a transfer may be set aside) with secs. 201 and 202 of the Municipal Ordinance (which Ordinance does not apply to the city of Lethbridge); but I have not yet found any authority which holds that a person could not redeem

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the land sold, under the Municipal Ordinance, if he offered to redeem on the terms allowed by the Confirmation Ordinance.

Under the Lethbridge charter, an owner of property sold for taxes has no power, so far as the city is concerned, to redeem after a year from the date of the sale, and the city has no power then to accept the redemption money. The redemption money in such case, if paid within that time, would be the sum paid by the purchaser, with 10 per cent. thereon, and any further sums levied against the land which might have been paid by the purchaser (title XXXIII., sec. 14). When, however, the purchaser applies for a confirmation order under ch. 109, and the applicant, before the hearing, tenders to the purchaser (*a*) the full amount of the purchase-money; (*b*) any further sums charged against the land and lawfully paid; (*c*) 20 per cent. (instead of 10 per cent.), and full costs (that is, such costs as the Judge might allow), on such tender or payment being made, the Confirmation Ordinance gives the owner the right to redeem, and the confirmation order would, in these circumstances, be refused.

The right to redeem given by the Confirmation Ordinance is not one which the city of Lethbridge could give effect to; but the Judge, on an application such as the present, can do so, under that Ordinance. The Ordinance exacts payment of costs (not required by the Lethbridge charter) and also a higher rate of interest (double the amount) than is required by the Lethbridge charter as a condition of redemption. It is not inconsistent with the Lethbridge charter, but gives the owner a further locus pœnitentiæ, imposing severer terms as conditions for redemption.

It is impossible to read the Confirmation Ordinance without seeing that the legislature had in mind, in drafting that enactment, that laws in relation to sales of land for taxes are to provide for the collection of such taxes and not for forfeiture of land in arbitrary fashion.

The owner of the land having, in the case before me, performed all the preliminaries required by the Confirmation Ordinance, the application to confirm the sale to the applicant is refused. The owner is to be at liberty to redeem the land on payment of the purchase-money with 20 per cent. interest, calculated to the date of the hearing, $2 costs of the transfer paid by him, and any further sum charged against the land and lawfully paid by him.

As the tender of the redemption money was made only after notice of the application in the present proceedings, which were properly instituted by the applicant, had been received by the owner, and this application being in the nature of a test case, it will be equitable that each party bear his own costs of it. Shepherd and Dunlop, for the applicant. L. M. Johnstone, for the owner.

## BEATTY v. HODSON.

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*Saskatchewan, District Court, Battleford, Judge Maclean.*
*January 9, 1912.*

BAILMENT (§ III—17)—*Liability of Bailee—Injury to Horse Hired.*]—Action for $300 damages for the loss of a mare hired by the defendants, which animal died from alleged wrongful treatment of the defendants, and for the loss of use and services of a gelding hired at the same time by the defendants, through the alleged wrongful treatment and want of care.

JUDGE MACLEAN:—I have no hesitation in coming to the conclusion that the team in question was driven too far without rest and feeding. In the condition of the mare, which was known to both defendants, more than usual care should have been shewn. The animal should not, with her looseness of the bowels, have been given water in the river where she would be in danger of drinking to excess. She should have been rested at least once and fed before coming to Swanson's; and, when she, at Swanson's shewed such langour and lack of desire to eat, the defendants should not have attempted to drive her any farther, especially when Swanson would have provided a substitute. The animal was certainly over-wrought. There was further evidence that she had been sweating; perhaps the day was warm, but she must have been driven the 45 miles to Swanson's at about nine or ten miles an hour, for the defendants were about five hours going that distance. The witnesses Sagmoen, Saunders, Watt, Hill, Reynolds, Davis, Dr. Tanner, and Dr. Elliott, all testify that a horse should be fed at least every twenty-five miles; and, when the team was driven a distance of 45 miles in the then condition of the mare, I must hold that there was not proper care and attention shewn. The mare died.

As the result of all the evidence submitted, I must come to the conclusion that the mare died from exhaustion, the result of negligence and want of care of the defendants, while driving the said horses and while the horses were in their custody.

I fix the loss of the mare at $200. This amount the plaintiff offered to take in settlement, and I presume it was a fair value. The team cost $450; and, according to the evidence of the plaintiff, the mare was of no more value except for breeding purposes than was the gelding. The gelding shewed signs of exhaustion as well from the long drive; he was brought into the stable in a very tired state; and, from the evidence of several witnesses, I find that he was suffering from the effects of the distance travelled and lack of proper care. The plaintiff, in consequence of the animal's condition, had him put in pasture to recuperate, and the animal was there for some weeks before being sold, and the loss to the plaintiff in the said livery busi-

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ness through the non-use of the said gelding, he said, would be about $12 a week. I fix the loss at $1 a day and allow him for 15 days, or $15. I also allow the plaintiff $10 for removing and burying the carcass of the dead animal. There will be judgment for the plaintiff for $225 and costs; the witness Dr. Tanner will be allowed professional witness fees. R. R. Earle, for the plaintiff. H. C. Lisle, for the defendant.

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HELSON v. MORRISEY, FERNIE and MICHEL R. CO.

(Decision No. 2.)

*British Columbia Court of Appeal, Macdonald, C.J.A., in Chambers, March* 11, 1912.

MOTION on behalf of plaintiff for an extension of time for giving notice of appeal to the Supreme Court of Canada from the judgment of the Court of Appeal for British Columbia whereby the judgment in favour of plaintiff at the trial was reversed and a new trial ordered: *Helson* v. *Morrisey, etc., R. Co.*, 1 D.L.R. 33, 17 B.C.R. 65, 19 W.L.R. 835.

The plaintiff's solicitors had through inadvertence omitted to give notice of appeal within the time limited by the Supreme Court Act (Can.), sec. 70. The notice of motion for the extension of time was not served until nearly two months after the decision sought to be appealed from, and section 70 of the Supreme Court Act (Can.) required notice of appeal to be given within twenty days after the decision.

MACDONALD, C.J.A., refused the motion, saying that a solicitor's mistake is not a ground for extending the time for giving a notice of appeal under sec. 70 of the Supreme Court Act (Can.). E. V. Bodwell, K.C., for the motion; D. E. McTaggart, contra.

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FULLER v. BEACH.

*British Columbia, County Court, Vancouver, Judge Grant. May* 22, 1912.

MECHANICS' LIENS (§ VIII—66)—*Procedure—Time for Registering Lien—Wrongful Termination of Building Contract—Liability of Contractor—Architect's Certificate—Lien of Subcontractor.*]—Action to recover $340 alleged to be due on a contract for plastering a building, and for a declaration of lien against lot 20, block 247, D. L. 526, on which the building in question was constructed. The defendant Turner was the owner of the lot in question. The defendant Beach was a building contractor, and had entered into a contract to erect for Turner a

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building on the above lot for $8,500, he (Beach) supplying both labour and materials for the job. Extras brought the contract-price up to $8,877.

JUDGE GRANT:—There is little, if any, dispute as to the facts. Beach let the contract for plastering to the plaintiff, for $740. There is no objection made as to the manner in which the work was carried on and performed by the plaintiff. It seems to have been entirely satisfactory to the architect in charge. The great bulk of the plaintiff's contract was performed on or before the 15th December, 1911; but there was an amount of touching-up to do after the other trades had completed their work, which was some time towards the end of January. This touching-up was done, at the request of the said architect, and was completed on the 26th January, 1912. It was a provision of the contract between Beach and Turner that, in the event of any delay in the work, caused by lack of material or men, or any other cause, filing of liens, assignment or bankruptcy, "the proprietor or his agents shall, after 24 hours' notice in writing given to the contractor, have power to find the requisite material or labour and charge the cost thereof against this contract and deduct the same from any sums that may or shall become due to the said contractor."

By said contract it was further agreed that the contractor should, before obtaining any certificate, submit to the proprietor or architect a correct statement, giving individual names and amounts opposite, of all sums due or owing, either for labour or materials, against this contract to the date of the said certificate; and, further, that all payments made to the contractor were given in trust to be paid for labour and materials used in carrying out this contract; and the payments were to be made at the rate of 75 per cent. of the value of the work done, in accordance with the architect's certificate. According to the progress certificates received and paid from time to time, up to and including the 18th December, 1911, the defendant Beach received from the defendant Turner $6,100. At the date of the last payment, all the work under the plaintiff's contract with the defendant Beach had been completed, save and except the said touching-up after the other trades were out.

As appears from the evidence of the architect, the defendant Beach misapplied some $263 of the last payment of $600 made on the 18th December, 1911. This money was to pay wages, and he spent only $337 for that purpose, and the balance for other purposes; and, as the architect says, "this was the immediate cause why the contract was taken away from him," or of his dismissal, which was couched in the following words:—

Dec. 21st, 1911. Mr. A. B. Beach, contractor, 4th ave. and Cedar st. I beg to give you notice that, seeing you have made an assign-

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ment, in accordance with the 3rd clause of the contract, Mr. Turner himself will complete the works and deduct the cost thereof from any sums that are now or may become due to you on account of the said contract.

Yours truly,

T. E. J.

About this date—the 21st December, 1911—the defendant Beach made an assignment for the benefit of his creditors. Although the evidence is not very explicit as to the exact time of the assignment, I take it to have preceded the above notice by a very few hours. Up to this time Beach had been paid on progress certificates $6,100. If this was only 75 per cent. of the work and materials done and provided there were then $1,586.25 in the hands of the defendant Turner, provided the house was being built within the contract-price.

After the contract was taken from the defendant Beach, by the architect, no steps were taken by the architect in the way of making a report as to how much work had been done under the contract, or how much would be required to complete the work in accordance with Beach's contract, nor was any notice of the cancellation of the contract given to the assignee, nor any care taken to see that the balance of the work was done with a reasonable regard to having the same done as cheaply as the contractor might have done it.

The rights of Beach, the assignee, or the plaintiff, were not considered in re the finishing of the work. The entire matter was taken in hand by the defendant Turner and finished at an expense of $3,181.27. Assuming that the architect, in giving his progress certificates, retained 25 per cent. of the value of the work and materials, the value of the work done under the contract of Beach was $7,668.25, leaving $1,208.75 worth of work and materials yet to complete the contract if the contract-price was not being exceeded, but the actual amount paid out by the defendant Turner, in his method of having the work done, was $3,181.27, which would bring the actual cost of the building —if paid—to $10,849.52. Bearing in mind the provision of the contract between the defendants Beach and Turner, "that, in the event of any delay in the work, caused by lack of material or men or any other cause, filing of liens, assignment in bankruptcy, the proprietor or his agents shall, after 24 hours' notice in writing given to the contractor, have power to find the requisite material or labour and charge the cost thereof against this contract, and deduct the same from any sum that may or shall become due to the said contractor," I do not think that the defendant Turner was within his rights in sending the notice of the 21st December, 1911, terminating the contract.

Under the terms of the contract, in the event of delay, caused

either by lack of material or men, the proprietor had the right, after notice, to furnish the same, and deduct the cost thereof from any sums then or thereafter falling due to the contractor. Beyond this, under the contract and the facts in evidence, he was not justified in going. Had he complied with this provision of the contract, and left the conduct of the work in the hands of the contractor, it might have been possible for him—the contractor—to have completed the contract within the contract-price, plus the extras. This the defendant Turner prevented by dismissing the contractor and repudiating the contract, and he now says: "Because I, as owner, was compelled, in the manner in which I completed the work, to pay more than the amount agreed upon with the contractor, the plaintiff, as sub-contractor, under and by virtue of the provisions of sec. 8 of the Mechanics' Lien Act, is not entitled to a lien against the property in question." This position would be unassailable provided the owner had kept himself within the four corners of his contract with the contractor, and of the said Act; but, having chosen to rescind or repudiate the contract and take the matter into his own hands, in the manner before mentioned, I do not think that position is now open to him.

In the absence of evidence that up to the time the contract was cancelled by the defendant Turner the cost of the work done exceeded the contract-price for the same, I cannot find that fact; and from the progress certificates issued by the architect and the provision of the contract as to retaining 25 per cent. of the value of the work done, which I have no reason to believe was not observed by the architect in granting his certificates, I do not think such was the case. It is a general rule that where one party to a contract repudiates it, the other party can sue at once. See *Hochster* v. *De La Tour*, 2 E. & B. 678, and *Frost* v. *Knight*, L.R. 7 Ex. 111. It amounts to repudiation if the employer gives notice to the builder not to do any more work: see *Cort* v. *Ambergate, etc., R. Co.* (1851), 20 L.J. Q.B. 460. The defendant Turner, having improperly terminated the contract with his contractor, became liable to the contractor as on a *quantum meruit* without the certificate of the architect —*Smith* v. *Gordon*, 30 C.P. 553—and a lien may be enforced upon a *quantum meruit*. See Wallace on Mechanics' Liens, p. 71. The cancellation of the contractor's contract put an end to the sub-contract of the plaintiff, and thus gave him an immediate cause of action for the amount of work done by him under the said contract with the defendant Beach, and the right at once to file a lien against the property in question for the same.

On the 23rd December, 1911, the defendant Turner received from the plaintiff a notice in writing of his intention to file a lien herein. Between that date and the 8th January, 1912, the

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plaintiff and the defendant Turner met in the office of the said architect, when, according to the uncontradicted evidence of the plaintiff, "they"—that is, Turner and the architect—"asked me to go back and complete the work when it was ready, and I did so according to their instructions." At this same time it was agreed between them that, when the house was ready and the other trades all out of it, the plaintiff would go back and finish up his work, and that in the meantime the plaintiff was to receive $400 from the defendant Turner without prejudice to his claim for the balance.

I don't think anything turns upon that—whether it took him the afternoon, or took him three or four days, if it was part of the contract. The contract was not completed until the work was done; and, if it was only a half hour's work and was not held back in bad faith, it would be a proper completion of the contract. I am satisfied that it was the intention of the plaintiff and the defendant Turner that, notwithstanding the cancellation of Beach's contract, the plaintiff's contract to plaster the building in question should not be considered cancelled, but should be adopted by the defendant Turner, and be fully completed by the plaintiff when the defendant Turner was ready for him. The effect of this, in my judgment, was to extend the time for filing the lien to 31 days after the actual completion, which, by the evidence, was on the 26th January, 1912. If I am correct in this view, the lien, which was filed on the 14th February, 1912, was in time; and the plaintiff is entitled to recover, and to a declaration of lien, without obtaining a final certificate from the architect.

There will be judgment against the defendant Beach for the sum of $340 and costs; and I order and adjudge that the plaintiff has established and has a valid mechanic's lien upon and against lot 20, block 247, D.L. 526, group 1, Vancouver district, together with the building thereon; and that the said lien be enforced for the said sum of $340 and costs; and that further consideration of the matter be adjourned. Bray, for the plaintiff. White, for the defendant Turner.

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## URBASZ v. GALL.

*British Columbia, County Court, East Kootenay, Judge Thompson. June 25, 1912.*

JUDGMENT (§ II B—72)—*Effect and Conclusiveness of Default Judgment—Irregularity of Service of Summons—Sheriff's Return—Discontinuance Against One of the Defendants—Setting Aside Judgment—Leave to Defend.*]—Motion by the defendant to set aside a judgment and garnishee proceedings.

JUDGE THOMPSON:—The plaintiff originally entered the ac-

tion against the defendant Gall and another defendant, afterwards discontinuing the action as against the other defendant. The sheriff's officer served the other defendant, believing him to be Gall; and, judgment having been entered upon default against Gall, a motion was made and heard on the 24th of May, 1912, to set aside the judgment and all proceedings taken thereunder. The motion was successful, and the judgment was set aside. In the meantime, on the 13th May, the sheriff's officer served the defendant Gall; the plaintiff's solicitor on the 25th May, at 10 o'clock in the morning, signed judgment. Shortly afterwards, on the 25th (the 24th having been a holiday), the defendant's solicitor entered the office of the Court, and then found that judgment had been signed. This motion is to set aside the service on the defendant Gall as irregular, upon the grounds hereinafter mentioned. Mr. Lawe contended that the judgment was irregular upon the grounds hereinafter enumerated, which I will deal with seriatim.

1. The order of the 24th May, made the service of the 13th May upon Gall void. I cannot hold with the defendant on this ground. While, undoubtedly, the more proper practice would have been for the plaintiff's solicitor to wait until he ascertained whether or not the judgment which as set aside on the 24th May was irregular, still he had a perfect right to serve the defendant in the meantime; and the defendant's proper course was to file a defence without prejudice.

2. The plaintiff's solicitor had no status to take any action until the order of the 24th May was entered. This objection, I think, is sufficiently answered by my answer to the first objection.

3. The sheriff's officer, in making the service, did not comply with Order II., Rule 16, of the County Court Rules. This objection is the most serious one brought forward by Mr. Lawe. Our Rule is as follows: "If the service of a summons has been personal, the sheriff who served the same shall endorse on the copy of the summons delivered to him by the registrar the fact of such service; . . . and in every case of service the sheriff shall endorse on such copy the place where service was effected, and all endorsements on summonses shall be signed by the sheriff."

Order IX., Rule 15, of the Supreme Court Rules, is as follows: "The person serving a writ of summons shall, within three days at most after such service, endorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default."

The Supreme Court Rule is mandatory, and is specific in its statement that, unless this endorsement is made by the person

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serving, the plaintiff cannot sign judgment. The County Court Rule, on the other hand, is merely directory, and, in the event of non-compliance by the sheriff, does not bar the plaintiff from signing judgment any more than if he were not to comply with Marginal Rule 14, stating that the sheriff shall keep books, etc., or Marginal Rule 15, by which he is directed to prepare and examine all processes. I must hold against the defendant on this ground.

4. The copy of the summons served was not a true copy. This objection is trivial, the only difference being that some figures were written on the bottom of the summons served. I must hold against the defendant on this ground.

5. The judgment of the 25th May is irregular and defective in that it does not contain the proper style of cause, the second defendant not having been mentioned. This objection, I think, is covered by *Prince Albert* v. *Strange*, 2 DeG. & Sm. 652, 709: "Where an action is dismissed as against one of the several defendants, it would seem that it is not irregular to leave that defendant's name out of the title of the action." Much more would this be the case where the action had been discontinued as against one of the defendants. I must hold, therefore, that the judgment was regular.

Another objection has been made that the garnishee summons served was in the form used after judgment, whereas the affidavit filed was in the form used before judgment. In examining the record in the clerk's book, all these documents —the judgment, the affidavit in support of the garnishee order, and the garnishee order—were, apparently, delivered at the same time; and, while the garnishee order may have been improperly obtained, it was an order given on application to the registrar. The material upon which the order was obtained may have been defective, but the order was obtained and duly served, and the money paid in. No appeal has been taken from the registrar's order; and I must hold that, so far as this application is concerned, the money has been properly paid in by the garnishee and must abide in Court. At the time when the motion was made, a further verbal application was made by the defendant's solicitor, and not objected to by the plaintiff's solicitor, for leave to defend. While the plaintiff's solicitor was technically correct in entering the judgment on the 25th May, he was well aware, from the application that was made on the 24th, that the defendant intended to defend; and, while the order of the 25th did not, in so many words, give the defendant leave to defend, that was undoubtedly the clear intention.

In any event, I would undoubtedly give the defendant leave to defend, he having sworn that he has a *bonâ fide* defence. The only question is as to terms. While I hold that the service of

the 13th May and the judgment of the 25th were regular, I must express myself as deprecating the practice of taking such an advantage as the plaintiff's solicitor has taken in this action; and I order that the defendant be allowed to enter a dispute-note within five days after the entering of this order, and the service upon him or his solicitor, or within five days after his taking out the order and serving the same upon the plaintiff's solicitor. Costs to the plaintiff in the cause. F. C. Lawe, and A. I. Fisher, for the defendant. A. Macneil, for the plaintiff.

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## HUNTER v. KERR.

*British Columbia, County Court, Vancouver, Judge Grant. July 10, 1912.*

VENDOR AND PURCHASER (§ I B—7)—*Deduction from Purchase Money for Deficiency in Quantity—Description "More or Less"—Absence of Fraud.*]—Action for the recovery of compensation for an alleged deficiency in a certain block of land sold by the defendants to the plaintiff.

JUDGE GRANT:—The description of the land sold was as follows:—

> Commencing at a post that is planted at the south-east corner of the north-west quarter of lot 338; thence west 7 chains and 95 links; thence north 6 chains and 14 feet; thence east 7 chains and 95 links; thence south 6 chains and 14 feet to the point of commencement and containing five acres more or less . . . according to the registered map or plan of said subdivision deposited in the land registry office at the city of Vancouver.

The block was purchased by the plaintiff on the above description, under an agreement for sale dated the 29th September, 1909, the purchase-price being $7,500, of which $1,000 was paid down, and the balance was payable $1,000 yearly on the 29th days of each succeeding September until fully paid. In February, 1911, the plaintiff caused a survey of the said lands to be made, when it was found that the block only contained a little over 4.6 acres.

No notification was then given by the plaintiff to the defendants as to shortage. In December following the survey, the plaintiff paid the defendants $1,000 on account of the purchase-price, without in any way mentioning a shortage in the acreage. Previous to this payment, but after the said survey, the plaintiff re-sold the block for $13,000. In April, 1912, the plaintiff approached the defendants with the proposal to pay off the balance on the block, upon his being allowed a rebate of 7 per cent. This was refused by the defendants, and not until the 1st May, 1912, was any mention made by the plaintiff as to shortage.

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The defendants refused to make any abatement whatever in the purchase-price; and two weeks later the plaintiff paid the defendants the whole unpaid balance, and took from them a conveyance of the property in fee. It does not appear that, after the refusal of the defendants to consider any abatement in the purchase-price by reason of the block falling short of five acres, anything was said as to the alleged shortage, until after the balance of the purchase-price had been paid by the plaintiff and the conveyance thereof executed and delivered by the defendants; and, after the matter had been fully completed, just as the defendants were leaving the office of the plaintiff's solicitor, he —the solicitor—handed to one of the defendants a notice in writing stating that the said balance of the purchase-price was paid under protest, and that the plaintiff would claim damages for whatever was short of the five acres.

There is no allegation of fraud in the plaint, and nothing in the evidence to shew fraud. Before the purchase by the plaintiff, he went upon the land and saw the location of the stakes, and of the fence that partly enclosed it, and beyond question he got just the lands he expected he was getting, his only disappointment being in the actual quantity, in acres, roods, and perches, which it contained. Had he taken the trouble to have examined the map or plan of the subdivision in the land registry office, he could have ascertained the exact acreage of the block; but this he does not appear to have done. Upon this branch of the case, *Joliffe* v. *Baker*, 11 Q.B.D. 255, is an authority directly against the plaintiff. Watkin Williams, J., in delivering the judgment of the Court, says, at p. 267:—

> I am further of the opinion that, after the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained, either at law or in equity, for damages or compensation on account of errors as to quantity or quality of the subject-matter of the sale, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit has been practised upon the purchaser.

See also Dart on Vendors and Purchasers, 7th ed., vol. 1, p. 512; *Clayton* v. *Leich*, 4 Ch. D. 103; *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98.

In his argument the plaintiff's solicitor assumes that the block was sold at $1,500 per acre; but such is not the evidence. While the plaintiff says that he figured upon a basis of $1,500 per acre, he does not pretend to say that the defendants and he agreed upon the block at the rate of $1,500 per acre; and I find that the block was sold for $7,500 "and containing five acres more or less."

There seems to be a disposition on the part of some purchasers to hold that the phrase "more or less" only applies

in their case when it is *more*, and never when it is otherwise. That this one-sided interpretation cannot stand the test of judicial interpretation is shewn in *Wilson Lumber Co.* v. *Simpson*, 22 O.L.R. 452, 17 O.W.R. 820, affirmed on appeal, 23 O.L.R. 253, 19 O.W.R. 950. In delivering judgment in this case, Meredith, C.J.C.P., very ably and exhaustively reviews the English, Massachusetts, and New York authorities upon the point, and, approving and following the same, holds that the words "more or less," added to the statement of the depth, controlled the statement, so that the plaintiffs were not entitled to compensation for the deficiency—the difference not being so great as to raise the presumption of fraud or gross mistake. Following the above authorities, I hold that the plaintiff is not entitled to compensation, and dismiss the action with costs to the defendants. F. J. McDougal, for the plaintiff. J. W. DeB. Farris, for the defendants.

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### BARR and ANDERSON v. PERCY & CO.

*British Columbia, County Court, Vancouver, Judge Grant. April 22, 1912.*

MECHANICS' LIENS (§ V—32)—*To What Property it Attaches—Separate Lots—Indivisible Contract.*]—Action to enforce a mechanics' lien.

JUDGE GRANT:—The plaint shews that the plaintiffs in this action are a firm of plumbers, and the defendants Percy are builders, while the defendants the Dominion Life Assurance Company are the mortgagees of the lands described in the claim for lien herein, and the defendants M. M. Harrell, W. Wightman, and Laura Bell Wilson are beneficial owners of the said lands, under agreements for sale executed subsequently to the date of commencement of the furnishing of the materials and labour for which this lien is claimed. The plaint further shews that on the date of entering into the contract in respect of which this action was brought, the defendants Percy & Co. were the owners of the said lands; and that the plaintiffs agreed with the defendants Percy & Co. to supply certain labour and materials in connection with the construction of a building for Percy and Co. on 31st avenue, South Vancouver, on lots G. H. J. K. and L, in lots 4, 5, and 6 in block 8, D.L. 391 and 392, for which the defendants Percy & Co. promised to pay; and this action is brought, under the Mechanics' Lien Act, 1910, by the plaintiffs against the above defendants, owners, mortgagee, and owners of beneficial interests, for a declaration that the plaintiffs are entitled to a lien on the said lands in respect of the moneys alleged to be owing for the work and materials done and furnished on and for the said building.

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In the affidavit of lien as appears in the plaint, the particulars of work done and materials furnished are as follows:—

> Aug. 22nd, 1911, to 5/7 of amount of contract for plumbing seven houses for S. Percy & Co., to be erected in South Vancouver, namely, to plumbing in five houses on lots 4, 5, and 6, block 8, district lots 391 and 392, group I, Vancouver district, at the rate of $164 per house, being the proportionate part of the contract made between the claimants and the said S. Percy & Co. for the plumbing of seven houses as aforesaid, on account of which said contract there is now due in respect of the said five houses the sum of $821.50.

The defendants S. Percy & Co. and M. M. Harrell in their dispute-note, amongst other things, say that, if a contract was entered into by the defendants S. Percy & Co. with the plaintiffs for labour and materials, it was an entire contract for work, etc., in houses not only on G, H, J, K, and L, in subdivision of lots 4, 5, and 6 in block 8, district lots 391 and 392, referred to in paragraphs 6 and 9 of the plaint, but also in other houses not situate thereupon, one being on 20th avenue and the other on Little avenue. While the plaint alleges that the contract was in connection with the erection of a building on lots G, H, J, K, and L, of lots 4, 5, and 6, block 8, D.L. 391 and 392, the evidence offered shews a contract to do the plumbing work not in one building on all the above lots but in seven different buildings, five of which were on 31st avenue, one of each said houses being on one of each said lots G, H, J, K, and L, and one on 20th avenue and one on Little avenue; and that the contract-price for the seven houses was $1,150. The work was to be done according to three different plans—four houses of one plan, two of another, and one of the third. I cannot find from the evidence that it was agreed upon by the parties that the work would be done by the plaintiffs at $164 for each house, but that the contract was for the seven houses at $1,150; nor can I find that there was any separate account kept for each house, shewing what each job cost. It is quite true as to the baths, boilers, sinks, and things of that nature, that they could ascertain what and how must went into each house, but that does not apply to the work of installing, where at least a part of the men worked indiscriminately at the job, sometimes spending some unstated part of each day at all of four houses; and it was not attempted to shew the time spent on each individual house.

From the evidence, I find that the contract was treated as entire and not as separate contracts; that separate prices were not fixed for each house, but a lump sum for the whole seven; and that it was not shewn, and from the manner in which the work was performed and accounts of time and material kept it cannot be shewn, what each job actually cost. Under the foregoing statement of facts, I am asked to hold, as to lots H, J,

K, and L, that they are liable to a lien for four-sevenths of the contract-price of $1,150. The evidence shews that none of these houses or lots are now owned by the Pereys, L being owned by the defendant Wilson, K by the defendant Harrell, while H and J. are owned by a Mr. Clark, who has not been made a party to this action. The evidence does not shew that four-sevenths of the work and material was done and furnished on these four houses; but I am asked to say arbitrarily that such was the fact, and then to place upon each house, and the owner thereof, the responsibility of paying the entire judgment, in order to get the incumbrance thus placed upon his land removed.

Such a proposition is, in my judgment, against natural justice and judicial authority. See *Currier* v. *Friedrich*, 22 Gr. 243; *Davies* v. *McCallum*, 9 O.W.R. 756; *Fairclough* v. *Smith*, 13 Man. L.R. 509; *Oldfield* v. *Barbour*, 12 P.R. 554. This right of declaration of a lien on the aforementioned property is wholly statutory, and is enforceable only in manner provided by the statute, and I am asked by the plaintiff to hold that the Act is so broad in its scope as to charge one lot of land for services rendered upon another lot of land, because the person rendering the service upon each lot did so under an indivisible contract. I cannot so read the various provisions of the Act.

In sec. 2 "owner" means "any person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done or material placed . . . at whose request and upon whose credit, or upon whose behalf or with whose privity or consent, or for whose direct benefit, such work is done or materials furnished."

Section 6 defines the nature of the lien. It enacts that

> every person who does work . . . or furnishes any material to be used in the making, constructing, erecting, etc., . . . of any building, etc., for any owner, contractor or sub-contractor . . . shall by virtue thereof have a lien for the price of such work . . . or materials upon said erection, building . . . the materials so placed . . . and the lands occupied or benefited thereby or enjoyed therewith, or upon or in respect of which such work . . . is done or upon which such material is . . . furnished to be used.

Section 7 declares that the amount of such lien shall not exceed the sum actually owing to the person entitled to the lien. Owing for what? Unquestionably for work or materials done or furnished upon the land occupied or benefited thereby, rather than for work done or material furnished upon some other lot of land. To me it is plain that the clear meaning of these sections is that a lien, under the Act, in respect of this claim, attaches only to the erection, building, etc., in respect of which the work was done and material furnished, and to the lands occupied thereby or enjoyed therewith, and then only when furnished for the owner as above defined, as distinguished from

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the owner of some other lot or building or erection. The Act does not give a lien upon property owned by one person for materials furnished in respect of another property owned by another person.

At the close of the case the plaintiff in his argument asked to have his claim apportioned by claiming one-seventh of the entire claim against each of the lots H, J, K, and L, and abandoning as to lot G; that, at most, it is a case of claiming too much against each property; and that, when the amount of the lien is ascertained, it can be apportioned to each individual lot. An answer to such a request is, that the evidence does not shew what the work at each house was to or did cost. The contract was not separate as to each house, and the plans were dissimilar, and there is no evidence to shew what was actually owing to the plaintiffs for each house; and, in the absence of evidence, there can be no finding of the amount owing on each house.

Assuming that the plaintiffs were entitled to four separate liens in respect of the four separate properties, were they entitled under the statute to consolidate the four separate amounts owing to them into one claim, and thus, by means of registering their claim of lien, create an incumbrance for the whole amount against each? I think that sec. 19 of the Act answers that question in the negative. Section 19 declares that a lien upon any such erection, etc., or lands, shall absolutely cease to exist; (1) in the case of a contractor's lien after the expiration of thirty-one days after the completion of the contract unless in the meantime the person claiming the lien shall file . . . an affidavit . . . stating in substance (*a*) the name and residence of the claimant and the name of the owner of the property or interest to be charged; (*b*) the particulars of the kind of work . . . (*c*) the time when finished . . . (*d*) the sum claimed to be owing . . . (*e*) the description of the property to be charged, and shall, within the said thirty-one days mentioned, file in the land registry office of the district within which the land lies a duplicate copy of affidavit . . . which duplicate . . . shall be received and filed in said land registry office as a lien against the property against which the lien is claimed.

Section 28 provides that any number of lien-holders may be joined in the one suit, but no provision has been made in the Act for consolidating actions as against the defendants, where the lienholders have a claim for lien against two or more properties. I cannot conceive that the legislature contemplated such a course, for it would be manifestly unjust to allow one man's property to be incumbered, even temporarily, with an alleged claim for which it was not legally chargeable. I con-

strue sec. 19 to mean that each parcel of land shall be deemed as incumbered only in respect of the lien with which it is properly chargeable. Section 24 provides for cancellation of the lien when the amount due in respect thereof is ascertained and paid, and it certainly contemplates that each owner should be in a position at any moment to remove the incumbrance by payment of the amount actually due and chargeable under the Act against the property, which he would not be able to do if it were permitted to consolidate liens against several pieces of property.

No such lien as is claimed herein has been created by the Act, and I think the registered claim is a nullity and must be set aside. No request was made to amend the affidavit of lien or plaint under the provisions of sec. 20; and I doubt very much if this would be a proper case for applying the curative powers of sec. 20. By sec. 34 upon the hearing of a claim for lien the Judge may, as far as the parties before him . . . are debtor and creditor, give judgment against the former . . . for any indebtedness arising out of the claim in the same manner as if such indebtedness . . . had been sued upon in the County Court in the ordinary way . . . and judgment may be given for the sum actually due. . . . The evidence shews the indebtedness of the defendants Stephen Percy and F. A. H. Percy, trading under the name of S. Percy & Co., and the said firm of S. Percy & Co. to be indebted to the plaintiff in this action in $821.50, and there will be judgment against them in favour of the plaintiff accordingly, and the actions against the defendants the Dominion Life Assurance Company, M. M. Harrell, and Laura Bell Wilson, will be dismissed with costs against the plaintiffs, and the liens registered herein will be cancelled. W. C. Brown, for the plaintiffs. R. M. Macdonald, for the defendants.

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## MACLURE v. CUSACK.

*British Columbia, County Court, Victoria, Judge Lampman. March 14, 1912.*

ARCHITECT (§ I—5)—*Right to Recover Fees for Preparing Plans—Defence of Not Being Satisfied with Plans—Payment into Court—Costs.*]—The plaintiff, an architect, sued for $337.50 for services in preparing plans and specifications for a house which the defendant contemplated building. The defence was, that the plans were never accepted, and that no instructions were given to prepare specifications.

JUDGE LAMPMAN:—It appears that at first the defendant intended building in the James Bay district; and, after hav-

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ing had the plaintiff prepare a plan of a house, he decided not to build there. Subsequently, he decided to build at the corner of Cook and Collinson streets, and the plaintiff was again employed as architect—no special agreement was made, but the plaintiff proceeded with plans, and from time to time submitted them to Mrs. Cusack, who had charge of the matter for the defendant. Changes were made at various times in the plans, and visits were made to completed houses designed by the plaintiff in order that Mrs. Cusack could the better decide on what she would like. Finally, the plaintiff thought all was settled, and he submitted his plans and specifications to several builders and received tenders and sent them to the defendant. The defendant then said that he had not finally approved of the plans and specifications; and the result was that the building proceedings were dropped; and the plaintiff now sues for his fees. The first ground of defence, viz., that the plans were never completed to the defendant's satisfaction, is, I think, bad in law.

I do not think an architect's right to be paid for his work differs from that of any other professional man, or a day labourer. If I employ a man to dig for me, I cannot at the end of a week's digging say to him: "I don't like the way you dig, and I won't pay you for what you have done." Neither could I refuse to pay a surgeon simply because I did not like the manner in which he performed an operation. The employment can be terminated, but for work already done payment must be made.

In the case before me, the main complaint the defendant has with regard to the plan is in regard to a very small matter —the position of a door. From the negotiations I am satisfied that there was an implied contract for specifications. For a time Mrs. Cusack was hurrying up the plaintiff, as she wanted to get along with the building. Both the defendant and his wife laid great stress on the fact that the plaintiff had not been instructed to call for tenders, as the wife had not yet seen the specifications; and there is no suggestion that any one other than the plaintiff was to prepare them. Besides, the visits to the interior of another house to see the finish would be, I should think, to gain information for use in the specifications rather than in the plans. The defendant's own case is, that he was on the verge of instructing the plaintiff to call for tenders; and he surely did not expect to let a contract without specifications for a house which he probably thought would cost at least $8,000, and have hardwood floors. The lowest tender was $13,500, and the plaintiff claims 2½ per cent. on that amount—$337.50. The claim in the plaint when issued was $327.50, and the claim for an additional $10 was made at the trial on amendment, as, at

the time the plaint was drawn, the plaintiff did not have the figures of the lowest tender.

Without admitting any liability, the defendant paid into Court $163.75, which he tendered in full settlement. By an unfortunate misunderstanding, hardwood panelling was specified, making an extra expense of $2,500 or $3,000. I am satisfied that Mrs. Cusack never really intended this, and the amount of the lowest tender for the purpose of computing the fees should be reduced by $2,750. It is clear that, had the house been built, this change would have been made in the specifications; and, besides, drawing plans and specifications for hardwood entails no more work and skill than drawing them for fir or cedar. This would leave the estimate for the house $10,750, and the ordinary fee would be $263.75. I think that the defendant is entitled to have the plan shew the door as Mrs Cusack wanted it placed; and, to cover that, I think an allowance of $5 is ample.

The plaintiff's claim is thus reduced to $263.75; and for that amount he is entitled to judgment. The costs of the action will be taxed on the scale applicable to $100, as that is the amount by which the sum to which the plaintiff is held entitled exceeds the amount paid into Court. W. H. Langley, for the plaintiff. F. C. Fowkes, for the defendant.

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## JOHNSTON & CARSWELL v. DESPARD.

*British Columbia, County Court, Yale, Judge Swanson. January 9, 1912.*

LOGS AND LOGGING (§ I—1)—*Booms — Obstructing Navigation — Rights and Liabilities of Party Removing Obstruction— Public Highway—Nuisance.*]—The plaintiff company, the owners of a sawmill on Long lake in the Okanagan district, claim damages from the defendants for trespass in opening and setting adrift a boom of saw-logs comprising some 500,000 feet of timber. The defendant is a retired clergyman living on a fruit ranch on Long lake. Long lake is connected at its southern end by means of an artificially cut canal with Woods lake. Both lakes and canal are navigable. The canal, which is a small one and the only opening between the two lakes, was cut through by the Dominion Public Works Department to facilitate the navigation of these lakes. The only craft navigating these lakes and canal are two small steamers owned and operated by the plaintiff company for towing logs to their sawmill, and some half a dozen motor launches operated by settlers along the shores of these lakes. The facts of the case are substantially admitted. The defendant on June 1st last had occasion to go by his motor boat from his residence at that time on the east shore

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of Long lake through the canal in question to the store at Oyama, which is on the north shore of Woods lake, quite close to the south mouth of the canal. On arriving at the canal between 7.30 and 8 a.m. of the day in question the defendant found the canal blocked with saw-logs, the plaintiff company's steamer "City of Vernon" being then in the canal. The steamer cleared the canal for the defendant, who says he hailed the engineer of the steamer in passing, informing him that he was going to the store and would be returning presently. Ten minutes afterwards the defendant returned in his boat to the canal and found the steamer had gone south on Woods lake, leaving no one in charge of the boom which was still moored near the south mouth of the canal. By this time the boom had again swung around with the current, which runs back and forth between the two lakes, and had completely blocked the canal right up to the bridge over the canal a distance of some 35 feet from the south mouth of the canal.

The defendant says he was very anxious to get back home with all speed as he was that day engaged in freighting in his motor boat about four tons of his furniture, which he had to remove that day in his boat to the west shore of Long lake. The defendant's residence was at this time between one and a half to one and three quarters of a mile from the Oyama store. The defendant finding the canal blocked completely, landed, tied up his boat, and took a plank lying on the shore and tried to push the boomsticks, which partly enclosed the logs, on one side. He says that for three quarters of an hour he used every effort to move the boomsticks, but was unable to move them. He then went on the east side of the boom, untied the rope or cable by which the boom was moored to the shore, and after half an hour's work succeeded in moving sufficient logs from the canal to make a 6-foot passage-way for his boat. He then took his boat through the canal, tied it up on the north side, and returned at once to close the boom. He tried to pull the boomsticks in, and re-moor the boom to its original position, but he had not the physical strength to accomplish this. Failing in this he resumed his way in his launch to his home, the boomsticks swinging out to the south and freeing all the logs, which floated down Woods lake. The plaintiff company's steamer did not return to the canal until about noon, no one having been left in charge of the boom during the absence of the steamer. The engineer of the steamer in his evidence says there was too much slack to the boomsticks, the boom not being full of logs, which gave more play to the current, thus swinging the boom around and closing the mouth of the canal.

The plaintiff company have only asked to be recompensed for the actual outlay in picking up the logs, but the defendant

refused to settle the claim as he asserts he was vindicating a right which he claimed along with other members of the public. There were complaints made that the canal had been frequently obstructed by the plaintiff company's saw-logs to the great inconvenience and annoyance of the settlers who use this canal with their launches.

The defendant's counsel, Mr. Billings, claims that the obstruction to this public highway constituted a nuisance which, by law, the defendant was justified in personally abating. This was the view I took at the trial, and after carefully reviewing the authorities, I am satisfied, that, under the circumstances of this case, the defendant was quite justified in his actions. The right to take the law in one's own hands is one not very much favoured by British law, nevertheless it is a right which an individual may invoke subject to certain well defined conditions in abating a private nuisance, and even in abating a public nuisance within certain narrow limitations.

The canal in question is navigable, and is a public highway. Smith's Leading Cases, vol. 2, pp. 164 and 165 in the notes to the case of *Dovaston* v. *Payne*, define a highway as a passage open to all the King's subjects, public rivers being there termed highways as falling within the above definition, being passages open to all the King's subjects: *Mayor of Colchester* v. *Brooke*, 15 L.J.Q.B. 59; *Dimes* v. *Petley*, 19 L.J.Q.B. 449; *McEwen* v. *Anderson*, 1 B.C.R. 308. In the latter case the headnote reads in part:—

> Every subject of the realm has a right to the user for legitimate purposes of public navigable waters and harbours within the realm where the tide ebbs and flows. He cannot be deprived of that right except by Legislative authority, duly exercised.

By sec. 4 of the Navigable Waters Protection Act, Rev. Stat. of Canada, ch. 115, no bridge, boom, etc., shall be constructed so as to interfere with navigation unless the site is approved by the Governor-in-council. The plaintiff company shew no legislative authority to obstruct navigation in this canal. The obstruction, therefore, must be held a public nuisance. This being a public and not a private nuisance the question arises, is the defendant privileged to take the law in his own hands, and abate the nuisance without resorting to litigation. The usual remedy to redress a public nuisance is by indictment, the offence being one against the public.

Gould, on Waters, 3rd ed., pp. 248 and 249, states that when a public highway is unlawfully obstructed any individual who has occasion to use it, and is thereby stopped in his journey may remove the obstruction in order to effect a passage. The public remedy, he states, may be pursued whenever the passage is partially obstructed, but the master of a vessel would not be justi-

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fied in running his vessel upon the obstruction unnecessarily or wantonly, thereby injuring property which is so placed as to constitute a common nuisance but which does not interfere with the reasonable prosecution of his voyage. A private individual cannot abate the nuisance to a greater extent than is necessary to effect a passage. In the case at bar the passage was completely obstructed, the defendant acting with great consideration, in my opinion, in making only a narrow passage for his launch through the logs, and using all diligence and care in opening and afterwards in endeavouring to close the boom.

In *Webber* v. *Sparks* (1842), 10 M. & W. 485, it was held that in the case of an obstruction to a public way such as the placing of posts and rails across it any member of the public may abate the nuisance and pull down the obstruction so far as is necessary to the exercise of his right of passage. But he cannot justify doing more than the necessity of the case requires. In *Mayor of Colchester* v. *Brooke* (1843), 15 L.J.Q.B. 59, Lord Denman, C.J., at 67, says:—

> It is very important for the sake of the public peace, and to prevent oppression even on wrongdoers, not to confound common with private nuisances in this respect. In the case of the latter the individual aggrieved may abate, 3 Blackstone Com., p. 5, so as he commits no riot in so doing it; and the public nuisance becomes a private one to him who is especially, and in some particular way, inconvenienced thereby, as in the case of a gate across a highway, which prevents a traveller from passing, and which he may therefore throw down; but the ordinary remedy for a public nuisance is itself public, that of indictment, and each individual, who is only aggrieved as one of the public, can no more proceed to abate than he can to bring an action.

In commenting on the statement of the law on this subject by Blackstone in his Commentaries, vol. 3, p. 5:—

> If a new gate be erected across the public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it.

Odgers in his work on Common Law (1911), at p. 958, says:—

> But it is now clear law that to justify a private individual in abating a public nuisance on his own authority he must shew that it did him a special injury; he can only interfere with it as far as may be necessary to exercise his right of passing along the highway with reasonable convenience and not because the obstruction happens to be there. 'A private individual can abate a nuisance only when necessary to exercise a right,

adopting the language of Lord Campbell, C.J., in *Dimes* v. *Petley* (1850), 19 L.J.Q.B. 453. In this case the defendant's ship had struck against the plaintiff's wharf and jetty in the river Thames. It was held that the defendant could not defend

himself by pleading that the wharf and jetty obstructed the navigation of the river, unless he also shewed that there was a necessity to navigate the ship over the part of the river where the wharf and jetty were, or at any rate that the right course of the ship was over that part, and that she could not have avoided the nuisance by taking any other course with reasonable convenience. Lord Campbell, in *Bateman* v. *Bluck* (1852), 21 L.J.Q.B. 409, alludes to his former judgment in *Dimes* v. *Petley*, 19 L.J.Q.B. 453, and adds:—

> A person cannot, at his pleasure, go into a public highway and remove an obstruction which may happen to be there. He must shew some necessity for his going over the part obstructed.

In commenting on the decision in *Dimes* v. *Petley*, Cockburn, C.J., in *Arnold* v. *Holbrook* (1873), 42 L.J.Q.B. 83, says:—

> The law is correctly stated in *Dimes* v. *Petley*, which decides that a necessity must be shewn to pass the place where the alleged nuisance is or a right to pass over that part, and that it would be inconvenient and difficult to have taken another course by which the nuisance might have been avoided.

Mr. Justice Gray in the above case in our Supreme Court, *McEwen* v. *Anderson*, 1 B.C.R. 308, at 310, says:—

> If the obstruction be of a public nature, of which the whole community may complain, the steps for removal must take place at the instance of the Crown, as guardian of the public interests, and by its officers; but a man who is specially injured thereby in his person or property, retains and has the fullest right to apply to the Courts of the country for redress for that personal injury, and it is useless for the wrongdoer to attempt to justify the private and personal wrong and injury resulting from his act by the allegation that the act was a wrong to the whole public. The law is plain, the ebb and flow of tidal waters constitute a public highway.

See also *Denny* v. *Thwaites* (1876), 46 L.J.M.C. 141, as to right of surveyor of highways to remove pipes at side of highway. See Addison on Torts, 8th ed., 1906, p. 902, as to right to remove obstructions in public thoroughfares: Clerk & Lindsell on Torts, 3rd ed., pp. 149 and 150; Pollock on Torts (Blackstone ed.), pp. 254, 255.

As to the right of commoner to summarily remove fences erected on commons, see *Arlett* v. *Ellis*, 31 R.R. 214.

The plaintiff's counsel, Mr. Rogers, argued that the defendant had no right to abate the alleged nuisance as he had suffered no peculiar damage as distinct from that suffered by other members of the public and relied on *Winterbottom* v. *Earl of Derby* (1867), 36 L.J. Ex. 194. Kelly, C.B., at page 198, there says:—

> Looking at all the authorities, I think the true principle of the law is that he only who has sustained a damage peculiar to his own per-

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son, or to him in the exercise of his trade or calling is entitled to maintain this action.

And Channell, B., at same page, says:—

> The great contest has been that the plaintiff cannot maintain an action of this description without shewing individual and peculiar damage arising to himself beyond that sustained by the rest of Her Majesty's subjects.

It is to be remembered, however, that the latter was an action for damages against the obstructor of a public footway, and not a case as to right to abate a public nuisance. Clerk & Lindsell, at page 150, in the footnote (*e*) state:—

> The right of abatement is not limited to cases in which the party might bring an action: See *Winterbottom* v. *Lord Derby*, 36 L.J. Ex. 194.

Apart from this point raised by Clerk & Lindsell (which would appear to be very problematical in view of the concluding words of Lord Denman above quoted in the case of *Mayor of Colchester* v. *Brooke*, I think the obstruction in the case at bar did the defendant a special injury. I refer also to the Ontario case, *Crandell* v. *Mooney*, 23 U.C.C.P. 212, where it was held that the defendant, who had stretched a boom across the Fenelon river, a navigable stream, obstructing the plaintiff's steamer plying between Lindsay and Fenelon, and preventing her from reaching the latter place was liable to an action, the peculiar damage sustained by plaintiff entitling him to maintain it.

The case at bar is distinguishable from a recent case in our Supreme Court decided by Mr. Justice Clement, November 20th, 1911, *Waddell* v. *Richardson*, 19 W.L.R. 531. In that case the plaintiff's fences enclosed part of the highway abutting on his lands. The defendant tore down the fences although his right of passage along the highway was not really interfered with. It was held there that the defendant as a private individual had no right to abate the nuisance caused by the obstruction of the highway, Clement, J., stating, at page 532:—

> The law certainly does not give the right to a private individual to remove the obstruction unless his right of passage is really interfered with, which is not the case here.

In the case at bar the defendant's right of passage was completely obstructed by the plaintiff company. I do not think the defendant was obliged by reason of this obstruction to leave his motor boat unattended at the canal, and walk home carrying his goods with him (which in some cases though not in this might be beyond his strength to do), a distance of one and a half to one and three quarters of a mile rather than do as he did. I think it reasonable that he should be allowed by law to pursue his journey home by the conveyance he chose to adopt on this

occasion, and which he generally used in that district, his motor boat. The defendant has acted throughout, I think, in a fair and reasonable manner.

The action is accordingly dismissed with costs. R. H. Rogers, for plaintiff. F. Billings, for defendant.

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## WALTON v. BIGGS.



*Manitoba, County Court, Winnipeg, Paterson, J. January 25, 1912.*

COVENANTS AND CONDITIONS (§ II A—6)—*Lease of Apartments—Quiet Enjoyment — Breach — Running Sewing Machines and Noisily Using Pressing Irons in Rooms Overhead — Vacation of Premises — Liability for Rent of Unexpired Portion of Term.*]—The plaintiff was the owner of the Strathmore block, in Broadway, in the city of Winnipeg, and in August, 1910, granted a lease of suite 38 to the defendant. The lease contained a clause that, if the lessee should abandon or vacate the premises, the same might be re-let by the lessor, for such rent and upon such terms as the lessor might see fit; and, if a sufficient sum should not be thus realized after the payment of the expenses of such re-letting to satisfy the rent, the lessee agreed to pay the deficit.

In June, 1911, the defendant vacated the premises without payment of the rent becoming due under the lease, and the plaintiff was able to sublet the suite only from the 15th August, 1911, to the 30th September, 1911. The plaintiff sued to recover $60, the balance due after accounting for the amount received from the sublessee. The defence raised was, that the lease contained a covenant by the plaintiff with the defendant that the defendant should have "quiet enjoyment" of the suite; and the fact was, that the defendant was obliged to vacate and abandon the same, owing to the fact that the occupiers of the suite overhead carried on therein a business of dressmaking, which business necessitated such a constant and frequent use of sewing machines, and caused such a nuisance, that the defendant and his family were unable to live in the suite.

The occupiers of the overhead suite were the tenants of the plaintiff, and carried on the business of dressmaking with the knowledge and consent of the plaintiff. The defendant notified the plaintiff of the nuisance and of his intention to vacate the premises unless the nuisance was abated; but the plaintiff failed to abate the same; and the defendant was forced to rent another suite; and he filed a counterclaim for $51, the amount of the excess of rent he had to pay over and above what he was required to pay under his lease with the plaintiff.

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JUDGE PATERSON, held that the plaintiff could not recover the rent sued for, and entered a nonsuit. He also held that the counterclaim of the defendant should be dismissed; and that each party should pay his own costs. The learned Judge was of opinion that the daily and continual use of the sewing machines by the dressmaker in her business, not being merely for domestic purposes, was an infringement of the covenant for quiet enjoyment. In addition to the nuisance caused by the sewing machines, there was also a further nuisance owing to the thumping of the pressing irons used by the dressmaker. C. A. Adamson, for the plaintiff. T. R. Ferguson, K.C., for the defendant.

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## Re CUTKNIFE STATIONS.

*Board of Railway Commissioners. April 10, 1912.*

CARRIERS (§ IV D—550)—*Board of Railway Commissioners — Regulation of Location of Stations and Sidings—Railways Exploiting Townsite — Disregard of Public Convenience.*]—Application by the Canadian Pacific R. Co. and Grand Trunk Pacific R. Co. in connection with the location of the stations and facilities at Cutknife. (Files Nos. 18630 and 19191.)

THE CHIEF COMMISSIONER:—These matters involve the location of stations and facilities at Cutknife, on the lines of the respective railways. The controversy is brought about by reason of each railway company desiring to exploit a townsite of its own without regard to the future and permanent convenience of the public.

The Canadian Pacific Railway Company, on February 7th, 1912, applied for leave to locate its Cutknife station on the south half of section 32, township 43, range 21. Prior to this date, it had sold lots in a forty-acre townsite at this point, and at the date of hearing some seventy people were living upon this townsite, and a number of buildings had been erected, some of a substantial and valuable character. The railway has been built to this point, but no station has been erected.

In November, 1911, the Board received petitions signed by some eighty persons, reciting that the Grand Trunk Pacific Branch Lines Company had located its line of railway along the northerly boundary of section 28, township 43, range 21, and had purchased the north-east quarter of that section for a townsite, and had subdivided it into lots; that the Canadian Pacific Railway Company had announced that its townsite would be located on section 32, one mile from the Grand Trunk Pacific townsite; and that the establishment of the townsites and two stations, as aforesaid, over a mile apart, would be a matter of

serious inconvenience to the residents and settlers, and would interfere with the growth and development of the town of Cutknife. The prayer was that the Canadian Pacific Railway Company should be ordered to locate its station on the north-east quarter of section 28.

On February 12th, 1912, the Grand Trunk Pacific Branch Lines Company applied for approval of proposed station at Cutknife, on "*section* 33, *township* 43, *range* 21." In the letter from the solicitor for the Grand Trunk Pacific Branch Lines Company enclosing this application, it was stated that it had reference "to the petition of the residents of Cutknife *re* Canadian Pacific Railway and Grand Trunk Pacific Railway townsite," meaning, I presume, the petition above referred to; that petition referred to a station on section 28, and not section 33.

The council of the rural municipality of Cutknife, on February 24th, passed a resolution in which it was recited that the Grand Trunk Pacific was asking for approval of its station on the "*north-east quarter of section* 28, *township* 43," just one and a quarter miles east of the Canadian Pacific Railway townsite. The request of the council was that the station buildings should be so located that passengers could readily transfer, and "contribute to the building of a united town."

The plans attached to the application of the Grand Trunk Pacific Branch Lines Company, and signed by the vice-president and chief engineer, shew a subdivision on "*section* 33, *township* 43, *range* 21."

The matter came on for hearing at Saskatoon, and a number of residents upon the Canadian Pacific Railway townsite appeared, and strongly urged that the application of the Canadian Pacific Railway Company should be granted, for the reason that these people had purchased lots, put up buildings, and started business of various kinds upon the representation that they should have station facilities. It seemed to be such a plain case for adjustment between the railway companies, that the matter was left over for hearing at Winnipeg, in order that a conference might be had; and at the latter sittings the following letter from the Land Commissioner of the Grand Trunk Pacific Branch Lines Company, directed to the solicitor for the Transcontinental Townsite Company, was filed:—

RE N.E. ¼, 28-43-21.

At the sittings of the Board of Railway Commissioners, at Saskatoon, on the 20th instant, you are hereby authorized, on behalf of the Grand Trunk Pacific Development Company, Limited, to make the following arrangement with the Canadian Pacific Railway Company, if the latter will consent to a joint townsite at Cutknife, to be situated on the above quarter section, namely, to give to the Canadian Pacific Railway Company free right-of-way and station grounds across the above quarter section; and, further, to give the Canadian Pacific

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Railway Company either one-third of the lots into which the above quarter section will be subdivided, or a one-third interest in the net proceeds of the sale of lots in the said townsite.

This offer the representatives of the Canadian Pacific Railway Company refused, and stated they would not join in any townsite proposition. It will be observed that this letter refers to a joint townsite on section 28, the same section referred to in the petition before mentioned, while the formal application of the Grand Trunk Pacific Branch Lines Company is for approval of station on section 33.

I certainly thought at the hearing, the location claimed for the Grand Trunk Pacific Branch Lines Company was section 28, but the formal application seems to call for section 33; and if I read their plan attached to the application correctly, their proposed station and townsite is on the south-east quarter of section 33, township 43, range 21. From what was said at the hearing, and from the plans and documents filed, it is impossible to say where they desire to locate this station.

In a letter from the solicitor for the Grand Trunk Pacific Branch Lines Company on the file, dated December 27th, 1911, he states that the company has its side-track on the north-east quarter of section 28. This, however, was some weeks before the application for station approval was filed. I do not know whether it is 28 or 33 that is wanted. The formal application asks for 33, and there has been no other written application filed. No order can intelligently be made upon this application of the Grand Trunk Pacific Branch Lines Company.

The principal objections advanced against the application of the Canadian Pacific Railway Company are contained in the petition above referred to, and in a letter from the solicitor for the Grand Trunk Pacific Branch Lines Company, dated February 7th. The petition contains no facts that would justify the Board in withholding station facilities from those who have located upon the Canadian Pacific Railway townsite. The letter contains the following statement:—

> I am advised by our chief engineer that the Canadian Pacific Railway route map, shewing the deviation from the original route in this vicinity, came up for hearing in the latter part of November; whereas, in the early part of November, the Canadian Pacific was advertising that steel would be laid to section 32-43-21, the location of their siding, to be in time to haul out this season's crops; and my best information is that steel was laid before route map was approved, not to mention location. In other words, the Canadian Pacific Railway, in their revision in the vicinity of Cutknife, built their line before it was approved by the Board.

I do not know how this is; no evidence was given as to when the line was built. The solicitor's information may or may not have been correct.

The position of matters, then, is that the Canadian Pacific Railway Company has its application regularly before the Board for approval of a station upon section 32 (south half). The necessity for early construction is evidenced by the appearance of landowners and business men, who support the application. Why should approval be withheld? I see no reason. An order may go as asked.

The reprehensible practice of railway companies selling lots, and undertaking to build stations before approval of location is obtained, is sadly in evidence in this case. It is difficult to understand why this is done; nothing is gained by it, and it always lands someone in trouble.

COMMISSIONER MCLEAN concurred.

*Brackenberry*, for the Municipality of Cutknife. *Bond*, for the Canadian Pacific Railway Company. *Mansur* and *Zimmerman*, for the Grand Trunk Pacific Railway Company, and *Worth*, for certain property owners.

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## WESTERGAARD v. WEYL.



*Saskatchewan, District Court, Judge Rimmer. May 1, 1912.*

BROKERS (§ II B—12)—*Sale of land—Commission—Quantum meruit—Termination of employment—Offer to purchase on own behalf.*]—Action for commission on the sale of land.

*Allan*, for the plaintiff.
*Brooksmith*, for the defendant.

JUDGE RIMMER:—The plaintiff claims commission on the sale of land, $200. The defendant denies employment, service; and says, alternatively, that, if the services were rendered, they were of no value. Further, the defendants sets up that, if there was any agency, it was determined by the plaintiff's offer to purchase the land himself.

The following are the material facts, as disclosed by the evidence and exhibits filed. The defendant, who resides in the State of Minnesota, in September, 1910, entered into correspondence with the plaintiff in relation to land owned by the defendant near Macoun. Finally, on the 15th April, 1911, the defendant wrote to the plaintiff in relation to the expediency of selling the land, and said:—

> Of course, I expect to pay for the trouble; and, if possible, can you take up this matter and dispose of the land at the best advantage. I won't set a price, but leave that to you. . . . I will be willing to pay the commission, and want it a regular business deal, and at the same time it will be a great personal favour.

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This was the first mention of commission. The whole of the correspondence discloses that the defendant was relying greatly upon the advice of the plaintiff. The letters of the plaintiff are consistent with the view that he was depreciating the value of the land, and his subsequent conduct shews that he proposed to profit by this depreciation. In his letter of the 19th April, 1911, the defendant said:—

> If the young man who goes to Iowa can dispose of this quarter section, have them do so at the best price they can obtain. By telegram of the 21st April, after refusing the responsibility of fixing a price the plaintiff stated: "Best offer $1,600 cash, land is in no shape for crop, must be summer-fallowed, covered with weeds and uncut flax straw, unable obtain renter, have written explaining fully."

The plaintiff did write explaining fully all the drawbacks to the land and the advantage of selling. On the 24th April, 1911, the defendant replied:—

> I am very sorry the land is in such condition . . . As it is now, I will consider it a great personal favour to sell the land at figures you mention, $1,600, and I will make out the papers soon as I know the name of the buyer.

Then comes to the defendant from the plaintiff the following telegram of the 27th April, 1911:—

> Party referred to buying other land, will take it myself, $1,600, five hundred cash, six hundred November, my note bearing six per cent. interest, assume mortgage, $500.
>
> H. WESTERGAARD.

The defendant did not reply to that telegram or accept the offer. Notwithstanding this, Westergaard subsequently, according to his statement, agreed to sell the land to the Havner Land Company for $1,800, and accepted the purchase-price less the amount due on the mortgage. He never disclosed to the defendant the sum obtained, but forwarded for execution a transfer shewing the consideration only as $1,600. This transfer Weyl did not execute, for reasons which are not pertinent to this action. Westergaard then brings this action to recover $200.

I hold that he cannot recover. There is no evidence of an agreement to pay any fixed sum as commission. There is no evidence of listing; and Westergaard was, in fact, not in the real estate business, but was a bank manager. He might, however, if an agreement existed, be entitled on a *quantum meruit;* but I hold that his offer to purchase on his own behalf was inconsistent with a continuance of the relation of principal and agent; and that thereupon the agency must have been determined. His subsequent conduct shews what was in the mind of Mr. Westergaard. He was, in intention, buying the land at $1,600 and selling at $1,800. It is just the difference in these amounts for which he sues. There cannot be the slightest doubt

from his conduct that he is looking, or has looked, for a profit out of the transaction, which he did not disclose to Weyl, and which Weyl had no reason to suspect until these proceedings were instituted. Such a condition is not consistent with the continuance of the relation of principal and agent entitling the agent to remuneration. As stated by Nesbitt, J., in *Manitoba and North-West Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255, 259, I think the test is:—

> Has the plaintiff, by making such an undisclosed bargain in relation to his contract of service, put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away.

I also refer to the judgments of Cotton, L.J., and Bowen, L.J., in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, 39 Ch. D. 339, and of Alverstone, L.C.J., in *Andrew* v. *Ramsay & Co.*, 19 Times L.R. 620.

As stated by Lord Alverstone:—

> This case turns on the broad principle that where a person is not entitled to say, "I have been acting as your agent and doing the work you have employed me to do," he cannot recover the commission promised him.

The work Westergaard was employed to do (if any) was to obtain the best price, not to sell to himself and resell at a higher price, or to sell at a higher price than he disclosed to his principal. The case is fully covered by *Manitoba and North-West Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255.

Judgment for the defendant with costs.

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### WESTAWAY and GREAVES v. CLOSE.

*Saskatchewan, District Court, Battleford, Judge Maclean. June 17, 1912.*

BROKERS (§ II A—8)—*Commission — Real Estate Agent—Transaction Closed by Principal—Employment of Sub-agents —Absence of Authority or Ratification.*]—Action for a commission on the sale of land.

JUDGE MACLEAN:—The plaintiffs, who are a firm of real estate brokers doing business at North Battleford, seek to recover from the defendant the sum of $160, commission for finding a purchaser and the sale of the north-east quarter of section 20, township 23, range 14, W. 3rd M., in the province of Saskatchewan, being the property of the defendant.

I find the following facts. The defendant, Henry Close, authorized his brother, C. W. Close, to sell for him the said land, and agreed to pay him for such service the sum of $100.

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C. W. Close went to the plaintiffs and listed the land, and at the same time stated to the plaintiffs that the land belonged to his brother, and that they would be paid for their services the sum of $1 per acre commission. The plaintiffs never saw the defendant himself, and all negotiations were made with C. W. Close, and he signed the listing book for the sale of the property. The plaintiffs introduced to C. W. Close, one Gordon, who afterwards purchased the land from the defendant. Gordon was introduced to the defendant by C. W. Close, but he (C. W. Close) did not inform the defendant that he had listed the property with the plaintiffs, or that any arrangement with respect to $1 an acre commission was at any time made. The defendant, in his evidence, admitted that he had inquired from his brother, C. W. Close, how he happened to meet Gordon, and was informed that the introduction came from the plaintiffs, and the defendant said that he at once notified his brother that he was not going to be responsible for any commission other than the $100, which he afterwards paid over to C. W. Close.

There are certain suspicious circumstances in connection with this case which lead me to think that perhaps the defendant knew of the arrangement that C. W. Close had entered into with the plaintiffs. He came to North Battleford with his brother, and the sale was made in North Battleford to Gordon, by the defendant; but at no time did he visit the office of the plaintiffs or enter into any arrangement with them himself. As stated, the whole of the negotiations in this matter were entered into by C. W. Close.

After carefully weighing the evidence, and looking into the cases to which I was referred by counsel, I have come to the conclusion that the plaintiffs cannot succeed in this action. In order that the defendant can be bound by the actions of his brother, there must be acquiescence and ratification on full knowledge of all the facts; and, so far as the evidence goes, the defendant was not advised of the arrangement which was entered into between C. W. Close and the plaintiffs. The maxim *delegatus non potest delegare* applies in this case. C. W. Close had no authority for establishing the relationship of principal and agent between his own principal and any third person.

The law, as I find it, is as follows:—

> The exigencies of business do, from time to time, render necessary the carrying out of instructions of a principal by a person other than the agent originally instructed for the purpose. . . . And we are of opinion that an authority to the effect referred to may and should be implied, where, from the conduct of the parties to the original contract of agency, the usage of trade, or, the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the

course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute: Wright on Principal and Agent, 2nd ed., 162 [quoting Lord Justice Thesiger in *De Bussche* v. *Alt*, 8 Ch. D. 286, at 310].

This case appears to me to be very simple, after consideration of the facts. The defendant authorized his brother to sell his property, but in no way did the defendant give him authority originally to make any agreement binding him with any third person. A person may make an arrangement with any person to sell his property, but that should not convey the right to the third person to bind his principal to give terms other than those originally agreed to, unless it can be clearly shewn that he acquiesced and ratified what the said party did after full knowledge of all the facts. The plaintiffs in this case have, to my mind, brought action against the wrong party. So far as the evidence goes, C. W. Close is clearly liable; and this judgment will in no way be a bar to the plaintiffs bringing a new action and holding the proper party liable. I regret that C. W. Close did not give evidence at the trial; and I further regret that application was not made to me to have him added as a defendant, as this matter could then have been disposed of with less trouble and expense. The action will be dismissed with costs. A. M. Panton, for the plaintiffs. J. M. Hanbidge, for the defendant.

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LAZIER v. MacCULLOUGH et al.



*Alberta Supreme Court. Trial before Walsh, J. November 19, 1912.*

CORPORATIONS AND COMPANIES (§ V C 1—192) — *Transfers —Agreement for sale—Conflicting evidence.*]

WALSH, J.:—I find that the defendant MacCullough acquired the shares in question under an agreement which bound him to pay in cash therefor the sum of $15,000 on the 6th day of December, 1907. This is the agreement sworn to by the plaintiff and Morgan, both of whom positively deny the making of any subsequent agreement in alteration of or substitution for it. The defendant, Vermilya, called as a witness for MacCullough, swears that this was the original agreement of purchase. That this was his view of it years ago, at or some time subsequent to the making of it, is evidenced by the memorandum made by him on stubs of share certificates 83 and 92, shewing that these certificates were held subject to the payment of $15,000 by MacCullough. It is true that he is under the impression that a subsequent arrangement was made under which MacCullough was to get these shares upon selling 30,000 of the 40,000 shares belonging to Lazier, Vermilya and Morgan and held by them for that

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purpose at 50 cents per share. This impression is, however, far too vague for me to act upon it. He does not know when it was made or where or why or who was present at the making of it. In fact he would not swear that it was made at all. He is, however, positive that the third arrangement sworn to by MacCullough as having been made in March, 1908, under which in consideration of MacCullough assuming with others liability for the Thomas purchase money and of the services rendered by him in the formation of and flotation of the company he was to get these shares without the payment of any sum, was not made. We therefore have the evidence of three witnesses, one of them called by the defence, proving the original agreement to be as I find it, two of them denying and the third quite unable to prove the alleged agreement with respect to the sale of the 30,000 shares and all three denying the alleged agreement of March, 1908. As against this, I have the evidence of the defendant alone.

The preponderance of evidence is so overwhelming in favour of the plaintiff's contention that I must give effect to it. If the evidence was nicely balanced, I might consider more carefully than I have done the probabilities of these different stories, but when the facts are established beyond controversy, as they are in my opinion, I do not think that I should disregard them in favour of something else that may appear more probable. So far, however, as I have considered the case from that point of view I see nothing improbable in the plaintiff's story. MacCullough was introduced to the proposition by his old friend Vermilya in whom I take it he had confidence. He went out to the property and made a personal examination of it before deciding to go into it at all. The bait of getting shares of a par value of $115,000 for $15,000 no doubt was an alluring one. His activity in the interest of the company after the making of the agreement is quite intelligible even if he was not bound to concern himself about it. As a person entitled to 115,000 shares in the capital stock of the company he ought to be reasonably expected to take some interest in its welfare. The fact that he made himself personally liable in March, 1908, for the Thomas purchase money is susceptible of a very easy explanation. This agreement was made on the day that the option from Thomas expired and MacCullough's evidence is that if it had not been arranged for on that day it would have lapsed. His name perhaps gave additional strength to it, but he at that time had faith in his associates who were primarily liable for the purchase money and he evidently had faith in the property. The Thomas agreement, however, covered both the coal and surface rights. The coal company was only interested in the coal rights, but he and Lazier, Vermilya and Morgan were interested in the surface rights under their agreement of the 19th of October, 1907 (exhibit 2), and as a member

of this partnership he was concerned in keeping the Thomas agreement on foot.

But for the agreement of the 19th of June, 1907 (exhibit 7), I would have found that these 115,000 shares were the property of the plaintiff. This is his story and in it he is fully corroborated by Morgan. They say that they originally had a half interest each in the proposition, but that when Vermilya was brought into it he acquired a quarter interest only which was taken out of Morgan's half, Lazier retaining his original interest. Vermilya says, however, that he bought a third interest in it and that this is so, is, I think, shewn by exhibit 7. That appears to be the only writing evidencing this arrangement. This agreement provides for the incorporation of a company capitalized at $1,000,000 and for the issue to Lazier, Vermilya and Morgan each of shares in the same of a par value of $200,000. The whole agreement evidences the fact that each of these three men had an equal interest in the proposition. It is not suggested that any change was made in it between its date and the introduction of MacCullough as an interested party. At that time the capitalization of the proposed company was placed at $999,000 and the shares to which these three men were entitled were cut down from 600,000 to 500,000. I think that they took in this substituted issue of 500,000 shares the same interest that they had agreed for by their original agreement, namely, one-third each. That being so, I find that the 115,000 shares contracted for with MacCullough belonged to Lazier, Vermilya and Morgan in equal shares. This view is strengthened by the fact that they all took an active part in the making of the agreement for the sale of the same to MacCullough. If Lazier alone was interested in these shares I do not know why it was necessary that the other two should have been as actively concerned as he was in the negotiations leading up to the sale unless it be perhaps that in the interests of the company they wanted the deal to go through, for it is admitted that Lazier was to lend this money to the company when he received it. Nor does any good reason appear why the shares of Vermilya and Morgan should have been cut down to one quarter each and that of Lazier increased to one-half when MacCullough came in.

These three men were therefore the vendors to MacCullough and in strictness they should all be before the Court. Vermilya is a defendant. He was not made such from the point of view of his interest in these shares. He has, however, given his evidence and has had his interests protected by counsel. I am inclined to think that he does not intend to make a claim to any part of this purchase money, but be that as it may, he could not on his own evidence have a larger interest in these shares than I am finding him entitled to.

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Morgan is not a party to the action, but he was a witness. He disclaimed any interest in these shares and stated expressly that Lazier is entitled to them. It may be that he will be willing to assign his interest in them and in MacCullough's purchase money to the plaintiff. Upon the plaintiff filing with the clerk such an assignment from Morgan, with an affidavit verifying its execution by him, judgment will be entered in favour of the plaintiff against the defendant MacCullough, for $10,000 with interest at 5 per cent. from the 6th day of December, 1907. If this assignment is not filed Morgan may be added as a plaintiff upon his written consent thereto, verified by affidavit being filed with the clerk and in that event the judgment will go in favour of Lazier and Morgan against MacCullough for $5,000 each with interest at 5 per cent. from the 6th of December, 1907. If the plaintiff's consent is not so filed, the judgment will be in favour of the plaintiff alone for $5,000 and interest as above upon Morgan being added as a party defendant which may be done without further order.

The defendant MacCullough will pay to the plaintiff his costs of the action including the costs of said defendant's examination for discovery and of the examination of the plaintiff for discovery if one was held but of no other examinations for discovery. He is not to pay any costs of procuring Morgan's consent or of adding him as a plaintiff or defendant.

The plaintiff must pay the costs of the defendant company and the defendant Vermilya. They were unnecessarily made parties for the only relief sought against them was an injunction restraining the delivery of the share certificates to MacCullough and his registration as a shareholder and both of these things had been done before the action was commenced.

The plaintiff is entitled to a lien on these shares for the amount of his judgment as is also Morgan if he is added as a plaintiff. I make no order for judgment in favour of Vermilya for although he filed a defence he has put forward no claim against MacCullough, and did not at the trial suggest his intention to do so. Leave is reserved to him to apply within one month from this date as he may see fit. If Morgan is added either as plaintiff or defendant, the pleadings may be treated as amended accordingly or the plaintiff may make the necessary amendments to that end.

*Tweedie*, for the plaintiff.
*Savary*, for the defendant MacCullough.
*Adams*, for the defendant company.

## JORDAN v. J. I. CASE THRESHER MACHINE CO.

*Saskatchewan District Court, Saskatoon, Judge McLorg. January 15, 1912.*

TROVER (§ II—31)—*Defences—Denial of property in the goods—Alternative claim as bonâ fide purchaser for value from chattel mortgagee—Validity of chattel mortgage.*]—JUDGE MCLORG:—This is an action of trover or detinue for articles described in the statement of claim as "two black mares, the property of the plaintiff."

The defence after denying the property of the plaintiff in the goods, proceeds:—

> in the alternative the defendants say that in the month of November, 1907, the said goods were mortgaged by one Wm. Vandale, who was then the owner, to the defendants which said mortgage was duly filed and kept renewed pursuant to the provisions of the Bills of Sales Act,

and then goes on to say that default having been made in payment of the monies secured under the mortgage, the defendants under the power conferred on them seized the goods, and by reason of such facts are entitled to the goods as against the plaintiff.

I have set forth the pleading *in extenso* because I think that important results may follow from it. No reply was filed, but at the trial of the action the plaintiff contended that the chattel mortgage, to which I shall presently refer, was invalid on the ground that the articles in question were not properly described. Now, if the plaintiff intended to take exception to the chattel mortgage on any ground, except possibly the ground he does take, I am of opinion that it was not open to him to do so because by rule 155 he should have distinctly specified what he contended rendered the transaction void or voidable. By rule 194, it is provided that if no reply be delivered the effect of it shall be that all the material statements of fact in the pleading last delivered shall be deemed to have been denied and to be in issue.

It is hard to specify exactly what the material facts are that would be denied by this method of pleading, but I gather that, to say the least, the fact that the goods were mortgaged by Vandale would be denied; possibly, also, that the mortgage was duly filed. I am free to admit that this phase of the case has caused me more difficulty than any other branch of it. I have assumed, therefore, that the question as to whether the mortgage was given and whether it was filed are raised by the pleadings and put in issue.

The facts of this case as I find them are briefly these: one Wm. Vandale, purchased from one Wright, two horses; these

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horses are described in the bill of sale by Wright to Vandale as:—

1 Brown mare, branded X O on right thigh, called "Mag."
1 Brown mare, branded X O on right thigh, called "Kate."

On the 7th of November, 1907, the J. I. Case agent, one Osborne, proceeded to Vandale's farm and took from him a chattel mortgage covering one black mare, five years old, "Kate," one black mare, five years old, "Mag." and some other articles. This is the description of the horses in dispute, according to Osborne's testimony, as given to him by Vandale. Osborne, however, in making out the duplicate for filing purposes, described these horses as "one bay mare, five years old, called 'Kate;' one black horse, five years old, called 'Mag.'" Osborne explains, and I accept his testimony, that the misdescription was purely an error; that he was very much hampered and busy at the time and quite inadvertently inserted the wrong description.

The mortgage with the wrong description was filed in the proper office on the 20th November, 1907. Some time in the month of October, 1909, Vandale sold two black mares named "Kate" and "Mag" respectively, to the plaintiff. There is a certain amount of discrepancy in the terms of the sale, but there is nothing to suggest that the plaintiff was not a purchaser in good faith.

On May 16, 1910, the J. I. Case Thresher Co., the defendants, by their bailiff, one Gold, seized these horses, and two or three days afterwards the plaintiff replevied them. I find as a fact that the horses sold were the horses on which the defendants intended to take their mortgage. Now, though I have stated that if the plaintiff wished to attack the chattel mortgage for some irregularity, he could not so attack it by a simple denial of the execution or filing of the document; he must raise the objection specifically; at the same time I think it is open to him to say that the goods in question are not mortgaged; that what is mortgaged is a "black horse" and a "bay mare," and in that sense raise the insufficiency, or perhaps I should say the inaccuracy, of the description. He can surely say: "These articles that you say are mortgaged do not purport to be those covered by your chattel mortgage at all; they purport to be something wholly different;" and in that sense he can urge that no mortgage of these articles was ever given or ever registered in accordance with the Bills of Sales Act, and that he, being a purchaser in good faith, has priority over the mortgagee. Now Vandale gave, at one time, to the bailiff, a description of these horses for the purpose of identifying them when the latter intended to seize them from the plaintiff. Gold afterwards seized them and stated that

the description was in all respects accurate. That description is as follows:—

> Mag was a blach mare with a split ear, a scar on the breast, white on each hind foot, and branded, Kate was a black mare with a scar on the nigh shoulder, with white on each hind foot; and a small star on the forehead of each mare.

Now, it must be clear that it is the mortgage that is filed that operates against purchasers, and the description there of these two horses is, as I have stated: "one bay mare, five years old, Kate; one black horse, five years old, Mag," the description required by our statute is such "sufficient and full description of such goods and chattels that the same may be readily and easily known and distinguished" and the same as that of the Manitoba statute referred to in *McCall* v. *Wolff*, 13 Can. S.C.R. 130, 133, where the learned Chief Justice is reported as follows:—

> I do not think the legislature intended to confine this description to the parties by whom it was prepared as between themselves alone, but the description was to enable the property to be identified as against third parties, creditors or others claiming an interest in the property. This need not be such a description as that with the deed in hand without other inquiry the property could be identified, but there must in my opinion, be such material on the face of the mortgage as to indicate how the property may be identified if proper inquiries are instituted.

And at the end of his judgment he states: "The statute is a wise one and should be so construed as to make it effectual."

The only other evidence in the deed tending to identification was the description of the articles as being on a certain quarter section, describing township and range, presumably the home of the mortgagor, but the evidence established that the mortgagor had left there—though whether before the sale to the plaintiff or not is not made clear. I will assume, in the absence of evidence to the contrary, that they were still on the farm when sold.

Now, accepting that as a test of what is required, can it be said that describing a mare as a horse, and a bay mare as a black mare, is a sufficiently accurate description, more especially where the marks on the animals afforded such excellent means of identification. It seems to me beyond doubt that the description is wholly insufficient; it is not only insufficient, but it is actually misleading and I cannot think that the reference to the locality can cure the defect. It was urged, however, on behalf of the defendant, that the plaintiff could not take this objection inasmuch as prior to the purchase he had never searched the records; that his position consequently was not in any way altered or prejudiced, and that if he had applied to the defendants he could have seen from the mortgage in their possession what the correct description was, and it was con-

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ceded that no search was made by the plaintiff until the horses were seized in his possession. This branch of the case, I think is covered by the decision in *Moffatt* v. *Coulson*, 19 U.C.Q.B. 341. In that instance also there was an insufficient description of two horses; they were just described as "two horses." There was some evidence that the purchaser had knowledge of the mortgage and it was held not to affect his right to raise the objection. The legal effect of the misdescription is dealt with as follows by the learned Chief Justice, the statute being the same as our own; he says:—

> There was no description whatever of the two horses mortgaged by which they could be "readily and easily known and distinguished" from any other two horses. The effect of that, I think, is to make the mortgage of them absolutely void as against a subsequent purchaser in good faith, for the fourth clause of the Chattel Mortgage Act, 20 Viet. ch. 3 (corresponding to our section 14), is to be read in connection with the preceding clauses, and thus the particular description which it exacts is made to form one of these requisites which must be found in all chattel mortgages, to enable them to bind the goods by virtue of registration only where there has been no immediate and continued change of possession.
>
> The only question, then, is whether this defendant should be held to be a subsequent purchaser in good faith, within the meaning of the second section (corresponding to our section 11), in which case only he would be entitled to hold against the mortgagee in consequence of the defective description of the horses. I think he should be so held, for there seems to be no reason to doubt upon the evidence that he bought in good faith in this sense, that he paid a fair consideration for the horse which is in question, and did not buy him collusively, in order to assist the mortgagors in placing him out of the plaintiff's reach. The only question is as to the effect of the evidence given of the defendant being aware of the mortgage before he bought.

And he goes on to say:—

> But at any rate, I think the notice of the existence of a mortgage insufficient to pass the property would not make the defendant a purchaser in bad faith.

Now the object of the Act after all is merely to give intending purchasers notice, and if he chose to take the chance of buying these horses without searching the records he surely cannot be in a worse position than if he had been told that there was a mortgage against them which insufficiently or inaccurately described them. There must be judgment for the plaintiff with costs. Jordan, for plaintiff. Bastedo, for defendant.

## FITZGERALD v. WARNER.

*Saskatchewan, District Court, Moosomin, Judge Farrell. April 25, 1912.*

ATTACHMENT (§ III—45)—*Procedure—Irregular affidavit leading to issue of writ—Strict compliance with Rules of Court —Sask. Rules* (1911), 545.]—JUDGE FARRELL:—This is an application by the defendant to set aside a writ of attachment on the ground of alleged irregularity in the issue of the writ, and that the defendant has not absconded and does not intend to abscond from this province. From the material before me, I think the plaintiffs had reasonable cause for issuing the writ of attachment herein, and notwithstanding the defendant's denials I am not at all satisfied that he did not intend and was not about to abscond from the province. However, the remedy given the plaintiff by order 38 is an extraordinary and drastic one, and comes under the class in which it has been held that the requirements of the statutes or rules must be strictly complied with to entitle the plaintiff to the remedies so provided.

In this case the plaintiffs have complied with the first part of Rule 545, and have shewn by affidavits that before the application for the writ of attachment, an action had already been commenced for the recovery of the amount claimed to be due from the defendant to the plaintiff, that it is over $50.00 and shewing clearly from what cause it arose.

As this is an alleged case of "about to abscond" sub-section (*a*) of the second part of this rule requires that the plaintiff or his agent must also swear, giving his reasons, that the defendant:—

> (*a*) Is about to abscond or has absconded from Saskatchewan leaving personal property in any judicial district thereof liable to seizure under execution for debt.

The question is, Have the plaintiffs complied with this part of the rule? Their agent Lewis has sworn that he has good reason to believe that the defendant is about to abscond from the province, giving his reason for so believing, and this is corroborated in the manner required by the rule, by a person whom I am ready to call a credible person. This, however, is not enough, he must swear not only that he believes the defendant is about to abscond, but that he is leaving personal property in any of the judicial districts of the province "liable to seizure under execution for debt."

I have already held in the case of *Richardson* v. *Roberts*, 10 W.L.R. 497, which was a very similar case to the present, being that of an attachment of debt, that a strict compliance with the requirements of this rule in such cases as these is absolutely necessary. The writ of attachment herein and all proceed-

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ings hereunder are set aside. As to costs, I do not see that I can deprive the defendant of them, but I will make them conditional, that no action be brought against the plaintiffs because of the wrongful issue of said writ, and these costs to be costs in the cause to the defendant in any event. The sheriff will be protected in any event. Truscott, for defendant. Proctor, for plaintiff.

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MERCER v. M———.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, J.J.A. April 2, 1912.*

VENDOR AND PURCHASER (§ I C—18)—*Option to purchase land—Conditional on owner of undivided part confirming same—Absence of confirmation.*]—Appeal from the judgment of Clement, J., at the trial.

*Bodwell*, K.C., and *Sir C. H. Tupper*, K.C., for appellant.

*S. S. Taylor*, K.C., for respondent.

MACDONALD, C.J.A., concurred with GALLIHER, J.A.

IRVING, J.A.:—I would dismiss this appeal. M—'s evidence has been accepted by the learned trial Judge, and I feel that I also must accept it.

The evidence is that the option was only delivered subject to Keary's confirmation. I understand that meant that he—Keary—would join with them in that option on the same terms. I think the ground taken in the 15th paragraph of the statement of defence is established.

In *Ex parte Harding*, 12 Ch. D., 557, 564, James, L.J., said:—

> If three persons sign a document, and it is said that they are not liable, because the intention was always that they should not be liable unless some other persons should also sign, that is an equity to get rid of a legal liability.

GALLIHER, J.A.:—This case was ably argued by counsel on both sides, and the evidence placed before us very fully at the hearing. I have examined the authorities to which we were referred very carefully, but after all it seems to me the case narrows down to one single fact. What was the intention of the parties as contained in the agreement and disclosed in the evidence? It seems to me there is only one answer. When the agreement was entered into which called for a sale of the entire property, it was known to all parties that the parties signing had only a three-fifth interest, and that there was two-fifths outstanding in one Keary.

The agreement does not purport to be a sale of the interests

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of the M——s and Bowles, whatever that interest might be, nor on the face of the agreement itself can we infer that they were agreeing to sell their interest only.

The sale was of the whole property at a lump sum for the whole, and it was in contemplation of all parties that this agreement had to be signed by Keary. Now, whether we accept M——'s statement that it was to be no deal unless Keary signed, or the contention of the other side that it was an agreement to which Doherty was to obtain Keary's signature, seems to me to make no difference in view of the fact that what was in the contemplation of the parties was that Keary's approval of a sale of his interest at the figure mentioned in the agreement was to be procured. This was not done, and the fact that his confirmation was afterwards obtained in a roundabout way and on payment to him of a much larger sum that his proportion would have been under the agreement, seems to me altogether outside of what was in the contemplation of the parties.

When this is borne in mind, I have no difficulty in distinguishing this case from those cited to us by Sir Charles Tupper. A number of other points were argued before us, which in the view I take as above expressed, it becomes unnecessary to decide. The appeal should be dismissed.

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## SUTCLIFFE v. SMITH.

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*British Columbia, County Court, Yale, Judge Swanson. May 13, 1912.*

VENDOR AND PURCHASER (§ I E—28)—*Stipulation for Rescission for Non-production of Deed—Action for Instalment of Purchase-money—Waiver — Payment into Court.*]—Action to recover an instalment of purchase-money of land, under an agreement of sale and purchase.

*Grimmett*, for the plaintiff.

*Maughan*, for the defendant.

JUDGE SWANSON:—On the 7th February, 1911, the plaintiff and defendant entered into an agreement for sale of lots 9 and 10 in block 9, south-west corner of Mammette avenue and Voght street, in the city of Merritt, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff the said lots, for the price of $1,100, payable $150 on execution of the agreement, $475 on the 7th August, 1911, and the balance, $475 on the 7th February, 1912, with interest at 7 per cent. per annum. The vendor entered into the following, among other, covenants, with the purchaser:—

> To convey and assure or cause to be conveyed and assured to the purchaser, his heirs or assigns, by a good and sufficient deed in fee simple,

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the hereditaments and premises above described, together with the appurtenances thereto belonging or appertaining, freed and discharged from all incumbrances, save taxes, rates, and assessments from the date thereof, but subject to the conditions and reservations contained in the original grant from the Crown, and such deed to be prepared at the expense of the purchaser, and to contain the usual statutory covenants.

The agreement also contained the following clause:—

If the vendor, his heirs, executors, administrators, or assigns, cannot produce a satisfactory deed or agreement of sale of lots 9 and 10 in block 9, free from all incumbrances, to the purchaser, his heirs, executors, administrators, or assigns, on or before the 28th February, 1911, the sum of $150 shall be forfeited and returned to the purchaser, his heirs, executors, administrators, or assigns, and this agreement of sale shall be void and cancelled by the vendor, his heirs, executors, administrators, or assigns.

This action was begun on the 19th September, 1911, to recover $475, the amount of the instalment alleged to be due on the 7th August, 1911, together with interest, $41.17, and some taxes paid by the plaintiff for the defendant as alleged, $550: in all, $521.67. The plaintiff based his action upon the defendant's covenant to pay pursuant to the agreement of sale. The defence raised is, that on the 28th February, 1911, the plaintiff was unable to produce a satisfactory deed or agreement of sale of the lots, free from all incumbrances, and that, therefore, the defendant demanded back from the plaintiff the amount paid by him, $150, payment of which was refused. The defendant contends that, by reason of non-production of the said deed or agreement of sale, the said agreement of sale dated the 7th February, 1911, was void, and that the said sum of $150 was due by the plaintiff to the defendant under and by virtue of the agreement. The defendant accordingly asked for cancellation of the agreement and for a return of the $150.

At the time the last-mentioned agreement of sale was entered into, the only title to or interest in the lands and premises possessed by the plaintiff was by virtue of an agreement of sale, dated the 25th June, 1910, entered into by the registered owners of the lots in question, B. B. Conklin and J. C. Conklin, as vendors, and the plaintiff as purchaser: under which the plaintiff agreed to buy lot 10 in block 9 and lot 15 in block 10, in the city of Merritt, for $650, payable $140 cash on execution of agreement; $170 on the 25th December, 1910; $170 on the 25th June, 1911; $170 on the 25th December, 1911; with interest at 8 per cent. per annum. Under this agreement of sale, the plaintiff had made the cash payment, $140, on the 25th June, 1910, and paid the first instalment, $170, and $20.45 interest.

The plaintiff's only title to or interest in lot 9, block 9, was derived under an agreement of sale (exhibit 3) dated the 13th

December, 1910, between the registered owners, B. B. Conklin and J. C. Conklin, as vendors, and the plaintiff, as purchaser, the price of lot 9 being therein set forth as $250, payable $50 on execution of the agreement, and the balance, $200, in three equal instalments at 6, 12, and 18 months from the date thereof, with interest at 8 per cent. per annum.

As a matter of fact, when the plaintiff and defendant executed the agreement of sale dated the 7th February, 1911, now in issue in the case at bar, the plaintiff had not paid anything whatever in respect of lot 9, block 9, under the agreement dated the 13th December, 1910. The Conklins were both absent from Merritt at the time the agreement dated the 7th February, 1911, was executed by the plaintiff and defendant. The plaintiff did not at that time have possession of the agreement of sale, delivery not having been made to him of the same by the Conklins. The defendant knew the nature of the interest possessed by the plaintiff in the lands in question at the date the agreement between them was signed.

It was by reason of that fact that the defendant had the above-recited clause, to the effect that if the plaintiff failed to produce a satisfactory deed or agreement of sale of lots 9 and 10 on or before the 28th February, 1911, the $150 paid by the defendant was "to be forfeited and returned" to the defendant, added to the agreement of sale. On the 28th February, 1911, the plaintiff was unable to comply with the above-recited covenant, to the knowledge of the defendant—the Conklins not having returned to Merritt—and payment not yet having been made by the plaintiff. The defendant, however, according to his own evidence, was willing to waive this clause in the agreement at least up to the 12th May; about that time the defendant was about to leave Merritt. The plaintiff was still unable to procure the agreement of sale to lot 9, block 9; but the plaintiff asserts that on or about the 11th March, 1911, with the consent of the defendant, he paid $25, on account of the purchase-price of lot 9, to one Crockett, an alleged agent of the Conklins. The plaintiff says this met with the full approval of the defendant, which, however, the defendant stoutly denies.

I am inclined to hold that the defendant did not at that date consent to the plaintiff's paying Crockett the $25, but that at that date the defendant was anxious to have the agreement cancelled and to get his money back, apparently being now anxious to get out of the whole transaction. Subsequently and before action brought, the plaintiff made his payment due under exhibit 3 in respect to lot 9, and obtained an agreement of sale signed by the Conklins.

The plaintiff admittedly, even at the time of the trial, the 28th February, 1912, was not possessed of the full legal estate

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in lots 9 and 10 in question. There was no dispute, however, that he was not in default to the Conklins under the two agreements of sale executed by him and the Conklins, above-mentioned. The defendant at the trial contended that the plaintiff's action must fail, as he must shew a good title in fee simple, free from all incumbrances, before he can compel payment of any of the instalments of the purchase-money due under exhibit 1. This defence was not expressly pleaded. If an amendment to the pleading be necessary for the purpose, I will allow an amendment to permit of this defence being pleaded. None of the agreements of sale in question were registered.

The defendant also avails himself of the defence, whatever effect it may have, afforded by sec. 74 of the Land Registry Act of 1906. The defendant, at the time he entered into the agreement (exhibit 1) was well aware that the plaintiff claimed title only under the agreements of sale (exhibit 2 and exhibit 3). The plaintiff never represented to the defendant that he had the legal estate in fee simple in the lands in question. The circumstances of the case are constantly being duplicated in this country in dealings with real estate under agreements of sale. It is an everyday affair for a man having only an agreement of purchase of real estate to enter into a new agreement of sale with a purchaser from him, both parties knowing that the last vendor's title is secured only under his agreement of sale.

There was no deception in the case at bar. It seems to me a serious thing to give effect to the defendant's major contention that he should be relieved of his obligation to pay under this agreement, and have the agreement rescinded and receive his money back because, at the date of the agreement of sale or at the time of the trial, the plaintiff did not have vested in him the full legal estate in the lands in question. The plaintiff is in a legal position to call for a conveyance of the legal estate in fee simple on completing his payments under his two agreements of sale with the Conklins (exhibit 2 and exhibit 3). The defendant says it would be unjust to compel him to make his payments in full to the plaintiff, when, after he had done that, he might find the plaintiff in default to his vendors, the Conklins, and be left to a more or less shadowy personal remedy against the plaintiff.

The defendant's position is very forcibly put by Perdue, J., in the Court of Appeal of Manitoba, in *Hartt* v. *Wishard-Langan Co.*, 9 W.L.R. 519, 538:—

> It appears to me it would be unjust and unreasonable that the plaintiff should be compelled to pay all his purchase-money, amounting to over $50,000, before he could call upon the vendor to shew a good title to the land. After all the money was paid, he might find that the vendors could not make title, and that he was left with simply his remedy on the covenant which might prove to be worthless.

Richards, J., concurs in the judgment of Perdue, J.A.; Howell, C.J.A., and Phippen, J.A., being of a contrary opinion. See the judgment of Stuart, J., in *Graves* v. *Mason*, 8 W.L.R. 542, dismissing an action to recover instalments of purchase-money of lands sold to the defendants. See Williams' Vendor and Purchaser, 2nd ed. 32.

I prefer to adopt the reasoning of Phippen, J.A., in *Hartt* v. *Wishard-Langan Co.*, 9 W.L.R. 519, at p. 528. He says:—

> It is true that, by the terms of that contract, the vendor can at any time call for the fee as of right; but the plaintiff contends that such title is not sufficient to support the agreement of sale, and that he is, therefore, entitled to be repaid what he has parted with. That a vendor can be called upon to repay purchase-money merely because it appears he holds title under an agreement of sale, although such agreement of sale entitles him, on terms, to an immediate fee, is a proposition to which I am unable to accede.

The learned Judge, at p. 530, quotes from the judgment of Strong, C.J., in *Armstrong* v. *Nason*, 25 Can. S.C.R. 263, 268:—

> It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent upon him to make out a good title in fee simple.

Commenting on this, Phippen, J.A., adds:—

> It is undoubtedly the vendor's right to receive such a title, but the time when the vendor is called upon for fulfilment of his obligation, apart from an appeal to the equitable jurisdiction of the Court and from custom, to my mind depends upon the terms of the contract.

The learned Judge, also at p. 530, continues:—

> The covenants of the vendor and the purchaser in the present case are independent. At law the purchaser would have no defence to an action on his covenant for an overdue instalment. But where the action is brought, as here, for the recovery of instalments payable by the terms of the contract before the time for completion has arrived, the vendor appears entitled to judgment for them, unless some equitable ground of relief is shewn, as, for instance, the existence of incumbrances or some defect in the title. Where the only objection is the existence of incumbrances to an amount not exceeding the purchase-money, the overdue instalments should be paid into Court, and the same rule should, in general, govern where there are defects in the title, and the defendant is in possession, unless he will go out of possession.

At p. 532 he adds:—

> It would be unwise unnecessarily to allow purchasers capriciously to rescind contracts because some small interest or estate in the subject-matter of the agreement happens at the moment of sale to be beyond the control of the vendor.

The latter portion of the judgment of Phippen, J.A., p. 530, are a quotation from a judgment of Street, J., in *Armstrong* v. *Auger*, 21 O.R. 98, at p. 102, as follows:—

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The later cases in this province have, however, established the reasonable rule that a purchaser whose purchase-money is payable by instalments which became due before his right to a conveyance arrives, is entitled to pay them into Court instead of to the vendor, where the vendor's title is defective or subject to incumbrances: *O'Keefe* v. *Taylor*, 2 Gr. 305; *Thompson* v. *Brunskill*, 7 Gr. 542; *Chantler* v. *Ince*, 7 Gr. 432; *Wardell* v. *Trenouth*, 24 Gr. 465; *Cameron* v. *Carter*, 9 O.R. 426; *Greenwood* v. *Turner*, 64 L.T.N.S. 261; see Sugden on Vendor and Purchaser, 14th ed., p. 231.

Street, J., adds, at p. 103:—

In the present case, the covenant to pay being independent and the time for completion not having arrived, the defendant has shewn the existence of charges which form an equitable ground for controlling its effect. He must be allowed to pay into Court so much of his purchase-money as may be necessary to protect him against the charges in question, unless the plaintiffs elect to pay the commutation at once and remove the trouble.

In *Foot* v. *Mason*, 3 B.C.R. 377, at p. 381, Drake, J., says:—

I am not aware that it is necessary to an action for specific performance that the vendors should be the holders in fee, if they can obtain a grant to the purchaser free from incumbrances.

See judgment of Martin, J., in *Towend* v. *Graham*, 6 B.C.R. 539, 544, in which *Foot* v. *Mason*, 3 B.C.R. 377, and several leading Ontario cases are reviewed. See *Re Bryant and Barmingham's Contract*, 59 L.J. Ch. 636.

I find that the defendant waived compliance with the covenant in writing, requiring production of deed or agreement of sale on or before the 28th February, 1911. I think that judgment should be given in the plaintiff's favour for the amount of the instalment overdue as set forth in the plaint, together with interest and taxes as therein claimed. I, however, order that the amount be paid into Court, and not be paid out to the plaintiff until he can shew in himself title in fee simple, free from all incumbrances, save taxes, rates, and assessments payable since the date of the agreement of sale. There will be a reference as to title before payment out to the plaintiff is made, if so desired by the defendant.

The defendant's counterclaim is dismissed with costs.

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## CHEKALUK v. WEBSTER.

*Alberta, District Court, Calgary, Judge Winter. April 15, 1912.*

MASTER AND SERVANT (§ I E—23)—*Liability of Master for Wrongful Dismissal — Res Judicata—Former Proceedings under the Masters and Servants Ordinance.*]—Action for damages for wrongful dismissal.

JUDGE WINTER:—The plaintiff seeks to recover in the Dis-

trict Court damages for wrongful dismissal, the circumstances being as follows. The plaintiff, being a domestic servant in the employment of the defendant, was discharged by him, as he alleges, for cause, and he thereupon paid her wages up to the date of her being discharged. The plaintiff then took proceedings under the Masters and Servants Ordinance, in the city of Calgary Police Court, to recover damages for wrongful dismissal, when the magistrate discharged the summons, holding that no damages were payable; and I assume that, in his view, the plaintiff had not been wrongfully dismissed. At any rate these are the facts, as I understand them to be admitted by the counsel for the plaintiff and defendant.

In the present action the defendant relied on the plea of *res judicata*. It was contended for the plaintiff, not very strenuously, it is true, that sec. 6 of the Masters and Servants Ordinance, by preserving a civil or other remedy, enabled the plaintiff in such a case as the present to bring the present proceedings. There is no substance in this contention. A servant can proceed either for recovery of wages and other damages in lieu of notice either in a civil Court or under the Masters and Servants Ordinance, but cannot recover in both proceedings for the same cause. If, however, by way of example, the servant has four months' wages owing to him and desires a speedy adjudication, he can, under the Ordinance, proceed for not more than two months' wages and for wrongful dismissal, and being then successful can bring an action in a civil Court for the other two months' wages.

In order to establish the plea of *res judicata*, the Court whose judgment is relied on as establishing that plea must have had jurisdiction directly in the matter in question, which was in the present case whether the plaintiff was wrongfully discharged and on that account entitled to damages in lieu of the customary notice. The magistrate's Court had such jurisdiction and duly adjudicated. The plea, therefore, is good: *Millett* v. *Coleman*, 44 L.J.Q.B. 194, 33 L.T. 204.

The fact that, according to usage, the servant is generally entitled to one month's notice or to one month's wages in lieu of notice, while under the Ordinance such damages are limited to four weeks, does not, in my view, affect the sufficiency of the plea.

Judgment will, therefore, be entered for the defendant with costs. Forsyth, for the plaintiff. McGillivray, for the defendant.

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**Re DOMINION and CANADIAN NORTHERN EXPRESS COMPANIES, Re Tariff on Cream.**

*Board of Railway Commissioners, July 23, 1912.*

CARRIERS (§ IV C 2—530) — *Governmental Regulation — Power of Board of Railway Commissioners to Fix Express Rates — Revising Local Tariff on Cream—Former Orders.*]— Consideration of the Special Local Tariff of Dominion and Canadian Northern Express Companies applicable on cream between points in the Provinces of Saskatchewan, Alberta and Manitoba, and Ontario, west of Port Arthur, for distances not exceeding 300 miles made effective on November 1st, 1911, which was suspended by the Board on October 27th, 1911. (File No. 4214.219.)

MR. COMMISSIONER MCLEAN:—The hearing in this matter, which was held in Winnipeg on March 25th, 1912, was the outcome of a series of negotiations which took their origin in the Board's judgment in the express investigation.

At the hearing in Winnipeg on September 15th, 1911, in which complaint was made by the Manitoba Dairymen's Association against the express companies, on the ground that these companies had not made reduction in the tariff on sweet cream for butter making, as required by the Board's judgment in the express case, it was stated by Mr. Burr, on behalf of the Dominion Express Company, that the express companies had been figuring out a new schedule of rates which they desired to submit to the Board. It was suggested by the Board that further negotiations should take place between the express companies and the parties interested, to see if an agreement could be arrived at. Subsequent to this, negotiations were carried on between the express companies and the parties affected.

The question of the express tariffs on sweet cream, and on sour cream, in the territory west of and including Port Arthur, was dealt with in the Board's judgment in the express investigation. The disposition then made was that there should be a lower rate on cream to the creamery for butter making than upon that used for domestic purposes. It was stated by the Chief Commissioner:—

> it appears that there is considerable shipment of butter by express from these creameries. The cream is their raw material. The company gets some earnings from carriage of the finished product, and so it is perfectly in order to give a lower rate on cream to the creamery than upon that used for domestic purposes, so we think the intention of the company should be given effect to, and the business of the creameries be left undisturbed. The tariff to be filed may provide for the existing sour cream rate upon all cream when shipped to creameries for use in the manufacture of butter. The tariff to remain as it is upon cream for domestic purposes.

There is an obvious anomaly in charging different rates upon the same commodity moved under the same general conditions, the only reason for the difference being the final use. The Board, in an early decision on October 10th, 1904, when the Grand Trunk Railway applied for a ruling as to whether it would be allowed to continue a difference in the rate of freight on bituminous coal of 10 cents per ton between certain points on its line of railway, such reduced rates being in favour of the manufacturer as compared with that charged the dealer or consumer, ruled that it could not properly entertain such an application. A similar position has been taken by the Interstate Commerce Commission, which has ruled that it is improper to so base a classification that it makes the rate dependent upon the use to which the article shipped is to be devoted: *Jones Bros. Co., V.M. and W.R.R. Co.*, 21 I.C.C., p. 579.

In its conference rulings it has laid down the position that

> the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate.

Rule 34, Conference Rulings Bulletin No. 4.

It has re-affirmed this position in its decision *In the Matter of Restricted Rates*, 20 I.C.C. 426.

Its position is most succinctly put in the following words:—

> The rule is well established that a rate cannot be based upon the use to which the commodity is to be devoted; neither can a rate be confined by its terms or application to an individual or a class; it must be open to all shippers alike.

*Virginia Chemical Co., V.A.C.L.R.R. Co.*, 22 I.C.C. 397.

While it is true that the rate practice as to cream for butter making as distinct from cream for domestic use bore some features of analogy to the milling-in-transit privilege, it is apparent that the predominating consideration was that the practice was an established one In the absence of further evidence, and in the lack of complaint in regard to the higher rates on cream for domestic purposes it was not deemed expedient to disturb the existing arrangement which the express companies had initiated.

It was, however, recognized at the time of the hearing, that there would be a difficulty in differentiating between cream for butter making and cream for domestic purposes. It was then stated in evidence by Professor Mitchell of the Manitoba Agricultural College that

> there would be a disposition on the part of some to ship cream presumably for butter making purposes, when in reality it would be used for other purposes.

It was thought in the disposition under the judgment that the limitation of the butter making rate to cream "shipped to creameries for use in the manufacture of butter," would meet

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this difficulty. The existing difficulty in this regard was set out by Mr. Burr for the express companies, when he stated in the present hearing that they were

> willing to allow the present tariffs on both classes to remain in effect if we can have some protection in the matter; if we can know what is one and what is the other. You will recollect, sir, that in a conference we had in Ottawa on the same subject, many months ago, this question was discussed, and we asked that the shippers or the consignees pay us the charges on the higher rate, and when they proved to us satisfactorily that a part of the consignment were on the lower rate class, we would make a refund. You asked us to confer with the Winnipeg people on the point. They refused absolutely to have anything to do with that.

In the hearing in Winnipeg in September, 1911, already referred to, the same matter came up incidentally in evidence, and it was stated by counsel for the applicants that the matter might be arranged by allowing the cream to be billed in on the butter making rate, and that thereafter the consignees could pay the express company the difference in rate on the portion of the consignments which might be used for domestic purposes.

The more carefully one examines the situation, the greater appear to be the difficulties of carrying out a dual system of tariffs based simply upon differences in the use of the commodity. One cardinal intention of the Railway Act is that there should be adequate publicity for clearly defined rates to be paid for services rendered. It is readily apparent that the dual system offers an inducement to an unscrupulous shipper to bill his cream on the butter making rate, when in reality it is to be used for domestic purposes. While no such evasion of the intention of the tariff may have taken place it is manifestly counter to the obvious intent and policy of the Railway Act to leave not simply a loop-hole but a wide open door available for such evasion. Such an arrangement sets a premium on perjury. It may happen also that there is an innocent evasion of the requirements of the tariff. Cream may be shipped in for butter making purposes. There may be some small surplus of sweet cream which is not used for this purpose and is sold for domestic uses. It would put a great burden upon the creamery company to keep exact tab on such small sales. It is also apparent that such a small sale might be made by an innocent employee of the company, and without any guilty knowledge of the management of the company.

The arrangement suggested by the company, namely, that all cream should be billed in on the higher rate, a refund being made on the portion which was used for butter making, is contrary to the policy of the Railway Act. It requires no elaboration to appreciate that this would leave a way open for rebating arrangements. On the other hand, the suggestion already re-

ferred to, that all of the cream should be shipped in on the lower rate, arrangements being made whereby a subsequent additional payment should be made for the portion of the cream used for domestic purposes is equally open to objection as contrary to the policy of the Railway Act in regard to rebates.

The tariff which was suspended on October 27th, 1911, provided for a uniform rate on cream irrespective of its use. Mr. Burr, on behalf of the express companies concerned, stated, both in a communicaton to the Board which is on file, as well as in his evidence in the present case, that the computations in regard to rates under the tariff in question were that 20 per cent. of the movement by express was for domestic use, and that 80 per cent. was for butter making. The following table sets out a comparison of the existing rates on sour cream; the rates on sweet cream, and the new rates proposed in the tariff to apply on all cream irrespective of use:—

CREAM RATES IN ALBERTA, SASKATCHEWAN, MANITOBA, AND ONTARIO.

(WEST OF PORT ARTHUR.)

| Miles. | Rates on Sour Cream. | | | Rates on Sweet Cream. | | | New Rates applying on both kinds. | | |
|---|---|---|---|---|---|---|---|---|---|
| | 5 | 8 | 10 | 5 | 8 | 10 | 5 | 8 | 10 |
| 25 | 14 | 19 | 24 | 35 | 38 | 48 | 20 | 25 | 30 |
| 50 | 16 | 20 | 25 | 36 | 58 | 72 | 25 | 30 | 35 |
| 75 | 20 | 25 | 30 | 48 | 77 | 96 | 30 | 35 | 40 |
| 100 | 26 | 31 | 36 | 60 | 96 | 120 | 35 | 45 | 50 |
| 150 | 38 | 43 | 48 | 72 | 115 | 144 | 45 | 55 | 60 |
| 200 | 50 | 55 | 60 | 84 | 134 | 168 | 55 | 65 | 70 |
| 250 | 62 | 67 | 72 | 90 | 144 | 180 | 65 | 75 | 80 |
| 300 | 74 | 79 | 84 | 96 | 154 | 192 | 75 | 85 | 90 |

Mr. Carruthers, of the Crescent Creamery, stated that about 4 per cent of the cream received by him was for domestic purposes, and about 13 per cent. was used in the manufacture of ice cream; the balance being used in the manufacture of butter. He stated further that during the year 1911, he had manufactured about 600,000 lbs. of butter. He contended that on account of the large amount of cream used in butter making any decreases in the rate on cream for domestic purposes would be more than neutralized by the increase in the rate on cream for butter making purposes, and he submitted a computation that at present the express charges on the total cream used in Manitoba would mean $42,000, while under the proposed tariff it would mean $66,000, or an increase of $24,000.

It was contended by various witnesses that the conditions in regard to cream shipments by express in the North-western Pro-

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vinces, were entirely different from those existing in the Province of Ontario. The essential point of difference referred to was the use of centralizing in connection with butter making. Mr. Carruthers testified that he had been engaged in the creamery business in Ontario and eastern Canada, and that he was more or less familiar with the conditions in eastern Ontario. The difference as between Manitoba and eastern Canada, he testified, was as follows:—

> Well the difference is this. In eastern Canada the population which is engaged in dairy farming is much more than it is here, and at every cross-road three or four miles apart there is a cheese factory or butter factory where the farmer delivers his goods to be manufactured, while in Manitoba everything has to be handled by the railroads to bring it to one common point, as there is no part of Manitoba that has population enough to support any location factory, either cheese or butter.

The same witness further testified:—

> I should judge that any shipments of cream in Ontario would be used for domestic use in large cities such as Toronto, Montreal and such points.

He further testified he did not know of any factory operating in either Ontario or Quebec on the same system as his company. Professor Mitchell, in his evidence, corroborated the evidence of Mr. Carruthers, stating that the cream in Ontario for butter making purposes is practically all handled in an entirely different way from that in which it is handled in Manitoba, and that it is not shipped by express to any extent.

In such a comprehensive investigation as was carried on in the general investigation of express rates, it necessarily follows that the general principles laid down do not exhaust the scope of regulative power. The Board was concerned with the investigation of the rates and practices of companies which had been a very much shorter time subject to the regulative jurisdiction of Parliament than had the railway companies. The scope of such a general investigation was, therefore, of necessity concerned with the blocking out of general reforms. The work of regulation in regard to express rates, instead of having been completed by the express judgment was simply begun by it. It will, of necessity, follow that in many cases complaints in regard to rates and practices will have to be dealt with from time to time. Some of these complaints may arise from conditions which were not developed at the time of the general investigation. Others may develop from conditions which were imperfectly set before us. At any rate it is apparent that some time must elapse before a complete body of regulative experience in regard to express rates in Canada is developed, and this will be developed when dealing from time to time with complaints, both general and special, as they arise. This was affirmatively

recognized in the express judgment itself which, in dealing with the matter of rate complaints from various points in the West said,

> but these are not dealt with, as it is considered that the better course to pursue is to await a general revision and re-alignment that must follow these findings, when if a more satisfactory situation is not brought about complaints that have not been dealt with categorically, or solved in the general result, will be further considered.

The express companies, since the issuance of the judgment in the express investigation, have been re-aligning and re-arranging their rates. The experience of the Board in connection with this shews that further work is to be done and this will be dealt with.

In the evidence and statements submitted, reference was made to conditions existing in the adjacent north-western states, and it was contended by counsel for the applicants that the decisions as to express rates in these adjoining states gave the measure of what should be reasonable in the present case. It was stated in general terms by Mr. Carruthers, and by Professor Mitchell, that the conditions in these adjoining states of the American Union were practically identical with those existing in the Canadian North-west. It was stated on the other hand by Mr. Burr that the conditions were dissimilar. But the situation is that the Board is left simply with two sets of assertions, neither of which is backed up by any evidence to substantiate the similarity or dissimilarity alleged. The Board has already held that where the traffic compared moves over two different routes, this precludes the mere reference to difference in mileage rates being taken as *primâ facie* evidence of discriminatory treatment, and that this held with especial force where comparisons are made with the rates of railways which are not subject to the Board's jurisdiction: *Canadian Oil Companies* v. *Grand Trunk, Canadian Pacific and Canadian Northern Railway Companies*, 12 Can. Ry. Cases 355.

The same line of reasoning covers the allegation of similarity of circumstances; a *primâ facie* case as a similarity of circumstances must be made; but this is not done by mere allegations.

This Board has always appreciated the value of the regulative work done by the Interstate Commerce Commission, and its findings have always been held in esteem. But the Board in holding that the decisions of that Commission are applicable in their entirety here only in cases where circumstances in Canada are on all fours with the circumstances upon which the aforesaid decisions depended, has recognized the burden placed upon it by Parliament of investigating the special circumstances of the cases coming before it. The Interstate Commerce Commission itself, in dealing with the situations arising from the regulation of rates by State Railway Commissions, has said that

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while, upon general principles of comity the action of a State Commission in fixing rates on state traffic must be treated with all due respect, at the same time the Interstate Commission has never felt itself bound to accept a state-made rate as the necessary measure of an interstate rate. That is to say, it must examine the circumstances for itself: *E. E. Saunders & Company* v. *Southern Express Co.*, 18 I.C.C. 415.

Sufficient justification has been advanced for doing away with the anomalous situation of two tariffs dealing with the same commodity; the difference in rate being dependent upon the difference in use. The Board has already recognized the advantage of having a uniform tariff on cream irrespective of its use in the section east of Port Arthur. The Board, by its order No. 13381, of March 21st, 1911, dealing with the situation east of Port Arthur, fixed certain express rates on cream for butter making, and a tariff of higher rates on cream for purposes other than butter making. It was found in practical operation that this arrangement was unsatisfactory, and accordingly order No. 14594, of August 21st, 1911, was issued fixing uniform rates for cream irrespective of the use to which the commodity was applied. Such an arrangement having been made east of Port Arthur, the question faces the Board, are the conditions sufficiently dissimilar west of Port Arthur to warrant a different treatment? As I construe the Railway Act the Board must find its criteria of the reasonableness of Canadian rates within Canada. I further apprehend that while it is the policy of the Railway Act to foster elasticity of rate making in so far as it is compatible with public policy, and that to this end the railways are permitted to vary rates with circumstances and conditions subject to the onus of disproof if these rates are shewn to be *primâ facie* discriminatory, there is not the same broad discretion vested in the Board. In other words, the Board being concerned with the correction not primarily with the initiation of rates must carefully consider in regulating rates in one section of Canada what it has done in another section of Canada. The railway, and what is here said, covers the express company as well, having its finger on the pulse of trade may quickly vary rates to meet changing needs. The Board has not, and was not intended by Parliament to have this direct relationship, since its powers are invoked only where grievances arise. It is concerned with corrective not with experimental rates.

As has been noted, it was contended in the course of the hearing in the present case, that the conditions in regard to centralization differentiate the situation west of Port Arthur from the situation east thereof. The Board has, however, found on investigation, that the centralizing system is gradually increasing in Ontario with which special comparisons were made in the

course of the hearing. It is advised by the Dairymen's Association of Western Ontario that the amount of cream shipped by express for butter making purposes is at least as great at that shipped for domestic purposes. The T. Eaton Company, which has the largest centralizing plant in Western Ontario, manufactured in 1911, 841,000 pounds of butter. This company advises the Board that the relative percentages of cream shipped into their factory by express for butter making are as compared with the shipments for domestic purposes 93 5/8 per cent. and 6 3/8 per cent.. Statements from other plans shew that the percentage shipments of cream by express for butter making purposes are steadily increasing. On due consideration of the whole matter, it appears justifiable to take what has been done by the Board in the section east of Port Arthur as a measure of what it should do in the section west of Port Arthur.

The tariff covered by the Board's order No. 14594, above referred to, covers distances up to 200 miles. As the situation in the present case requires a longer mileage the rates may be stepped to 300 miles on the same basis as set out in the order, and indicated in the following table. The following tabular summary sets out a comparison of the western sour cream rate, the western sweet cream rate, the eastern uniform scale and the uniform scale proposed by the express companies:—

| Miles. | Western Sour Cream. | | | Western Sweet Cream. | | | Eastern Uniform Scale. | | | Proposed Uniform Scale. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 5 | 8 | 10 | 5 | 8 | 10 | 5 | 8 | 10 | 5 | 8 | 10 |
| 25 | 14 | 19 | 24 | 35 | 38 | 48 | 15 | 20 | 25 | 20 | 25 | 30 |
| 50 | 16 | 20 | 25 | 36 | 58 | 72 | 18 | 26 | 31 | 25 | 30 | 35 |
| 75 | 20 | 25 | 30 | 48 | 77 | 96 | 22 | 31 | 36 | 30 | 35 | 40 |
| 100 | 26 | 31 | 36 | 60 | 96 | 120 | 26 | 36 | 41 | 35 | 45 | 50 |
| 150 | 38 | 43 | 48 | 72 | 115 | 144 | 34 | 46 | 51 | 45 | 55 | 60 |
| 200 | 50 | 55 | 60 | 84 | 134 | 168 | 42 | 56 | 61 | 55 | 65 | 70 |
| 250 | 62 | 67 | 72 | 90 | 144 | 180 | 50 | 66 | 71 | 65 | 75 | 80 |
| 300 | 74 | 79 | 84 | 96 | 154 | 192 | 58 | 76 | 81 | 75 | 85 | 90 |

I am therefore, of opinion, that the express companies should instal within thirty days from date of the order making this judgment effective, a tariff west of Port Arthur, which will put into force the same provisions as are contained in the Board's order No. 14594, subject to the rates for 250 and 300 miles being stepped as indicated. Further additional mileage, where necessary, should be covered by the tariffs on the same scale.

THE ASSISTANT CHIEF COMMISSIONER concurred.

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**INDEPENDENT LUMBER CO., Ltd. v. DAVID et al. and HURLBURT (claimant).**

*Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. November 23, 1912.*

COSTS (§ I—19*d*)—*Issue directed on an appeal—Insufficient record.*]—APPLICATION on behalf of the claimant Hurlburt to be allowed the costs of an appeal which was taken to this Court from the order of the District Court Judge for the judicial district of Moosomin upon an interpleader application which, by consent of the parties, he disposed of summarily.

The application was granted.

*D. Mundell*, for claimant.

*J. A. Allan*, for plaintiff.

LAMONT, J.:—In disposing of the application, the learned District Court Judge upheld Hurlburt's right to the goods seized and directed the sheriff to withdraw from possession. The plaintiffs appealed from this decision to this Court, and sought a reversal of the order of the District Court Judge, or, in the alternative, the direction of an issue. On the appeal the great bulk of the argument was directed to the question whether or not the relation of landlord and tenant had been created between Hurlburt and David. On this point the Court decided against the plaintiffs' contention: *Independent Lumber Co.* v. *David*, 19 W.L.R. 387. But as it did not appear from the material filed that the seizure by Hurlburt had been made between sunrise and sunset, and as the Court was unable to determine whether or not the validity of Hurlburt's seizure had been questioned or relied upon before the District Court Judge, this Court directed an issue to be tried. In reference to the costs in appeal, the judgment-roll of this Court reads:—

> And it is further ordered and decreed that either party be at liberty to apply to this honourable Court after the final disposition of the said issue for the disposition of the costs of this appeal.

A perusal of the judgments given in appeal satisfies me that if this Court had been sure that the validity of Hurlburt's seizure had not been questioned in the Court below, the plaintiffs would not have been allowed to raise it in appeal. In his judgment on the issue the District Court Judge has, for our information, stated that the point was not argued before him on the interpleader application, nor was his attention drawn to it. He also states that he agreed to dispose of the application summarily at the request of the plaintiffs and with the consent of the defendants. Had these facts been before this Court when the appeal was disposed of, I am satisfied the appeal would have been dismissed with costs. Hurlburt was successful on all points on the issue, and in my opinion he is entitled to the costs of the appeal.

*Application granted.*

## ALEXANDER v. TODD.

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*British Columbia, County Court, Victoria, Judge Lampman (Arbitrator). January 30, 1912.*

MASTER AND SERVANT (§ A 2—49)—*"Course of Employment"—Workmen's Compensation Act, R.S.B.C.* 1911, *ch.* 244 *—Employee Working on a Pile Driver—Presumption That he Fell Overboard.*]

JUDGE LAMPMAN (Arbitrator):—The respondents were operating a pile driver for the purpose of constructing a fish trap off Otter Point, Vancouver Island. The deceased and other workmen slept upon the pile driver and upon the morning in question, the deceased, with the other workmen, arose and washed for breakfast and was proceeding along the pile driver on the way to breakfast and the deceased was not seen again. It was proven that he had been subject to fits. The morning of the accident was a clear, fine morning and the tide was running out, so that there was no likelihood of the body being found on the beach, and the body was never found.

There can be no doubt that the deceased fell overboard and was drowned, and the question I have to decide is whether the accident arose out of and in the course of the employment. At the conclusion of the evidence the inference that I drew from the facts was that the deceased after washing had, instead of going in at once to breakfast, gone back to the end of the pile driver or to the side of the scow tied alongside for the purpose of relieving nature and that while going or while in the act or while on his way back was seized with a fit and fell overboard and was drowned. In *Blovelt* v. *Sawyer*, 6 W.C.C. 16, it was held that an accident that occurs to a workman when he is on the works eating his dinner arises out of and in the course of his employment; and in *Elliott* v. *Rex*, 6 W.C.C. 27, it was held that an accident which happened to a workman on the scene of his work while returning from relieving nature during the dinner hour arose out of and in the course of the employment. There is no suggestion of suicide or murder, and I think it is quite clear that the evidence warrants the inference I have drawn that the accident arose out of and in the course of the employment.

The latest case to which my attention was drawn—a case in the House of Lords, *S.S. "Swansea Vale" (Owners of)* v. *Rice* (1911), 4 B.W.C.C. 298, presents circumstances somewhat similar. There the deceased was known to be suffering from giddiness, and while on duty disappeared from the deck of his ship and the County Court Judge who tried the case inferred that the accident arose out of and in the course of the employment, and the House of Lords held that he was justified by the balance

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of probability. It may be that the deceased Alexander fell overboard while walking around the deck of the pile driver for some purpose other than I have mentioned, in which case I think the result would be the same as there is no probability that he was doing anything out of the ordinary routine.

Since Alexander's death the respondents have paid his widow $25 and that amount will have to be deducted from the $1,500 compensation allowed by the Act. It appears that at the time of his death some wages were due Alexander and have not been paid to his representatives, but that matter is outside the scope of the arbitration.

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**BRADSHAW v. BRITANNIA.**

*British Columbia Supreme Court, Murphy, J. April 10, 1912.*

MASTER AND SERVANT (§ III B 3—305)—*Liability of Master for Injuries to Employee of Independent Contractor—Contract under Supervision of Mine Superintendent—Driving a Tunnel.*]—Motion for nonsuit.

MURPHY, J.:—On the first question as to whether plaintiff was in the employ of an independent contractor, I think there was evidence to go to the jury. Even if the question was one purely of the interpretation of the written contract I would be inclined to hold against the defendant. The contract provides not only that the work is to be done according to direction of the engineer but further that it is to be carried on under the general supervision of the mine superintendent. In order to give effect to such general superintendence I think there must be such control and direction of the men employed by the contractor as would have the legal effect of placing them in the employ of the defendants.

But on the evidence as given at the trial I think there was ample justification for calling upon the jury to pass upon what was the relationship between plaintiff and defendant as established by the actual working out of the contract.

As to the position that plaintiff, even if an employee, was a mere licensee. Again, I think there was ample evidence to go to the jury. The motor had been running only a comparatively short time and abundant evidence was given to shew that the train was commonly ridden upon by the employees and that to the knowledge of the officials.

I think, too, there was ample evidence for the jury to pass upon as to whether it was not reasonably necessary for plaintiff in doing his work to use the train. As all findings are in favour of the plaintiff there will be judgment for the amount of the verdict with costs. Craig, and McDonald, for plaintiff. Davis, and Kerr, for defendant.

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**REX ex rel. Taylor v. GEORGE.**

*Saskatchewan, District Court, Battleford, Judge Maclean.*
*February 22, 1912.*

QUO WARRANTO (§ IV—41)—*Procedure—Preliminary Objections—Failure to Entitle Notice of Motion—Reference to Wrong Statute — Non-payment of Taxes as Ground for Avoiding Election.*]

JUDGE MACLEAN:—Certain preliminary objections were raised by counsel for the respondent as follows:—

(1) Notice of motion not properly headed. It is not an application in the District Court.

(2) An acting District Court Judge has not jurisdiction to hear the matter.

(3) That paragraph 3 of the notice of motion refers to the provisions of the Municipal Act and should have referred to the Rural Municipality Act.

I do not consider that the objections 1 and 3 are fatal to this application. The notice of motion should not have been headed simply in the District Court but the notice of motion discloses fully the nature of the application and the respondent has not been taken by surprise. The hearing should have referred to the Controverted Municipal Elections Act and also the District Court, the Court in which the proceedings are entitled. I would certainly allow an amendment and if necessary now do so. The same answer applies to objection 3. As to the jurisdiction of the acting District Court Judge I do not agree with respondent's counsel. The District Court Judge is under the Election Act *persona designata* but under the District Courts Act, sec. 7, sub-sec. 4, any acting Judge has the same jurisdiction and same powers as the Judge of the district and to oust his jurisdiction would be to my mind a very narrow view of the Act. In the absence of any express authority holding a contrary opinion and binding on me I decide that the acting District Court Judge has jurisdiction in the matter.

Among other grounds in the notice of motion on which it is claimed the respondent is illegally elected is the contention that at the time of the election he was in debt to the municipality for taxes. I find from the certified copy of the assessment and tax collector's roll placed in evidence that $93.17 were owing by the respondent when he was nominated and the election was held. The correctness of this roll is not disputed. It should bear the seal of the municipality but that objection was not raised and I allow it to be amended to comply with sec. 293 of the Rural Municipality Act. The respondent says in his affidavit that "he was cancelled out of the lands" on which such taxes were levied before the 4th of December, 1911, but I find,

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and it is not disputed, that when the assessment was levied and the roll prepared he was assessed. If he wished to object he should have appealed from a wrongful assessment to the Court of Revision and if necessary to a Judge, but I have no evidence that he did anything towards objecting to said assessment.

I find the respondent was assessed and his name on the roll and amount owing is *primâ facie* evidence of his debt. Could he legally be elected and hold the said office of councillor? Sec. 93 of the Act says who are eligible. The respondent owing taxes to the municipality could not be legally elected and his election must be set aside. I have some sympathy for the respondent but I must and do on the facts and evidence as presented me find that he was and is disqualified. As there was only one legally nominated candidate, namely, the relator, he is now entitled to be declared elected and I so order and direct.

The respondent I find is not entitled to his seat as said councillor. The costs of this application will go to the relator and after taxation judgment may be entered and enforced as provided by sec. 34 of the Controverted Municipality Elections Act. Moxon, for the relator. Routledge, for respondent.

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## HAMPTON v. MACADAM.

*Saskatchewan, District Court, Battleford, Judge Maclean. September 27, 1912.*

PHYSICIANS AND SURGEONS (§ II—42)—*Liability for Want of Care or Skill—Evidence Required—Absence of Proof of Damage.*]—Action by a married woman and her husband to recover damages against the defendant, a medical practitioner, for negligent and unskilful treatment of her in the month of March, 1912, while professionally attending her, when she had a miscarriage. The defendant denied all improper and unskilful treatment, and alleged contributory negligence on the part of the wife, and denied that she had sustained any damage.

JUDGE MACLEAN:—I find the following facts from the evidence. The defendant, who is the medical attendant under Government appointment for certain Indian Reserves, was returning from a professional visit to Poundmaker Reserve on the evening of Friday the 22nd March, 1912, and was called in to see the plaintiff Mrs. Hampton, by her husband, Robert Hampton, who was, at the trial, joined as a plaintiff in the action. She was suffering severe pain prior to a miscarriage, and was in labour when the defendant first saw her. She was, shortly after his arrival, delivered of a three or four months' fœtus. Hæmorrhage was profuse, and the defendant, who had no pro-

per medical appliances or medicines with him, did his best to stop the hæmorrhage with the material he found in the house, and was successful. Part of the afterbirth or placenta came away, but a portion remained in the uterus, and nothing further was done that night by the defendant. In the morning, Mrs. Hampton asked him what his bill was, and the defendant replied that he would send it by mail. He went away on Saturday morning, the 23rd March, and was driven to town by the plaintiffs' servant.

I find that the defendant, in his unprepared state, and when called in on an emergency case, while returning from the Reserve, was not justified in taking steps, by curetting or otherwise, forcibly to remove the placenta at that time. The medical evidence all shewed that great care was required, and without proper assistance and equipment any attempt to operate further might cause the very thing that should be avoided, namely, the introduction of any foreign matter that might produce blood poisoning or septissemia. Contradictory evidence was given as to what was said by the defendant to the plaintiff as to getting all the afterbirth away. The plaintiff swears that the defendant said: "You will be all right now; I have taken it now, and you will be all right." This the defendant denies, and I believe his version. He says he knew he had not removed all the afterbirth, and further says that he used the words, "you will be all right," to encourage her when she was in a state of great weakness bordering on collapse. I cannot find from the evidence that the defendant erred in his treatment of the plaintiff on the night in question.

The plaintiff and her husband testified that the defendant's attendance on her was on the night of Wednesday, the 20th March. I find that they are mistaken in the date. The evidence of the defendant, which is supported by written and verbal testimony, is conclusive that the night in question was Friday the 22nd March. The defendant arrived at Battleford on the morning of Saturday, the 23rd March; and, after a very short delay, an hour or so, left for another Reserve, returning on the morning of Sunday, the 24th March. There is evidence, uncontradicted, that he inquired at his home, when he returned on Sunday, if any word had been received from the plaintiff, and he also called up the hospital by telephone to know if she, the plaintiff, was there. The defendant has sworn that the plaintiff said she would come into the hospital, and that he told her to come for further treatment. This is denied by the plaintiff; but I accept as correct this statement of the defendant, as it is corroborated by his subsequent inquiry at the hospital about the plaintiff being there. The plaintiff had a family physician, Dr. Millar, and this the defendant knew; and, on Monday the 25th

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March, the day the plaintiff came to the hospital to be further treated, the defendant spoke of the case to Dr. MacMillan, the family physician's substitute, who was on that day called in to attend to the plaintiff. Although the defendant was asked for his bill on the Saturday morning, and considered himself discharged or that his services were no longer required, he was interested in the case, and shewed such feeling by inquiring of her welfare and speaking of her condition to Dr. MacMillan.

I find from the evidence that the defendant believed that the plaintiff was coming into the hospital, and that he would not be engaged any further in the case; and it is the fact that his services were not again asked for. A great deal of medical expert evidence was given at the trial as to what treatment in such cases is proper—the immediate removal of the placenta or afterbirth, and curetting, if nature will not at once do its work, or the expectant treatment, waiting events, that is, to watch if any symptoms of blood poisoning arise, such as fever, headache, hæmorrhage, etc. These theories I will not discuss, nor will I venture to find from the evidence which theory is the correct one. I am not required to do so, because, first, the defendant could do nothing more than he did on the night in question; he could not further operate without the help of a nurse, without chloroform, and without obstetrical instruments and antiseptic material; and, second, because, where doctors and authorities differ, the defendant is not to be condemned because somebody else of equal or greater skill would have pursued another course.

Further, I find that Dr. MacMillan certainly adopted the expectant theory, and did not consider it wise to operate at that time. The nurse Nixon and Dr. MacMillan contradicted each other on the question of the plaintiff's condition when he saw her, and on the correctness of the sickness chart, also as to what was said on the two visits of the doctor. I am not required to find whose statements are false. The defendant cannot be blamed for the treatment of Dr. MacMillan; and, so far as I can read from the evidence, no attempt has been made to criticise adversely the said doctor's methods, unless it be by Dr. Blyth, who in his evidence did not approve of the expectant treatment.

The plaintiff, to succeed in this action, must shew: (1) that there was negligence or want of skill or carefulness on the part of the defendant; and (2) that she has been injured, and that the injury is the result of the negligence and want of skill of the defendant. Was there negligence or want of skill or carefulness on the part of the defendant while so employed by the plaintiff? "The general rule is, that the degree of care or skill required of physicians is that ordinarily possessed by the average members of the profession in good standing": American and English Annotated Cases, vol. 1, p. 306.

Mr. Justice Lamont, in *Dangerfield* v. *David*, 17 W.L.R. 249, at p. 253, lays down the principle of law which applies to this case in the following quotations:—

> The degree of skill which a physician, in the exercise of his profession, is required to possess, is laid down by Tindal, C.J., in *Lanpheer* v. *Phipos*, 8 C. & P. 479, as follows: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest degree of skill. There may be persons who have greater education and greater advantages than he has, but he undertakes to bring a reasonable degree of skill." And in Beven on Negligence, ed. of 1908, p. 1128, the rule is laid down as follows: "The degree of skill requisite is such as may be expected in the circumstances of time and place from any average person in the profession—one neither specially gifted nor extraordinarily dull. Where this reasonable amount of information and skill, proportioned to the duties that are undertaken, is found, there is no liability for errors of judgment in the application of knowledge. Each case depends on its own circumstances; and, when an injury has been sustained that could not have arisen except from the absence of reasonable skill or diligence, then there is liability."

As stated before, I fail to see where the defendant or any physician could have done more on the night in question. I consider and so find that the defendant deserves a great deal of consideration; when in poor health himself, he turned off his road to render assistance in such a case. He would have been severely criticised had he refused to attend the patient, and it is not what I find he deserves to criticise his treatment, when, in no way professionally equipped to answer an emergency call, he did what he could under the circumstances. In view of my finding as to no negligence, I do not require to consider the question of damages, but I may just say: (1) that, so far as the special damage is concerned, I have no evidence to shew that the plaintiff incurred the hospital and doctor's expenses on account of the defendant's treatment; the further treatment could only be properly attended to in the hospital, as was done before when the plaintiff was sick in a similar way; and (2) no general damage was proven.

The plaintiff had a miscarriage in August, 1911, and again in March, 1912, and these premature births, so soon after each other, would weaken the constitution and leave an impaired condition of health. There is no evidence that the plaintiff suffered any injury from the lack of proper treatment. She was operated on on Wednesday, the 27th March, by Dr. Blyth, and, shortly after, the fever fell, and she quickly regained her normal condition. Dr. Millar testified that she was anæmic and not

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of a strong constitution. As to contributory negligence, I may say that, when the plaintiff was suffering with a threatened miscarriage for some days, she could and should have procured medical assistance before she did, and she should have had a nurse to assist her some days before and afterwards, as asked for by the defendant. Her suffering and illness was intensified by her own neglect to obtain relief sooner. The husband, who assumed the responsibility of nursing, was not a proper person to wait on a woman when in such a condition. To do nursing for a patient at all times, and especially in confinement cases, requires the utmost cleanliness as a first duty, and a farmer's clothes and person are not generally free from foreign germs.

I find that Dr. MacAdam, the defendant, in his treatment of the plaintiff, exercised a reasonable degree of care and skill, and was not guilty of any negligence on which the plaintiff could found this action. The action is dismissed with costs. R. R. Earle, for the plaintiffs. W. W. Livingston, for the defendant.

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## Re DRUID STATION.

*Board of Railway Commissioners. June 17, 1912.*

CARRIERS (§ IV D—550)—*Governmental Regulation — Erection of Station — Contradictory Evidence—Board of Railway Commissioners.*]—Petition of the residents and property owners of Druid, Saskatchewan, and vicinity, that the Grand Trunk Pacific Railway install a station at that point close to the Canadian Pacific Railway station, in order to make the construction of transfer track between the two roads feasible. (File No. 19113.)

COMMISSIONER MCLEAN:—This application was heard at Saskatoon. Coupled with it is the application of the Grand Trunk Pacific for the approval of its station at Dodsland which it dealt with under file 19440.

The Canadian Pacific branch from Kerrobert to Rosetown approaches the Calgary-Biggar branch of the Grand Trunk Pacific about mileage 44 on the Canadian Pacific branch and runs alongside of it for a distance of about three and a half miles on the north side. It then crosses to the south side about one mile from Druid station on the Canadian Pacific. Dodsland station as proposed by the Grand Trunk Pacific will be about one and a half miles west of Druid. Petitioners from Druid desire to have the Dodsland location placed north of Druid so that the Dodsland development may be between the two locations.

It is unfortunate that the growth should be dissipated be-

tween the two stations. But except where the Board is justified in intervening because of discriminatory treatment it is not its function to deal with the possible growth of a new town. It is the Board's function to see, in so far as possible, that there are proper facilities for as large as possible a portion of the public using the railways. The evidence presented is contradictory. This is usually the case in applications in which townsites, whether belonging to private individuals or to railways, are involved. At least as many people favour the proposed Dodsland location as oppose it. On the whole it appears that the proposed location at Dodsland in co-operation with the station at Druid will reasonably serve more of the public using the railway than would the proposed re-location.

As to the transfer track, this is a matter which may be dealt with when the need therefor is shewn. The present disposition as to the transfer track in no way prejudices a later application.

THE ASSISTANT CHIEF COMMISSIONER concurred.

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### Re GRAND TRUNK PACIFIC BRANCH LINES.

*Board of Railway Commissioners. March 20, 1912.*

CARRIERS (§ IV D—550)—*Governmental Regulation as to Erection of Station—Board of Railway Commissioners—Approval of Works Constructed in Contravention of the Railway Act.*]—Application of the Grand Trunk Pacific Branch Lines, under section 167 of the Railway Act, R.S.C. 1906, ch. 37, for the approval of revised right-of-way and location of station grounds on its Tofield-Calgary branch, between township 42-21 and township 41-21, west 4th meridian, Alberta; which station is known as Bashaw, Alberta. Heard at Saskatoon, Saskatchewan (File No. 10821.70).

THE CHIEF COMMISSIONER (HON. J. P. MABEE):—We have held repeatedly, and it was recognized by a statute passed two or three years ago, that where the law requires a railway company to obtain the authority of the Board, or the sanction of the Board, before the construction of a work, or locating a building, or a station of that kind, and it has not obtained that authority, and constructs the work, the Board has no jurisdiction to approve of it after it has been done. That was recognized. We held that over and over again, and Parliament gave us authority to approve of work that had been constructed in contravention of the statute prior to the end of the year 1909. We approved of hundreds of works under that provision.

We have no authority to approve of works that have been built in contravention of the Act, subsequent to the above date.

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**Re SAVOY and CANADIAN NORTHERN R. CO.**

*Board of Railway Commissioners. March 19, 1912.*

RAILWAYS (§ II B—18)—*Highway Crossings — Application for Construction of Subway — Excessive Expenditure — Proposed Diversion of Highway—Submission of Plans.*]—Application by J. B. Savoy and another for the construction of a subway at a highway crossing.

THE CHIEF COMMISSIONER (HON. J. P. MABEE), Edmonton:—There is not sufficient information before us, given upon behalf of these applicants, that would justify this Board in requiring the railway company to construct a subway at the point in question. The application is made by two or three gentlemen living in that vicinity for this order directing the construction of this subway. The application purports to be made by J. B. Savoy, and another person, and Local Improvement District. I do not know what the number is. I do not know whether it is intended that some Local Improvement District is a party applicant or not. Is the Local District Company a party? Mr. Edwards: Yes. The Chief Commissioner: What is the number? Mr. Edwards: 27 T-4. We are furnished no information as to the probable cost of the work. The railway company, in constructing the road, files its plan, and the engineer of the Board approves the crossing. This very crossing has been approved by order of the Board. But that does not establish the fact that it cannot be varied or changed. It would seem to be inconvenient, possibly unsafe. It is altogether likely that some improvement can and should be made. On the evidence, though, we could not require the railway company to go to an expenditure of what their engineer says would be $8,000 or $9,000. Nobody else has given us any estimate of the probable cost of the work. We cannot embark on requiring railway companies to make unknown expenditures all over the land in every township of the Dominion. They would be wrecked inside of six months if we adopted any such policy as that. It may be that, by a diversion of this road, it can be made much more convenient and much safer for those who require to use it. We dispose of the application in that way now, in so far as it covers the construction of a subway, but the Local Improvement District may, if it desires, have the question of a road diversion considered. It would look, upon the plan, as if two or three different diversions might be considered, one of which would be convenient and could be worked out upon the basis of a reasonable expense, and perhaps, in the end, be much better and more satisfactory than a subway constructed upon the back of the road, upon the brow of a hill.

If the parties desire to send us in any information with respect to any plan, or proposed diversion, all of the information we have got here now will be available, and will endeavour to get the roadway put in a better condition than it apparently now is in; but insofar as the subway is concerned, it is out of the question.

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**Re PHEASANT POINT FARMERS and CANADIAN PACIFIC R. CO.**

*Board of Railway Commissioners. March 25, 1912.*

CARRIERS (§ IV A—521*a*)—*Governmental Regulation—Construction of Side Tracks—Distance Apart — Convenience of Shipper — Hardship on Railway—Order of Board of Railway Commissioners.*]—Petition of farmers in the district of Pheasant Point, near Carberry, Manitoba, for an order requiring the Canadian Pacific Railway Company to construct a siding on their line, at a specified point convenient for their purpose.

THE CHIEF COMMISSIONER (HON. J. P. MABEE):—I am afraid that in this matter we cannot make any order. It, no doubt, would be a convenience to these gentlemen to have this siding. It would save them a certain distance in hauling out their grain. They are also labouring, apparently, under a drawback because of the hilly nature of the country. But there are other features that preponderate. Some six or seven miles apart is generally the limit of stations. That leaves perhaps three or four miles as the farthest anybody has to draw.

If these people could get this siding, they would save two or three miles in drawing out their grain; but, if we required one railway company to put in a siding between two stations where the sidings would be within three miles or thereabouts of a station, we would have to apply the same principle to all railway companies; and, if we granted the request of these gentlemen, we should have to grant the request of others in similar circumstances.

It does not seem to us good practice or good policy. Every break in the main line is an additional danger and an additional liability to accident, and so on. It should not be permitted or required unless for the gravest reasons.

In this case, these gentlemen have only about three miles farther than if they had the siding at this point. It would never do to require companies to put in sidings every three or four miles along their railway line. It would, probably, in the end, bring about greater inconvenience than it would convenience.

We shall have to refuse this petition.

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**Re MUNICIPALITY OF NUTANA and CANADIAN NORTHERN R. CO.**

*Board of Railway Commissioners. March 20, 1912.*

RAILWAYS (§ II C—25)—*Duty to Fence Right-of-way—Order of Board of Railway Commissioners—Limitations of Order as to Particular Localities.*]—Complaint of the municipality of Nutana, Saskatchewan, relative to Canadian Northern Railway Company not fencing their right-of-way through that municipality. (File No. 9991.51.)

Saskatoon, Sask. THE CHIEF COMMISSIONER (HON. J. P. MABEE):—Two or three years ago, upon the complaint of a large number of municipalities in Manitoba and Saskatchewan, and after hearings at a number of cities in those provinces, and after having received complaints innumerable from farmers and settlers whose cattle and horses and stock had been killed upon the railways, where the rights-of-way were unfenced, we made an order requiring the railway companies to fence the unfenced portions of their rights-of-way in these provinces on or before a fixed date. The railway companies, or some of them, appealed to the Supreme Court, and the Supreme Court held that we had exceeded our jurisdiction in making a general order of that character, and that we should have confined the order to some specific locality.

Now, we have a complaint here of a specific locality that is unfenced. We all know that this road has been built for many years; that it goes through a thickly settled, highly cultivated, and rich agricultural district; and that it is a section of country through which a railway should have been fenced long ago.

In this case, an order will go that the Canadian Northern Railway Company fence all of the unfenced portion of the right-of-way along the Qu'Appelle, Long Lake, and Saskatchewan Railway, between Saskatoon and Regina, on or before the first day of November, 1912; that these fences shall be of the character and description described in the Railway Act, namely, fences of the character that will turn cattle and other animals; and that, for every day's default, if any, after the first day of November, 1912, the company shall be assessed the sum of fifty dollars per day by way of a penalty.

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**EDMONTON STREET R. CO. v. GRAND TRUNK PACIFIC R. CO.**

**(Decision No. 2.)**

*Board of Railway Commissioners. August 30, 1912.*

APPEAL (§ XI—720)—*Granting Leave to Appeal—Order of the Board of Railway Commissioners—Canada Supreme Court*

*—Fixing Cost of Installation, Maintenance and Protection of Crossing of Railway by Municipally Owned Street Railway.*]—Application of the Grand Trunk Pacific Railway Company, for leave to appeal to the Supreme Court of Canada from an order of the Board, *Edmonton Street R. Co.* v. *Grand Trunk Pacific R. Co.*, 4 D.L.R. 472, putting half the cost on the said railway company of the installation, maintenance and protection of a crossing of the Edmonton municipally owned electric street railway over the tracks of the Grand Trunk Pacific, on Twenty-first street, in the city of Edmonton. (File No. 19435.)

THE ASSISTANT CHIEF COMMISSIONER (Edmonton):—The Grand Trunk Pacific Railway Company has, for a number of years, had its tracks on Twenty-first street, in the city of Edmonton, and operates its trains along that street. By an application, dated the 15th March, 1912, the city of Edmonton asked this Board for authority to cross the tracks of the Grand Trunk Pacific on Twenty-first street with the tracks of its municipally owned electric street railway on Short and Nelson avenues where those avenues cross Twenty-first street.

The application of the city was granted by order No. 16701, dated 4th June, 1912, which placed one-half of the cost of constructing and maintaining the crossing, and the devices for its protection, on the Grand Trunk Pacific Railway Company. The railway company did not object to the crossing, but submitted to the Board before the order was issued that it should not pay any part of the cost of the work. The Grand Trunk Pacific now in its desire to be relieved of the share of the cost of the crossing put upon it by the order, seeks leave to appeal to the Supreme Court of Canada from the order, on the grounds set out in its application, dated the 24th June, 1912.

Both parties were heard at some length at the sitting at Edmonton on the 24th July last. The Board has a well-established practice, where one railway seeks to cross another, of putting the entire cost of the construction and maintenance of the crossing as well as the entire cost of the construction and maintenance of any protective device which it may order on the junior road. We have also a well-established practice of considering a municipally owned street railway as senior to the tracks of a steam railway which a municipality seeks to cross with its street railway if the street upon which the street railway is to be operated over the steam railway was a street at the point of crossing prior to the construction of the steam railway. That is, the seniority of the street at the point of crossing is taken to give seniority to the street railway, because the operation of a street railway is but one of the many ways a municipality might carry traffic along its street.

Short and Nelson avenues are senior to the Grand Trunk

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Pacific Railway where those avenues cross Twenty-first street. The Grand Trunk Pacific Railway Company was permitted to lay its tracks along Twenty-first street, by an agreement made with the city of Edmonton, dated March 6th, 1906, and confirmed by the Legislature of Alberta in 1907. (See 7 Edw. VII. ch. 36.)

By sec. 7 of the agreement it is provided that,

> the company may utilize, without charge therefor, any streets required for its railway in reaching the city limits, etc.

It is contended by the railway company that this provision should relieve it of the obligation placed upon it by the order of the Board to pay a portion of the cost of the crossing. The Board is of the opinion that it was not bound by the agreement, and that, even if it was so bound, the provisions of sec. 7 of the agreement, quoted above, do not mean that the company should be relieved of paying such expense as is placed upon it by the order. These are both questions of law, which I think the railway company might be permitted to argue before the Supreme Court of Canada.

The Grand Trunk Pacific Railway Company also urges that an order should not have been made, because at the time the application was made by the city of Edmonton the city had not complied with the provisions of some statute of the Province of Alberta. We clearly had the right, under the Railway Act, to make an order for a crossing, and, if the railway company thinks the city is not complying with the provincial laws, the Courts of the province are open to it to take such action as it may desire. We will not submit any question to the Supreme Court under this head.

An order may, therefore, go submitting the following questions to the Supreme Court:—

> (1) Was the Board bound by the agreement between the city of Edmonton and the Grand Trunk Pacific Railway Company?
>
> and
>
> (2) If it was so bound, do the provisions of sec. 7 of the agreement mean that the railway company should not pay such expense as is placed upon it by the Board's order?

**Re GRAND TRUNK PACIFIC R. CO. and FORT SASKATCHEWAN TRAIL.**

*Board of Railway Commissioners, March 18, 1912.*

RAILWAYS (§ II B—18)—*Crossing Over Highway — Order of Board of Railway Commissioners — Failure to Comply with Conditions Imposed, Where Highway Diverted—Rescission of Order—New Order for Construction of Overhead Bridge.*]—Application in the matter of the crossing of the Grand Trunk Pacific R. Co. over Fort Saskatchewan trail and in connection with the proposed diversion of the said trail.

THE CHIEF COMMISSIONER (HON J. P. MABEE):—This death-bed repentance never appeals to me very strongly. The first communication that came to the Board in this matter was one of the 21st November, 1908, from Turnbull Allan, chairman of Local Improvement District 27 S. 4. He pointed out that the district council desired to bring to the Board's attention the following facts:—

> The Grand Trunk Pacific Railway crosses the highway between Edmonton and Fort Saskatchewan on the north-east quarter of 15-53-24 W. 4. The highway runs north-east and south-west; the railway runs nearly due east and west. The dump at the crossing of the highway is about 21 feet in height. The evident intention of the railway is to provide a subway.
>
> As the dump stands at present, it would appear to be the intention of the railway to make the subway not more than 16 feet wide, and crossing the dump at right angles. The width of the highway is 66 feet.
>
> The council is of opinion that the subway should not be less than 33 feet in width, and that the walls of the subway should be in line with the highway, and not, as apparently proposed, at right angles to the dump.
>
> If the apparent intention is carried out, there will be two sharp turns on the road at the entrance and leaving the subway, which, with the narrowness of the subway, will make the place most dangerous to teams.
>
> The council has given notice to the railway company of its objection to the plan of the proposed subway, and asks the order of your Board to compel the company to conform to the recommendation herein made.

Now, at that time, the railway was under construction, and the earth, according to this statement, had been dumped in on the highway so that it left an open crossing in the highway of only 21 feet, wiping out the right of the public to use the balance of the highway up to the 66 feet. That letter was served upon the railway company or their agents, and the matter was set down here for hearing in Edmonton on Friday the 19th

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February, and was heard here on that date. It was referred to one of the Board's engineers to inspect the ground and make his report.

The engineer's report was dated on the 15th March, reciting that he had inspected this place on the 19th February, and the operative portion of his report was based upon two or three facts, one of which was that the Fort Saskatchewan trail was crossed at that angle which would make the view bad for travelling on the highway. That, I presume, is, of course, provided the subway walls were placed at right angles to the railway and not parallel to the highway. The second fact is that Norton street is to be used in the near future by an electric street railway. That was three years ago day before yesterday.

He says:—

> I am of opinion that the Grand Trunk Pacific Railway should be asked to divert the Fort Saskatchewan trail to Norton street as shewn on plan and construct a permanent overhead bridge over Norton street full 66 feet wide, with the required clearance of 22½ feet; and that the railway company should also be asked to fill in the dip between the Grand Trunk Pacific and the Canadian Northern Railway tracks on Norton street. By using the route via Norton street and the diversion, it would make the distance to travel only about 430 feet further than via the direct route along the Fort Saskatchewan trail.

Then he deals also with the question of injury to land along the Fort Saskatchewan trail north of the track owing to that trail being closed up.

The plan referred to by the engineer is a plan shewing both a subway on the trail, a fifty-foot girder at right angles to the railway track and an alternative diversion of sixty feet in width, estimated cost of grading and bridge $3,000.

My recollection of what took place at the hearing in February of 1909 (unfortunately we have not the volume of evidence here) was that this diversion was to be carried down to the point where the water-opening was there, and that there was to be a bridge from the end of the road elevation over to Norton street, the engineer having estimated the cost of the grading and of that bridge to be $3,000.

If my recollection is accurate there were opinions expressed here by those who were opposing that diversion that it was an impossibility to construct a satisfactory roadway there, that a bridge could not be properly constructed. They told us about the flow of the water and so on in flood time that people had seen coming down there. At any rate that was the situation at the hearing, followed up as I have indicated by the report of the engineer of the 15th March.

The next matter of importance that appears on the file is a letter written by me to the general solicitor of the railway company, dated the 26th day of July, 1909. There had been a lot of

correspondence and many complaints sent in about this trail being in the same condition and this dump obstructing traffic, and so on. A number of affidavits had been sent in by some of the interested parties.

On the 26th July, as I say, I wrote to the solicitor of the railway company pointing out that he had made an application on behalf of the Grand Trunk Pacific for leave to divert the Saskatchewan trail.

> The Board intimated that if it were closed and diverted, the property owners should be compensated. We were afterwards advised that no attempt had been made to compensate the owners, but that the railway company had proposed to erect a line of railway over the highway without leave having been obtained therefor.
>
> At the time your application to divert the Saskatchewan road came up at Edmonton, there was also a complaint, as you will remember, about the embankment then existing at the highway crossing.
>
> We have had several telegrams and formal complaints about the wooden structure that has been erected. The opening is said to be only 15 feet; it is at right angles with the railway, and not parallel with the travelled portion of the highway. We have been furnished with photographs shewing the awkward position in which this structure leaves the highway traveller. It cannot be permitted to remain, and the Grand Trunk Pacific need expect no approval of this work. On the other hand, we are of the opinion that the obstruction should at once be removed, and if the Saskatchewan road is not to be closed up and diverted, a permanent work should be put upon the ground and of a kind to be approved by one of the Board's engineers, having regard to the public convenience, as well as that of the railway company.
>
> We have received a lengthy communication from Messrs. Griesbach and O'Connor of Edmonton, and in replying to it I have enclosed them a copy of this letter.
>
> Will you be good enough to take this matter up at once with your company and advise us if it is necessary for us to interfere further.

Then there was a postscript to that letter as follows:—

> Since dictating the foregoing, I have noticed your letter of the 20th July. Of course it is no answer to the complaint in connection with this matter, and if you so regard it, I would be pleased if you would refer me to the portion of the Railway Act under which you contend that a railway can construct its line over a highway and leave whatever opening and at whatever angle its chief engineer chooses. My understanding of the Railway Act is quite different.

The letter of the 20th July, referred to in that postscript is to this effect:—

> I beg to say that our chief engineer advises that he has allowed 20 feet clear opening under our track which is maintained in good shape, and he is fixing up and improving the approaches to the opening so that there can be no reasonable exception taken to the condition of the roadway on the Fort Saskatchewan trail at this point.

The next important step in this long-drawn-out matter was

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the hearing at Edmonton on the 23rd August, 1909. The parties appeared here, evidence was given, the matter was deferred for further consideration, and on the 29th October the order was made which has given rise to all the trouble.

That order provided that the railway company should construct, before the first of July, 1910, a subway 66 feet wide and 14 feet high, with two spans, with a rest pier in the centre, the abutments to be constructed at right angles to the highway (that means, of course, parallel with the highway) to permit of the passage of the Fort Saskatchewan trail on its present grade under the tracks of the railway company. Detail plans of the said structure to be first approved by an engineer of the Board.

Then having before us the recommendation that had been made by the engineer many months before, an alternative was given to the railway company, instead of constructing that subway on the Saskatchewan trail, if they so desired, to close that portion of the trail crossed by the railway and divert the trail to Norton street on the southern side of the railway, that if it desired to do that it was hereby authorized to do so on condition that it first secures and files with the Board releases from the owners of all property facing on Fort Saskatchewan trail and lying between the right-of-way of its railway and the intersection of Fort Saskatchewan trail with Norton street on the north side of the said right-of-way, for all land damages which will be caused by the closing up and diverting of Fort Saskatchewan trail as herein provided.

In passing it will be noted that that has never yet been done. Of course it was possible, in one view, an onerous condition to impose upon the railway because they have no power to compel people to release. That feature of it, however, was taken care of later on upon an application by the railway company which will be referred to in a few moments.

The latter part of that option contained the provision that a plan and profile of that diversion was to be approved by an engineer of the Board.

Now the railway company were to do two things before they were at liberty to take advantage of that alternative. The first was to obtain releases from those land owners who were suffering damages by the closing up of that road, and the second was to file a plan and profile of that diversion for the approval of an engineer of the Board. Well they did not do anything.

A lot of correspondence took place, complaints came in to the Board, and the matter was set down for further hearing at Edmonton on the 19th September, 1910, and it was heard here on that date. A lot of evidence was given. Many complaints were made about the impassability of this Saskatchewan trail, the obstruction still being left there in the highway illegally, and

an order was made, dated 19th September, dealing with both Norton street and this diversion—that is the Norton street crossing and this diversion.

The third clause of that order of the 19th September was as follows:—

> That the said railway company shall complete all the necessary work to properly connect Norton street and Fort Saskatchewan trail in accordance with the standard regulations of the Board affecting highway crossings as amended May 4th, 1910, and to the satisfaction of an engineer of the Board within one month from this date.

That called upon the railway company to complete by the 19th October that diversion.

Up to that time they never had filed a plan and profile provided for by the order of the 29th October, 1909. Mind you we are speaking now of nearly a year after the order giving the alternative to construct this diversion; and it is stated by the engineer, of course he has not the dates when he began or when he finished (one would not expect that he would have), at any rate not here at the moment, but he thinks he commenced work sometime during the fall, in October; he finished it at any rate during that year of 1910. He thinks he is quite safe in saying that the diversion was completed before the end of the year.

Well, the Board was never notified that the work had ever been commenced. The company was still in default in not filing its plan shewing its grade and shewing the nature of the work. The Board's engineer who had originally made the inspection expected there would be a bridge connecting the roadway with Norton street. Whether that was feasible or not I do not know. At any rate our engineers never had any opportunity to pass upon it. This roadway would be elevated. It was running alongside of the railway track, the elevation on the side away from the railway track might be so high, which would call for some sort of protection in the way of guard rails or the like. There was nothing upon the Board's file to shew at what elevation that was. All these things were taken into the hands of the railway company without the Board's engineers having any opportunity to exercise their judgment upon the matter.

It is said then that this work was finished by the end of 1910.

The second order I have just been referring to, of the 19th September, 1910, required them to finish the work to the satisfaction of the engineer of the Board. The Board was never notified that the railway company ever thought the work was finished. The railway company never gave the Board an opportunity to have one of its engineers inspect the work and see whether and say whether it was completed to his satisfaction or not.

Then another letter which perhaps it may be well to refer

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to is dated 7th November, 1910. That deals with a letter written by the solicitors of the railway company to the Board, dated 2nd November, and it refers to an application for an extension of time to comply with clause 3 that I have just referred to, so that it would seem, apparently, that on the 2nd of November the work had not been finished.

The letter of the 7th November in reply to the letter of the 2nd November dealing with the application for extension of time, among other matters covers the following:—

> We had complaints as far back as November, 1908. Mr. Drury reported on the matter in March of 1909. At that time he reported that your company should be asked to divert Saskatchewan trail to Norton street. Your company was about that time furnished with a copy of that report. In the meantime, you had constructed your railway over the trail without authority. We had repeated letters from the various parties interested submitting photographs and other material, including several affidavits, and on the 26th July of 1909, I wrote you advising of my views of the position matters were then in. Your answer to me of August 2nd contains a statement that for the purpose of avoiding undue delay in construction, that it had been the practice of obtaining approval of highway crossings after the road had been constructed relying upon previous approval of the location plans for the authority to cross highways. In answer to this statement I beg to say that this is not the practice of any other railway, and we have succeeded in getting all of the other railways to follow the law and make their applications for the approval of highway crossings before carrying their railway lines over highways.
>
> The matter came up before Mr. Scott and Mr. McLean at Edmonton, on the 29th October of 1909, when an order was made of which you have a copy.
>
> We received complaints in July of 1910, from the solicitors, Messrs. Griesbach & O'Connor, also from Mr. Graham, secretary-treasurer of the village of North Edmonton—two complaints from the latter—and as you are aware the matter came up for hearing again at Edmonton on the 19th September. No attention, whatever, was apparently paid to the order then made, but your company simply left it to the applicants to follow the matter up, which they did in their letter of the 28th of October, pointing out that the month expired on the 19th of October, and that Mr. O'Connor had gone over the ground on the 23rd and found that your company had done absolutely nothing towards connecting the trail and Norton street.
>
> After our attention is brought to the fact that you are in default, no explanation whatever is made, except that you had found it practically impossible to get labourers to do the necessary grading; that there was not sufficient material available in the immediate vicinity, and that it would be necessary to bring it in by train and put it in place by team.
>
> No statement of any kind is given as to why the matter was allowed to delay from the 19th of September until the 2nd of November; and I might say that it has been the practice of every other company—where orders have been made and it was the desire that the time

should be extended—to make application to the Board in good time for such extensions. We have invariably endeavoured to be reasonable in these matters in the past, and it is not the custom of other companies to wait until they are in default and then when brought to task to make an application of this sort.

It seems that your chief engineer, as well as your divisional engineer, were present on the 19th of September, and knew at that time that the company would be expected to have this work completed within a month.

I am forced to say that I think this matter is quite in line with many other matters that your company has had with the Railway Board, and I think it is high time that some steps should be taken to find out whether the engineering department of the Grand Trunk Pacific is subject to the Railway Act or whether it has a procedure unto itself uncontrolled by the law that other companies are supposed to be governed by.

The point is not—as put by your chief engineer—that the completion of the work will be of little use until the trail is closed, but it is rather that since first complaint was made there has been a steady and studied resistance to any interference in connection with this matter. As already pointed out, your road is there illegally, and although, personally, I have done all I could to assist your company in every reasonable way, my efforts have been met with a desire from your engineering department to do as it saw fit irrespective of anybody else's views.

The balance of the letter deals with a communication from some of the solicitors.

That letter was answered on the 28th November. On the 28th November no intimation was made to the Board that work had been started then, although it is possible that it may have been. The solicitor said he would take this matter up vigorously with both Mr. Kelliher and Mr. Brewer on my return,

and you need not trouble writing me further in reference to this matter. I will do everything possible under the circumstances. As you know we are in default under the order of which we spoke on Saturday. I cannot help this now, but will see that everything is done that is possible at the present time and will further see that no default occurs with respect to future orders.

Now then, after that we had petitions and letters innumerable almost. There are several petitions that were forwarded to the ex-Minister of the Interior and by him forwarded to our secretary, signed by large numbers of the residents. We have letters here from Mr. Clare, telegrams and letters from solicitors and all sorts of communications. On the 22nd of February, 1911, answering a letter from Mr. Francis Clare, secretary-treasurer of the United Farmers of Alberta—being, I think, about the fourth or fifth letter from Mr. Clare—the history of the whole thing was given. He was complaining that the people who use this trail, and had no notice of its closing up, and the

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people living out in the country who came into the city, and the people who went from the city to the country by means of this trail, seemed to feel very keenly the position in which matters had been left. Among other things it was pointed out to Mr. Clare that when the matter came up at Edmonton the railway people were told that before they would be allowed to divert the trail they must produce releases from all land owners, and so on, that there was very considerable delay in the company acquiring the necessary land, and so on, and that they had proceeded with the closing up of the work on Norton street, and then a number of the additional steps in the matter that I have briefly adverted to were dealt with, and then it goes on to say:—

> I only refer to the foregoing for the purpose of indicating that the question of closing up the trail was well known to all concerned from the commencement of the matter.
>
> At Edmonton, on the 29th of October, 1909, an order was made in which the railway company was given the alternative of closing the Saskatchewan trail by the diversion of it to Norton street; and in this order provision was made for securing and filing releases from the land owners who might be injured. A copy of this order was furnished to the municipality of North Edmonton, and so far as the Board knows, that disposition of the matter was entirely satisfactory.
>
> The next order was dated the 19th September, 1910, in which the railway company was given leave to expropriate lots 36, 37, 38 and 45, etc.

That is the matter that was referred to a little while ago.

The railway company being unable to obtain releases from certain of these land owners it seemed only reasonable to the Board that they should not be blocked in their undertaking by reason of those who might be stubborn or unreasonable or who might honestly be holding their lands at a greater value than they were worth, so an order was given the railway company for leave to expropriate these properties in order to carry out their work.

The letter goes on to say:—

> The company was also required to file a plan for carrying the railway over Norton street; and was also required to do all the work necessary to connect Norton street and Fort Saskatchewan trail, in accordance with the standard regulations of the Board and to the satisfaction of an engineer of the Board.
>
> So far as I know, there never has been any serious objection advanced to the diversion of the trail into Norton street, until the receipt of your letter. It would be entirely unreasonable and unjust, after the railway company had made all its plans and had expropriated the lots above referred to, to enable it to comply with what originally seems to have been a recommendation by one of the Board's engineers, to reverse all this and not divert the trail. The whole theory of the diversion was to close up the crossing of the railway

over the trail. If that approach was to be left there, and the trail left open, there would be no diversion, and no need of doing all that has been done.

Now that was the view that we took in February of 1911. That is the view we would still take were it not for the continued persistent want of respect to public convenience that the railway company has displayed in connection with all of this matter. We find now that the roadway is more seriously obstructed on the Saskatchewan trail where the railway crosses than it was three or four years ago. When I was out there three or four years ago there was not that hump that has been referred to, after you get through, going away from the city, that now exists. It is positively dangerous as it exists and the only wonder to me when I passed it yesterday was that people had not been upset and injured in trying to get along the highway which they had a right to use. That seemed to have been caused by part of the embankment sliding down on to the trail. At any rate the railway company has apparently paid no attention whatever to it, no regard whatever to the rights of the public who are travelling along there, and they leave them to get by as best they can; no doubt many people with loads and so on taking their lives in their hands getting over that difficult and dangerous place.

Then the Norton street diversion is impassable. One might possibly walk over it as it now stands but it is absolutely impossible to get any vehicle across from the Saskatchewan trail to Norton street now by this diversion that is said to have been finished a year ago.

It is explained that the embankment has slid down on to the work. Well, this is the fault of the railway company. They have themselves to blame for it entirely. Perhaps, if they had submitted their plans, as they were directed to do by this order, to one of the Board's engineers, they would have been saved all that work. He would probably have disapproved of it. In the result it seems to me he must have disapproved of it, from the fact of this embankment sliding down. It is perfectly apparent that the road was either constructed in an improper place or improperly constructed or something was wrong about it, or the first winter that passed over it would not have made it so that it could not be used at all.

Now, we are not dealing with this matter in any way with reference to the claims of these land owners. We pay no attention to Kelly bringing this thing up because he has not been settled with. That is not an element in it. That is a mere individual matter. He should get his redress. We are dealing with this thing upon the basis of the public convenience, the thousands and thousands of people who have to use that crossing every

year. It does not seem fair or reasonable that the thing should be permitted to remain in this position any longer, and if this Board can prevent it it will not remain in this position any longer. The railway company in the past has certainly had the best of us in connection with this matter, but if we are able we will see that they will not have the best of us very much longer.

Now, the company has done nothing in connection with the matter in conformity with either the law or the permission that we have given them. They were there originally as trespassers. They are there still as trespassers. We gave them the right to close up the trail under certain conditions, none of which have they ever observed, and it seems to me that the only reasonable thing we can do now is to do what should have been done in the first place. If I had had the knowledge that I have got now of the whole situation I never would have consented to an order going closing up this trail in the first place. It seems to me it would be about as reasonable, and perhaps more reasonable, to have closed up Norton street and diverted it into the trail than to close up the trail and divert it into Norton street. Doubtless one of the reasons, indeed it is referred to in the engineer's original report which actuated him in making the report which he did was the representation that it was the desire of the city of Edmonton to run a street railway along Norton street. For that reason he would not be, of course, an assenting party to closing up Norton street, but as far as I am concerned, knowing the thing as I do know it now, I would not have been a consenting party to closing up the Saskatchewan trail. Apparently the original intention of the railway company was not to close it up. We have plan after plan filed here by the railway, and application after application made by the railway company, shewing subways and overhead crossings upon both of these streets.

It seems to me that idea of the railway company in the first place was the right one, that subways should be constructed at both of these streets and that is what the railway company must provide now.

It is all very well to say they have wasted a lot of money in the construction of this diversion. Of course they have. This Board, and the public that are affected are in no way responsible for that. The company has brought that all about themselves. And, while no one wishes to see railway companies, or for that matter private individuals, wasting money, if a railway company will voluntarily go ahead as this company has done, it can waste its money if it likes. That is all that can be said about that feature of it.

The better way will be to rescind the order of the 29th October entirely.

A new order may go requiring the railway company to construct an overhead crossing on the Fort Saskatchewan road, spoken of as the Saskatchewan trail, of fifty feet in width, abutments to be parallel with the highway, or if it chooses it may make the opening 66 feet in width and put the abutments at right angles with the railway. It must file plans within thirty days (detail plans) covering that work, for the approval of the Board's engineer. And it must complete the work within ninety days after the approval of the plan by the Board's engineer.

In the event of the plan not being filed within the above specified time, or in the event of the work not being completed within ninety days from the approval of the plan by the Board's chief engineer, the railway company shall be liable to a penalty of $100 a day for every day's default; and in conclusion let me say that if there is a penalty accruing either under the first head or under the second I will undertake to see it will be imposed and enforced, and that it will not be remitted.

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## LESSARD v. CANADIAN PACIFIC R. CO.



*Alberta Supreme Court. Trial before Simmons, J. July 17, 1912.*

CARRIERS (§ III C—388)—*Shipment of Perishable Goods in Box Car—Shipper's Omission to Order Refrigerator Car at Higher Rate.*]

SIMMONS, J.:—The plaintiffs shipped a carload of butter on April 12th, 1911, over the defendant's railway from Edmonton to Calgary, in a box freight car. Alfred Denis, a member of the plaintiff firm had charge of the shipping and says he telephoned the defendant company at Edmonton and he understood the rate was 21 cents, so he paid it, and when the car got to its destination he found he had made a mistake. He says he paid according to what they told him at the freight office. The bill of lading put in by the plaintiffs, has a space noted as follows:—

> If charges are to be prepaid, write or stamp here to be prepaid

and no writing appears in this space. Below this is a space on which appears:—

> Received $52.14 to apply on prepayment of the charges on the property described hereon.

The butter was invoiced to the Crown Feed & Produce Company at Calgary, at 30 cents per pound, although Mr. Denis says the market price of butter at Edmonton then was 35 cents per pound. He gives as a reason for invoicing to Calgary at a lower price that he had not time to attend to the sale of the butter in Edmonton. Mr. Denis says he told the agents of the defendant company at Edmonton to have the car rushed. He says he did

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not think it was necessary to ship in a refrigerator car. Mr. Kennedy, a witness for the plaintiff, and at that time an employee of the Crown Feed & Produce Co., says:—

> A close car with the heat beating on the roof would turn any butter. It would take about a week to turn it.

He also says the weather was very warm at that time. The temperature records put in by plaintiff confirm his statement as to the weather conditions. He says he did not think it wise to ship butter in a box car in April. Mr. Denis says he did not expect any warm weather in April.

The car arrived in Calgary on the night of the 17th or morning of the 18th of April and was placed by the defendant on delivery track 6 where the Crown Feed & Produce Company usually had their cars placed for delivery. The Crown Feed & Produce Company say they verbally told the defendant on the 18th to place the car on the Swift Packing Co.'s siding while Burns, freight clerk in defendant company's freight office, says he got these instructions on the 19th of April. The car was not placed on the Swift siding till the 21st and the Swift Company commenced unloading when the car checker stopped them as there was a balance of $47.40 due for freight. The unloading ceased about 5 p.m. on Friday and Mr. Cahil, manager of Swifts, tried to get the Crown Feed & Produce over the telephone and get them to adjust the freight so that unloading might proceed. He was unable to do so on Friday afternoon and on Saturday the officials of the defendant company took up the matter with the Crown Feed & Produce Co. and finally Mr. Campbell, in charge of car checking went to their office and got a cheque for the balance of freight and released the car and unloading proceeded on Saturday afternoon and was completed. The members of the Crown Feed & Produce Company and their assistant Mr. Kennedy, gave evidence of enquiries made by them on the 18th, 19th and 20th as to this car and also as to instructions given by them to the defendant's officer in the freight department to have the car placed on the Swift siding. I cannot give very much weight to this class of evidence in view of their actions after the car was placed on the Swift siding. The bill of lading sent by their principals at Edmonton to them indicated on the face that all freight charges had not been paid. When their attention was called to the necessity of paying the freight in order to allow unloading to proceed they did not pay the freight and the defendant company sent an official of their own to the Crown Feed & Produce Company, and only after some wrangling with them he secured from them their unaccepted cheque for the freight and he released the car, although he need not have done so until he secured acceptance of their cheque. It is admitted by plaintiffs' own witnesses that unloading was delayed a whole day on account of the unpaid freight charges.

The sections of the contract of the carrier printed on the back of the bill of lading and which have a bearing on this case are 1, 3 and 8 which are as follows:—

1. The carrier of any of the goods herein described shall be liable for any loss thereof or damages thereto except as hereinafter provided.

2. The carrier shall not be liable for loss, damage, or delay to any of the goods herein described, caused by the act of God, the King's or public enemies, riots, strikes, defect, or inherent vice in the goods, or the act or default of the shipper or owner; for differences in weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights when the elevators are not operated by the carrier, unless the weights are evidenced by government certificate; the authority of law or by quarantine. For loss, damage or delay, except where cartage is to be performed by the carrier or its agents, caused by fire occurring after forty-eight hours (exclusive of legal holidays), after written notice of the arrival of said goods at destination or a port of export (if intended for export and not covered by a through bill of lading) has been sent or given, the carrier's liability shall be that of the warehouseman only. Except in case of negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the goods are stopped and held in transit upon the request of the party entitled to make such request. When in accordance with general custom, on account of the nature of the goods, or at the request of the shipper, the goods are transported in open cars, the carrier (except in case of loss or damage by fire, in which case the liability shall be the same as though the goods had been carried in closed cars) shall be liable only for negligence, and the burden of proving freedom from such negligence shall be on the carrier.

The owner or consignee shall pay the freight and all other lawful charges accruing on said goods and if required, shall pay the same before delivery if upon inspection it is ascertained that the goods shipped are not those described in this bill of lading, the freight charges must be paid upon the goods actually shipped, with any additional penalties lawfully payable thereon.

The carrier shall not be liable for the act or default of the shipper or owner.

The defendants cannot be held liable because the owner chose to take the chance of shipping butter in a box car in April in the expectation that the weather would remain cool whereas the weather conditions became so warm as to cause injury to the butter. The plaintiffs' own agents, the Crown Feed & Produce Company, engaged in the same business, considered it unsafe to do so. The defendant company on request could have provided a refrigerator car, though at a higher rate.

The plaintiffs' own agents, the consignees, caused a delay of a whole day by failing to pay freight charges.

The plaintiff it seems to me must also fail on another ground.

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Counsel for plaintiff at trial endeavoured to locate the injury as having occurred between the 17th and 21st while the car was at Calgary through the failure of the defendant to place it on Swift's siding. I am not able to find on the evidence that the defendant company had any notice that the car was to be placed on the "Swift" siding prior to the placing of the car on No. 6 siding where the Crown Feed & Produce Company usually took delivery. The delay in the change from this siding to Swift's was primarily caused by the plaintiffs themselves. The defendant company had to move a car placed with many others at a time when plaintiffs say the yards were congested and get it in to a private siding. I am not able to say they were an unreasonable time in doing so.

The plaintiffs' action is dismissed with costs.

S. B. Woods, K.C., for plaintiffs. G. A. Walker, for defendant.

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**MICHELLI v. CROW'S NEST PASS COAL CO., Limited.**

*British Columbia, County Court, Judge Thompson. October 16, 1912.*

MASTER AND SERVANT (§ II A—43)—*Notice of inquiry—Workmen's compensation.*]—JUDGE THOMPSON, arbitrator:—This is an application under the Workmen's Compensation Act, made by one Raffelle Michelli against the respondent company. The applicant on the 21st day of November, 1911, was in the employ of the respondent company at No. 3 mine, Michel, one of the properties of the respondent company. He was, on that date, injured by a fall of rock from the roof and is now permanently disabled. It appears, according to the applicant's evidence that he was instructed by the fire boss, under whose orders he worked, to go to No. 2 slope of No. 3 mine, to work with some Slav workmen in pulling out props. These Slavs appeared to have a leader, a Slav, by name of Billi.

The applicant says that he obeyed the fire boss and while working with the Slavs was injured. Billi, on the other hand, says that he stopped the applicant when the latter came to him and that he told him not to go further as there was danger; that he said to him in English: "You had better stay here, it is pretty dangerous up there;" that the applicant did not listen but started off; that twice Billi took hold of the applicant's coat and told him to stop. That Billi then left and Michelli started off. The accident occurred shortly afterwards. This evidence is in part confirmed by one Jan Dormin, another Slav. He says that Michelli was not working under Billi. Another Slav, Steve Mikus, states that he also warned Michelli. After the accident Michelli was taken to the Michel hospital, where he still lies per-

manently disabled. Evidence was given that at the time of the accident, Dr. Shaw, one of the resident physicians of the hospital, drew up the following certificate:—

Workmen's Compensation Act, 1902.

Michel, B.C., Nov. 21st, 1911.

I hereby certify that I have this day examined Raffelle Michelli, working No. 772, whose injury consists of fracture of spine with paralysis of legs said to have been received in mine No. 3 on the 21st day of November, 1911. Probable duration of incapacity, probably permanent.

R. M. SHAW, *Surgeon.*

Operating Department
Received
Dec. 9th, 1911.
The Crow's Nest Pass Coal Company, Limited,

which was duly forwarded with a letter reading as follows:—

Michel, B.C., 8th December, 1911.

*In the Matter of the Workmen's Compensation Act*, 1902.

The Crow's Nest Pass Coal Company, Limited,

Fernie, B.C.

Dear Sirs:

Enclosed find notice of injury of the following persons: Robert Rae, Raffelle Michelli and Fred Noherny.

Yours truly,
MAURICE BURRELL, *Secretary.*

Operating Department
Received
Dec. 9th, 1911.
The Crow's Nest Pass Coal Company, Limited,
United Mine Workers of America.
Local Union No. 2334
Michel, B.C.
3 Copies.
For original see attached to
Robert Rae, 3829.

both of which were received by the respondent company on December 9th, 1911.

On the 21st February, 1912, Dr. Shaw drew up the following certificate:—

District 18 U.M.W. of A.
Michel Local Union No. 2334.
Doctor's Certificate.

No..... (Date) Feb. 21st, 1912.

This is to certify that I have attended R. Michelli from November 21st, 1911, to February 21st, 1912, inclusive. Nature of illness, fractured spine, paralysis, and that the patient was unable to work during that period. Unable to work.

R. M. SHAW, *Medical Doctor.*

Operating Department, Received Feb. 22nd, 1912.
The Crow's Nest Pass Coal Company, Limited.

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which was forwarded to the respondent company with the following letter:—

Michel, B.C., 21st Feb., 1912.

*In the Matter of the Workmen's Compensation Act*, 1902.

The Crow's Nest Pass Coal Company, Limited, Fernie, B.C.

Dear Sirs,—Enclosed find doctor's certificates for the claims of Robert Christian, Robert Clare, John Ferancik, Frank Pajk, R. Michelli, John Volpatti and Albert Allan.

Yours truly,
MAURICE BURRELL, *Secretary*.

Operating Department, Received Feb. 22nd, 1912.
The Crow's Nest Pass Coal Company, Limited.
United Mine Workers of America, Local Union No. 2334.
Michel, B.C.
7 Copies, for original see attached to R. Michelli.
File 3828.

both of which were duly received by the company on February 22nd, 1912.

On the 25th March, 1912, Dr. Weldon, another resident physician at the Michel hospital, drew up another certificate:—

District 18 U.M.W. of A. Michel Local Union, No. 2334.
Doctor's Certificate.

No..... (Date) March 25th, 1912.

This is to certify that I have attended R. Michelli from February 21st to March 25th inclusive. Nature of illness, broken back and that the patient was unable to work during that period.

R. C. WELDON, *Medical Doctor*.

Operating Department, Received March 26th, 1912.
The Crow's Nest Pass Coal Company, Limited.

which was forwarded to the respondent company with the following letter:—

Michel, B.C., 25th March, 1912.

*In the Matter of the Workmen's Compensation Act*, 1902.

The Crow's Nest Pass Coal Company, Limited, Fernie, B.C.

Dear Sirs,—Enclosed find doctor's certificates for the claims of the following persons: Robert Clare, John Ferancik, R. Michelli, John Volpatti and Robert Christian.

Yours truly,
MAURICE BURRELL, *Secretary*.

For original see attached to File 3779, R. Christian.

and which was duly received on the 26th March, 1912, by the respondent company.

No further proceedings appeared to have been taken until the applicant's solicitor, on the 17th August, 1912, issued and served upon the respondent company the formal request for arbitration and particulars. At all events there is no evidence before me of any further steps being taken prior to that date.

The respondent company resist the claim on the following grounds:—

1. Lack of notice of injury as soon as practicable.
2. Lack of claim for compensation made within six months.
3. Serious and wilful misconduct on the part of the applicant.

I will deal with the objections in order:—

First—The lack of notice of injury. The applicant argues that the doctor's certificate of November 21, 1911, and the letter of Maurice Burrell, of December 8, 1911, constitute a proper notice of injury. I do not think they do.

Sub-section 2 of section 7 of the Act is specific in its requirements.

1. Name and address of the person injured. This requirement has been complied with.
2. The cause of the injury. This requirement was not complied with.
3. The date at which the injury was sustained. This requirement I construe as having been complied with.

The non-compliance with the second requirement, however, in my opinion is fatal to the construction of these documents as a proper notice of injury under the Act. The notice is in this respect defective. The Act, however, while providing for the giving of a notice of injury by the applicant to the respondent, contains a proviso:—

> Provided always that the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause.

In other words a defective notice or even no notice at all is not a bar to the maintenance of the proceedings if it is proved that:—

1. The employer is not prejudiced in his defence; or
2. The want or defect was occasioned by mistake or other reasonable cause.

In dealing with this aspect of the case it must be borne in mind that it would be unreasonable to expect the applicant himself to give the notice. He is a foreigner, unable to speak English, injured so that he will never again have any use of his limbs; and undoubtedly as any person would be in the same situation, with an impaired mentality induced by the shock, his illness and his confinement to bed. In *Lever* v. *McArthur*, 9 B. C.R. 417, on p. 420, Mr. Justice Martin says:—

> The plaintiff was confined for several months to the hospital in consequence of the serious injuries he sustained and that is a most material element in this case. There is no doubt that for the first few weeks this man was not in a position to transact the most ordinary business or attend to his affairs. It may be that his mind was clear, but we all know that when a man is sick and suffering such as

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this man was that he is hardly capable of attending to such matters; such a shock to the system causes frequently loss of mental force and dulls the faculties, and I am not prepared to say that this man in this case could not, from that fact alone, be reasonably excused from the giving of the notice.

The notice of injury was given on his behalf by one Maurice Burrell, secretary of the Miners' union, to which (though there is no evidence before me to that effect) Michelli presumably belonged.

The onus of proving that the respondent company has not been prejudiced is upon the applicant: *Hughes* v. *Coed Talon Colliery Co., Ltd.*, 78 L.J.K.B. 539, 2 B.W.C.C. 159. Has the applicant satisfied the onus? I think he has, and that the respondent company has not been prejudiced in its defence. A notice of the injury was given to the company, defective in one particular, in that it did not state the cause of the accident. R. W. Young, the secretary of the company, in his examination for discovery, says:—

5. Q. You know that Michelli was employed by the company? A. Yes.

6. Q. Where was he employed by the company? A. At Michel, I believe.

7. Q. What was he doing? I mean what was his occupation? A. Track cleaner.

8. Q. Was he injured while working there? A. He was injured while working there.

9. Q. While working for the company? A. Yes.

10. Q. Do you know the cause of the injury? A. I do not know the details of the injury, I believe it was from an accident received while working in the mine.

11. Q. How soon did you learn about the accident? A. The next day.

And further on:—

40 Q. From whom did you learn the particulars about this accident? A. We got the regular accident report.

In the face of these statements it is inconceivable to suppose that the company's officials would not know the cause of the accident. And, that being the case, and all the other requirements having been complied with, I must hold that the respondent company was not prejudiced in its defence: *Bush* v. *Gellyceidrim Colliery Co., Ltd.*, 3 B.W.C.C. 44; *McClelland* v. *Todd*, 2 B.W.C.C. 472; *Beadle* v. *Milton*, 5 W.C.C. 55.

There is another excuse, however, allowed by the Act for the want or defect in a notice of injury, namely: If such want, defect or inaccuracy was occasioned by mistake or other reasonable cause. In *Eke* v. *Sir William Hart Dyke*, 3 B.W.C.C. 482, on page 485, Cozens-Hardy, M.R., says:—

Then upon that, there is a proviso that (*a*) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance

of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy. That is the first limb in the proviso. Then comes the second limb: "or that such want, defect or inaccuracy, was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." Now, the second limb has nothing whatever to do with the prejudice caused to the employer by the want of notice. It says the want of notice shall not be a bar if the want was occasioned by a reasonable cause.

Evidence was given by the witness, Martin Burrell, of a custom of the respondent company to accept these certificates and letters accompanying them as notices of injury. The natural deduction Burrell would therefore make is that the respondent company would accept them in this case. Mr. Young, in his examination for discovery, says:—

20. Q. Did you or did you not receive notice of injury from Mr. Burrell, of the Michel local union in the month of December? A. I think there was a letter enclosing the doctor's certificate. I think it was written in December. I would not be sure.

32. Q. Have you not infrequently paid compensation after receiving notice from the local union of the district? A. The local union usually forwards certificates to us and we keep the doctor's certificates as a basis on which to pay compensation where the question of liability is not in dispute.

33. Q. As a matter of fact, you don't know in what case the question of liability may become a matter in dispute? It may happen in any case, may it not? A. Yes.

34. Q. How long has the company been in the habit of recognizing those doctor's certificates when liability is not in question? A. I do not know.

35. Q. It has been for some time? Since you were connected with the company? A. Since I have been in Fernie this last time. Since November, 1909, it has been in force.

36. Q. You have often paid out compensation on the strength of those doctor's certificates? A. We always do where the question of liability is not disputed.

37. Q. From whom do you, as a rule, get the letters enclosing those certificates? A. The secretaries, I think.

And in his evidence at the arbitration says that the company has paid compensation on these doctor's certificates. The applicant's counsel has asked me to hold that the company are thereby estopped from setting up this or the second defence. I cannot so hold; nor is the evidence admissible to prove estoppel. But I do hold that there has been a genuine mistake, not of law, that is, as to the legal effect of these certificates, but of fact, that is, as to whether or not the company would accept them as a notice of injury. I hold therefore that the applicant has satisfied the onus imposed on him to prove that the defect in

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the notice was not such that the respondent company was prejudiced in its defence thereby, and that such defect was occasioned by mistake.

Counsel for the respondent company has argued that the claim for compensation with respect to the accident has not been made within six months from the occurrence of the accident causing the injury. In *Powell* v. *Main Colliery Co., Ltd.*, 69 L.J.K.B. 758, 2 W.C.C. 29, the House of Lords has held that the claim for compensation mentioned means a claim made to the employer, not the initiation of proceedings in arbitration. Undoubtedly a demand for compensation must be made: *Perry* v. *Clements*, 3 W.C.C. 56; *Trencar* v. *Wells & Co.*, 3 W.C.C. 58, held that the following words constituted a claim: "I shall be extremely obliged if you will let me know what compensation you will allow me." Here there was no actual demand, merely a request. In *Lowe* v. *Myers & Son*, 75 L.J.K.B. 651, 8 W.C.C. 22, was held that a claim need not be in writing. In *Powell* v. *Main Colliery Co., Ltd.*, 2 W.C.C. 29, Lord Halsbury says:—

> I wish to say something apart from the mere words upon the whole of the statute itself. It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely that there should not be any lawyers employed at all and that the man who was injured should be able to go himself and say, "I claim so much," and that then he could go to the County Court Judge and say, "Now, please to hear this case because my employer will not give me what I have claimed." It appears to me that that is the meaning and construction of the whole statute and that is what the legislature intended and that is the reason why it avoided any technical phrases. It strikes one at once that if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended the legislature was competent and had sufficient knowledge to say what it meant.

In *Linklater* v. *Webster & Son*, 6 W.C.C. 50, a claim was made under the Employers' Liability Act, none being made under the Workmen's Compensation Act. This the Court of Appeal held to be a valid claim. I cite these cases to shew that a claim need not be specific and that very little will constitute a claim under the Act. Surely, in view of these decisions I would be straining the meaning of the Act to hold that the letters of February 21, 1912, and March 25, 1912: "Enclosed please find doctor's certificates for the *claims* of" combined with the heading: "In the matter of the Workmen's Compensation Act, 1902" do not constitute a claim. The object of the Act is to let the employer know that a claim has been made. And the respondent company could have no clearer evidence of a claim having been made than these two letters. I need

only again refer to the words of Lord Halsbury in *Powell* v. *Main Colliery Co.*, 2 W.C.C. 29, quoted above, to see the reasonableness of such a conclusion. I find, therefore, that there has been a claim for compensation duly made within six months from the occurrence of the accident causing the injury.

Counsel for the respondent company argues that the applicant in not heeding the warnings of the Slavs, Billi and Mikus, was guilty of serious and wilful misconduct. The facts I find are these. Michelli obeyed the orders of the fire boss to help the Slavs. I believe Michelli when he says the Slav Billi ordered him to take off the props and to take them away. I believe Michelli could understand this because Billi could shew him by signs as well as speech. I believe Billi did say something about the place being dangerous, but I do not believe that Michelli understood him. I had both men in the witness box, Michelli, an Italian, in the hospital, and Billi, a Slav, in the Court-room. I tested their English-speaking abilities and could not understand either of them. I tested them in such a manner that they could not know I was so doing and failed to understand them. Much less could they understand each other. I do not believe that Michelli could understand the witness Mikus. There was plainly some feeling of animosity between the Slav and Italian witnesses which led to exaggeration on both sides. I do not believe that Michelli appreciated that he was running into danger; and I believe he understood he was carrying out his instructions when he was injured. While this case differs in some respects from *Granick* v. *B.C. Sugar Refining Co.*, 15 B.C.R. 198,* in principle, they are similar. As expressing the true intent and meaning of the Act, I refer to the words found in the judgment of the learned Chief Justice, on p. 202:—

> That Act has always been construed liberally in favour of the injured or his dependants, and the employer has always been required to fully satisfy the onus which is placed upon him of shewing that the workman was guilty of misconduct, disentitling him or his dependants to obtain the compensation provided by the Act. I think it is incumbent on the defendant to practically exclude by evidence every other hypothesis than wilful and serious misconduct before it can succeed in such an issue.

Michelli had his instructions which he apparently did understand. He had a vague warning from Billi which I believe he did not understand or which he might very reasonably have taken as a mere expression of opinion, namely, that the place was dangerous. In either event he was undoubtedly justified in acting as he did. I hold, therefore, that the respondent company have not satisfied the onus cast upon them of proving

*Granick* v. *B.C. Sugar Refining Co.*, 15 B.C.R. 198, affirmed *sub nom.*; *B.C. Sugar Refining Co.* v. *Granick*, 44 Can. S.C.R. 105.

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serious and wilful misconduct on the part of Michelli. Serious neglect is not alleged. There is no question and it is not disputed but that the accident arose out of and in the course of the applicant's employment. Michelli's wages were $2.75 per diem or $16.50 a week. I find, therefore, in favour of the applicant in the sum of $8.25 per week from the 5th day of December, 1911, until the sum of $1,500 shall have been paid or until he is able to earn the sum of $16.50 per week; together with the costs of the arbitration. I will, if required, grant a stated case to the respondent company on any or all of the three points in question. Macneil, for the applicant. Herchmer, for the respondent.

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**Re VANCOUVER, VICTORIA AND EASTERN R. CO. and INGRAM.**

*British Columbia Supreme Court, Murphy, J., in Chambers. September 12, 1912.*

COSTS (§ II—32)—*Taxation—Award under Railway Act (Can.)—Reasonable Expenses.*]

Taxation of costs under the Railway Act, R.S.C. 1906, ch. 37.

MURPHY, J.:—The principles under which taxation of costs should be carried out are laid down by Mathers, J., in *Re Canadian Northern R. Co.* and *Robinson*, 17 Man. L.R. 579, 8 W.L.R. 137, and are:—

> First—That the taxation should be on a solicitor and client basis.
>
> Second—That where land is taken compulsorily the costs should be taxed on a larger scale than in ordinary litigation. Everything that was necessarily or reasonably done and every expense that was necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him in taxation.
>
> Third—The tariff of costs prescribed for ordinary litigation may be accepted as a general guide but the taxing officer is not bound by it and should not follow it in all circumstances.

Applying these principles to the disputed items I hold that the costs of obtaining transcripts of evidence as was done here is a reasonable expense which a prudent man would incur and I direct that the registrar proceed to tax such disputed costs but in so doing I in no way hamper his discretion in deciding whether any particular item is chargeable as one which was necessary. I allow the $6 paid for the auto, as I hold that it is an expense reasonably incurred. As to the third set of disputed items I hold that the registrar is not bound to refuse to tax them merely because they do not fall within the words of any particular item of the Supreme Court tariff. I hold also that he is not precluded from taxing them by reason of sub-section 3 of section 201 of the Railway Act, R.S.C. 1906, ch. 37. I fur-

ther hold that they are only recoverable as reasonable expenses actually incurred and that, therefore, before they can be taxed an affidavit of increase must be filed. If such affidavit is filed the registrar is to proceed to tax them but in so doing he is not bound to allow the amounts actually paid but only such amounts, if any, as he in his discretion deems fair in view of all the circumstances and then only if he, in his discretion, deems that such amounts were reasonable and necessary expenses demanded by a proper presentation of the appellant's case. He is not to allow any amounts under this head which he deems to result from unnecessary work or from over-caution. With these directions the matter is referred back to the registrar.

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

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## LOPER v. CAIRNS.



*Manitoba King's Bench, Patterson, K.C., Referee. October 21, 1912.*

DISCOVERY AND INSPECTION (§ IV—20)—*Objection to be Sworn—Presence of Opposite Party.*]

GEORGE PATTERSON, K.C., REFEREE:—Following *Merchants Bank* v. *Ketchum*, 16 P.R. (Ont.) 366, ordered that the plaintiff attend at his own expense on being served with a new appointment, and in default thereof the action be dismissed with costs.

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## LETHBRIDGE SASH AND DOOR CO. v. TAYLOR.



*Alberta, District Court, Lethbridge, Judge Winter. October 19, 1912.*

SALE (§ II A—27)—*Implied Warranty of Fitness—Purchase of Glass—Absence of any Inspection before Delivery — Purchaser's Assumption of Risk—Alleged Custom—Sufficiency of Evidence to Establish.*]

JUDGE WINTER:—This action is brought to recover $31.39, being the price of certain glass which the plaintiffs claim to have sold and delivered to the defendant, who, while not disputing the delivery, claims that such glass was delivered to him in substitution for or to replace other glass of the same quality purchased of the plaintiffs and which proved to be unfit for the purpose for which it was intended and unmerchantable.

The following are the circumstances: The defendant, who required a large quantity of panes of glass, enquired of the plaintiffs the price and stated the number of panes he required

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for his greenhouse and was told by their salesman that he would want 24 cases or thereabouts. Each case contained 40 sheets of glass. The defendant paid $186 for these. Neither the plaintiffs nor the defendant had inspected the cases before delivery. The cases were delivered by the plaintiffs and on opening them up the defendant discovered that a large proportion of the sheets of glass were broken. He then ordered from the plaintiffs and obtained delivery from them of a sufficient quantity of sheets of glass to replace those which were broken. It is for the price of this second delivery of glass that the present action is brought.

The plaintiffs, who are wholesale dealers and who generally supply retail merchants, contend that it is the custom of the trade to sell and purchase by the case as it stands unopened at a lower price than when the case is opened and examined, in which event it is sold by the sheet, every sheet being sound, the price then being $12.15 the case, *i.e.*, for 40 sheets of glass —that when buying by the case unopened the purchaser takes the risk of all breakages. It was stated by the plaintiffs and their witnesses that they themselves always purchased glass on these terms and that when selling the purchaser from them assumed the same risk.

The defendant swore that he was not informed of such usage and that he did not know of its existence. I was not, previously to the hearing, aware of any such usage nor do I think it is generally known to exist, except, perhaps, among wholesale jobbing houses and retail houses. Moreover, the defendant was entitled to believe that he was to receive the full quantity of sound sheets, as the number of cases the salesman told him he would require would have been sufficient only if every sheet had been sound. On the supposition that a percentage of the sheets might be broken the number of cases sold would have been sufficient.

A custom of the kind sought to be set up, in order to incorporate it as a mercantile usage, must be such as attaches universally to the subject matter of the contract in the place where it was made and it should be shewn that the parties knew the custom. The evidence of the custom should be clear, cogent and irresistible: *Burke* v. *Blake*, 6 P.R. (Ont.) 260, also *Parsons* v. *Hart*, 30 Can. S.C.R. 473. I do not find the alleged usage was so notorious and generally acquiesced in that it could be presumed to have formed an ingredient of the contract for the purchase of this glass, and I find that the defendant was ignorant of the alleged usage.

By the Sale of Goods Act there were implied as conditions of the contract that the glass should be reasonably fit for the purpose for which, to the knowledge of the plaintiffs, it was

bought and, that it should be of merchantable quality. So far as the broken sheets of glass were concerned, they were neither. Judgment will be for the plaintiff on his claim for $31.39, and I assess the damage to the defendant at the same amount, for the breach of the implied warranty, and as regards these sums there will be a set-off. As the result of this judgment is that neither party is entitled to receive any difference from the other, there will be no costs C. F. P. Conybeare, K.C., for plaintiff. W. S. Ball, for defendant.

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### Re ANCHOR INVESTMENT CO. Limited.

*British Columbia Supreme Court, Murphy, J., in Chambers. January 15, 1912.*

CORPORATIONS AND COMPANIES (§ VI A—313)—*Trading Company—Winding-up—Insolvency.*]

MURPHY, J.:—Application by a creditor to wind up, which is opposed by the company and some creditors, whilst the petitioner is supported by other creditors. Proceedings are instituted under the Winding-up Act, R.S.C. 1906, ch. 144.

It is first objected that the company is not a "trading company" within the meaning of the Act and therefore the Court has no jurisdiction. The memorandum of association empowers the company to do a great many things such as acting as real estate and financial agents, manufacturing and dealing in brick, selling and supplying gravel, etc., which admittedly would make it a trading company, if such powers had been exercised. The company since being licensed in British Columbia has, however, merely bought and sold land and in one instance erected an hotel which it afterwards sold. It is argued that I must have regard only to its operations and not to its powers. I cannot agree. To do so would be to concede that a company might be at one moment within the scope of the Act and at another without it according as it was exercising one or other set of powers conferred upon it by its memorandum of association. Further it has been held that if the company for any purposes for which it exists comes within the term defined by the Act it is sufficient. *Re Lake Winnipeg L. & T. Co.*, 7 Man. L.R. 255.

It is next contended that no case for winding up within the Act has been made out. The application is based on the insolvency of the company and if an order is to be made it must be because the material filed satisfied some one of the sub-sections of sec. 3 of the Act. It was argued that the petitioner holding an unsatisfied judgment was sufficient to invoke sub-section (*a*). But admittedly sec. 4 has not been complied with and that being so said sub-section (*a*) cannot be made the foundation of an

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order. *Re Qu'Appelle Valley Farming Co. Ltd.*, 5 Man. L.R. 160 and *Re Ewart Carriage Works Limited*, 8 O.L.R. 527.

Next it is sought to rely upon sub-section (*d*) *i.e.*, that the company has acknowledged its insolvency otherwise than in sub-sections (*a*), (*b*), and (*c*). This sub-section requires something actively to be done by the company which constitutes such acknowledgment: *Re Qu'Appelle Valley Farming Co. Ltd.*, 5 Man. L.R. 160. I think further that this sub-section was inserted to cover actions by the company not intended by them to amount to such acknowledgment, but which the Court holds do in fact constitute an acknowledgment of insolvency. The two preceding sub-sections seem to cover all possible acts which a company might commit with the intention of making such acknowledgment.

Now here the company on the 5th of January, 1911, entered into an agreement with the National Resources Co. Ltd., whereby it parted entirely (except in one contingency involving a breach of contract) with the control and administration of the only asset it has in British Columbia. This agreement provided for contingent payments to the Anchor Investment Company dependent on sales of this asset the only certain payment thereunder not accruing due for a period of seven years. Then on February 6, 1911, the directors passed two resolutions as follows:—

> Moved by J. T. Cook, seconded by A. R. Stevens, that all creditors of the company be written to or seen by J. T. Cook, president, and the situation of the company explained and requested to file their correct claims to C. E. Bennett who would dispense *pro rata* money received from the National Resources Security Company or, any source, as the same are received. (Signed.) J. T. Cook and James Larmour.
>
> Moved by J. T. Cook, seconded by James Larmour that all parties from whom any moneys are payable to the company or may be payable to the company from any future transactions, shall be notified to pay same to C. E. Bennett, on behalf of the company, the said C. E. Bennett to hold the same in trust for the company, and dispense same to the various creditors *pro rata* as arranged by resolution of directors, passed even date herewith. (Signed.) J. T. Cook, A. R. Stevens, James Larmour and C. E. Bennett, February 6th, 1911.

Pursuant to such resolutions letters were sent to creditors, one of which reads:—

> Vancouver, B.C., Feb. 20th.
>
> McLennan, McFeely & Co.,
>
> At a meeting of the Directors of Anchor Investment Co. Ltd., it was decided to request that all accounts be sent in and they will be filed with Mr. C. E. Bennett who will pay out *pro rata* immediately the money is received from sale of property. Your account has been received and will be filed accordingly.
>
> The Natural Resources Security Co. Ltd., have purchaser an interest

in Masset Town-site with the Anchor Investment Co., and they will be pushing the sale of this property very soon now, when these claims will be taken care of.

ANCHOR INVESTMENT CO. LTD.,
By J. T. Cook, *Pres.*

In my opinion these acts bring the company within the scope of said sub-section (*d*). Insolvency is the condition in which the debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted: *Dominion Bank* v. *Cowan*, 14 O.R. 465. That the company was in this condition on February 6, 1911, is, I think, clear from the material before the Court and I think further that it acknowledged such to be the case when it passed the above resolutions and notified creditors to file claims with a trustee who would pay same *pro rata*. This is a clear intimation that the company cannot pay its debts in full as they mature and is, in effect, a scheme to gain time by a proceeding analogous to an assignment for the benefit of creditors without taking the actual step of formally executing such an assignment.

It is argued that what was done was merely an internal arrangement made by the company for its own convenience. This view might be taken had it stopped at passing the resolutions but when it proceeded to notify creditors of what it had done and advised that the result would be the payment of claims *pro rata* as funds came in went beyond any internal arrangement and as stated amounted to an acknowledgment of insolvency. I think then that the case for an order is made out under this sub-section. The Union Bank by its solicitors appeared on the final hearing and contended that even were this so an order should not be made as there would be no resultant benefit to creditors. In the first place it is to be noted this bank is not a primary creditor, but merely holds the company as endorser on certain notes which the president of the Anchor Investment Co., on his cross-examination states are being paid on at the rate of $500 per month.

But that aside, I consider the report of Mr. Shaw, the accountant appointed by me to report on the company's conditions, shews beyond doubt not only that it would be beneficial to creditors to make such winding-up order but that their interests might be gravely imperilled were it not made. That report shews the company's records and books to be in a state of chaos and further shews the company's moneys to have been handled extensively without any record whatever of such handling being entered in proper books of accounts. There is apparently a cash shortage of over $500 on the part of the person who handled these moneys.

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Now the arrangement whereby Bennett is made trustee to collect and disburse the company's funds is clearly revocable for the notification thereof to the Natural Resources Security Co. distinctly states that they are to act thereunder until notified to the contrary. The company may then at any moment cancel this arrangement and demand payments to itself. Such payments, if the past actions of the company are any criterion of the method in which their business in the future will be carried on, might never get into the company's accounts at all. It was suggested that if an order was made under this sub-section the question of costs should be considered as the material implementing its requirements was only filed on the final argument by special leave. On the whole I think costs should follow the event. The main item is Mr. Shaw's charge and whilst it is true his report because of the chaotic character of the company's records did not materially assist me on the question of insolvency it was of much value in determining whether the making of the order would be beneficial or otherwise to the creditors as a body.

E. Bloomfield and Jackson, for applicant. C. M. Woodworth, for the company.

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**BURNS v. CITY OF CALGARY; ROSS v. CITY OF CALGARY.**

*Alberta Supreme Court, Harvey, C.J., Scott, Beck and Simmons, JJ. June 22, 1912.*

TAXES (§ III D—138)—*Appeal from assessment—Validity of—Excessive valuation—How value determined—Actual sales—Admissibility of evidence as to price received.*]

Appeal from judgment of Judge Carpenter of the District Court, on an appeal to him from the decision of the Court of Revision of the city of Calgary, assessing certain property belonging to the appellant, P. Burns. Judge Carpenter's decision was as follows:—

JUDGE CARPENTER:—There were a number of preliminary objections raised at the hearing of this appeal, which must be disposed of before I consider the real questions involved.

In the first place objection was raised by Mr. Clarke on behalf of the ratepayers whose assessments are here in question, there was no proper notice of appeal filed on behalf of the appellant. The notice was entitled:—

> In the Supreme Court of Alberta, Judicial District of Calgary, and directed to the City of Calgary, to the city clerk of the city of Calgary, and to the Judge of the Supreme Court having jurisdiction in Calgary, who may hear these appeals.

By sec. 41 of the Calgary city charter as it originally was, provision was made for an appeal in such cases to the "Judge of the Supreme Court having jurisdiction in the city of Calgary." By sec. 1 of ch. 9, of the Alberta Statutes, 1909, it was provided that:

> Notwithstanding anything to the contrary contained in any city or municipal charter in force in the province, appeals from the decision of the Courts of revision, shall be made to the Judge of the District Court of the district within which the city or town affected is situate.

And by sec. 2 of the same Act it is set out that:—

> The procedure on such appeal shall continue to be the procedure set out in the city or municipal charter of the city or town affected. And nothing herein shall be taken in any wise to vary the provisions of any such city or municipal charter otherwise than by substituting the district Judge of the District Court of the province of their several districts respectively for such Court or Judge as shall have been mentioned in the said city or to which such appeals shall be had, taken, or made.

The notice of appeal in regard to the assessment in question was delivered to the city clerk as required by the provisions of sec. 41, sub-sec. 1, of the city charter, and a copy of the notice was, with a number of other notices of appeal, delivered to me as required by sub-sec. 2 of the same section and I fixed the hearing of this and the other appeals for the 12th instant, and as in the other appeals, the city clerk posted the required notice mentioned in sub-sec. 3 of this section. Subsequently at the request of counsel for the parties whose assessments are the subject matter of this appeal, and with the consent of counsel for the appellant, I enlarged the hearing until the 20th instant, counsel for the former parties reserving any right to raise any objection as to the form of the notice of appeal.

It will be seen that none of the parties interested are in anyway prejudiced by the form of notice given, and the objection raised in this connection is purely a technical one, and I confess I would be very loath to give effect to an objection of this kind in any such case. And it seems to me that there is no reason why I should consider this notice void, even though the Judge to whom the notice of appeal is addressed is wrongfully described. In *Re McCulloch and the Judge of the County Court of the United Counties of Leeds and Grenville*, 35 U.C.Q.B. 449, it was held that the notice of appeal addressed to "The Judge" instead of "The Judge of the County of the County Court of Leeds and Grenville," was good; and in *The Queen* v. *The Recorder of Liverpool*, 15 Q.B. 1070, 117 Eng. R. 764, where the notice of appeal was given to the quarter sessions, though a subsequent notice, after the expiration of the time limited for the giving of such notice, of an appeal to the borough sessions, the

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proper tribunal, was given, Lord Campbell, C.J., held that the notice was not bad because there was coupled with it a statement that the appeal was to be to the county sessions. "That," he said, "was merely an erroneous surplusage, which could not mislead."

There is not the slightest suggestion here that any of the parties interested were in any way mislead or prejudiced by this notice. The city clerk was not, for he at the proper time delivered to me the notice of appeal and posted the notice of the day appointed for the hearing, as required by the provisions of the charter. Indeed, no objection was raised by the city solicitor in regard to this notice. It is true that copies of this notice were served by the appellant upon the parties interested but such service is not at all required, and in any event as I have said these parties were not in any way misled by such notice, for they have appeared at the hearing both in person and by counsel. I will therefore overrule this objection.

As to the objection that the term "any person" in sec. 41 only refers to persons who are directly interested in the assessment dealt with by the Court of Revision, I do not think this need be considered seriously. Further objection was raised that the assessment was completed before the Act of 1911 came into force, but I am unable to accept this view. This Act came into force on December 20, 1911. By sec. 27 of the city charter, as amended, it is provided that it shall be the duty of the assessor to begin to make assessment not later than the 1st day of November in each year for the following year, and on or about the 1st day of January in each year to return to the city clerk such assessment roll. To give effect to this contention would be in effect, to hold that the assessor, once he had valued the property could not make any change in regard to its assessment, or reconsider his valuation, and to do so, as under the present circumstances, might easily result in two properties lying side by side being assessed according to entirely different standards, and this only for the reason that the one was valued yesterday and the other one to-day. The case cited by Mr. Muir, *Bradshaw* v. *Trustees of Riverdale Public School District* (No. 1), 3 Terr. L.R. 164, can, I think, easily be distinguished from the case now under consideration.

I come now to what is, apart from the technical objections I have mentioned, the main question involved in this appeal. By the amendment to the city charter, ch. 32 of the statutes of 1907, the limits of the city were extended so as to take in certain lands, amongst which are some of the lands forming part of the subject-matter of the present appeal, and sec. 25 of the charter, which along with sec. 26 provides for the mode of assessment of property, was amended by adding a

clause, providing that land used for agricultural purposes in any of the areas then brought within the limits of the city should not be assessed at a greater value or for a higher amount than $50 per acre, unless or until the same was sub-divided into lots or parcels. In 1910, the limits of the city were again extended by the amendment of that year, being ch. 28 of the statutes of 1910, and sec. 25 of the said charter was still further amended by adding a further clause which made the former added clause, that is the amendment of 1907, referred to, apply to such of the lands further brought in, as were used for agricultural purposes. The land brought in under these amendments, and not sub-divided was, after the year in which it was brought in, assessed at the rate of $50 per acre, as lands used for agricultural purposes, and there does not seem to have been any attempt to construe the phrase "lands used for agricultural purposes" with any strictness. A small proportion of this land was apparently used for these purposes, or at least was more or less under crop, but by far the greater portion of it had been used for the purpose of pasturage alone, and it is doubtful whether any of it is used in connection with the actual raising of stock.

In one case under consideration, that of the Eau Claire Lumber Co., the land is used only to pasture horses used in connection with their business. It is, however, unnecessary, I think, so far as the determination of this appeal is concerned, for me to deal with the question of what are or are not lands used for agricultural purposes. In 1911, when the limits of the city were further extended there was a section inserted in the amending Act, which became law as of December 20, of last year, repealing sub-secs. (*b*) and (*f*) of sec. 25 referred to, and as a consequence since that date there is in the city charter no clause providing for the assessment of any land within the city limits at the rate of $50 per acre, because it happens to be land used for agricultural purposes.

The exemption from taxation of lands at its true and actual value and at a rate uniform with the surrounding property has been eliminated from the charter, and as a consequence the mode of assessment is the same in regard to land whether within the city limits before 1907, or brought into the city in 1907 or 1910. The land is to be valued at its true and actual value and the assessment throughout the city is to be as uniform as possible. A great deal of stress was laid at the hearing of this appeal upon the agreement which was alleged to have been made between the city council and the owners of the lands brought within the city limits under the amending Acts of 1907 and 1910, particularly in reference to the Act of 1907.

The minutes of the city council were produced to shew that

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conferences had taken place between the owners and a committee of the council, but whatever may have taken place, I think there has not been given in any way proof that there was any agreement entered into by the city with the owners of the lands then brought in, and as to any such agreement in 1910, there has been no proof. In these minutes I find a report of the committee on the charter, to the effect that they had had a conference with Messrs. Burns, Walker, and others, and that these gentlemen had expressed a willingness to come into the city corporation upon the terms, amongst others, that farm lands should not be assessed for a sum exceeding $50 per acre as long as the same were not subdivided. And at the first council meeting thereafter, a resolution was passed to the effect that the delegation proceeding to Edmonton in connection with the amendment of the charter be authorized to consent, if pressed, as to the taxation of farm lands, then to be brought in, that such be not assessed during a period of 10 years at more than $50 per acre, unless subdivided. There is nothing in that resolution to shew that the city was prepared to consent to an exemption for an indefinite period, such as was actually given by the Act of 1907. If this agreement had been proved the question might be raised as to what authority the city council would have to enter into such agreement without a reference to the ratepayers, or indeed at all. But it does not seem to me to be necessary to consider this point in view of the legislation of 1911.

The Act of 1911, as I have said, has repealed the clauses relating to the assessment of any lands taken into the city as farm lands or lands used for agricultural purposes, and that being so there remains, apart from lands used for manufacturing or industrial purposes as provided by sub-sec. (*c*) of sec. 25, only one method to be adopted in the assessment of land within the city limits. And I think the Court of Revision acted wholly beyond their powers when attempting to give effect to what is alleged to be at least a moral obligation in regard to the assessment now under consideration. If the Act of 1911 is *ultra vires*, and there is no suggestion to the contrary, then there can be no further assessment of unsubdivided land used for farm purposes at the rate of $50 per acre, for the right to make an assessment in this manner is taken away by the amendment of 1911, and these lands are, as I have said before, to be assessed at their true and actual value.

In only remains for me to consider whether or not the values placed by the assessor upon these lands was based upon their true and actual value. Considerable stress was laid upon the fact that so far as the Burns property was concerned, Mr. Burns had given in July last an option of purchase upon all

the lands of his in question, including other lands, at prices considerably less than these values. This option expired on the last day of November last and was not exercised. But as this particular transaction would have involved an amount of over $2,000,000 and on cash terms, it is not at all surprising that the option was not exercised. Mr. Burns, in his examination, mentioned prices at which he was now willing to sell the various properties in question that were owned by him, and if I am right, these prices corresponded with the prices set out in the option referred to. While such evidence must have considerable weight I do not think that it is at all conclusive. And in his evidence, Mr. Burns stated that a small piece of this land, some 31 acres or thereabouts, valued in this option I think at $1,500 per acre was actually disposed of by him a few days ago at the value placed upon it by the assessor. And the other evidence called on Mr. Burns' behalf rather sustains the assessor's valuation than otherwise, and so far as these properties are concerned, I do not feel like altering the valuation placed upon them by the assessor.

As to the Walker properties I do not think any evidence adduced at this appeal is sufficient to disturb the assessor's figures. And the same applies to the various Riley properties, and to those of the Eau Claire Co., of Mr. Inglis, of Messrs. Raby & Laurendeau, and of J. Bannerman. As to the appellant's appeal in regard to the assessment of his own lands in the Capitol Hill subdivision I do not see my way clear to disturb this assessment. What is mainly relied upon in this particular portion of the appeal is the assessor's valuation of the Riley properties adjoining, which are not subdivided. I am not, however, prepared to go to the extent of saying that all unsubdivided property must be valued for assessment purposes exactly as if it were cut up into lots. That, I think, is possibly going to the other extreme, in the place of the assessment of $50 per acre. As I have said before, I am disposed to leave these properties at the original assessment as fixed by the assessor, and not consider that I must reduce the adjacent subdivided property to the basis of such assessment.

The appeal against the decision of the Court of Revision whereby the assessment of the various properties mentioned in the notice of appeal was reduced to an assessment of $50 per acre, will be allowed, and all these properties will be assessed at the values placed upon them by the assessor as shewn in the assessment roll returned by him to the city clerk. The appellant's appeal in regard to his own properties will be dismissed. I have already held at the hearing of this appeal that I had no jurisdiction in regard to lands wholly omitted from the assessment roll, and not the subject of an appeal to the

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Court of Revision and that portion of the appeal will be also dismissed.

In regard to assessments Nos. 36,587, 39,158 and 39,159, being the properties of James Inglis, Messrs. Raby & Laurendeau and J. Bannerman, respectively, I was under the impression that these lands had been reduced by the Court of Revision to an assessment of $50 per acre. I find, however, that these lands were originally assessed at that rate. The evidence of value as to the Inglis property is that a fair valuation would be $1,000 per acre; that a fair valuation of the Raby & Laurendeau property is $600 per acre; and that a fair valuation of the Bannerman property is $650 per acre. These assessments, namely, No. 36,587, being the Inglis property; No. 39,156, being the Raby & Laurendeau land, and No. 39,159 being the Bannerman land will be raised respectively from $50 per acre to $1,000 per acre, $600 per acre, and $650 per acre, respectively, making the Inglis assessment $120,000, the Raby & Laurendeau assessment $192,000 and the Bannerman assessment $104,000. As the appellant has succeeded in by far the most important part of the appeal he should have his costs.

HARVEY, C.J.:—The appellant Burns was assessed by the assessor of the city of Calgary in respect of 1132.19 acres situate within the city and all in one block but assessed in nine separate parcels according to the sectional sub-divisions, for a total of $3,284.120. On appeal the city council sitting as a Court of Revision, reduced the assessment to $56,610, being at the nominal rate of $50 an acre without regard to value. An appeal from this action was taken by Ross, a ratepayer, to the district Judge, who restored the original assessment. This appeal is from his decision.

The boundaries of the city were extended in 1907 by which they included a portion of this property and again in 1910 by which they included the remainder. By the statute extending the boundaries in 1907 it was provided (ch. 32, sec. 7) that there should be no assessment for the current year in the territory added to the city and that thereafter such portion of it as consisted of lands used for agricultural purposes should not be assessed at a greater value or larger amount than $50 per acre unless or until the same is subdivided into lots or parcels. The Act of 1910 (ch. 28, sec. 2) made the same provision respecting the area added by it. In 1911, the legislature repealed these provisions leaving the general provisions to apply to them.

On the appeal before the district Judge the assessor stated that he had assessed their lands as all other lands in the city at what he believed to be their actual value, but admitted that he had no actual sales of similar property to that in question to

guide him. Other witnesses gave evidence of their opinion of the market value of this property and upon quite ample evidence the learned Judge concluded that the assessment was a fair one and being satisfied of the illegality of the action of the Court of Revision he restored the original assessment. On the present appeal the appellant applies for leave to give evidence of actual sales of this property nearly all of which he has made sales of since the hearing below. In view of the very great variance between the estimates of witnesses as to the value on the appeal below which is to be expected in such a case it seems advisable that when such satisfactory evidence as that of actual *bonâ fide* sales establishing a market value, can be had it should be received and we therefore consider it proper to receive it. Counsel for the appellant Burns raises no question on this appeal except as to the fairness of the valuation. Counsel for the appellant Ross below offers no opposition to the appeal considered in this way stating that his purpose has been served by establishing that it should be assessed at its actual value and not at a nominal sum. Counsel for the city urges that the assessment should not be reduced in view of the provision of sec. 39 (1) of the charter which provides that "no assessment shall be changed—which appears to be in practical uniformity in regard to value throughout the city." If it were clear that this uniformity existed throughout the city there is no doubt the assessment should stand but inasmuch as the assessor has stated that he assessed at what he considered the actual value it is to be assumed that though, in some cases when he had insufficient data he may have been over-sanguine and assessed too highly, speaking generally throughout the city the assessment is the actual value and to make this assessment uniform it should be placed at its actual value which is shewn by the appellant's evidence now before us of the best price he says he has been able to obtain and which he has accepted.

It is necessary to deal with the parcels individually and for convenience sake they may be described by their number on the assessment roll:—

No. 269, consisting of 160 acres is assessed at $480,000. It has been sold for $176,000. The assessment will be reduced to that amount.

No. 270, consisting of 160 acres, is assessed at $480,000. It has been sold for $240,000, to which amount the assessment will be reduced.

No. 271, consisting of 160 acres, is assessed at $480,000. It has been sold for $240,000, to which amount the assessment will be reduced.

Nearly 10 acres of these two parcels have not been sold, but have been expropriated by the Canadian Northern Railway, but there is no reason to consider their value greater than the remainder on which the assessment is based.

No. 272, consists of 308.18 acres and is assessed at $2,500 an acre

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making a total of $770,450; of this 32 acres have sold at $3,000 an acre or $500 in excess of the assessment. No reduction can of course be made for that portion; 77 acres have been sold at $1,950 an acre, the remainder is still unsold. $2,500 is almost exactly the average of the two sales and for the unsold portion the assessment seems fair. The assessment will be reduced by $550 an acre for 77 acres sold at $1,950, making a total deduction of $42,350, and reducing the total assessment to $728,100. No objection is taken to the assessment of No. 274 which will remain unchanged at $179,500.

No. 500 has not been sold and there is, therefore, no basis for reduction and it will, therefore, remain unchanged at $62,500.

No. 5788, containing 95 acres is assessed at $3,500 an acre, or $332,500. It has been sold for $3,000 an acre or $285,000, to which amount the assessment is reduced.

No. 7017, comprising 109.67 acres assessed at $3,000 an acre or $329,010; 3.63 acres have been taken by the Canadian Northern Railway for $3,000 an acre. The remainder has been sold for $2,000. The assessment will be reduced by $106,000, leaving it $223,010.

No. 7018, consisting of 42.4 acres is assessed at $4,000 an acre or $170,160. It has been sold with the exception of 15 acres which has no exceptional value at $3,000 an acre. The assessment will be reduced by $1,000 an acre, leaving it at $127,620.

As we have arrived at the proper assessment by the evidence available now for the first time there will be no costs of the appeal.

SCOTT, BECK, and SIMMONS, JJ., concurred.

A. H. Clarke, K.C., for appellant. D. S. Moffat, for respondent.

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## DONNELLY v. ROBERTS.

*British Columbia, Vancouver County Court, Judge Grant.*

SALE (§ I C—19)—*Conditional sale—Effect of re-taking possession.*]

JUDGE GRANT:—This action was brought to recover from the defendant the sum of $518.24 as a balance for goods sold and delivered. The defendant having entered a dispute note herein the plaintiff moved under order XII. of C. C. Rules for speedy judgment. The motion was heard in Chambers, and on or about August 26th, an order was made "that the plaintiff be at liberty to sign final judgment in this action against the defendant, L. V. Roberts, for the sum of $515.59 with interest and costs"—a slight error in the computation of amount due the plaintiff being corrected. Upon this order no formal judgment has been signed, as appears by the records of the case in the registrar's office.

After entering the order for judgment, as it appears, the plaintiff instead of taxing costs and entering judgment and issuing execution thereon proceeded to re-possess itself of the soda fountain that formed the major part of the claim herein. This it did under and by virtue of the provisions of a conditional sales agreement in the words and figures following:—

August 22nd, 1911.

To Donnelly, Watson & Brown, Limited, Calgary, Alta.

Please ship to my (our) address as soon as possible, the following goods as per price and terms agreed upon, f.o.b. cars.

| | |
|---|---|
| One F1011 soda fountain without back bar delivered on the floor at No. 2274 4th Ave., Kitsilano | $520 00 |
| ½ doz. glass-holders | |
| 1 doz. glasses (No charge.) | |
| 1 10 gal. steel tank | 30 00 |
| 1 Daisy peanut warmer | 22 50 |
| Amount | $572 50 |

I or we agree to accept and pay for the said goods on the following terms: $52 cash, and the balance as follows, $10 per month, Oct. 22nd, Nov. 22nd, Dec. 22nd, 1911, Jan. 22nd, Feb. 22nd, Mar. 22nd, April 22nd, $25 per month, May, June, July, August and September, and the balance then due at $10 per month until May, 1913, and $25 per month until paid in full.

And I or we agree not to countermand this order and if the above articles are not settled for by cash or notes within ten days after same are delivered, according to "terms of sale" then the account shall become due and I (we) hereby agree, for value received, to pay same on demand. And I (we) further agree that the title to the said articles shall not pass from you until all the above amount, whether payable as cash or on notes, is paid, but shall remain your property until that time, and that until the whole amount is paid I (we) will not sell or remove the said articles from our premises without your consent in writing so to do, and in case of default in the payment as above specified, or that any of my (our) goods be seized under legal process or I (we) become insolvent, you are at liberty without process of law, to forcibly enter upon my (our) own premises and take down and remove the said articles, and I (we) hereby waive all claims for damages that I (we) might sustain from such removal; and it is hereby also expressly agreed and understood, that any money paid on account of said articles shall not be recoverable at law, but shall be forfeited as a rental charge for the use of said articles; and for the execution of this the parties do elect domicile in the city of Vancouver, province of British Columbia, for demands of payment, suits, etc., and I (we) further agree, if you at any time, owing to my (our) default or otherwise, resume possession of said articles, to waive any notice of sale and allow you to resell at any time without giving us notice of your intention, and I (we) also agree to insure the said articles to its full insurable value and to assign policy of insurance to you, and that the foregoing embodies all the agreements made between us in any way, hereby waiving all

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claims of verbal agreements of any nature not embodied in this order: these articles are only on hire or lease until paid for.

I (we) hereby acknowledge receipt of a copy of this order.

This order is subject to the approval of the firm at Vancouver and is contingent upon strikes, accidents and other delays unavoidable or beyond their control.

L. V. ROBERTS.

Ship via———.

Salesman, J. A. Reed.

Having re-possessed itself of said soda fountain, the plaintiff company next issued execution herein for $175, allowing to the defendant the sum of $340.59, as the value of the goods re-possessed. From the evidence and admission of counsel no steps were taken by the plaintiff company to, in a public and open way, ascertain the value of the goods so re-taken. The valuation was its own, and the execution was issued for the balance, under which the sheriff on the 12th October took possession of defendant's place of businesss. A demand was made upon plaintiff's solicitor by defendant's solicitor for particulars of the amounts credited on account of said order for judgment, shewing in what way the same so credited was made up, and this information not being forthcoming, the defendant served on plaintiff a notice of motion returnable in Chambers for an order that the plaintiff give such particulars. The motion came before Howay, J., then presiding in Chambers, who adjourned the hearing of the application, but made an order that the sheriff should not in the meantime proceed with the sale. On the hearing of this application plaintiff's counsel objected to the jurisdiction of the Court to grant the order applied for, on the ground, amongst others, that there was no rule of Court or other provisions under which the application could be sustained. On the 25th October, the adjourned hearing came before me when the objections taken on the first hearing were renewed. In the meantime the cheque of Taylor, Harvey, Baird, Grant & Stockton, solicitors for the defendant herein, was accepted by the sheriff in lieu of the levy made, and was to be held subject to the order of the Court herein.

After hearing the argument of counsel herein, the matter was taken under consideration, and the order to the sheriff to stay proceedings herein was continued. This brings me to consider the question of jurisdiction of the Court to grant relief in a case of this nature.

This case is in many respects similar to *Arnold* v. *Playter*, 22 O.R. 608, where the defendant purchased machinery from a company, under a conditional contract of sale in writing, providing that the property should remain in the company until the price was paid in full, with the right to resume possession and re-sell on non-payment, but without any provision that in such

latter event the purchase money was to be applied *pro tanto*, and the defendants remain liable for any balance. On default after certain payments had been made the company obtained judgment on the notes, which had been given for the purchase money, and subsequently seized and sold the machinery, and applying the proceeds sought and were allowed to prove a claim in the Master's office for the balance due on the judgment. In this case it was held that the whole matter was examinable in the Master's office, although the judgment had been recovered, and as the consideration for the judgment had disappeared by the intentional act of the company in taking possession and selling, the claim should have been disallowed.

*Arnold et al.* v. *Playter*, 22 O.R. 608, followed *Sawyer* v. *Pringle*, 18 A.R. 218, in which case after default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due, and that the vendors should be at liberty to resume possession, nothing being said as to re-sale, the vendors seized the machine and resold it, and after crediting the proceeds, brought this action to recover the balance of the original price, and it was held that by the re-sale the original agreement had been put an end to and that the plaintiffs had no right of action: *Sawyer* v. *Pringle*, 18 A.R. 218, was followed in *Harris, Son & Co.* v. *Dustin*, 1 Terr. L.R. 404, where Wetmore, J., at 413, uses the following words:—

> In my opinion that case lays down the law correctly and I would have no hesitation in following it. But the learned counsel for the plaintiffs urged that in this case there was no re-sale and he therefore draws a distinction between this case and *Sawyer* v. *Pringle*, 18 A.R. 218. It is true there is that distinction, but it is not necessary that there should be a re-sale to bring the case within the *ratio decidendi* of *Sawyer* v. *Pringle*. That case is far more reaching in its consequences than that.

The agreement in question in this action is very similar to the agreements referred to in each of the before cited cases, save and except it is in the agreement in suit expressly provided:—

> It is hereby also expressly agreed and understood that any money paid on account of said articles shall not be recoverable at law, but shall be forfeited as a rental charge for the use of said articles.

If the plaintiff under this agreement saw fit to elect to repudiate the agreement for sale, and to treat it as a hiring agreement and the moneys paid thereunder forfeited as a rental charge for the use of said articles, it cannot now be allowed to says:—

> We are willing to treat the agreement as an agreement for sale with a privilege to repossess the property at our own valuation and to recover on execution for the balance.

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Having re-possessed the property under the agreement the plaintiff is not entitled under it to anything more than the money paid under it as a rental charge. As appears by the authorities cited above, no merger arises here. The plaintiff seized under the power given it by its contract and in the assertion of its right to retake the property and to treat the payments as made on account of hire, but in so doing it cut the taproot of its action then pending which now fails. It was held in *Arnold* v. *Playter*, 22 O.R. 608, that the Master could go behind the judgment, if, for example, it had been paid, and this transaction of sale subsequent to the judgment shews that the consideration for the judgment has disappeared by the intentional act of the vendor—the judgment creditor, and in view of this last cited authority I hold that in a properly launched motion I have authority to go behind this judgment and set it aside for the reasons hereinbefore given, but I know of no authority empowering me to order the particulars asked for in this motion, and it must be refused with costs. In the meantime, I will, if the defendant requires it, make an order retaining in the sheriff's hands, for say ten days, the cheque so paid in to him in this suit so as to enable the defendant to move to vacate the judgment for the reasons herein given. *Fraser & Blakney*, for the plaintiff. *Taylor*, for the defendant.

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**HAIG v. ROGERS et al.**

*Saskatchewan Supreme Court, Judge Rimmer, Local Master.*
*October 12, 1912.*

STAY OF PROCEEDINGS (§ II—21)—*Pending action by second mortgagees—New action by first mortgagee—Multiplicity of suits—Sask. Rules* 180, 181.]—JUDGE RIMMER, L.M.:—Order to go. The defendant, the Rogers Lumber Company, second mortgagees, on the 2nd of July, 1912, commenced an action in which they joined the plaintiff alleging that the first mortgage which he held had been paid. To this claim the plaintiff, J. T. Haig, in this matter, and defendant in the first action, filed a defence on the 16th of September, 1912, and afterwards on the 28th September, 1912, he commenced this second action on the first mortgage claiming foreclosure or sale. The parties in the second suit are identical save as to the positions they occupy as plaintiff and defendant. Upon the pleadings filed in the first action there is a clear issue of facts to be determined before the plaintiff Haig in this action can have a right to foreclosure or sale. I can see no reason why his claim in this action could not have been set up by way of counterclaim in the first action. The case is in nowise similar to *Williams* v. *Raleigh*, 14 P.R. (Ont.) 50,

cited to me. In view of rules 180 and 181, I consider that there is every possibility of all issues between the parties being determined in the first action and that the second action constitutes a municipality of proceedings to be avoided. As stated in *Searle* v. *Choat*, 25 Ch.D. 723, 727, the whole tenor of the Judicature Act is to require all proceedings as far as possible to be taken in one action. The second action involves multiplicity and confusion. The plaintiff is not entitled to foreclosure or sale if the mortgage is discharged, this second action involves confusion prejudicial to the present applicant. It should, in my judgment, be stayed with leave to the plaintiff in this action to file his counterclaim in the first action: *Ladd* v. *Pulcston*, 52 L.J. Ch. 976. Broatch and Lennox, for the plaintiff. Pickett and Schull, for defendant, the Rogers Lumber Co.

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## BARNUM v. BECKWITH.



*British Columbia Supreme Court, Gregory, J. December 11, 1912.*

EXECUTION (§ I—11)—*Stay—Pendency of appeal—Supplemental material—Terms.*]

THIS is an application to stay execution pending an appeal to the Court of Appeal.

The application was refused.

*Aikman*, for plaintiff.

*F. A. McDiarmid* and *J. Y. Copeman*, for defendant.

GREGORY, J.:—On the hearing, I expressed the opinion that no sufficient ground had been shewn for granting the application, and only delayed dismissing the same because of Mr. McDiarmid's suggestion that I was prejudiced against his client, until I had an opportunity of consulting some of my brother Judges. I have now had that opportunity, and see no reason for changing the view I then expressed.

The affidavit does not even state that it is intended to appeal, but simply that the solicitor has received instructions to appeal. There has been ample opportunity to make this application since the sheriff went into possession, but the defendant, though repeatedly notified of the plaintiff's intention to proceed and enforce his rights, takes no steps, and actually pays the sheriff and secures his withdrawal from the goods seized.

It seems to me there is nothing left for me to stay—the execution is satisfied.

If the execution could still be stayed, the defendant should come into Court with all necessary affidavits to establish his position: an adjournment will not be granted to enable him to procure affidavits: *Barker* v. *Lavery*, 14 Q.B.D. 769. The execution creditor must shew special grounds for seeking a stay:

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*The Annot Lyle*, 11 P.D. 114; *Atkins* v. *Great Western R. Co.*, 2 Times L.R. 400; *Webber* v. *London, Brighton, etc., R. Co.*, 51 L.J.Q.B. 154; *Reynolds* v. *McPhail*, 13 B.C.R. 159. No special grounds have been shewn here. Mr. McDiarmid's second affidavit, and Mr. Barnum's in reply I do not consider. I only agreed to allow defendant to supplement his original affidavit if he could produce authority that the practice allowed it. No such authority has been shewn me, and *Barker* v. *Lavery*, 14 Q.B.D. 769, above referred to, being a decision of the Court of Appeal, seems to be conclusive against it.

*Application refused.*

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## GARVEY v. FREER.

*British Columbia Supreme Court. Trial before Murphy, J. July 30, 1912.*

PARTNERSHIP (§ VI—29)—*Dissolution Agreement—Fraudulent Representation.*]

MURPHY, J.:—I have already decided that plaintiff is entitled to succeed on the main action on the ground that no damage was suffered by the defendants even assuming that the misrepresentations alleged by them were all made. In the event of the case going to appeal it may be desirable, however, that I make findings of fact on this branch of the case. I find, therefore, that Garvey, husband of the plaintiff, and her assignor in this matter represented in effect to defendants that he had exclusive control of the property in question in the sense that it would still be on the market open for purchase for a sum not exceeding $19,000 when defendants and himself reached Port Essington. I find that he did not in reality have such exclusive control but that in fact the property was still for sale when defendants arrived at Port Essington and that they did purchase it as Garvey had said they would be able to and that at a price less than the outside price named by him to them.

There will be judgment for plaintiff for the amount claimed and the costs. As to the counterclaim, I find that Garvey did represent to defendants that he had $1,000 commission coming out of the final payment to be made to the vendors of Haysport and that he agreed that this $1,000 should be put into the partnership assets as part of the consideration for his being taken in. I find that the partnership was in fact constituted on this basis, the $1,000 being made partnership assets and that the dissolution took place on the assumption that the remaining partners would be able to retain this $1,000 out of the final payment to be made on the Haysport property. I find that Garvey in reality had no such claim and that the making of said representation was so reckless on his part as to be fraudulent. A close perusal

of the partnership agreement and of the dissolution convinces me that I am not precluded from acting on these findings of fact and as I am of opinion that the defendants can deduct this $1,000 from the consideration agreed to be paid by them for the dissolution I give judgment on the counterclaim against Mrs. Garvey for $1,000 and costs. In this view the counterclaim against Garvey must be dismissed but under the circumstances this will be without costs. The plaintiff is to have all costs occasioned by the amendment of the pleadings granted on the first hearing. C. W. Craig and R. R. Maitland, for plaintiff; D. A. McDonald, for defendant Garvey; J. Edward Bird and V. H. Shaw, for defendants Massey and Freer.

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## GIBSON v. GARVIE.

*British Columbia Supreme Court. Trial before Clement, J. June 17, 1912.*

FERRIES (§ I—4)—*Exclusive Privilege.*]

CLEMENT, J.:—Upon the short ground that the plaintiff has not, under his grant from the Crown, made, used or plied a ferry such as was stipulated for in the grant, I must dismiss this action. A decision is necessary merely to settle the question of costs, as the license or grant expired on March 31st last, and at the trial I was informed there was no traffic to warrant the plying of a ferry at the point in question. "A right of ferry," says Lord Macnaghten, in *Simpson* v. *Attorney-General*, [1904] A.C. 476, at 490, "is a derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too." One of the terms of the grant in question here is that "the boat used for the conveying of passengers and for towing the scow shall conform in all respects with the requirements of the Steamboat Act"; and it seems to me that until such a boat was put upon the run the grantees of the right of ferry in question here had not entered into enjoyment of the right granted so as to entitle them to an injunction to prevent the exercise by another of the common right referred to by Lord Macnaghten, much less to recover damages as for a trespass. I do not think the law lays down any such "dog in the manger" principle. Here confessedly the grantees never put on a boat conforming with the requirements of the Act mentioned and they were in fact fined for breach of the Act. In the face of this state of facts it seems to me hopeless for the plaintiff to seek the aid of the Court, and this action should be dismissed with costs.

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**WASSERMAN v. GOLD.**

*British Columbia Supreme Court, Gregory, J., in Chambers. March 16, 1912.*

STAY OF PROCEEDINGS (§ I—13)—*Non-payment of Costs of Prior Action—Ground for Staying Second Action.*]

GREGORY, J.:—The stay asked for should be granted. In the case of *Hall* v. *Paulet*, 66 L.T.N.S. 645, a stay was granted, although the second action was in a different division of the Court from the first. In *McCabe* v. *Bank of Ireland*, 14 A.C. 413, at p. 415, Lord Herschell says the same rule applies, even though the actions were not between precisely the same parties, etc. These two cases appear to me to cover the principle of the present case.

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**CRUIKSHANK** et al. v. **RURAL MUNICIPALITY OF COULEE.**

*Saskatchewan, District Court at Moose Jaw, Judge Ouseley. August 10, 1912.*

TAXES (§ I F 4—90)—*Public Property—Interest of Licensee from Crown.*]

JUDGE OUSELEY:—This is an appeal to me from an assessment of taxation of the appellants Cruikshank and Simpson by the respondent municipality. The appellants took an appeal to the Court of Revision of the municipality, which appeal was dismissed and from the decision of the Court of Revision the appellants appealed to the District Court Judge. The appellants are in possession of a large tract of land comprised of about seven thousand acres and the respondents are a municipality situate within this judicial district.

The respondents and their assessor for the year 1911 have assessed the appellants as owners or occupiers of 7,360 acres of land situate within the respondent municipality. This assessment is made under provision of section 252 *et seq.* of the Rural Municipality Act, being ch. 87 of the R.S.S. 1909; the enabling clause of this statute reads as follows: "As soon as may be in each year, but not later than the 1st of July, the assessor should assess every person, the owner or occupier of land in the municipality and should prepare an assessment roll in which should be set as accurately as may be:

(1) The name of the owner and the name of the occupier of each parcel of land in the municipality which is not exempt of assessment.

(2) A brief description of each of such lot or parcel of land and the number of acres."

The notice of assessment, hereafter referred to as exhibit "B," states that the appellants are assessed for 2,240 acres of

land and contains a statement that should appellants think that they have been wrongly assessed or that their name or name of any person has been wrongfully inserted in the roll or omitted therefrom, they may within twenty days of the date of the notice lodge a complaint with the secretary of the municipality. The notice further states that the property described in the notice is assessed upon acreage basis and not upon valuation, the rate per acre to be fixed by council of the municipality, which should not be less than 2½c. nor more than 6¼c. per acre unless a higher rate is required to meet any debenture coupons which may accrue during the year.

The appellants hold certain lands owned by the Government of Canada under written instrument, which lands are situate as I have said herein within the boundary of the rural municipality of the respondents. The respondents having observed all the requirements as provided by law assessed the appellants for the said lands, claiming they were occupants of the said lands by virtue of the written instrument. It should be noticed that section 252 enacts that the only persons liable to be assessed would be those on the assessment roll and the only persons liable to be placed upon the assessment roll are persons who are either the owners or occupants of land in the municipality. The question, therefore, which I have to decide is whether the appellants are, under the terms of the written instrument under which they possess the land, the owners or occupants of the land described in the written instrument. It will be necessary before discussing this question, to examine the instrument under which the appellants hold the land and this I shall proceed to do. The indenture was made in duplicate on the 21st day of June, 1911, and is made between His Majesty King George V., represented by His Honour the Minister of the Interior of Canada, hereinafter referred to as the Minister, of the first part, and Robert Cruikshank and John D. Simpson, of the Province of Saskatchewan, hereinafter called the lessee, of the second part. The recitals are that whereas the lands described are Dominion lands within the meaning of the Dominion Lands Act, and whereas the Act provides among other things that leases of unoccupied Dominion lands may be granted by the Minister for grazing purposes to any person for a term of years for such rent and upon such terms as the Governor-in-council may order, and that whereas the lessees having applied for a lease for grazing purposes, this indenture witnesseth, that in consideration and subject to the rents, stipulations, provisos and conditions hereinafter contained, His Majesty doth demise and lease unto the lessee the following lands: By the *habendum* clause the lessees are to have and to hold the said lands for a term of 21 years, yielding and paying therefor unto His Majesty his successors and assigns the clear

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rent of $147.20 per year. The indenture also contains this clause:—

These presents are made and issued subject to the following provisos, terms and conditions: (1) That the lessee will abide by, perform and fulfil and keep all provisos, terms and conditions and that upon breach, whether negative or positive, the term granted shall at the option of the Minister cease and expire, and right of re-entry is given to His Majesty his successors and assigns in the event of breach. (6) That the lessee shall within each of the three years from the date of commencement of the term, place upon the tract of land hereby demised, not less than one-third of the whole number of stock which they require to place upon the said tract, namely, one head of cattle for every 20 acres. (8) That the lessee will not during the said term use or allow to be used any part of the lands or premises demised for any purpose other than grazing purposes, and shall not allow sheep to graze or be kept upon any part of the said tract without the consent in writing on that behalf by the Minister, and will not, during the said term, cut or destroy, or allow to be cut or destroyed any timber or timber trees without the consent of the Minister. (12) That should any portion or portions of the land demised be now occupied by any person or persons who have settled thereon, such persons and those claiming through them shall not be disturbed in their possession by the lessee unless by the consent in writing of the Minister; and the Minister may, if he think it expedient to do so, from time to time give the lessee written notice that the land in possession of such persons and such adjoining lands as he may think proper are withdrawn in the operation of these presents, and the term created shall cease and determine, and the lessee shall become entitled to a reduction of rent hereby reserved equal to two cents an acre for every acre so withdrawn, but shall have no further claim or be entitled to any other compensation for or on account of such withdrawal. (13) That should any person or persons become entitled under the provision of the preceding clause, or in any other way, to lands included within the boundaries such person or persons shall become entitled to the free use of such right of way across the lands hereby demised as may be required for convenient and proper access to the lands so held by him or them, and the lessee shall not interfere with such person or persons in the proper use of such right of way, and in case of dispute the decision of the Minister shall be final. (18) That no implied covenant or liability of any kind upon His Majesty's part is created by the use of the words "demise" and "lease" or by the use of any other word or words herein. (21) The lessee shall not be entitled to break or crop any portion of the lands demised, but the Minister of the Interior may grant the lessee permission to cultivate and crop such portion of the said lands as may be considered necessary for the growing of fodder for his stock and further providing that the lessee shall not dispose of any fodder so raised by barter or sale without the consent of the Minister. (22) If any of the lands leased produce hay the lessee is not entitled to use, barter or sell the same but may, upon applying to the Agent of the Dominion Lands in whose district the land is situate, obtain in accordance with the regulations on that behalf the first permit, free of dues,

to cut so much of the hay as the lessee actually requires for the use of his own stock provided the rental of the leasehold has been paid and further providing that the agent may then issue permits to other applicants and the permitees will be entitled to enter upon the leasehold and cut and remove the quantity of hay specified in their permit, subject, however, to such conditions as the Minister of the Interior may think proper for the protection of the lessee.

It is, I think, admitted on both sides that the property of the Crown is exempt from taxation. If authority were needed for this, it can be found in the judgment of Ritchie, C.J., in *Attorney-General of Canada* v. *City of Montreal*, 13 Can. S.C.R. 352, 355; but it has been held that the tenants of the Crown property, paying rent for it are rateable like other occupants. As to this, in *Mersey Docks* v. *Cameron*, 11 H.L. Cas. 443, Mr. Justice Blackburn in giving the opinion of the majority of the Judges, which was adopted and acted on by the House of Lords, thus enunciates the law on this subject:—

> The Crown not being named in the Statute of Elizabeth is not bound by it; and consequently the overseer cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by the servants of Her Majesty. The exemption depends entirely on the occupier and not upon the title to the property. The tenants of Crown property paying rent for it are rateable like other occupiers.

It seems to me that it is necessary to get the true meaning of the word "occupant" in the sense in which it is used in the statute. Are the appellants the occupants of these lands? The answer to this question depends upon the construction of the instrument issued by the Crown and under which the appellants enjoy the use of the land. By sub-sec. 10 of sec. 2, ch. 87 R.S.S., "'occupant' includes the inhabitant occupier of any land in the rural municipality, or if there be no inhabitant occupier the person entitled to the possession thereof and the leaseholder or holder under agreement for sale and any person having or enjoying in any way for any purpose whatever the use of any land in a rural municipality."

By sub-sec. 16 of sec. 2 "'land' or 'property' includes lands, tenements and hereditaments."

It will be noticed that the definition of "occupant" under ch. 87 R.S.S. is different from the definition of "occupant" as given in the Municipal Ordinance C.O. 1898, sub-sec. 9, sec. 2. Under that Act "'occupant' means a person who possesses, holds or occupies any land under any title whatsoever or even without title, or is occupying lands of the Crown under any style of location, agreement or tenure whatever."

Bearing these definitions in mind it is necessary to consider whether or not the appellants are occupants within the meaning of the statute. In order to get a full definition it is necessary

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to read the provision of the Dominion Lands Act, 1908, ch. 20, in connection with the provincial statute. In construing the indenture under which the appellants enjoy this land, the substance of the indenture or agreement will be considered more than the words. See *Smith* v. *Overseers of St. Michael*, 3 E. & E. 383, at 390, where it is said: "In determining whether a transaction is a lease or a mere license the substance of the agreement will be considered more than the words." And in *Roads* v. *Trumpington*, L.R. 6 Q.B. 56, "If the nature of the acts to be done by the lessee imply the right to exclusive possession, the transaction will be deemed a demise."

Now, in examining the agreement entered into between the appellants and the Crown, is the instrument a lease or is it a mere license? I have purposely given a fairly full description of the contents of the instrument entered into. I am of the opinion that the instrument entered into between the Crown and the appellants on the 21st day of June, 1911, is not a lease but a mere license. In the first place there is no exclusive possession conferred by the instrument on the lessee. Of this there is abundant proof; for instance, by clause eight the land was not to be used for any other purpose than grazing and in addition the licensee is prohibited from allowing sheep to graze and prohibited from cutting timber. By clause 12, if there are any persons in occupation of this land or any part of them they are not to be disturbed. By clause 21 the licensee cannot operate or crop, except for fodder, and then, the fodder grown, they are prohibited from selling same. By clause 22 he cannot sell hay nor can the hay be cut unless under a permit, and then for stock; and in addition to this permits may be granted to others to cut hay on the land included in the license and it may be removed.

Bell, Landlord and Tenant, 43, speaks the rule thus:—

> Moreover, a tenancy will not be created unless the right of exclusive possession is conferred upon the lessee. Permission to use premises in common with the lessor or others, or where the control of the premises is retained by the lessor, will be construed as a mere license and not as a demise, although the instrument by which such permission is granted is called a lease and contains the usual words of demise.

*Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *London and Northwestern Railway Company* v. *Buckmaster*, L.R. 10 Q.B. 70, 444; *Smith* v. *Lambeth Assessment Committee*, 9 Q.B.D. 585, 10 Q.B.D. 327.

The judgment of Lord Blackburn in *The Mersey Docks* v. *Cameron*, 11 H.L. Cas. 443, has been held not to apply. See *Victoria* v. *Bowes*, 8 B.C.R. 363. The Crown, whether represented by the Province or the Dominion, is not liable to taxation under sec. 125 of B.N.A. Act.

Now, with regard to the question whether the improvements have been validly assessed so as to bind the occupant. What is the occupant to be assessed for? Is he to be assessed as the owner? If so, he is in fact assessed for Crown lands which are exempt. See *Attorney-General of Canada* v. *City of Montreal*, 13 Can. S.C.R. 352, where it was held the owners of land occupied by the Crown could not be assessed.

If owners of land occupied by the Crown could not be assessed then the tenants of the Crown cannot be liable as there can be no tax imposed on Crown property. *Mersey Docks* v. *Cameron*, 11 H.L. Cases 443, does not apply. It lays down the rule that tenants of Crown property paying rent are rateable like other occupiers. They are not rated on the value of the land but on the value of their interest which is based on their rental. Here the occupier is not rated on his interest but in respect of the entire value of the land and improvements.

The provincial Legislature has no power to deal with the rights of the Crown as represented by the Dominion Government.

Where any property mentioned in the preceding clause is occupied by any person otherwise than in an official capacity the occupant shall be assessed in respect thereof, but the property itself shall not be liable.

Apart from the express provisions in the agreement there are no implied covenants to be inferred on behalf of the Crown; see the judgment of the Chief Justice of Canada in *Bulmer* v. *Queen*, 23 Can. S.C.R. 488.

I would also refer to the judgment of Mr. Justice Newlands, in *Osler* v. *Coltart*, 6 W.L.R. 536. In that case the trustees of school district No. 560 assessed the plaintiff for taxes which were assessed on plaintiff's homestead prior to entry by him. The learned Judge found that the argument of the Deputy-Attorney was fallacious and that by sec. 125 B.N.A. Act no land or property belonging to Canada or any province is liable to taxation and finds against the argument then adduced that the interest of the homesteader could be assessed although until patented by the Crown the interest could not be sold. At page 537 the learned Judge proceeds:—

> I cannot see that this argument, however ingenious it may be, answers the objection that land belonging to Canada is thereby taxed. It is true that the interest only was assessed, but if the tax becomes a lien on the land realizable from a subsequent occupant who derives his title from the Crown, I cannot see but that the property of the Crown has been taxed. A subsequent homesteader or purchaser would have to take into consideration the liens for taxes that were against the land and if a purchaser, would give that much less for the land which would mean that the Crown paid the taxes.

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By sec. 43 of the Dominion Lands Act (1908), ch. 20:—

> A receipt for a payment on account of the sale or lease of land shall, unless the sale or lease has been forfeited, revoked or cancelled, entitle the person to whom it was issued to take, occupy and use the land described in the receipt and to hold possession thereof to the exclusion of any other person, and to bring and maintain action for a trespass committed on the said land; and the land shall not be liable to be taken in execution before the issue of letters patent therefor. Provided that occupancy, use and possession of such land shall be subject to the conditions of the sale or lease and to the provisions of this Act or of any other Act affecting it or any regulation made thereunder.

A mere perusal of this section will shew the distinction between cases such as *Osler* v. *Coltart*, 6 W.L.R. 536, which I have quoted, and *Re Cunningham and Wauchope Village School District*, 2 S.L.R. 377, 11 W.L.R. 399, and those arising under instruments such as the Crown and the appellants entered into in this case. Under the Dominion Lands Act power is given to bring action for trespass committed on the land, also the right to occupy and use the land described to the exclusion of any other person. Nothing of this nature is given to the appellants and in fact the agreement is exactly opposite. To illustrate this I need only point out what I have already quoted from *Allan* v. *Liverpool*, L.R. 9 Q.B. 180, where Blackburn, J., says at 191:—

> The poor rate is a rate imposed by the statute on the occupant and that occupant must be the exclusive occupant, a person who, if there is a trespass committed on the premises would be the person to bring an action for trespassing upon it.

I think it is clear that the appellants could not bring an action for trespass nor is their position the same as the homesteader under the Dominion Lands Act, consequently I do not think that the cases under the Dominion Lands Act can apply. The only case that seems directly opposed to this decision is *Crosskill* v. *Sarnia Ranching Co.*, 5 Terr. L.R. 181. This is a judgment of Mr. Justice Scott. The learned Judge says:—

> In my opinion the defendants were occupants of the land to such extent as to render them liable for the payment of taxes in respect of them. Under the lease they had the right of sole occupation (subject to certain conditions and exceptions which do not appear to me to affect the question raised), and they exercised that right by running sheep upon the lands during the year 1899. The fact that the lands were not enclosed or that the defendants may have permitted the stock of other persons to run or graze upon them does not, in my opinion, relieve them from liability as occupants.

It does seem to me that the argument which was urged before me, that the appellants here had not the right of sole occupation, and the authority which I have cited in support of that contention, could not have been urged before the learned Judge in *Crosskill* v. *Sarnia Ranching Co.*, 5 Terr. L.R. 181,

and it is also well to note that the statute which was under construction before him contained a different definition of the word "occupant" from the statute which I have to construe, and this distinction I have already pointed out.

Under these circumstances I have come to the conclusion that appellants were not liable to be assessed as occupants of these lands and that the appeal taken by them from the Court of Revision of the respondent municipality must be allowed. As this is a matter which, so far as I am aware, has been raised under this statute at least, for the first time, I do not think I should award any costs.

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## RURAL MUNICIPALITY OF SPY HILL v. BRADSHAW.

*Saskatchewan, District Court, Moosomin, Judge Farrell. May 11, 1912.*

TAXES (§ III E—140)—*Assessment — Enforcement—Action to Recover—Meaning of "Occupant" and "Squatter"—R.S.S. 1909, ch. 88, sec. 2.*]

JUDGE FARRELL:—This is an action by the plaintiffs for the recovery of the taxes and arrears of taxes levied against the defendant by local improvement district No. 152, in the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, amounting in all to the sum of $97.96, as the occupant during these years of the north half of section 36, in township 18, range 30, west of the first principal meridian, in the Province of Saskatchewan, said land being situate within the said local improvement district.

By an order of the minister of municipal affairs of the province, dated the 30th day of August, 1911, the said lands of said local improvement district were organized as a rural municipality under the name of the plaintiffs, namely the rural municipality of Spy Hill, No. 152, to take effect on, from and after the 11th December, 1911, and under sec. 334 of the Rural Municipality Act the rights of the said local improvement district against the defendant for said taxes then became those of the plaintiffs and are vested in them. It appears that 17 years ago the plaintiff and his family came upon the land in question. About that time some sort of dwelling house was built upon the land, also stable and corral. Whether some of these were built by the defendant's predecessor or not is not very clear from the evidence, but I think it is immaterial. The defendant and his family continued to live upon said land for 13 years, occupying the house during that time and using the stable and corral with the said lands, and other adjoining lands as a ranch.

About four years ago the defendant and his family moved from said premises a few miles away, but still continued to use, as he does yet, said buildings as the headquarters of his ranch,

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and his sons under his directions at certain times of the year continue to occupy (as also occasionally himself) the house while in charge of animals belonging to their father upon said ranch. The lands in question are fenced in along with other lands and this has been done by the defendant for the better use of said lands in his business of a rancher.

The defendant also paid school taxes on said lands for some of the years he was occupying the dwelling house thereon by himself and family, prior to four years ago. The defendant, however, says that he is not the owner of said lands, nor is he a homesteader of the same, nor has he ever made a homestead or pre-emption entry of them. He claims he is a mere squatter on said lands, without any legal rights of any kind to them, and that such school taxes as he may have paid in regard to these lands were paid purely voluntarily on his part under some sort of friendly agreement between the school trustees and himself. It was taken for granted that the lands are Crown lands. The legislation governing the right to levy these taxes is sec. 52 of ch. 88 of the Revised Statutes, which enacts as follows: "The council may cause to be levied in each year for the general purposes of the district a tax not less than one and one-quarter cents and not more than five cents per acre upon every owner or occupant in the district for land owned or occupied by him." This is identical with sec. 49 of ch. 24 of the Ordinance of 1903, 2nd Session, except that sec. 49 had the word "all" before the said "land" in the last line, making the section read, "for *all* land owned or occupied by him," a variation that has no bearing upon the issue here. This ordinance and its subsequent enactment as ch. 88 of the Revised Statutes, are the ordinance and statute in force touching this matter during the years 1905 to 1911, both inclusive, when these taxes were levied.

The word "occupant" is defined by sec. 2 of the Local Improvement Act R.S.S. 1909, ch. 88. It will be noted that the definition defines as an "occupant" any one enjoying in any way the *use* of land, without reference to his right to use it. Further it is *enjoying* the use of the land, which one can do without actual residence upon the land. This part of the definition is wide enough I think to cover any person who has any kind of use of land at all, and whether it involves a personal occupancy or residence on the land or not. It will also be noted that the word "occupant" as used in this Act is not restricted to even the said definition of the term, for the section only says that it shall *include* the definition given, which does not prevent it from having a still wider meaning if that is possible.

Is then the defendant here such an occupant? In my opinion he is. I think for the first three years, that is for the years

1905, 1906 and 1907 he would be a person described by the phrase "inhabitant occupier" in the section, and probably the phrase might be continued to cover the remaining years. However, whether or not such would be a correct construction to put upon that phrase it is not necessary to decide here, for I do not think that there is any doubt that the defendant comes under the last clause of the definition, namely, "any person having or enjoying in any way or for any purpose whatsoever the use of the land," and this is for the whole period for which these taxes are levied. Under this clause I am of the opinion that it is immaterial whether the person taxed has any legal title of any sort to the land or not or whether he is a mere squatter as claimed by the defendant. I have no hesitation in finding on the evidence that the defendant has now, and has had since and including the year 1905 and every year since, the special use and enjoyment of this half section in question herein, and I further find that he is an *occupant* of said lands as defined by said Ordinance and Act. The word "squatter" as defined by Stroud in his Judicial Dictionary, is "a person who has taken possession of a piece of land and occupied it by buildings or by cultivation and has by so taking possession of it asserted a right to it." In giving this definition, the learned author is but quoting the words of the Lord Chancellor when delivering judgment in the House of Lords in *Hoggan* v. *Esquimalt & Nanaimo Ry.*, [1894] A.C. 429, at 434, and 437 of that judgment his Lordship expresses the opinion that there is no difference between a "squatter" and a "settler." Plainly a "squatter" from this definition cannot be anything else than an "occupant" as defined by the Local Improvement Act. Besides this we have a number of decisions of our own Court shewing the class of persons who have been held to be "occupants" where the word has not been defined as in the Act before us. See *Cantelon* v. *Lorlie School District*, 3 Terr. L.R. 414; *Crosskill* v. *Sarnia Ranching Co.*, 5 Terr. L.R. 181, and *Re Spring Creek School District*, 7 Terr. L.R. 259.

Having found as I have that the defendant is an "occupant" of the lands in question as defined by the Act, it is quite clear that under sec. 49, ch. 24, sec. 50, ch. 36 and sec. 52, ch. 88, R.S.S., the district would have a right to levy the taxes sued on against the defendant.

See *Cantelon* v. *Lorlie School District*, 3 Terr. L.R. 414; *Crosskill* v. *Sarnia Ranching Co.*, 5 Terr. L.R. 181; *Re Spring Creek School District*, 7 Terr. L.R. 259; *Alloway* v. *Rural Municipality of Morris*, 8 W.L.R. 729; *Re Wauchope School District Assessment*, 2 S.L.R. 327, 11 W.L.R. 399; *Graham* v. *Broadview School District*, 3 Terr. L.R. 200; *Re Attorney-General N.W.T. and Canada Settlers Loan Co.*, 1 W.L.R. 225; *Osler* v. *Coltart*, 6 W.L.R. 536; *Robertson* v. *Hopper*, 2 S.L.R. 365, 12 W.L.R. 5.

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There will, therefore, be judgment for the plaintiffs for the amount claimed with costs. Wylie, for plaintiffs. The defendant in person.

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**THOMSON v. INTERNATIONAL CASUALTY CO. and VAN HUMMEL.**

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 4, 1912.*

FRAUD AND DECEIT (§ VI—25)—*Promissory Notes given for stock subscription—Misrepresentations of agent—Action against company and agent—Liability—Costs.*]

AN appeal by the defendant Van Hummell, the agents of the defendants the International Casualty Co., from the judgment at trial dismissing the action against the company and giving judgment against the appellant; the plaintiff cross-appealed. The appeal and cross-appeal were both allowed.

*J. B. Patullo*, K.C., for Van Hummel.
*F. J. McDougal*, for the company.
*W. S. Deacon* and *T. E. Wilson*, for Thomson.

MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A. (oral) allowed the appeal, and the cross-appeal without costs to the appellant.

IRVING, J.A. (dissenting):—Mr. Deacon says the defendant Van Hummell should not be allowed his costs below as he was the author of the trouble. When we stop to consider what the trouble was, we find an answer to that argument. The trouble was between the plaintiff and the company, and in the action founded on that trouble the plaintiff gets his costs from the company. The action against Van Hummell and in respect of which it is suggested that he should not receive his costs, was an alternative action, and arose out of the alleged contract between himself and the plaintiff. The falsity or truth of the representations in issue in the action against the company were not involved in the action against Van Hummell. The defendant company admitted that Van Hummell was their agent to make the representation that the plaintiff would be the company's doctor; but denied that Van Hummell was authorized to say within what time the company would commence work in Vancouver. This Court has decided that the company was liable on his representations, on the ground that this being a matter of contract, his representation was the company's act. The Courts have vigorously denounced the practice of adding agents unnecessarily as co-defendants: *Barnes* v. *Addy*, L.R. 9 Ch. 244; *Burstall* v. *Beyfus*, 26 Ch. D. 35.

I would allow the defendant Van Hummell his costs below against the plaintiff.

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